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THE

ALL INDIA DIGEST

SECTION II (CIVIL)—1811-1911

S. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

BY

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ABBREVIATIONS EXPLAINED

REPORTS.

A.	Indian Law Reports, Allahabad Series.
Agra	Agra High Court Reports.
A. L. J.	Allahabad Law Journal.
A. W. N.	Allahabad Weekly Notes.
B.	Indian Law Reports, Bombay Series.
B. H. C.	Bombay High Court Reports.
B. L. R.	Bengal Law Reports.
Bom. L. R.	Bombay Law Reporter.
Bourke	Bourke's Reports.
Bur. L. R.	Burma Law Reports.
C.	Indian Law Reports, Calcutta Series.
C. L. J.	Calcutta Law Journal.
C. L. R.	Calcutta Law Reports.
C. W. N.	Calcutta Weekly Notes.
C. P. L. R.	Central Provinces Law Reports.
Cor.	Coryton's Reports.
Hay	Hay's Reports.
Hyde	Hyde's Reports.
I. A.	Law Reports, Indian Appeals.
Ind. Cas.	Indian Cases.
Ind. Jur. N. S.	Indian Jurist, New Series.
Ind. Jur. O. S.	Indian Jurist, Old Series.
Knapp	Knapp's Reports.
L.B. R.	Lower Burma Rulings.
M.	Indian Law Reports, Madras Series.
M. H. C.	Madras High Court Reports.
M. J.	Madras Jurist.
M. L. J.	Madras Law Journal.
M. L. T.	Madras Law Times.
M. W. N.	Madras Weekly Notes.
Marsh.	Marshall's Reports.
M. I. A.	Moore's Indian Appeals.
Moo. P. C. C.	Moore's Privy Council Cases.
N. L. R.	Nagpur Law Reports.
N. W. P. H. C.	North-West Provinces High Court Reports.
O. C.	Oudh Cases.
P. R.	Punjab Record.
P. L. R.	Punjab Law Reporter.
P. W. R.	Punjab Weekly Reporter.
R. & J.'s	Rafique and Jackson's Oudh Privy Council Decisions.
Sar.	Saraswati's Privy Council Judgments.
S. L. R.	Sind Law Reporter.
Suth.	Sutherland's Privy Council Judgments.
U. B. R.	Upper Burma Rulings.
W. R.	Sutherland's Weekly Reporter.

OTHER ABBREVIATIONS.

Appl.	Applied.
Appr.	Approved.
Cons.	Considered.
D. or Distd.	Distinguished.
Disc.	Discussed.
Diss.	Dissented from.
Exp.	Explained.
F.	Followed.
(F. B.)	Full Bench.
Obs.	Observed on.
(P. C.)	Privy Council.
R. or Refd. to	Referred to.
Rel. on.	Relied on.
(S. B.)	Special Bench.

N.B.—In the Punjab Record and the Punjab Law Reporter and also in the Punjab Weekly Reporter, the cases are known by their numbers and not by the pages where they are printed; (*e.g.*) 4 P. R. 1910 would mean Case No. 4, in the Punjab Record of 1910. The same explanation applies to the Punjab Law Reporter as well as to the Punjab Weekly Reporter also. It has also to be remarked that the Punjab Record, the Punjab Law Reporter and the Punjab Weekly Reporter have been divided into two sections, Civil and Criminal.

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In the High Court of Justice

Family Division

Before Mr. Justice Harrington

In the matter of the Children Act 1989

and

In the matter of Sunshine Meadows Primary School

IN THE MATTER OF:

Application by the Local Authority for a Care Order

Counsel for the Applicant: Miss Rebecca Thornton

Counsel for the Respondent: Mr. Daniel Okafor

Counsel for the Guardian ad Litem: Ms. Priya Mehta

Solicitors for the Applicant: Hartwell & Co.

Solicitors for the Respondent: Okafor Legal Services

Solicitors for the Guardian ad Litem: Mehta Family Law

Hearing dates: 14, 15 and 16 January 2026

JUDGMENT

Table of Contents

1. Introduction
2. The Background
3. The Issues
4. The Evidence
5. The Law
6. Analysis
7. Conclusion

---

1. Introduction

1. This is an application by the Local Authority for a Care Order in respect of two children, Amelia Rose Thornton, born on 3 March 2019, and her brother Oliver James Thornton, born on 21 July 2021. I shall refer to them throughout this judgment as Amelia and Oliver.

2. The children's parents, Mr. Daniel Thornton and Mrs. Sarah Thornton, oppose the making of any order. The children's Guardian ad Litem supports the application.

3. The hearing took place over three days in January 2026. I heard oral evidence from the social worker, the parents, and the Guardian ad Litem. I have read all the documents filed in the case, including the bundle of 412 pages.

4. I am grateful to all counsel for their clear and helpful submissions.

---

2. The Background

5. Amelia and Oliver live with their parents in a three-bedroom terraced house in Sunshine Meadows. Mr. Thornton is employed as a delivery driver. Mrs. Thornton is employed part-time as a teaching assistant at Sunshine Meadows Primary School, where Amelia is in Reception and Oliver attends the nursery.

6. The family first came to the attention of the Local Authority in October 2024, when a member of staff at the school raised concerns about Amelia's appearance and behaviour. Amelia arrived at school on several occasions wearing clothing that was dirty and unsuitable for the weather. She was also observed to be hungry, asking for food at the start of the morning.

7. A referral was made to the Local Authority's Children's Social Care team on 14 October 2024. An initial assessment was completed within the statutory timescale of 45 working days.

8. The initial assessment identified a number of concerns, including poor school attendance, persistent lateness, and a lack of routine at home. It also noted that Mrs. Thornton had been absent from work for a period of six weeks in the summer of 2025 following a miscarriage.

9. On 12 December 2024, a child protection conference was held. Amelia and Oliver were made the subject of a Child Protection Plan under the category of neglect.

10. The Child Protection Plan was reviewed on 12 March 2025, 11 June 2025, and 9 September 2025. On each occasion it was decided that the plan should continue.

11. On 2 November 2025, the Local Authority issued these proceedings. An Interim Care Order was made on the same day, and the children have remained in the care of their parents under the terms of that order.

---

3. The Issues

12. The issues for the court to determine are:

    (a) whether the threshold criteria in section 31(2) of the Children Act 1989 are met;

    (b) if they are, what order, if any, is in the children's best interests; and

    (c) whether the plan for the children's future care is proportionate to the risks identified.

13. The parents accept that there have been concerns about the children's care, but they dispute that the threshold is crossed. They say that the difficulties have been overstated and that the family has been receiving appropriate support.

14. The Guardian ad Litem's position is that the threshold is crossed and that a Care Order is necessary to secure the children's welfare.

---

4. The Evidence

15. I heard evidence from the following witnesses:

    (a) Ms. Rebecca Thornton, the allocated social worker;

    (b) Mr. Daniel Thornton, the father;

    (c) Mrs. Sarah Thornton, the mother; and

    (d) Ms. Priya Mehta, the Guardian ad Litem.

16. I also had regard to the written evidence of the school's designated safeguarding lead, Mrs. Helen Carter, and to the health visitor's records.

17. Ms. Thornton gave evidence that she had visited the family home on 18 occasions between October 2024 and November 2025. She described the home as "generally clean but cluttered", and said that she had seen no evidence of physical harm to the children.

18. Mr. Thornton gave evidence that he had struggled to maintain a routine for the children after his wife's miscarriage. He said that he had been working long hours to cover the loss of income and that he had relied on his mother to help with the children's mornings.

19. Mrs. Thornton gave evidence that she had been suffering from depression following the miscarriage and that she had not always had the energy to get the children ready for school. She said that she had since started counselling and that her attendance at work had improved.

20. Ms. Mehta gave evidence that she had spoken to the children on two occasions. She said that Amelia had told her that she sometimes went to school hungry and that she liked her teacher very much.

---

5. The Law

21. The relevant law is set out in the Children Act 1989, as amended by the Children and Families Act 2014.

22. Section 31(2) provides that a court may make a Care Order or a Supervision Order if it is satisfied that the child is suffering, or is likely to suffer, significant harm, and that the harm is attributable to the care given to the child not being what it would be reasonable to expect a parent to give.

23. "Significant harm" is defined in section 31(9) as ill-treatment or the impairment of health or development. The court must compare the child's health or development with that which could reasonably be expected of a similarly-aged child.

24. The leading authority on the threshold criteria is *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33. The court must look at the circumstances at the time the application was issued, and at the time of the final hearing.

25. In *Re S-B (Children) (Care Proceedings: Standard of Proof)* [2009] UKSC 17, the Supreme Court held that the standard of proof is the balance of probabilities. There is no intermediate standard.

26. The welfare checklist in section 1(3) of the Children Act 1989 requires the court to have regard to the ascertainable wishes and feelings of the child, their physical, emotional and educational needs, the likely effect of any change in circumstances, their age, sex, background and any characteristics which the court considers relevant, any harm they have suffered or are at risk of suffering, and the capability of each parent to meet their needs.

27. The court must also have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

28. Section 1(5) provides that the court should not make an order unless it considers that doing so would be better for the child than making no order at all.

29. The court must apply the principles of proportionality and the least interventionist approach. The order must be necessary, and it must be the order that is most likely to promote the child's welfare.

30. In *Re B-S (Children) (Adoption Order: Contact)* [2013] EWCA Civ 1146, the Court of Appeal emphasised the importance of the court's duty to consider the human rights of all the parties, including the right to respect for family life under Article 8 of the European Convention on Human Rights.

31. The court must also have regard to the Public Law Outline, which sets out the timetable for the case and the steps that the parties must take.

---

6. Analysis

32. I have considered the evidence carefully. I am satisfied that the threshold criteria are met.

33. The children have suffered significant harm in the form of neglect. Amelia's attendance at school has been poor, and she has arrived on many occasions hungry and in clothing that was unsuitable. Oliver's speech and language development has been delayed, and he has missed a number of appointments with the speech and language therapy service.

34. The harm is attributable to the care given to the children not being what it would be reasonable to expect a parent to give. The parents have had the benefit of a Child Protection Plan for nine months, and they have had the support of the school and the health visitor. They have not engaged with that support as they should have done.

35. I accept that Mrs. Thornton's miscarriage was a traumatic event and that it affected her ability to care for the children. I also accept that Mr. Thornton was working long hours. But these explanations do not excuse the harm that the children have suffered.

36. I am satisfied that the parents have the capability to meet the children's needs, but that they have not done so. They have had the opportunity to engage with the support that was offered, and they have not taken it.

37. I have considered whether a Supervision Order would be sufficient. I am not satisfied that it would be. The parents have had the benefit of a Child Protection Plan and they have not engaged with it. I do not consider that they would engage with a Supervision Order.

38. I have considered whether the children should remain with their parents under the terms of a Care Order. I am not satisfied that they should. The risk of further harm is too great.

39. I have considered whether the children should be placed with their maternal grandparents, who live in Bexhill-on-Sea. The grandparents have been assessed and they are willing to care for the children. But the distance from Sunshine Meadows would mean that the children would have to change schools, and I am not satisfied that this is in their best interests at this stage.

40. I have considered whether the children should be placed with foster carers. I am satisfied that this is the most appropriate placement for the children at this stage.

---

7. Conclusion

41. For the reasons I have given, I am satisfied that the threshold criteria are met and that a Care Order is necessary to secure the children's welfare.

42. I make a Care Order in respect of Amelia Rose Thornton and Oliver James Thornton.

43. I approve the Local Authority's plan for the children's future care, which is that they should remain in foster care with a view to adoption.

44. I make a Placement Order in respect of each child.

45. I make no order for contact at this stage. The parents may apply for contact in the future.

46. I direct that the Local Authority shall file a report for the next hearing by 14 March 2026.

47. I list the case for a review hearing on 28 April 2026.

Dated this 16th day of January 2026

BY THE COURT

SANAD ... 322
Sanction ... 328
SANCTION TO PROSECUTE ... „
Sanitary Drainage, Bengal ... 350
Sanitary Inspector ... „
SANKHOLA LAND ... „
Santan ... „
Santhal Parganas ... „
Sanyasis ... „
Sapindas ... „
Sarak ... „
SARANJAM ... „
Sarvasvadanam Marriage ... 352
SAUNJIDAR ... „
SAYER ... „
Sayer Compensation ... „
Sayer Right ... 353
Scandalous Matter ... „
Scheduled Districts ... „
SCHEME ... „
School-buildings ... „
SCIRE FACIAS, WRIT OF ... „
SCRIBE ... „
Sculptures .. 354
Sea Customs ... „
Seals ... „
Seal Warrant ... „
SEARCH ... „
Search Fees ... 355
Seaworthiness ... „
SECONDARY EVIDENCE ... „
Secretary ... „
SECRETARY OF STATE ... 356
SECRETARY OF STATE FOR INDIA IN COUNCIL ... 358
Sects ... „
SECUNDERABAD CANTONMENTS... 359
SECURITY ... „
SECURITY BOND ... 362
SECURITY FOR COSTS ... 363
Security for good behaviour ... 374
Seduction ... „
Seizure ... „
Select Committee ... „
Selection ... „
SELF-ACQUIRED PROPERTY ... „
Self-acquisition ... „
SEPARATION DEED .. „
SEQUESTRATION ... 375
Serai ... 376
Serjeant William's Rules ... „
Servant ... „
Service ... 377
SERVICE GRANT ... „
SERVICE INAM ... 378
Service of Notice to quit ... 380
SERVICE OF PROCESS ... „
Service Settlement ... 381
SERVICE TENURE ... „
Service Vatan ... 398
Sessions and Joint Zilla Judges ... „
SET-OFF ... „
SETTLEMENT ... 422
1.—GENERAL ... „
2.—CONSTRUCTION ... 426
3.—EFFECT OF SETTLEMENT ... 428
4.—EVIDENCE OF SETTLEMENT... 432
5.—MODE OF SETTLEMENT ... 433
6.—RIGHT TO SETTLEMENT ... „
7.—SUBJECTS OF SETTLEMENT. 436
8.—MISCELLANEOUS ... 437
Settlement Award ... 440
Settlement, Bengal Rent ... „
Settlement Court ... „
SETTLEMENT DECREE ... 441
Settlement Deed ... „
Settlement, Khoti ... „
Settlement Manual ... 442
SETTLEMENT OFFICER ... „
SETTLEMENT PAPERS ... 446
SETTLEMENT PROCEEDINGS ... 447
SETTLEMENT RECORD ... „
Settlement Register ... 449
Settlement Reports ... „
Settlement Rules ... „
Settlement and Survey, Bombay ... „
Sewing Machine ... „
SHADE RIGHT ... „
Shajoog Hundi ... 450
SHALL ... „
SHAMILAT LAND ... „
SHAM TRANSACTION ... 458
Shanghai ... „
Shankaracharya ... „
Share-certificate ... „
SHARE-HOLDER ... 459
SHARES ... „
Shares, Transfer of ... 467
Sharik Shikmi ... „
SHASTRI ... „
SHEBAIT ... „
Sheiks of Mulana ... 472
Shells ... „
SHELLY'S CASE, RULE IN ... „
SHERIFF ... „
Sheriff's Fees ... 474
Sherishtadar ... „
SHET-SANADI ... „

Shetsanadi Vatan ... 475
Shiahs ... „
Shia Imami Ismailis ... „
Shikmi Cultivation ... „
SHIKMI TALUKDARS ... „
Shikmi Tenure ... 476
SHIP ... „
SHIPMENTS ... 480
Shipping ... „
SHIPPING LAW ... „
Shipping, Merchant ... 485
Ships, Native Passenger ... „
SHIPPING ORDER ... „
Ships, Registration of ... „
Shoe ... 186
Shops ... „
"SHOW CAUSE," MEANING OF ... „
Shroffs ... „
Shrotriemdars ... „
Shurkayan-i-Shikmi ... „
Side-wall ... „
SIGNATURE ... „
Sikhs ... 488
SIKHISM ... 489
Sikkim ... 490
SILENCE ... „
Silver Bars ... „
Sindh ... „
Sindh Courts ... „
Sindh Incumbered Estates ... „
SINDH LAND REVENUE CODE ... „
SINDHU JATS ... 491
Singing ... „
Sirdar ... „
SIR LAND ... „
Sister ... 493
Sister's Son ... „
Sivaganga Sanad of 1803 ... „
Site of House ... „
Skin ... „
SLANDER ... „
SLANDER OF TITLE ... 497
Slaughter-house ... 498
Slave ... „
Slavery ... „
Slope ... „
Small Cause Court ... „
Small Cause Court Establishment ... „
SMALL CAUSE COURT JUDGMENT. 499
SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF ... „
1.—GENERAL ... „
2.—PRACTICE AND PROCEDURE ... 607
3.—MISCELLANEOUS ... 618
Small Cause Courts, Mofussil, References by ... 620
Small Cause Courts, Presidency Towns, Act ... „
SMALL CAUSE COURT, PRESIDENCY TOWNS, JURISDICTION OF ... „
1.—GENERAL ... „
2.—SMALL CAUSE COURT, PRESIDENCY TOWNS, PRACTICE AND PROCEDURE ... 632
Small Cause Jurisdiction ... 636
Small-pox ... „
Smoke ... „
Social Questions ... „
Societies Registration ... „
SOCIETY ... „
Sodi Razinama ... 637
Sodomy ... „
Soil ... „
SOLDIER ... 638
Sold Notes ... „
Solenamah ... „
SOLICITORS ... „
SOLICITOR AND CLIENT ... 639
SOMAJ ... 640
Son-in law ... „
SONTHAL PARGANAS ... „
Soodras ... 641
Sorcery ... „
South Breeze ... „
SOVEREIGN ... „
SOVEREIGN POWERS ... „
Sovereign Prince ... 642
SPECIAL ACT ... „
Special Appeals ... 643
SPECIAL COMMISSIONERS ... „
Special Damage ... „
Special Exceptions ... 644
Special Judge ... „
Special Marriage ... 645
SPECIAL OR SECOND APPEAL ... „
1.—GENERAL ... „
2.—ADMISSION OR REJECTION OF APPEAL ... 656
3.—APPEALS AGAINST ORDERS WHEN LIE AND WHEN NOT 659
4.—ERRORS OF LAW OR PROCEDURE ... 668
5.—GROUNDS OF APPEAL ... 687
6.—PRACTICE AND PROCEDURE IN SPECIAL APPEAL ... 715
7.—RIGHT OF SPECIAL APPEAL... 73
8.—SMALL CAUSE COURT SUITS... 746
9.—MISCELLANEOUS ... 772

SPECIFIC PERFORMANCE ... 778
SPECIFIC RELIEF ACT (I OF 1877). 816
SPECULATIVE SALE ... 921
Speculative Suit ... ,,
Speculative Theory ... ,,
SPES SUCCESSIONIS ... ,,
Spiritual Adviser ... 922
Spiritual Benefit ... ,,
Spiritual Brother ... ,,
Spiritual Necessities ... ,,
Spiritual Son ... ,,
SPLITTING UP OF CAUSE OF ACTION ... ,,
Splitting up of Claim ... 928
Sradh ... 929
SROTRIYAM ... ,,
Stables ... ,,
Staff Corps ... ,,
Stake-holders ... ,,
STAMP ... ,,
STAMP ACT (XXXVI OF 1860) ... 943
STAMP ACT (X OF 1862) ... 944
STAMP ACT (XVIII OF 1869) ... 953
STAMP ACT (I OF 1879) ... 962
STAMP ACT (II OF 1899) ... 1033
STAMP DUTY ... 1032
STAMP DUTY, REFUND OF ... 1037
Stamp Fraud ... 1039
STAMP LAW ... ,,
STAMP VENDOR ... 1040
Standard Pole ... ,,
STANDING CROPS ... ,,
Standing Orders of Board of Revenue, Madras ... 1041
STANDING TIMBER ... ,,
Stani ... ,,
Stanom ... ,,
STARE DECISIS ... ,,
State ... 1042
STATE LAND ... ,,
STATEMENT IN PREVIOUS SUIT.. ,,
Statements of Objects and Reasons ... 1043
Stationery ... ,,
Stationery Accounts ... ,,
Stationery Superintendent ... ,,
Status ... ,,
STATUTE 8, ANNE, C. 14 ... ,,
STATUTE 29, CAR. II, C. 3 (STATUTE OF FRAUDS) ... 1044
STATUTE 29, CAR. 2, C. 7 (LORD'S DAY ACT) ... ,,
Statute 5 and 6, Edw. III, C. 16 ... 1045
Statute 32, Hen. VIII, C. 34 ... ,,
ST. 13, ELIZ, C. 5 ... 1045
Statute 27, Eliz., C. 4 ... ,,
Statute 43, Eliz., C. 4 ... ,,
Statute 2, Jac. I, C. 16 ... ,,
STATUTE 3, JAMES I, C. 7 ... ,,
Statute 7, Geo. I, C. 21 ... 1046
Statute 13, Geo. III, C. 63 (The East India Company Act, 1772) ... ,,
STATUTE 21, GEO. III, C. 70 (THE EAST INDIA COMPANY ACT, 1780) ,,
Statute 37, Geo. III, C. 142 (The East India Act, 1797) ... ,,
Statute 36 and 40, Geo. III, C. 79 (The Government of India Act, 1800) ... 1047
Statute 49, Geo. III, C. 126 (The Sale of Officers Act, 1809) ... ,,
Statute 52, Geo. III, C. 101 (Lord Romilly's Act) ... ,,
Statute 53, Geo. III, C. 155 (The East India Company Act, 1813) ... ,,
Statute 56, Geo. III, C. 100 ... ,,
Statute 4, Geo. IV, C. 71 (The Indian Bishops and Courts Act, 1823) ... ,,
STATUTE 6, GEO. IV, C. 16 ... ,,
Statute 6, Geo. IV, C. 85 (The Indian Salaries and Pensions Act, 1825) ... ,,
STATUTE 9, GEO. IV, C. 14 ... ,,
Statute 9, Geo. IV, C. 31 ... ,,
Statute 9, Geo. IV, C. 33 ... ,,
STATUTE 9, GEO. IV, C. 73 ... ,,
STATUTE 9, GEO. IV, C. 74 (THE CRIMINAL LAW (INDIA) ACT, 1828) 1048
Statute II, Geo. IV and I, Will. IV, C. 68. ,,
STATUTE 2 AND 3, WILL. IV, C. 51. 1049
Statute 2 and 3, Will. IV, C. 71 ... ,,
STATUTE 2 AND 3, WILL. IV, C. 114. ,,
Statute 3 and 4, Will. IV, C. 41 (The Judicial Committee Act, 1833) ... ,,
Statute 3 and 4, Will. IV, C. 42 ... ,,
Statute 3 and 4, Will. IV, C 85 (The Government of India Act, 1833) ... 1050
Statute 5 and 6, Wm. IV, C. 54 ... ,,
Statute 6 and 7, Will. IV, C. 96 ... ,,
Statute 1, Vict., C. 26 ... ,,
Statute 1 and 2, Vict., C. 110 ... ,,
Statute 2 and 3, Vict., C. 39 ... ,,
Statute 3 and 4, Vict., C. 56 ... ,,
Statute 3 and 4, Vict., C. 65 ... ,,
Statute 5 and 6, Vict., C. 39 ... ,,
Statute 5 and 6, Vict., C. 45 (The Copyright Act, 1842) ... ,,
Statute 5 and 6, Vict., C. 100 ... ,,
Statute 6 and 7, Vict., C. 94 ... ,,

Statute 7 and 8, Vict., C. 69(The Judicial Committee Act, 1844) ... 1050
Statute 8 and 9, Vict., C. 16 ... ,,
Statute 8 and 9, Vict., C. 18 ... 1051
Statute 8 and 9, Vict., C. 30 ... ,,
Statute 8 and 9, Vict., C. 109 ... ,,
STATUTE 11 AND 12, VICT., C. 21 (INSOLVENT ACT, 1848) ... ,,
Statute 11 and 12, Vict., C. 42 (Insolvency Act) ... 1109
Statute 11 and 12, Vict , C. 49 (Insolvent Act) ... ,,
Statute 12 and 13, Vict., C. 83 ... ,,
Statute 17 and 18, Vict., C. 31 ... ,,
STATUTE 17 AND 18, VICT., C. 104 (MERCHANT SHIPPING ACT, 1854) ... ,,
Statute 18 and 19, Vict., C. 115 ... 1110
Statute 20 and 21, Vict., C. 66 ... ,,
Statute 20 and 21, Vict., C. 85 ... ,,
Statute 20 and 21, Vict., C. 160 ... ,,
STATUTE 21 AND 22, VICT., C. 21 ... ,,
Statute 21 and 22, Vict., C. 70 ... 1111
STATUTE 21 AND 22, VICT., C. 106 (THE GOVERNMENT OF INDIA ACT, 1858) ... ,,
STATUTE 22 AND 23, VICT., C. 41 (THE GOVERNMENT OF INDIA ACT, 1859) ... 1113
St. 22 and 23, Vict., C. 41 ... 1114
St. 22 and 23, Vict., C. 63 (The British Law Ascertainment Act, 1859) ... ,,
ST. 23 AND 24, VIC., C. 104 (CHARTER ACT) ... ,,
St. 23 and 24, Vic., C, 127 ... 1115
ST. 24, VIC., C. 10 ... ,,
St. 24 and 25, Vic., C. 73 ... ,,
ST. 24 AND 25, VIC., C. 67 (INDIAN COUNCILS ACT, 1861) ... ,,
ST. 24 AND 25, VIC., C., 104 (THE INDIAN HIGH COURT ACT, 1861) 1116
Statute 25 and 26, Vict., C. 63 ... 1123
Statute 25 and 26, Vict., C. 89 (Joint Stock Companies Act, 1862) ... 1124
St. 26 and 27, Vict., C. 26 ... ,,
STATUTE 26 AND 27, VICT., C. 57 (REGMIENTAL DEBTS ACT, 1863) ,,
Statute 28 and 29, Vict., C. 15 (The Indian High Courts Act, 1865) ... 1125
STATUTE 30 AND 31, VICT., C. 13, (MUTINY ACT) ... ,,
Statute 32 and 33, Vict., C. 29 ... ,,
Statute 39 and 40, Vict., C. 46 (Slave Trade Act, 1876) ... ,,
STATUTE 42 AND 43, VICT., C. 33 (ARMY DISCIPLINE ACT) ... 1126
STATUTE 44 AND 45, VICT., C. 58 (THE ARMY ACT, 1881) ... ,,
Statute 46 and 47, Vict., C. 37 (English Patents, Designs and Trade-Marks Act, 1883) ... 1127
STATUTE 46 AND 47, VICT., C. 52 (INSOLVENCY) ... ,,
Statute 51, Vict., C. 4 ... ,,
Statute 51 and 52, Vict., C. 4 ... 1128
STATUTE 52 AND 53, VICT., C. 49, (ENGLISH ARBITRATION ACT) ... ,,
Statute 53 and 54, Vict , C. 27 (Colonial Courts of Admiralty Act, 1890) ... ,,
Statute 55 and 56, Vict., C. 14 (Indian Councils Act, 1892) ... ,,
STATUTE 57 AND 58, VICT , C. 60 (THE MERCHANT SHIPPING ACT, 1894) ... ,,
Statute 58, Vict., C. 7 ... 1129
STATUTE, CONSTRUCTION OF ... ,,
STATUTE OF MORTMAIN ... 1168
Statutory Charges ... ,,
STATUTORY DUTIES ... ,,
Statutory Powers ... 1169
Stay of Criminal Proceedings ... ,,
STAY OF EXECUTION ... ,,
STAY OF PROCEEDINGS ... 1172
Steam Tugs ... 1173
Step-in-aid of Execution ... ,,
Step-mother ... ,,
Step-sister ... ,,
Stipend ... ,,
Stock-broker ... ,,
Stolen Coin ... ,,
STOLEN CURRENCY NOTE ... ,,
Stolen Goods ... 1174
Stolen Notes ... ,,
Stolen Property ... ,,
Stoppage in Transit ... ,,
Stranger ... ,,
STREET ... ,,
STRIDHANAM ... 1175
STRIKING OFF CASE FROM FILE... 1176
STRIKING OFF EXECUTION PROCEEDINGS ... ,,
Sub agent ... 1177
SUB-LEASE ... ,,
SUBMERGENCE OF LAND ... ,,
SUB-MORTGAGE ... 1178
SUBORDINATE COURT ... 1180
SUBORDINATE COURT, DUTY OF ... ,,

SUBORDINATE JUDGE, JURISDICTION OF ... 1180
Subordinate Proprietor ... 1182
Sub-Partnership ... ,,
Sub-Registrar ... ,,
SUBROGATION ... ,,
SUBSCRIPTION ... 1184
SUBSISTENCE-MONEY ... 1185
SUBSISTING DECREE ... 1188
Sub-soil Rights ... ,,
Substantial Injury ... ,,
Substantive Offence ... ,,
Substituted Service ... 1189
Sub-Tenant ... ,,
SUCCESSION ... ,,
SUCCESSION ACT (X OF 1865) ... 1197
Succession Certificate ... 1235
Succession Certificate Acts ... ,,
SUCCESSION CERTIFICATE ACT (XXVII OF 1860) ... ,,
SUCCESSION CERTIFICATE (VII OF 1889) ... 1252
Succession Law ... 1288
Sudder Court ... ,,
SUDDER KHAJANA ... ,,
Sudra Ascetic ... 1289
SUDRAS ... ,,
SUDS ... 1290
Sufficient Cause ... ,,
SUGGESTION BY COURT ... 1291
SUITS ... ,,
Suits and Appeals, Bengal and Madras, Dismissal of ... 1295
Suits, Bombay ... ,,
Suits Legal Representatives ... ,,
Suit of Civil Nature ... 1296
SUITS VALUATION ACT (VII OF 1887) ... ,,
SUKHAVASI TENANTS ... 1308
Sukhadi ... ,,
SUMMARY DECISION ... 1309
SUMMARY DISMISSAL OF SUIT ... ,,
SUMMARY EXECUTION OF DECREE ... ,,
SUMMARY JURISDICTION ... ,,
SUMMARY ORDER ... ,,
SUMMARY PETITION ... 1310
SUMMARY PROCEDURE ... ,,
Summary Remedy ... ,,
Summary Settlement ... ,,
SUMMARY SUIT ... ,,
SUMMARY TRIAL ... ,,
SUMMONS ... 1311
SUMMONS BOOK ... 1325
Summons to and Attendance of Witnesses ... 1325
Sunday ... ,,
Sunderbund Estate ... 1326
SUNDERBUNS ... ,,
Sunjogee Bairagi Community ... ,,
Sunnad ... ,,
Superannuation Funds, Police ... ,,
SUPERINTENDENCE OF HIGH COURT ... ,,
Superintendent ... 1362
SUPERSTITIOUS USES ... ,,
SUPREME COURT, BOMBAY ... ,,
SUPREME COURT, CALCUTTA ... 1363
SUPREME COURT, MADRAS ... ,,
Supreme Courts, Equity Procedure ... 1364
Supreme Courts, Lunacy ... ,,
Supreme Courts, Officers Trading ... ,,
Surbarahkar ... ,,
Surbarakari Tenures ... ,,
SURETY ... ,,
1.—GENERAL ... 1365
2.—DISCHARGE OF SURETY ... 1371
3.—ENFORCEMENT OF SECURITY ... 1374
4.—LIABILITY OF SURETY ... 1375
5.—MISCELLANEOUS ... 1380
Surety Bond ... 1384
Surplus Collections ... ,,
Surprise ... ,,
Surrender ... 1385
SURRENDER OF TENURE ... ,,
Survarakari Tenure ... ,,
SURVEY ... ,,
Survey and Settlement, Bombay ... 1386
SURVEY AWARD ... ,,
Survey, Bengal ... 1390
SURVEY MAPS ... ,,
Survey Officer ... 1391
SURVEYOR ... ,,
Surveyor's Report ... ,,
Survey Proceedings ... ,,
Survey Records ... ,,
Surviving Partner ... 1392
SURVIVORSHIP ... ,,
Suspicion ... ,,
SUTI TENURE ... ,,
Svamibhogam Rent ... 1393
Symbolical Possession ... ,,
Synagogue ... ,,
Tacking ... ,,
Tahsildar ... ,,
Tahzimni Tenure ... ,,
Taidnuvees ... ,,

"Tainati Peon" ... 1393
TAKARRIDAR ... ,,
Takavi Advances ... 1394
Taking Instructions ... ,,
TALBANAH ... ,,
Taluq Board ... ,,
Taluqdar ... ,,
Taluqdars, Ahmadabad ... 1395
Taluqdars, Gujarat ... ,,
TALUQDARI ESTATE ... ,,
Taluqdari Settlement ... ,,
Taluqdari Settlement Officer ... ,,
Taluqdari of Kathiawar ... ,,
Taluqdars' Relief, Oudh ... 1396
Tambol ... ,,
Tambol Register ... ,,
Tamlik-nama ... ,,
Tanjore District ... ,,
TANK ... ,,
Tanki Tenure ... 1398
Tariff ... ,,
Tarwad ... ,,
Tastik ... 1399
Taveris ... ,,
Tawazhi ... ,,
TAX ... ,,
Taxation ... 1401
TAXATION OF COSTS ... ,,
Taxing ... 1403
Taxing Master ... ,,
Taxing Officer ... ,,
TAYLOR'S MEDICAL JURISPRUDENCE ... ,,
TAZI MANDI CHITTIES ... ,,
Teacher ... ,,
Teiskhana Papers ... ,,
Teji Mandi Transactions ... 1404
Telegrams ... ,,
Telegraph ... ,,
Telegraphs, Electric ... ,,
TEMPLE ... ,,
TEMPLE COMMITTEE ... 1407
Temple-trustees ... ,,
TEMPORARY ABSENCE ... ,,
TEMPORARY LODGING ... ,,
Temporary Residence ... 1408
Tenancy ... ,,
Tenancy, Agra ... 1409
Tenancy, Amendment, Chota Nagpur ... ,,
TENANCY-AT-WILL ... ,,
Tenancy, Bengal ... ,,
Tenancy, Bengal, Amendment ... ,,
Tenancy, Central Provinces ... ,,
Tenancy, Chota Nagpur ... ,,
TENANCY FROM YEAR TO YEAR ... 1409
TENANCY-IN-COMMON ... 1410
Tenancy, Punjab ... 1412
TENANT ... ,,
Tenant and Landlord, Procedure ... 1413
Tenant and Landlord, Procedure, Chota Nagpur ... ,,
Tenants, Government, Punjab ... ,,
Tenants' Improvements, Malabar Compensation for ... ,,
Tenants-in-Common ... ,,
TENDER ... ,,
TENURE ... 1417
Tenure-holder ... 1419
Tenure of Groves ... ,,
Tenures, Bhagdari and Narwadari ... 1420
Tenures, Chota Nagpur ... ,,
TERRITORIAL JURISDICTION ... ,,
Territorial Law of British India ... ,,
Testamentary Guardian ... ,,
Testamentary Suits ... ,,
Testator ... ,,
TEST CASE ... ,,
Testimony, Prisoners ... 1421
Thak and Survey Map ... ,,
THAKBUST MAP ... ,,
Thakoor ... 1422
Thakur's Relief Act, Broach ... ,,
Thatch ... ,,
THEFT ... ,,
THEKADAR ... 1423
Thika Lease ... 1424
THIRD PARTY DIRECTIONS ... ,,
Thirty Years Old Documents ... 1425
Thoroughfare ... ,,
Threshing Floor ... ,,
THUGY'S REGISTER ... ,,
Tidal River ... 1426
Tiffin House ... ,,
Tiled Huts ... ,,
TIMBER ... ,,
Time ... 1427
Tin-shed ... ,,
Tipperah ... ,,
TIRNI ... ,,
TITLE ... 1428
Title-deeds ... 1453
Titles to Rent Free Estates, Bombay ... 1454
Tiyars ... ,,
Tobacco ... ,,
Toda-Giras Allowances ... ,,
TODA-GIRAS-HAK ... ,,
Toddy ... 1458
TOLLS ... ,,

Toll-gates ... 1459
Tolls on Roads and Bridges ... „
Tomb ... „
Tonnage ... „
TORT ... „
Tort-feasors ... 1474
Total Loss ... 1475
Touching the Pen ... „
TOUT ... „
TOWAGE ... 1476
Tower of Silence ... „
TOWING ... „
Town ... „
Town and Village Lands, Lower Burma.. 1477
Town Duties, etc., Abolition of, Bombay. „
Towns Improvements ... „
Towns, Improvements in ... „
Track-rent ... „
TRADE ... „
Trade Debts ... 1478
Trade Libel ... „
TRADE-MARK ... 1479
TRADE-NAME ... 1492
TRADER ... 1493
Traders, Bombay Insolvent ... 1494
Tradesman ... „
Trading ... „
Trading Firm ... „
Trading, Supreme Courts' Officers ... „
Traffic Manager ... „
Traffic Superintendent ... „
Trailer Cars ... „
Tram Car ... „
Tramway Company ... 1495
Tramways Act, Bombay ... „
Transfer ... „
Transferee ... „
Transfer of Briefs ... „
Transfer of certain Suits to Civil Courts... „
TRANSFER OF CIVIL CASES ... „
TRANSFER OF DECREE ... 1518
Transfer of District ... 1520
TRANSFER OF JUDICIAL OFFICERS ... „
Transfer of Judge ... „
TRANSFER OF LICENSE ... „
TRANSFER IN FRAUD OF CREDITORS ... 1521
TRANSFER OF PROPERTY ... „
TRANSFER OF PROPERTY ACT (IV OF 1882) ... 1530
Transfer of Property Act ... 1859
Transfer of Property Act (1882) Amendment Act (1885) ... „
Transfer of Rent Suits ... 1859
Transfer of Small Cause Court Decree ... „
TRANSIT DUTIES ... „
TRANSLATION ... 1860
Translation of Papers ... „
TRANSMISSION OF RECORDS ... „
Transportation for Life ... 1861
Transportation of Term Convicts ... „
Transport of Native Labourers ... „
Travelling Allowance ... „
Treasurer ... „
TREASURE TROVE ... 1862
Treasure Trove Act ... 1863
Treasury ... „
Treasury Account ... „
Treasury Inspection ... „
TREATY ... „
TREATY, CONSTRUCTION OF ... „
TREES ... 1864
TREE-TAX ... 1871
TRESPASS ... „
Trespass, Cattle ... 1878
TRESPASSER ... „
TRESPASS TO GOODS ... 1881
Trial ... „
Tribunal of Appeal ... „
TRIBUTARY MEHALS ... „
TRIBUTARY MEHALS OF ORISSA 1882
Trichinopoly ... „
TROVER ... „
TRUST ... 1883
Trust-deed ... 1921
TRUSTEE ... „
Trustees Act ... 1930
Trustees' and Mortgagees' Powers Act... „
Trustees' Official Act ... „
TRUST PROPERTY ... „
TRUSTS ACT (II OF 1882) ... 1931
Truth ... 1948
Tullubana ... „
Ulandi Mirasdar ... „
ULKUDI TENANTS ... „
Ultra Vires ... 1949
UMPIRE ... „
Unascertained Goods ... „
Unauthorized Conversion ... „
Unborn Child ... „
Unborn Persons ... „
UNCERTIFIED PAYMENT ... „
Unchastity ... 1950
Unclaimed Deposits Act ... 1951
UNCLAIMED PROPERTY ... „
UNCONSCIONABLE BARGAIN ... „

UNCONSCIONABLE RATE OF INTEREST ... 1952
Unconsolidated Suits ... 1953
Uncovenanted Officers, Madras ... „
Uncovenanted Service Family Pension Fund ... „
Uncultivable Lands ... „
UNDER-GROUND RIGHTS ... „
UNDER-PROPRIETARY RIGHTS ... „
Under-Proprietor ... 1955
UNDER-RAIYAT ... „
Under-tenant ... „
Under-tenures, Bengal Rent Recovery ... „
Under-valuation ... 1956
UNDIVIDED TALOOK ... „
UNDUE INFLUENCE ... „
Union ... 1961
United Provinces Acts ... „
United Provinces Court of Wards ... „
United Provinces General Clauses ... „
United Provinces Kanungos and Patwaris ... „
United Provinces Land Revenue ... „
United Provinces Municipalities ... „
United Provinces Village Courts ... „
Universal Legatee ... „
University, Bombay ... 1961
University Buildings ... „
University, Calcutta ... „
Unlawful Assembly ... „
Unlawful Consideration ... „
Unliquidated Damages ... 1962
Unobstructed Heritage ... „
Unprofessional Conduct ... „
UNPROVED DOCUMENTS ... „
UNREPORTED CASE ... „
Unreported Judgment ... „
Unseaworthiness ... „
UNSETTLED POLLIEM ... 1963
Unsound Mind ... „
UNSOUNDNESS OF MIND ... „
Upanchouki Tenure ... 1964
Uraima Right ... „
Uralers ... „
Urban Areas ... „
Usage ... „
USE AND OCCUPATION ... 1965
USER ... 1966
Usufructuary Mortgage ... 1969
Usury ... „
Usury Laws Repeal Act ... 1970
UTBANDI TENURE ... „

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SECTION II.—CIVIL.—VOL. IX.

Sabararkar.

See LIMITATION ACT, 1908, s. 19, 17 A. 198, P.C. = 22 I.A. 31 = 6 Sar. 551.

Sadavarat.

Will—Construction—Bequest by Hindu for building well and cistern, whether constitutes charitable trust—Devise for establishment of sadavarat—Bequest of residue to unmarried in preference to married daughters, legal validity of—*See* HINDU LAW—WILL, 14 B. 1.

Sadr Amins, etc., Bengal (Principal) Act.

See BEN. ACT XVI OF 1868.

Sadr Courts, Mofussil, Jurisdiction of.

Decisions of—Their binding character—*See* BOM. ACT XVII OF 1879, s. 11, 2 S.L.R. 28.

Sagyi Marriage.

See HINDU LAW—MARRIAGE.

See HINDU LAW—INHERITANCE, Marsh. 644.

Hindu Law—Custom—Form of Marriage—Marriage of widow—*See* HINDU LAW—MARRIAGE, 5 C. 692 = 5 C.L.R. 505.

Sair Abkari.

Money payable by Government in lieu of—*See* ACT XXIII OF 1871, ss. 3 and 4, A.W.N. 1887, 225.

Sajjadanashin.

See MAHOMEDAN LAW—WAKF.

(1) *Mahomedan Law—Wakf—Sajjadanashin and Mutwalli.*—Respective status and positions of Sajjadanashin and Mutwalli, explained, discussed and distinguished. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. MOHIUDDIN AHMAD, 27 C. 674. [*R.*, 6 Bom. L.R. 1058, 6 A.L.J. 632.]

Removal of—*See* CIV. PRO. CODE, 1908, ss. 92, 93, 6 A.L.J. 632 = 3 Ind. Cas. 508.

Salary.

See ATTACHMENT—SUBJECT OF ATTACHMENT.

Salary—*continued.*

(1)—*Assignment of salary.*—An assignment, by a Puisne Judge of the Supreme Court at Madras, of the sum "equal to the amount of six months' salary," directed by the 6 Geo. IV, c. 85, to be paid to the legal personal representatives of such Judge, in case he shall die, in and after six months' possession of office, is a valid assignment, being a vested contingent interest in such Judge; and, not being payable during the lifetime of the Judge, is not an assignment of salary, within the 5 and 6 Edw. III, c. 16, and 49 Geo. III, c. 126, and therefore, contrary to public policy. ARBUTHNOT v. NORTON, 3 M.I.A. 435 = 5 Moo. P.C.J. 219 = 10 Jur. 145 = 1 Sar. P.C.J. 300.

The salary of an appointment not be drawn by a person not holding or conducting the duties thereof. **Cir. No. 15, dated the 28th July, 1865, 3 W.R. Civ. Cir. Orders, p. 4.**

Increase of the Salaries of Ministerial Officers. **Cir. No. 38, dated the 11th September, 1866, 6 W.R. Civ. Cir. Orders, p. 7.**

Power of S. C. Court to attach—Of railway servant not fallen due—Salary disbursable outside jurisdiction of Court—*See* ATTACHMENT—GENERAL, 30 C. 713 = 7 C.W.N. 821.

Salary, suit to recover, lies where the contract of service is to be performed in those cases where the place at which the salary becomes payable is not mentioned—*See* CIV. PRO. CODE, 1908, s. 20, 2 Bom. L.R. 514.

Of a railway servant, attachment of—*See* CIV. PRO. CODE, 1908, O. XXI, r. 46, 5 Bom. L.R. 803 = 28 B. 198.

Attachment of salary—Judgment-debtor and disbursing officer beyond jurisdiction of attaching Court—Attachment whether legal—Proper procedure—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 12 B. 44.

See INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 6 B.L.R. 575 = 15 W.R. 204.

Servant—Suit for salary—Limitation—*See* LIMITATION ACT, 1908, Arts. 2, 6, 7, 8, 9, 22, 24, 25, 40, 48, 49, 118, 120, 4 B.L.R. App. 68 = 13 W.R. 150.

Salary—*concluded.*

Suit relating to trust — Appointment of plaintiff by deed of trust—Suit for—Small Cause suit—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, Art. 18, 26 M. 368.

See St. 11 and 12 Vic., ch. 21, ss. 7, 27, 19 B. 232.

Sale.

1.—GENERAL.
2.—SALE BY AUCTION.
3.—SALE FOR ARREARS OF RENT.
(a)—*General.*
(b)—*Defaulters.*
(c)—*Deposit of money and staying sale.*
(d)—*Effect of sale.*
(e)—*Incumbrances.*
(f)—*Rights and Liabilities of purchasers.*
(g)—*Setting aside sale and its effect.*
(h)—*Surplus proceeds of sale, Right to.*
(i)—*Under tenures and portions of, Sale of.*
(j)—*Miscellaneous.*
4.—SALE FOR ARREARS OF REVENUE AND CESS.
(a)—*General.*
(b)—*Deposit of money and staying sale.*
(c)—*Proceeds of sale, Right to.*
(d)—*Purchasers, Rights and Liabilities of.*
(e)—*Sale of share of estate.*
(f)—*Setting aside sale and its effect.*
(g)—*Tenures that are protected in such sales.*
(h)—*Miscellaneous.*
5.—SALE IN EXECUTION OF DECREE.
(a)—*General.*
(b)—*Decrees against representatives.*
(c)—*Description of property sold, Errors in.*
(d)—*Joint property, Sale of.*
(e)—*Mortgaged property, Sale of.*
(f)—*Proceeds of sale, Right to.*
(g)—*Purchasers, Right of.*
(h)—*Re-sales.*
(i)—*Right of purchaser on setting aside sale.*
(j)—*Rival decree-holders.*
(k)—*Setting aside sale.*
(l)—*Stay of sale.*
(m)—*Wrongful and invalid sales.*
(n)—*Miscellaneous.*
6.—SALE OF GOODS.
7.—MISCELLANEOUS.

Sale—continued.

——1.—General.

See CUSTOMS—PUNJAB—ALIENATION.

See HINDU LAW—ALIENATION.

See MAHOMEDAN LAW—ALIENATION.

See TRANSFER OF PROPERTY ACT, 1882, ss. 53 to 56.

See VENDOR AND PURCHASER.

(1)—"*Power to sell,*" *meaning of—Sale under power—Duty of purchaser—Power of attorney—*"*Purchase, sell, endorse, and transfer.*"—A power to sell (shares in a public company) is only a power to sell in the ordinary course of business, *i.e.*, for a money price—*Per Wilson, J.* Where shares in a public company are sold under a power, it is the duty of the purchaser, to see that the price was paid to the owner or his attorney — *Per Wilson, J.* A joint and several power authorizing the holders "to purchase, sell, endorse, and transfer for the principal and in his name and on his behalf" all his shares in any public company or society, would not justify them to enter into a contract, embodied in bought and sold notes, agreeing to sell and to purchase some time hence at an advanced rate, on their account, certain shares, the bought and sold notes bearing the same date and being one transaction —*Per Garth, C.J.* It was held that the transaction in this case was either an actual loan, or a transaction in the nature of a loan, for the purpose of raising money — *Per Garth, C J.* JUMMA DASS v. ECKFORD, **9 C. 1.**

(2)—*Contract Act*, 1872, *s.* 23—*Champerty—Speculative sale.*—A speculative sale is not bad on the ground of being against public policy. RAMANUJA AYYANGAR v. NARAYANA AYYANGAR, **18 M. 374.** [*R.*, 2 N.L.R. 17.]

(3)—*Agreement to sell—Person not in possession—Ejectment suit—Proper remedy.*—A certain person alleging himself entitled to possession of certain property from a stranger, and being in want of funds to institute a suit, executed a conveyance to the plaintiff whereby it was agreed that, in consideration of the latter's financing the litigation to be launched jointly by both, the latter should take one-half of the property to be recovered by the intended suit. The vendor, contrary to the terms of the agreement and without the consent of the vendee, compromised with the person against whom the contemplated suit had to be filed, whereby the vendor got some property in quit of all claims. The vendee, thereupon, instituted the present suit for possession of a half share in the whole property under the agreement and for ejectment. *Held* that the vendor not having been in possession of the property at the date of the agreement, the agreement did not operate as a present transfer of the property, but as an agreement to transfer so much of it as might be recovered by the contemplated suit. The vendee's proper remedy would be a suit for specific performance or for damages for breach of contract, to support

Sale—continued.

——1.—General—*continued.*

which it would have been necessary for the plaintiff to allege a performance of his part of the contract or at least his readiness and willingness to perform and prevention by the wrongful act of the vendor. RANEE BHOBOSOONDREE DASSEE v. ISSUR CHUNDER DUTT, **11 B.L R. 36, P.C.=18 W.R. 140=2 Suther. 616=3 Sar. 136.** [*F.*, 21 W.R. 101, 6 B. 380, F.B.; *R.*, 20 W.R. 446. 22 W.R. 535, 23 W.R. 131, 1 C. 297, 2 B. 299, 7 C. 753, 6 B. 645, 10 C. 1037, 9 B. 324, 10 A. 133, 12 A. 234, F.B., 2 O.C. 149, 27 B. 31, 30 C. 265; *D.*, 11 C. 121=11 I.A. 218.]

(4)—"*Contract of sale*" *and*" *contract to sell,*" *difference between.*—A contract of sale is an executed contract and creates a *jus in rem*, as it passes ownership immediately when it has been executed; and a contract to sell belongs to the class of executory contracts, and is only a *jus ad rem* for it only creates an obligation attached to the ownership of the property and does not amount to an interest therein. SHIB LAL v. BHAGWAN DAS, **11 A. 244=A.W.N. 1889, 96.**

(5)—*Sale with condition for cancelment—Condition not fulfilled—Sale rendered absolute.*—Where a deed of sale was executed conveying certain property subject to the condition that if the purchase-money were repaid within a certain time together with interest the deed of sale was to be cancelled, on breach of the condition of repayment within the time stipulated the contract executed itself, the transaction was closed and became one of absolute sale and thereafter neither the vendor nor an assignee from him could not sue for redemption. JAGANNATH BRAHMIN v. BALWANTSING, **7 C.P.L.R. 22.** [*R.*, 7 C.P.L.R. 101, 8 C.P. L.R. 113, 4 N.L.R. 177; *D.*, 1 N.L.R. 137.]

(6)—*Covenant to repurchase in a deed of sale of land—Such covenant is personal and does not run with the land.*—A covenant to repurchase in a deed of sale of land is purely personal and does not bind the heirs of the original vendee. GURUNATH BALAJI MUTALIK v. VAMANAVA NALARAO DIVAN, **13 Bom. L.R. 240.**

(7)—*Sale—Agreement to repurchase executed on same day—Debt—Redemption.*—A sale-deed was executed whereby certain property was sold out-and-out. On the same day, an agreement was executed between the parties, whereby the purchaser promised to reconvey the property to the vendor if he paid back the consideration money within a certain time. Money was not paid within the time stipulated, but long after the expiry of that time a suit for redemption was brought. *Held* that the property was sold out-and-out, and there was no mortgage to be redeemed. A stipulation for repurchase will not of itself convert a sale into a mortgage. To make a mortgage there must be a debt. If there be a right to redeem a property from debt, there must be the correlative right to enforce payment of the debt. GHULAM NABI KHAN v. NIAZ-UN-NISSA, **8 A.L.J. 11=9 Ind. Cas. 140.** (12 A. 387, *F.*; 31 B. 528, *R.*)

(8)—*Contract for sale of goods—Stipulations as to the time of delivery, whether of the essence of contract—Sale of Goods Act, s. 10.*—*Held*, that, unless a different intention appears from the terms of the contract, stipulations as to the time of delivery are not deemed to be of the essence of a contract of sale of goods. THE INSTALMENT BANK, LD., FYZABAD v. LALA KAUDHAYA LAL, **13 O.C. 143=6 Ind. Cas. 1011.**

(9)—*Right of delivery of goods, whether can be sold—Contract to sell goods C.I.F., at a port named—Incidents attaching to sale by trade usage—Breach of contract of sale—Damages, measure of.*—There is no such thing known in law as a sale of a right to delivery. The incidents attaching to a sale C.I.F., by trade usage are these:—On a sale C.I.F., the seller undertakes to ship the goods sold on a vessel bound to the port mentioned, and to deliver the goods on board such vessel by tendering to the buyer a bill of lading for them, together with a policy of insurance covering their insurance to the port to which the goods are to go, and the seller must be ready and able to endorse the bill of lading and to transfer the policy to the buyer, on receiving payment of the price. In case of a breach of contract to deliver the goods, the buyer is entitled to receive from the seller the difference between the contract rate and the rate at the place on the day on which delivery ought to have been made. ABDUL HAMED v. TORAB ALI, **3 L. B.R. 144.**

(10)—*Sale—Contract to sell—Payment of part consideration—Specific performance—Discretion—Delay—Pleadings—Amendment—Suit on sale—Appeal, second—Prayer for specific performance—Pleadings.*—The payment of a part of consideration money does not necessarily imply that there is an out-and-out sale and not a contract to sell. (65 P.R. 1898, *R.*) Where a suit is based on an alleged completed sale, the plaintiff cannot be allowed to urge in second appeal that the suit may be regarded as one for specific performance of a contract to sell. The latter suit is inconsistent with the position based on an alleged completed sale and cannot be entertained without an amendment of the plaint being allowed. In a suit to enforce specific performance of a contract to sell, where the plaintiff slept over his alleged rights for very nearly twelve years and made no attempt, until a few months of the institution of the suit, to pay to the defendant the balance of the sale price and to get a sale-deed executed and registered in his favour: *Held* that, under the circumstances, the Court would not be justified in exercising its discretionary power to decree specific performance of the contract. BARKHURDAR v. HAJI MUNAWAR DIN, **7 Ind. Cas. 568.**

Sale—continued.

——1.—General—*continued.*

(11)—*Practice—Specific performance—Property, under a contract of sale to one person, actually sold to another—Subsequent vendee, a trustee for the former—S.* 91 *of the Indian Trusts Act—Whether conveyance to be executed by the vendor or subsequent vendee—Correct procedure.*—A agreed to sell certain land to B, but afterwards sold it to C. B sued A and C for a declaration that the sale to C was void as against him, and for a direction that A should execute a conveyance in his favour. The lower Courts accordingly passed a decree. In second appeal, it was contended that the proper course is to direct C, and not A to execute a conveyance in B's favour, and that, as there was no prayer in the plaint for such a direction, the suit should be dismissed: *Held*:—That though the proper course is the one contended for by the appellants, the practice in the Mofussil generally is to declare the subsequent sale void and to direct the vendor to execute a conveyance; and, therefore, in the face of that practice, the appellant's contention cannot be upheld. SUBBAIYYA PILLAI v. VELAPPA NAICKEN, **2 M.W.N. 1911, 560=10 M.L.T. 524=22 M.L.J. 124.**

(11-*a*)—*Completed sale—Transfer of ownership, not open to the parties to withdraw—Rights of pre-emptor.*—In the absence of any intention common to both parties to a sale that the ownership should not pass, until the deed of sale had been registered and delivered to the vendee, or until possession had been actually given, the accomplishment of these conditions is not essential to the completion of a sale. Where the sale of a house has been completed, it is no longer open to the parties to undo such completed act so as to deprive the pre-emptor of his right to recover the house by a suit brought with that object. Such a case is clearly within the spirit and the words of s. 17 of Act IV of 1872, and the mere circumstance that, before suit brought, the purchaser re-sold his house to the original vendor would be no obstacle to the plaintiff getting a decree under that section directing defendant to sell the house to him. KAHNA v. DEWA SINGH, **62 P.R. 1879.** [*R.*, 80 P.R. 1889, 102 P.R. 1888, 73 P.R. 1898; *D.*, 153 P.R. 1882.]

(12)—*Specific performance—Contract to sell buildings in Bombay—Covenant for title—Hindu law.*—In a suit for specific performance of a contract of sale of certain buildings, wherein the parties were Hindus, the defendant raised the plea "that the plaintiff had not shown such a title to the property, the subject of the contract, as the plaintiff was bound to show and the defendant was bound to accept under the said contract." *Held*, that the question has to be determined according to Hindu law, while the intention of the parties with regard to the title to be shown must be ascertained from the terms of their agreement, without having regard to any implication: The principle of English law which gives the purchaser of

Sale—continued.

——1.—General—*continued.*

land a right to have a good title to it shown by the vendor was held not to apply to an agreement among Hindus. DEVSI GHELA v. JIVARAJ MUKUNDAS, **2 B.H.C. 406.** [*R.*, 11 B. 272; *D.*, 15 B. 657.]

(12-*a*)—*Agreement of sale—Specific performance—Alternative relief—S.* 29, *Specific Relief Act—Civ. Pro. Code* (*Act* V *of* 1908), *O.* VII, *r.* 7.—Where, in an agreement of sale, it was stipulated that, if the transaction fell through for default of the vendors (defendants), the vendee (plaintiff) would be free to enforce specific performance at law, and would be entitled to be credited with interest on his deposit from the date on which it was made, but if it fell through owing to the vendee's default, then the latter would be entitled to the refund of the bare deposit without interest, and the vendors would be at liberty to dispose of the property in any other way they might choose; and the Court below refused a decree for specific performance and gave a decree for the refund of the deposit with interest though the plaintiff (vendee) did not ask for any such alternative relief: *Held*, that the Court below was in the main right, as it did not necessarily follow from the dismissal of a suit for specific performance that an order for the refund of any part-payment of the purchase-money should also be denied. (21 B. 827, 24 C. 897, 31 A. 65, 27 Ch. D. 89, *R.*) The vendee could, notwithstanding that his suit for specific performance has been dismissed, and no matter on what ground it failed, have brought a suit for the recovery of his deposit. (27 M. 380, *R.*) *Held* further, that the Subordinate Judge was right in refusing to relegate the parties to fresh litigation, as there could have been but one result of another suit on the contract. RAGHU NATH SAHAI v. CHANDRA PROTAB SINGH, **17 C.W.N. 100.**

(12-*b*)—*Agreement to sell—Subsequent fraudulent mortgage by owner before actual sale—Declaration—Purchaser entitled to priority—*Onus.—The purchaser of a property in pursuance of an agreement entered into between him and the owner of the property is entitled to a declaration that a mortgage executed by the owner, subsequent to the agreement but before the actual sale, in order to defraud the purchaser, was not binding on him. The actual conveyance obtained by the purchaser in pursuance of such an agreement will entitle him to priority over every subsequent transferee from the owner except a *bona fide* transferee for value. The question of *onus* of proof is immaterial when the evidence of both the sides has been considered by the lower Court. *In re* KINTADU DALAPADU, **M.W.N. 1912, 902=15 Ind. Cas. 457.**

(13)—*Contract for sale of house—Sale of encumbered property—Failure to clear encumbrance—Claim for rent—Retention of purchase-money—Transfer of Property Act—Applicability of principles of ss.* 55 (1) (*g*) *and* 5 (*b*).—Plaintiff entered into a contract with defendant

***Sale*—continued.**

——1.—General—*continued*.

to sell his house to the latter, who was already in possession. The house was encumbered at the time of the contract. Plaintiff received a portion of the purchase-money, agreed to clear the encumbrance himself within a certain time and execute a conveyance to the defendant on receipt of the balance at the time of the sale. Defendant continued in possession. Two years later, plaintiff, without clearing the encumbrance and executing the sale, sued defendant for rent of the house. There was no contract for payment of rent after the contract for sale. The defendant retained with himself the balance of the purchase-money towards the payment of the encumbrance. *Held*, the plaintiff was not entitled to the rent. The defendant remained in possession as purchaser and owner, and all that remained for the plaintiff to do was to clear the encumbrance and execute the sale to the defendant. Plaintiff having failed to do this, the fault was his own and he could not hold the defendant liable to the rent or damages. The principles of s. 55 of the Transfer of Property Act were applicable to the case, though the Act was not in force at the place where the contract was entered into. Plaintiff was bound to clear the encumbrance and the defendant was entitled to retain the purchase-money. H. MCDONALD v. C. B. WILLS, **4 L.B.R. 224.**

(14)—*Purchaser, if party to a suit to set aside sale, right of.*—Where the decree under which a sale takes place is subsequently set aside, the purchaser, if he be a party to the suit, may have to give up the property, the reason being that the person purchasing is, at the time he purchases, a party to a proceeding which may get rid of the authority for the sale; but when he is not a party to such proceeding, the sale is not set aside. GONESH PERSHAD v. FAZUL EMAM KHAN, **23 C. 857.** (10 W.R 154, *R.*)

(15)—*Suit against vendee—Strangers in possession—Decree only against vendee.*—Where the right of the plaintiff is against his vendee alone, for goods sold to him, third persons found in possession of such goods cannot be made liable for the price in a suit against them all. After a decree against the vendee, the property may be attached although in the possession of others. MADDANIAH v. BHIMAPPA, **M.W.N. 1912, 72 =13 Ind. Cas. 469.**

(16)—*Sale of land by unregistered deed—Vendee placed in possession—Right of some vendors to sue to recover possession after lapse of several years.*—Where all the members of a family sold land by means of an unregistered deed of sale and placed the vendee in possession, some of them could not be permitted after the lapse of several years to sue to recover possession of the land sold on the ground that the sale deed has not been registered. BANSI SETH v. PANDOBA, **12 C.P L R. 154.** [*Cons.*, 3 N. L.R. 72; *Commented on*, 15 C.P.L.R. 33]

(17)—*Vendor and purchaser—Vendor failing to give possession to vendee of a part of property*

***Sale*—continued.**

——1.—General—*continued*.

sold—Remedy of vendee—Suit for specific performance or recovery of possession—Limitation Act (XV *of* 1877), *sch.* II, *art.* 144.—Where a vendor delivers possession to the vendee only of a part of the property sold, the remedy of the latter is not by a suit for specific performance, but by a suit for recovery of possession of the part of which he has not been given possession in pursuance of the sale; and art. 144 of the Limitation Act would apply to such a suit for possession. BHANJAN RAM v. SOHAURA, **9 Ind. Cas. 238 = 18 P.R. 1911 = 92 P L.R. 1911.**

(18)—*Vendor and purchaser—Purchaser buying lands from one in whose name the title deeds were made out—Possession of the lands with another person—*Benamidar—*Purchaser's suit for possession.*—The plaintiff purchased some lands from L, a widow of G, in whose name the title-deeds stood. In taking possession, he was obstructed by the defendant who was in possession and who stated that G was a *benamidar* for her. The lower Court dismissed the suit, holding that it was the plaintiff's duty not merely to rely on the paper title disclosed by G's deed, but also to make enquiries of the defendant in actual possession as to her title:—*Held*, that the plaintiff should fail, because he omitted to make the enquiries which he was bound to make to perfect his own title, and by his own negligence exposed himself to the risk of purchasing property which in reality belonged not to his vendor but to the defendant. VYANKAPPACHARYA SHRINIVASACHARYA v. YAMNASANI RADHASANI, **13 Bom. L.R. 258.**

(19)—*Verbal sale followed by possession—Validity of sale.*—Where the second and third respondents had sold certain land to the first respondent, and sale was verbal but was followed by possession and mutation of names: *Held*, that such sale was valid, and the appellant, who was subsequent purchaser of the same land by a registered deed, could not recover the land from the first respondent. MAUNG TUN E. v. MAUNG THET PYO, **8 Ind. Cas. 443.** (4 L.B R. 26, *F.*)

(20)—*Conveyance by person not in possession*—Although a person may not have property in his possession, he is nevertheless competent to convey it. GOWRI KOER v. AUDH KOER, **10 C 1087.** [*R.*, 3 O.C. 215.]

(21)—*Sale of immoveable property by person out of possession—Actionable claim.*—A transfer of ownership of immoveable property is not a sale of an actionable claim, although the owner at the time of the sale may not be in possession. MODUN MOHUN DUT v. FUTTARUNNISSA, **13 C. 217.** [*F.*, 11 M 445, 3 O.C. 215; *R.*, 16 A. 315, F B., 19 A. 265, F B., U.B.R., 1897-1901, Vol. II, 573]

(22)—*Hindu Law—Sale of immoveable property—Delivery of possession not essential.*—By Hindu Law, a sale of immoveable property is

Sale—continued.

——1.—General—*continued.*

valid though not followed by possession. BHUKAN BHAIBAVA v. BHAIJI PRAG, **1 B. H. C. 19.** [*R.*, 2 B. 299=P.J. 1880, 57, 6 B. 168.]

(23) — *Hindu Law — Sale — Possession.* — Under the law administered in this Presidency before the Transfer of Property Act came into force, where all was done that the parties contemplated to complete the sale, the title of the first purchaser would not be defeated in favour of the second purchaser merely by the reason that the latter obtained, and the former did not obtain, possession. RAMASAMI v. MARIMUTTU, **6 M. 404.** [*R.*, U.B.R., 1897-1901, Vol. II, 573.]

(23-*a*)—*Hindu law—Sale by father of joint ancestral property*—Bona fide *purchaser for value—Necessity—Son's right to have sale set aside.*—Where joint ancestral property has passed out of a joint family governed by the Mitakshara law under a conveyance executed by a father in order to raise money to pay off an antecedent debt, his son, by reason of his duty to pay his father's debt, could not recover the property unless he showed that the debts were contracted for immoral purposes, and that purchaser had notice that they were so contracted. Where a larger sum was raised by such sale than was necessary to pay off the debt, the sale was liable to be impeached by the son if the property sold was of very large value and the sale was effected for the ostensible purpose of paying off a comparatively small debt, but a sale was not liable to be so impeached on the ground that a somewhat larger sum was realized by the sale than was necessary for the purpose in view, if the purchaser had satisfied himself by reasonable enquiry that the father, as manager of the joint family property, required money for a necessary purpose, and that the money was not forthcoming otherwise than by alienation of the property, and that a sale was the form of alienation which a prudent owner would have resorted to for the purpose of raising the money. KANHYA LAL v. HAZURA SINGH, **44 P.R. 1880.** (4 C.L.R. 226, P.C., *F.*; 14 B.L.R. 187, P.C., 2 C. 341, 6 M.I.A. 393, *R.*)

(24)—*Vendor and purchaser—Defect in title—Condition of sale not to question defect—Right of purchaser.*—Where, in a sale of a piece of land one of the conditions of the purchase was that the vendor shall not be bound to show any title prior to a mortgage deed of a certain date, *held* that in spite of such condition, the purchaser was not precluded from requiring the vendor to show a title prior to the said mortgage deed, and he could show *aliunde* that the title is defective; and he could also insist on that ground of defect in title, to rescind the contract and recover back his earnest money, interest and expenses. MANCHARJI PESTANJI v. NARAYAN LUKSUMANJI, **1 B.H C. 77.** [*R.*, 13 M. 158.]

Sale—continued.

——1.—General—*continued.*

(25)—*Sale of property—Absence of title at time of sale—Subsequent acquisition of title.*—If a person executing a *kobala* in favour of another had no title to the property at the time he executed it, his subsequently becoming entitled to the property as heir would not make the *kobala* good. KALI CHANDRA CHOWDHRY v. SHIBCHANDRA BHADURI, **6 B.L.R. 501, P.C. =15 W.R. P.C. 12=2 Suther. 383=2 Sar. 621.** [*Expl.*, 8 C. 138, 16 W.R. 112.]

(26)—*Deed of sale — Covenant for title—Covenant for quiet enjoyment—Transfer of Property Act* (IV *of* 1882), *s.* 55 (1) (*b*)—*Mortgage—Charge—Money paid in redeeming property.*—The plaintiff purchased from the defendant certain lands under a deed of sale which contained a covenant that: "if to the property mentioned above any one offers obstruction of any sort or puts forth any claim thereto, we, our heirs, and our representatives agree to hold ourselves answerable in any way you require us to do." The plaintiff could obtain possession only of some of the lands purchased and he had to pay Rs. 176-10-0 to redeem some more lands mentioned in the deed of sale. He then filed this suit to recover the above sum and to recover damages for breach of the covenant:—*Held*, (1) that the covenant relied upon by the plaintiff was not a covenant for quiet possession and that there had been no breach of it; (2) that under s. 55 (1) (*g*) of the Transfer of Property Act, the plaintiff was entitled to recover from the defendant the mortgage-money which he expended in redeeming a portion of the property referred to in the deed of sale. MANISHANKER v. RAMKRISHNA, **6 Bom. L.R. 832.**

(27) — *Of timber — Breach of warranty of title — Rights of buyer — Measure of damages.*— In the case of a sale of goods, where there was a distinct breach on the part of the seller of warranty of title, the buyer is entitled to a refund of the money paid by him for the goods, and having regard to the nature of the goods sold and what was within the contemplation of the parties, the expense incurred in removing the timber must be taken into account as loss to the buyer naturally flowing from breach of the warranty. BAMANUNNI NAIR v. KARUMATHIL NARAYANAN NAIR, **8 M.L.T. 216=7 Ind. Cas. 757.**

(28)—*Registered sale deed executed by Hindu widow to her nephew — Nephew pre-deceasing widow—Passing of title—Intention, when will affect the passing of title—Circumstances under which Court of equity will decline relief against a voluntary deed.*—If the parties intend that title should pass, the fact that no consideration was paid does not prevent title from passing. (16 M.L.J. 147, *F.*) Where the plaintiff intended that *some* title should pass, though not the title which the deed purported to convey, *held* that the plaintiff could not plead the deed to be a mere sham and could not claim to b

Sale—continued.

——.—General—*continued.*

relieved as against its effect. (21 M. 56, *Appl.*; 20 M. 826, 28 M. 124, *D.*) The circumstances in which a Court of equity will decline to give relief upon (that is, will decline to treat as operative) a voluntary deed alleged to have been executed for a special purpose for which it was never required, summarised and explained. AMIRTHAMMAL v. PERIASAMI PILLAI, **4 M.L.T. 279.**

(29)—*Suit against vendors to recover debt, pending—Sale of immoveable property, validity of.*—A sale of immoveable property pending a suit against the vendors to recover a debt is valid, although the motive of the vendors may have been to prevent the land being attached and sold in execution. PULLEN CHETTY v. RAMALINGA CHETTY, **5 M.H.C. 368.** [*R.*, 16 M. 397.]

(30)—S. 54, *Transfer of Property Act, not extended to Berar—Transfer of intangible, immoveable property—Sale of equity of redemption—Registration of deed of transfer—Admission of transaction effected by unregistered instrument, effect of—Estoppel—Ss. 17 and 49, Registration Act—S. 24, Stamp Act.*—The equity of redemption of a usufructuary mortgage is an intangible thing within the meaning of s. 54, Transfer of Property Act. (24 M. 449, *R.*) The effect of s. 54 of the Transfer of Property Act is to abrogate the rule of Hindu Law which recognised transfer by parol. But s. 54 has not yet been extended to Berar and the rule that a transfer of intangible, immoveable property of whatever value must be by registered deed cannot be enforced in Berar. (26 C. 1, 26 C. 39, *Expl.*) So the parties to a sale in Berar are not bound by law to reduce the terms of the transaction to the form of a document; but if they did reduce them to the form of a document, and the consideration for the sale exceeded Rs. 100, that document requires to be registered under s. 17 of the Registration Act, in the absence of which, the document cannot, with reference to s. 49, Registration Act, confer a valid title. And a transaction, which is effected by an unregistered instrument, does not become valid in law, because it is admitted and has been acted upon. (12 C.L.R. 154, 25 W.R. 211, 22 M. 508, *R.*; 18 B. 66, *D.*) Where the consideration for the sale of the equity of redemption is expressly set forth as being the amount of the mortgage, that amount must be taken as the consideration for deciding whether the deed requires to be registered. (15 W.R. 558, 11 B.H.C. A.C. 149, 16 P.R. 1892, *R.*) S. 24, Stamp Act, has no connection with the question of liability to registration. (Bom. Printed Judgments, 1892, P.R. 259, *D.*) A representation made to a person, who knows the facts, does not amount to an estoppel (30 C. 539, P.C., *R.*) and an admission on a point of law is not an admission, so as to make the admission matter of estoppel. (21 A. 285, *R.*). JAIRAM v. BALKRISHNA DAS, **3 N.L.R. 72.**

Sale—continued.

——1.—General—*continued.*

(31)—*Of immoveable property—Agency—Authority to sell, whether includes authority to receive purchase-money—Sale of goods and sale of immoveable property distinguished—Notice on the outer wall of house to make enquiries of vendor's vakil, whether amounts to an authority to vakil to sell the house.*—A person having a general authority to sell immoveable property does not by necessary implication have the authority to receive the purchase-money. *Per Abdur Rahim, J.*—In case of a sale of goods, if an agent, for instance, an assistant in a shop, has authority to sell goods, it may be presumed that he should have authority to receive the price of those goods. Notice put up on the outer wall of a house for sale, that enquiries were to be made of the vendor's vakil, does not amount to an authority to the vakil to sell the house on behalf of the vendor. NARASIMHULU CHETTY v. SUNDRA CHARIAR, **8 M.L.T. 7=20 M.L.J. 479=7 Ind. Cas. 189.**

(32)—*Sale of immoveable property — Subsequent purchase without notice and fraud—Rights of subsequent purchaser.*—Where there is no evidence of fraud on the part of a defendant purchaser, under a registered *kobala*, of property which the plaintiff had previously purchased, and also no evidence that the defendant purchased with notice, *held*, in a suit to recover possession of the property, that the plaintiff could not succeed. SREENATH CHURN DASS v. DWARKANATH GHOSE, **14 W.R. 318.**

(33)—*Deed of sale—Parties treating transaction as one of conditional sale—Construction.*—Courts of justice are not bound to consider a deed of sale to be one of out-and-out sale and not to take into consideration the acts and conduct of the parties in their own view and dealings in regard to the transaction. If the parties treated the transaction as one of conditional sale, the Courts must not necessarily hold it to be a sale. KASHEESSURREE DOSSEE v. WOOMA CHURN DOSS, **5 W.R. 104.**

(34)—*Construction—Deed of sale out-and-out—Second deed of re-transfer, executed after seven days—Mortgage by conditional sale.*—Where a document purporting to be an out-and-out sale deed was executed on a certain date, and seven days later a document was executed by the vendee whereby he covenanted as a matter of favour to reconvey the property if the vendors paid back the purchase-money after the lapse of nine or ten years from the date of the aforesaid sale deed, the two deeds being separately stamped and registered on different dates, *held*, in view of the delay intervening between the two deeds and other circumstances, that the two deeds were not intended to be parts of one and the same transaction so as together to constitute a mortgage, and the later deed was the result of an after-thought. *Per Richards, J.*—If the two deeds were of even date an almost irresistible presumption would arise in favour of the transaction being a mortgage. *Per Griffin, J.*

Sale —continued.

——**1.—General** —*continued.*

—The intention of the parties has to be gathered from the documents themselves, the circumstances attending their execution and also from the conduct of the parties. The reason usually assigned for the execution of deeds of conditional sale instead of ordinary mortgages is that Mahomedans who abide strictly by the tenets of their religion object to receiving interest on money lent. JHANDA SINGH v. WAHID-UD DIN, **8 A.L.J. 399, F.B.** (12 A. 337, P.C., *F.*; 22 A. 149, *D.*)

(34-*a*)—*Document — Construction of — Sale or agreement to sell — Admissibility in evidence for want of registration.*—Where a document, purporting to be an agreement to sell and containing a provision for the execution of a sale deed on a proper stamp, contained a clause that possession of the land had been delivered over to the vendee for being enjoyed freely, hereditarily from son to grandson, with power to alienate by sale or gift. *Held*, that the latter clause was only put in to indicate the terms of the conveyance to be thereafter executed, that the document was only an agreement to sell and not the record of any conveyance *in presenti* and that the possession though given at once was to be held under the conveyance to be executed subsequently. The test in such cases is whether, according to the intention of the parties, as expressed in the instrument, there is a present conveyance of the property or only an agreement to create a future right. Even if a present right is created, the instrument would be admissible in evidence in a suit for specific performance. PICHIKALA MANGAMMA v. PAMU RAMAMMA, **M.W.N. 1912, 917=12 M.L.T. 262=15 Ind. Cas. 587** (14 M. 55, 15 C.W.N. 375, *F.*)

(35)—*Conditional sale—Redemption—Re-purchase—Vendee in possession—Price paid—Sale deed unregistered—Evidence Act* (I *of* 1872), *ss.* 58, 112—*Admission - Proof—Burden of proof —Suit for possession.*—Plaintiff sued for redemption, alleging that he had sold the land in suit out-and-out to defendant for Rs. 250 less than 12 years before suit, but that at the time of sale a stipulation was made for re-purchase by the plaintiff at any time on payment of the purchase-money. The sale-deed was unregistered but the defendant had obtained possession on payment of the price: *Held*, (*a*) that the suit, though ostensibly for redemption of mortgage, was in reality a suit for the enforcement of the alleged stipulation to allow re-purchase; (*b*) that the sale was not ineffectual on account of non-registration of the sale-deed, because the defendant had paid the price and obtained possession and consequently had the equitable right to demand that the plaintiff should complete his title by a formal registered conveyance; (*c*) that, as the plaintiff had admitted in the plaint the *factum* of an absolute sale in favour of defendant it was unnecessary for the latter to prove the sale; (*d*) that the burden of proving the stipulation as to re-purchase lay on the plaintiff; (*e*) that, even if the suit be supposed to be for redemption of a mortgage by conditional sale, the burden of proving the alleged mortgage lay on the plaintiff who was out of possession. MAUNG PYA v. MAUNG O ZA, **9 Ind. Cas. 770.**

(36)—*Mortgage—Sale—Deed of conveyance on agreement to re-sell—Construction of documents—Sale-deed and agreement if not between same parties, cannot constitute mortgage.*—A document purporting to be one of sale, though accompanied by an agreement reserving to the vendor a right to re-purchase the property sold, on repaying the purchase-money within a certain time, is not on that account to be construed as if it were a mortgage. (12 A. 337, 6 C.L.J. 203, 11 C.W.N. 400, *F.*) The sale-deed and agreement, if they be not between the same parties, cannot be construed as constituting a mortgage. RAMA KANTA SARMA v. KALIJOY SARMA. **11 Ind. Cas. 124.** (29 M. 307, 16 M. L.J. 106, *F.*)

(37)—*Mortgage—Sale with contract of re-purchase—Construction of documents.*—Where a document purported to be a sale out-and-out, and under it the purchaser took possession of the property, and on the same day there was an *ekrarnamah* to the effect that, if the purchase-money was repaid within four years, the purchaser would be bound to give up the property: *Held*, that the deeds did not constitute a mortgage, but a sale with a contract for re-purchase. MOHAMAD YUSUFF v. JASHODHA KUMAR DAS PURKAISTA. **2 Ind. Cas. 930.** (11 C.W. N. 400, *F.*; 27 M 348, *D.*)

(38)—*Sale of "right, title and interest of mortgagor"—What passes by such sale.*—Although it is not the practice of the Mofussil Courts to require a mortgagee who sues for and obtains a sale of the mortgaged premises, formally to convey to the purchaser, and the latter must be contended with a certificate of sale to him of the right, title and interest of the mortgagor, yet in fact, the interest of the mortgagee, who causes the sale to be made, is held to pass to the purchaser, and that mortgagee is completely estopped from disputing that such is the effect of the sale. KHEVRA JUSRUP v. LINGAYA, **5 B. 2.** [*R.*, 5 B. 5 (8), 11 B.H.C. 139, 22 B. 686, 945; *D.*, 20 B. 290.)

(39)—*Sale-deed — Substitution of mortgage deed by vendee's son—Proprietary rights—Attachment of money—Investment - Interest—Release of attachment.*—A suit which is based on a deed of sale to a certain person must be materially affected, if it is found as a fact that the son of the vendee accepted a mortgage deed substituting another agreement and transaction in lieu of his father's deed of sale. A sum of money was attached and was left with the Collector. The Collector invested the same in Government 4 per cent. promissory notes. After the release from attachment, the party claimed legal interest on the amount. *Held* that so much of the interest that accumulated in the

Sale —continued.

——1.—General —*continued.*

hands of the Collector by his investment must be taken as a credit to the party. But the difference between that and the legal interest can only be calculated from the date of release from attachment. RAJAH SAHIB PURHLAD SEIN v. BOODHOO SINGH, **3 W.R. 228.**

(40)—*Transaction, whether sale deed or mortgage, tests as to.*—The usual indicia which might lead a Court to the opinion that a transaction was a mortgage and not a sale are—(1) insufficient consideration for the sale of the land, (2) a stipulation that the grantee should account for the rents during his possession or for payment of interest by the grantors either before, at, or, after the period named for the repurchase, (3) the lands remaining in the possession of the grantors after execution of the deeds, (4) any subsequent advance made by the grantee on the security of the lands, (5) any right on the part of the grantee to recover from the grantors the sum or any part of it, either before, at, or, after the period named for the re-purchase. BAPUJI APAJI v. SENAVARAJI MARDAVI, **2 B. 231.**

(41)—*Sale of mortgage-debt—Property outside jurisdiction.*—The sale of a mortgage-debt, with a future and contingent right of enforcing payment by proceeding against the land, is not the sale of a right or interest in land. Therefore, though a Court may not have jurisdiction to attach lands out of its district, it would still have jurisdiction to sell in execution the right to enforce a mortgage lien upon such lands. BALAKRISHNA v. MASUMA BIBI, **5 A. 142, P. C.=9 I.A. 182=13 C.L.R. 232=4 Sar. 398.** [*R.*, 1 M.L.J. 30, 18 A. 469=A.W.N. 1886, 154, 14 C.P.L.R. 5.]

(42)—*Sale-deed — Misdescription — Title — Tenant's possession, when adverse.*—Where a vendor, being entitled to lands in *mouzas* A and B, sold portions situate in *mouza* A, describing them as situate in B, the title passed to the vendee, notwithstanding the false description. The mere fact of non-payment of rent could not make the possession of the tenants adverse, unless they asserted an independent title to the knowledge of the person against whom they claimed their title. SRINATH ROY v. SATYA KINKAR SEN, **13 C.L.J. 660.**

(43)—*Sale—Description of subject-matter—Quantity of land exactly described—Boundaries uncertain—Intention of parties.*—In a sale-deed the quantity of land sold was exactly described, but its boundaries, as set forth in the deed, were such as could be applied to the entire plot of land of which the quantity sold was only a portion; *held* that the intention of the parties was to sell the specific area described in the deed, and not the entire plot covered by the boundaries. MOTI BEGAM v. ABHAB ALI, **7 Ind. Cas. 574.** (37 C. 293, 10 C.L.J. 570, 4 Ind. Cas. 718, *Appr.*; 14 W.R. 301, 15 W.R. 394, 16 W.R. 5, 5 B. 208, *R.*)

(44) — *Same broker for both vendor and vendee—Sale effected by bought and sold notes—*

C. IX—2

Sale —continued.

——1.—General—*continued.*

Terms altered by Reuter in course of transmission—Liability of broker and of seller — Contract Act, ss. 230, 235.—In this suit plaintiff sued in respect of the non-delivery of certain shares in M. Company, which he alleged to have purchased from first defendant through brokers, the second and third defendants. The brokers having been authorised by plaintiff to buy at 20 cabled through Reuter Agency to the first defendant who was then in England that they could sell for him at Rs. 20. Reuter varied the message in the course of transmission by inserting the word "profit" before 20, and the first defendant cabled back "sell," which the brokers read as an acceptance of the offer actually made by them, whereas it was in fact an acceptance of the offer as altered by Reuter. *Held* that, as regards the first defendant, his acceptance was an acceptance of the offer he actually received in the cable as altered by Reuter, and he cannot be held liable to the plaintiff in this suit, as in such a case there was no contract between the plaintiff and the first defendant. A broker may act for both sides, and if he does not exceed the limits of his authority, he incurs no personal liability. To render the agent liable under s. 235, Contract Act, it is only necessary that the representation should have been untrue in fact, and it is not necessary to show that the agent was in any way to blame. HAJEE ISMAIL SAIT v. JAMES SHORT, **8 M.L.T. 353=8 Ind. Cas. 291.**

(45)—*Sale-deed by an old man—Consideration to be maintained till his death—Failure to maintain by the wife of the vendee on his death—Suit to set aside the sale—Recital different—Admissibility in evidence— S* 92, *Evidence Act.*—Where a sale deed recites the payment of cash as consideration therefor, evidence is admissible under s. 92, of the Evidence Act, to show that the real consideration was something different, *viz*., the support of the vendor till his death. Such a sale-deed cannot be set aside on the ground that there was a failure of consideration, *viz.*, that the old man was not at all maintained by the vendee or his assigns. Though American Courts have set aside sales on this ground, so far as English Courts are concerned, the rule is that property passes by *Registration and delivery*, and there is no reason why that rule should be departed from in this case though the case may be a hard one. SUBBAYYA v. MONIEM SUBRAMANIYA AIYAR, **2 M.W.N. 1911, 6=10 M.L.T. 51.** (23 B. 528, 25 A. 125, 16 M.L.J. 524, *F.*)

(46)—*Vendor and purchaser—Sale—Consideration for sale, payment of — Ownership.*—Where a deed of sale is executed and the intention of the parties is that ownership should pass only on payment of the consideration money to the vendor, the mere execution of the sale-deed will not *ipso facto* operate to convey the property to vendee. SALAMAT RAI v. RAM KISHEN, **260 P.L.R. 1911=12 Ind. Cas. 534.** (9 Ind. Cas. 547=27 P.L.R. 1911, *F.*)

Sale--continued.

——1.—General—*continued.*

(47)— *Vendor and Purchaser—Consideration for sale, payment of—Intention of parties.*—It is a well-known principle of law that, to make a sale complete, it is not necessary that price should be paid. But the principle is subject to the qualification to the effect that ownership does not pass if there is proof of an intention in both the parties that ownership should not pass until payment of consideration. (62 P.R. 1879, 132 P.R. 1879, 40 P.R. 1906=78 P.L.R. 1907, 163 P.R. 1882, *R*.) The conduct of the parties after the transaction of sale is important in order to ascertain whether the parties intended ownership to pass independently of payment of consideration. MUSSAMMAT BHAGAN v. ALLAH DITTA, **27 P.L.R. 1911=55 P.R. 1911=41 P.W.R. 1911=9 Ind. Cas. 547.** (7 P.R. 1897, Rev. and 68 P.R. 1900, *R.*)

(48)—*Sale--Part-payment of consideration—Effect of non-payment—Lien on the property sold.*—The fact that part of the consideration money for a sale has not been paid, does not make it void wholly or partially. All that the vendor is legally entitled to in that case is a lien on the property sold to the extent of the amount not paid. KEVALDAS KUBERDAS v. NAGINDAS NATHUBAI, **11 Bom. L.R. 313=2 Ind. Cas. 429.** (2 B. 547, 30 A. 157, *F.*)

(49)— *Deed of sale, acted on—Absence of consideration—Intention of transferee that the deed should not be operative until the happening of a certain event—Effect of the deed.*—A Hindu widow transferred by a deed of sale certain lands in favour of her nephew, and the nephew was informed of the deed. The transfer was also acted upon, in that the tenant in possession executed an agreement to the nephew. But the deed was always retained by the transferor. After the death of the nephew, his mother, being his legal heir, transferred the lands to the defendant. In a suit by the widow against the defendant for the recovery of the possession of the lands, it was found that no consideration passed from the nephew to the plaintiff, and that the widow intended the deed to become operative only on the event of her nephew outliving her. *Held* that the deed operated to convey to the nephew the title which it purported to convey, and that the plaintiff cannot be heard to say that she intended that title should not pass if the nephew pre-deceased her. If the parties intended title to pass, the fact that no consideration was paid does not prevent title from passing. AMIRTHAMMA v. PONNUSAMI PILLAI, **17 M.L.J. 386.** (16 M.L.J. 147, *F.*; 20 M. 326, *D.*; 28 M. 124, 21 M. 30, *R.*)

(50)— *Sale — Consideration, partial failure of—Rescission of contract—Refund of deficiency cannot be claimed till rescission—Rescission on the ground of false representation—Accuracy of the statements tested.*—By a sale-deed executed in favour of the plaintiff two mortgages were assigned to him. It turned out subsequently that the sum stated to be due under the two mortgages was not the sum actually due; and

Sale—continued.

——1.—General—*continued.*

that the amount actually due was something less than the amount stated and paid by the plaintiff. The plaintiff did not want to rescind the contract of sale, on the other hand he wanted to stick to the bargain: *Held*, that, so long as the sale subsisted, he was not entitled to a refund of the purchase money: *Held*, further, that, if representations were made regarding the nature and character of the property which affected its value, and those representations were subsequently found to be false to the knowledge of the party making them, the other party to the contract would be entitled to rescind the contract and to be relieved of the bargain, but, if he tested the accuracy of the statements made to him, he cannot be held to have been deceived and is not entitled to rescind the contract. MURLIDHAR v. MATRU MAL, **4 Ind. Cas. 389.**

(51)— *Sale—Conveyance executed* bona fide—*No consideration paid—Sale not void—Vendor can sue for and recover the purchase money but cannot recover the property.*—Where, in a *bona fide* sale transaction, the conveyance is properly executed, the mere fact that the consideration for the sale is not paid does not render the document absolutely void. The vendor might recover from the purchaser the purchase-money which was agreed to be paid, but cannot ignore the transaction and claim back the property. NASIR-UD-DIN KHAN v. HIKMATULLAH KHAN, **6 Ind. Cas. 117.**

(52)—*Vendor and purchaser—Payment of consideration*, Onus *as to--Effect of non-payment —Mutation entry, value of.*—*Held*, (1) that the vendor having come into Court seeking special redress the initial *onus* rested on him, but the entry of the transaction of sale in the mutation register does not bring the case within the purview of s. 44 of the Land Revenue Act, until the entry, which may be the subject of appeal to the Collector, is incorporated in the *Jamabandi*: though it is relevant under s. 35 of the Evidence Act, as an entry in a public record made by a public servant in the discharge of his duty. That it lay on the defendant to satisfy the Court as to the payment of consideration previous to the mutation: But (2) that if there has been a completed sale for an ascertained price, part payment of which has taken place or payment is deferred by arrangement, the vendor cannot be permitted to withdraw and deny the transaction entirely. GHARIB KHAN v. SIKANDAR, **91 P.R. 1902.** (132 P.R. 1879, *R.*)

(53)—*Registration Act*, 1908, *s.* 47—*Sale—Consideration—Decree in suit for possession.*—*Held*, that there is no rule of law that a sale of immoveable property is not complete and the ownership does not pass until purchase money is paid (132 P.R. 1879, 91 P.R. 1902, *F.*; 6 B. 168, 93 P.R. 1883, 55 P.R. 1911=41 P.W.R. 1911, *D.*) *Held*, also that s. 47 of the Registration Act has the effect of antedating the registration of a sale deed to the date of its execution, and, in the absence of specific contract, the

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Sale—continued.

—— 1.—General—*continued.*

failure to pay consideration does not prevent such effect. (29 B. 46, *R.*) *Held*, further, that Courts are at liberty to make the decree for possession of the property sold, subject to the payment of consideration for its sale which is not paid. BHAGWAN SINGH v. HARDIT SINGH, 153 P.W.R. 1912=185 P.L.R. 1912=105 P.R. 1912=16 Ind. Cas. 29.

(53-*a*)—*Sale of land by registered sale-deed — Recital of payment of consideration—Suit by purchaser for possession—Failure to pay purchase-money — Second sale to mortgagee in possession with prior title — Right of plaintiff to declaration of title and not to possession.*—A executed a deed of sale of the land in suit in favour of B. The deed contained the recitals that the land was sold, and the consideration money received by the vendor, and possession delivered to the purchaser. After entry in the Registration Office books, the deed was delivered to the plaintiff who had the Registrar's receipt for presentation of the deed. Subsequently, A executed a second deed of sale of the same land in favour of C, a mortgagee in possession and caused it to be registered and *dakhil kharij* effected in his favour. In a suit by B against A and C for possession, the Commissioner found that B did not pay the consideration money for the sale, and held the sale to be not complete, but the Chief Court was of opinion that the transaction has passed beyond the stage of a mere contract for sale, and that the ownership of the land had passed to the plaintiff notwithstanding non-payment of the consideration. There is no rule of law that a sale of immoveable property is not complete and the ownership does not pass until the purchase-money is paid. So, in the absence of allegation and proof that the agreement for the sale contained not merely a promise to pay the purchase-money but a promise which constituted the payment a condition precedent to the deed taking effect as a transfer of ownership, it could not be said that the ownership would not pass and that the sale could not be deemed to have been completed as between the parties. ABBAS ALI SHAH v. PIR BUKSH, 132 P.R. 1879. [*F.*, 192 P.R. 1882; *R.*, 153 P.R. 1882, 91 P.R. 1902.]

(53-*b*)—*Joint sale to two persons—Consideration paid by one vendee—Right of other vendee to recover his share of property.*—Certain immoveable property was purchased by two persons jointly. One of them alone paid the consideration and took possession of the property. Sometime afterwards, the vendee who was not in possession brought a suit for possession—*Held* that the suit for possession ought to be decreed on the condition of the plaintiff paying his share of the consideration money, as the ownership in the property vested in both the vendees as soon as the sale was complete. PARAG v. JAGANNATH, 15 Ind. Cas. 173. (5 A.L.J. 96, A.W.N. 1908, 38, 30 A. 125, 11 A. 244, *F.*)

Sale—continued.

——1.—General—*continued.*

(54)—*Registered sale-deed — Effect of, although the purchase money not paid.*—A registered sale-deed passes the property to the vendee, although he fails to pay the vendor the purchase money, and although the deed of conveyance was never delivered to the vendee. (17 M. 146, 15 M. 54, 11 A. 244, 21 M. 56, *Appr. & F.*). In case of non-payment, the remedy of the vendor is to sue for the unpaid purchase money, for which he also has a lien. But he has no right, on account of non-payment, to cancel the sale-deed by another document, conveying the property to a third person; and such conveyance in favour of third person cannot prejudice the original vendee. KRISHNAN EMBRANDRI v. MARAKKAR, 1 M. L.T. 432.

(55)—*Sale—Purchase-money partly paid—Vendor's lien—Right of vendor's decree-holder to bring the property to sale in execution as his judgment-debtor's property.*—Where upon a sale a part of the sale consideration remains unpaid, the vendor has a lien on the property sold for the unpaid purchase-money. But this does not entitle any decree-holder of the vendor to bring the property to sale in execution of his decree as property of his judgment-debtor. He may attach the unpaid portion of the purchase-money which is due to his judgment-debtor and enforce his lien on the property, but he cannot cause the property purchased by a third party to be sold for the recovery of the unpaid purchase-money to which he, as decree-holder, is not entitled. MOTI LAL v. BHAGWAN DAS, 6 A.L.J. 645=31 A. 443.

(56)—*Conveyance alleged to be a colourable transaction in fraud of creditors—Proof of execution and consideration not sufficient—Evidence essential regarding subsequent beneficial possession and conduct of parties.*—This was a suit for a declaration that, under the alleged *kubala* set up by the defendants who were claimants to property sought to be sold by the plaintiff in execution of his decree, the property did not pass from the judgment-debtor. The Court of first instance found for the plaintiff, relying on the evidence as to the conduct of the parties subsequent to the alleged transfer, but this decision was reversed on appeal. In special appeal it was contended that the lower appellate Court was wrong in having held that, as the execution of the *kubala* and the passing of the consideration-money were proved, it was unnecessary to enquire further into the *bona fides* of the transaction, or to determine whether there was any transfer of the property which was good as against a creditor like the plaintiff. This contention was upheld by the High Court which ruled that where the main issue in an action is whether a conveyance is a real substantial transaction as between the parties to it and is not merely a colorable one in fraud of creditors, the proof of the execution of the deed and the passing of a

Sale —continued.

——1.—General—*continued.*

sum of money as consideration, goes but a short way towards establishing the validity of the transfer as against the creditor who disputes it and, there can be no dobut that evidence as to the subsequent beneficial possession of the property and generally of the mode in which the parties deal with it, is most important. TARA CHUND GHOSE v. MOHESH CHUNDER DOSS, **2 W.R. 30.**

(57)—*Colourable, explained.*—Collusion between a debtor and his ostensible vendee to defraud a judgment-creditor by pretending that a sale of the debtor's property has taken place when there has been, in fact, no genuine sale but only a colourable (that is, a sham) one to protect the property of the debtor, does not prevent the judgment creditor from proceeding against such property as still the property of his judgment-debtor (the sham vendor). But a real sale of any survivang interest of the debtor, if it takes place before the property has been attached or specially bound by the decree, will hold good, even though such sale may prevent the creditor from getting his decree executed against the property. MA GAUK v. MAUNG PO KA, **L.B.R. 1893—1900, 201.**

(58)—*Fraudulent sale by husband to wife to defraud creditors — Suit for possession on ground of foreclosure — Notice of foreclosure held invalid— Decree for possession in lieu of mortgage-money* —Where a debtor, with a view to defraud his creditors, executed a sale-deed of his property in favour of his wife, purporting to be in lieu of dower alleged as due to her. *Held*, upon the circumstances of the case, that it must be held as fictitious, and no effect should be given to it. In a suit for possession as owner on the ground of foreclosure of the mortgage, if the notice of foreclosure is held as invalid and irregular, decree for possession in lieu of the mortgage-money due to the plaintiff as mortgagee may be passed in his favour when the plaintiff is by the terms of his mortgage entitled to possession. DEVI DAS v. KARM, **8 P.L.R. 1903.**

(59)—*Custom — Pre-emption — Transfer by husband to wife—Sale—Gift— Limitation Act* 1877, *s.* 18, *sch.* II, *art.* 10—*Fraudulent concealment of right— Shamilat land — Property capable of physical possession.*—On the 15th June 1897 the plaintiff brought a suit for possession by right of pre-emption in respect of a transfer by a husband to his wife of certain *khewat* lands, including a share in the *shamilat* and a habitable house. The deed of transfer was dated the 8th March 1892. The plaintiff alleged that about a month previously to the institution of the suit he came to know of the transfer, which was to all intents and purposes a sale, and that limitation was saved under s. 18 of the Limitation Act, by reason of the transfer having been fraudulently concealed from him. To establish fraud it was contended for the plaintiff that there had been no *dakhil kharij*, and change of possession, and the vendor had been representing himself, and dealing

Sale —continued.

——1.—General—*continued.*

with the property, as the person in proprietary possession of it. *Held*, (i) that as physical possession of the whole property conveyed could not pass *eo instanti* to the transferee, inasmuch as it included a share in the *shamilat* land, the period of limitation, *i.e.* one year, under art. 10 of the 2nd schedule of the Limitation Act began to run from the date of registration of the deed of transfer; and (ii), that the plaintiff had failed to prove such fraud on the part of the defendants as would entitle him to the benefit of s. 18 of the Limitation Act. The expression 'fraud' as used in s. 18 of the Limitation Act means, and can only mean, active deceit in defrauding or endeavouring to defraud a person of his rights by artful device. In all cases where fraud is alleged it ought to be set forth specifically in particular and in detail. The mere omission to give a pre-emptor notice of the sale even in a case where there had been no outward and visible change of possession does not constitute fraud. To bring a case under s. 18 of the Limitation Act, the fraudulent act which kept the plaintiff from knowledge of the transfer must, in order to extend the period of limitation, be one which occurred while the plaintiff still had a right to institute the suit. *Obiter dictum.*—That the transaction must be regarded as a gift by the husband to the wife rather than a sale. HAJI GHULAM RAZA v. SARDAR KHAN, **4 P.L.R. 1903=86 P.R. 1902.**

(60)—*Sale of zamindari, what it includes.*—In the entire absence of evidence to the contrary, a *kothi* or other building situate within the zamindari area is included in and passes with the zamindari, by a conveyance or execution sale of the zamindari The contrary may, however, be shown by evidence, *i.e.*, evidence of the circumstances connected with the acquisition, construction, or user of the buildings, from which it may properly be inferred that they are not appurtenances of the zamindari, but have been severed or held so separately from it as to form a separate and distinct property of the zamindar. BANKE LAL v. JAGAT NARAIN, **22 A. 168=A.W.N. 1900, 31.** [*R.*, 24 A. 218.]

(61)—*Sale of share in zamindari — What pass as appurtenances.* — When a share in a zamindari property is sold, buildings, such as an indigo factory, which were not occupied by the former owner *qua* zamindari, will not ordinarily pass to the vendee along with the zamindari, because they cannot be regarded as part and parcel of, or as appurtentant to, the zamindari, unless clear evidence is given to the contrary. DURGA SINGH v. BISHESHAR DAYAL, **24 A. 218=A.W.N. 1902, 27.** (4 A. 381, A.W.N. 1900, 31, 7 N.W.P. 38, *R.*)

(62)—*Property claimed as a gift—Gift or sale*—Purdanashin.—Where the evidence shows that a *Purdanashin* intended by a deed to pass the property for some purpose, and the suggestion of gift is excluded, the deed must operate, if at all, according to what it purports

Sale—continued.

——1.—General—*continued.*

to be, as a sale. HAKIM MUHAMMAD IKRAM-UD-DIN v. NAJIBAN, **2 C.W.N. 545, P. C.= 20 A. 447=25 I.A. 137=7 Sar. 353.** [*D.*, 2 A.L.J. 436.]

(63)—*Sales by and under Court, distinction between.*—There are two classes of sales in suits:—(1) sales by the Court and (2) sales under the Court. Sales by the Court are cases, in which the Court makes a title to the purchaser and confirms the sales and issues a sale certificate. The second class is where the Court authorizes a trustee, receiver or other person holding property, to sell the property, and the sale is made out of Court; the Court does not make any title to the purchaser, nor does it grant a sale certificate or confirm the sale. GOLAM HOSSEIN CASSIM ARIF v. FATIMA BEGUM, **6 Ind. Cas. 300.** (21 C. 479, *Diss.*)

(64)—*Sales in execution of decrees—Decree not declaring liability of mortgaged property—Sale in execution—Priority between purchasers.*—Defendant purchased certain property in execution of a decree. Plaintiff bought the same property at a sale in execution of a decree founded upon a mortgage bond, but the decree did not declare the liability of the property under the mortgage, being only a decree for money. *Held*, under the circumstances, that the plaintiff's title had no priority over the defendant's. BROMO GOPAL ADHIKAREE v. BHOLANATH PODDAR, **10 W.R. 309.**

(65)—*Execution sale and ordinary sale.*—No distinction can be made between a person claiming under an execution-sale and one claiming under an ordinary conveyance. BRINDABUN CHUNDER ROY v. TARACHAND BUNDOPADHYA, **11 B.L.R. 237=20 W.R. 114.**

(66)—*Private sale—Possession of sale deed by purchaser—Innocent purchaser from first purchaser—Right of first seller to plead want of consideration.*—When a person sells his property by a registered deed and allows the purchaser to retain the sale-deed as evidence of title, an innocent purchaser from the first purchaser, cannot be defeated by the seller pleading non-payment of consideration. HANIF PINJARA v. MT. JODHI, **3 C.P.L.R. 25.**

(67)—*Private sale in satisfaction of decree—Execution-sale—Difference in titles conferred.*—The purchaser at a private sale of property in satisfaction of a decree derives title through the vendor and cannot acquire a better title than his; whereas, under an execution-sale, the purchaser, notwithstanding that he acquires merely the right, title and interest of the judgment-debtor, acquires it, by operation of law, adversely to the judgment-debtor, and free from all alienations or incumbrances effected by him after the attachment. TARAK CHANDRA BHUTTACHARJIA v. BAIKANT NATH SANNIAL, **7 C. 107=8 I.A. 65=10 C.L.R. 281, P.C.=4 Sar. 213.** [*F.*, 20 C. 236; *Expl.*, 16 B. 197: *R.*, 10 B. 400, 14 C. 401, 16 C. 355, 16 B. 91, 33 B. 311=11 Bom.L.R. 26=5 M.L.T. 228; *Expl. & Diss.*, 10 C.L.J. 150; *Cons.*, 24 C. 62]

Sale—continued.

——1.—General—*continued.*

(68)—*Inadequacy of price and irregularity in proceedings, connection between—Semble.*—No positive rule of law can be laid down leading to an inference that the inadequacy of the price realised by a sale is in all cases due to the irregularity in the sale proceedings, 11 C.L.R. 494 (P.C.) did not lay down a rule for all cases. LALA MOBARUK LAL v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **11 C. 200.** [*R.*, 20 C. 599, 30 C. 1; *Diss.*, 11 C. 658.]

(69)—*Registrar's sale—What is purchased—Sale notification—Rectification of boundaries—Annulment of sale.*—The thing to be looked at, in determining what the property is which is purchased at a Registrar's sale, is the sale notification, the description of the property and the boundaries therein given. If a dissatisfied purchaser has made out a case for relief, what he is entitled to is either compensation or annulment of the sale. THE ADMINISTRATOR-GENERAL OF BENGAL v. ANNODA PROSAD DASS, **4 C.W.N. 504.**

(70)—*Sale by Registrar—Dwelling house—Mis-statement in abstract of title—Payment into Court—Subsequent discovery of mis-statement—Recession of sale.*—A purchaser of a dwelling house at a Registrar's sale accepted the conditions of sale, whereby he was required to furnish requisitions and objections, if any, within a fortnight after delivery of abstract (and in this respect time was the essence of the contract), and he was not entitled to call for any other documents except those abstracted or for the originals of the documents of which the vendor had only copies, and was to accept the title as shewn in the abstract of title. By the abstract it was represented to the purchaser that he was purchasing the entire sixteen annas of the house and premises. The purchaser accepted the title as shown in the abstract, and paid the balance of the purchase-money into Court, without reserving any right to object to the title. He then applied to be discharged from such purchase and for leave to withdraw the purchase-money from Court, on the ground that he had subsequently discovered that only an eight-twelfth share of the house had been sold to him and that he had been misled in the purchase by misrepresentations contained in the conditions of sale and the abstract of title: —*Held* that, although there was no fraud on the part of the vendor, he knew or had the means of knowing, that the sixteen annas share of the property could not be sold, and if the purchaser's allegations are true, the Court would not enforce the contract. (Kay's Rep. 52, 1 Kay and Johnson 286, 2 Cox 394, L.R. 13 Eq. 196, 12 Ch. Div. 131, *R.*) *Held*

Sale—continued.

——1.—General—*continued.*

that in the case of a purchase of a dwelling-house, it is impossible to compensate a person in respect of such a material mis-statement, and the Court must either enforce the contract or rescind the sale. It is different in the case of land occupied for agricultural or such like purposes where there is a deficiency in area. UPENDRA NATH MITTER v. OBHOY KALI DASSEE, **5 C.W.N. 593.** [*R.*, 30 C. 468.]

(71)—*Ss.* 244, 313, *Civ. Pro. Code*, 1882—*Purchaser at Sheriff's sale—Sheriff's sale in execution—Area of land sold, deficiency in—Application for setting aside sale for compensation – Sheriff's sale and Registrar's sale—Difference.*—Where the interest of a purchaser at a Sheriff's sale is adverse to the interest of the judgment-debtor, the purchaser is not the legal representative of the latter. (24 C. 62, F.B., *F.*). An application by a purchaser to set aside an execution-sale held by a Sheriff, on the ground of deficiency in the area sold or for compensation, is not sanctioned by s. 313 or any other section of the Civ. Pro. Code. (20 C. 8, P.C., *applied*). S. 313, Civ. Pro. Code, is limited to the case where the judgment-debtor has no *saleable interest* in the property sold. [*R.*, 10 C.L.J. 492=3 Ind. Cas. 438.] Sales by the Registrar, Original Side, High Court, stand on a different footing from the Sheriff's sales in execution of decrees. The Rules of the Court which govern sales by the Registrar direct that compensation shall be allowed for errors and mis-statements as to the particulars or description of the property, if capable of compensation, while no condition of this kind governs the sale by the Sheriff. RAM NARAIN v. DWARKA NATH KHETTRY, **27 C. 264=4 C.W.N. 13.**

(72)—*Sale by Munsif's Peshkar—Substantial injury.*—Where a Munsiff who is indisposed directs his peshkar to conduct a sale and it is not shown that any substantial injury has been sustained by this proceeding, the sale could be upheld. OMUR CHUNDER DOSS v. SOORMUNNISSA KHATOON, **W.R. 1864, 44.**

(73)—*Sale of superior tenure set aside—Effect on subordinate tenures.*—On the setting aside of a rent-sale of a patni tenure, all the subordinate tenures, comprised in it, that had been extinguished by the sale, are revived; and the holder of such a subordinate tenure can recover possession of his holding from the purchaser at the sale or his assignee, though such assignee is no other than the purchaser at a sale, in execution of a decree against such holder, of an under-tenure, comprising such subordinate tenure, which such holder had himself taken from the purchaser at the original sale. SREENARAIN BAGCHEE v. SMITH, **4 C. 807=4 C.L.R. 148.** (2 I.A. 131, *R.*)

(74)—*Sale of under-tenure—Setting aside, grounds for—Civ. Pro. Code (Act X of 1877), s. 311.*—The sale procedure in the case of an under-tenure is that in the Civ. Pro. Code; and the sale of an under-tenure may be set aside upon any of the grounds mentioned in s. 311 of the Code. AZIZOONNESSA KHATOON v. GORA CHAND DASS, **7 C. 163.**

(75)—*Construction of document—Sale of share excluding* sir bila lagan, *construction of—Covenant by vendor to pay rent, if subsequently assessed—Contract to indemnify—Limitation Act* (IX *of* 1908), *sch.* I, *art.* 83.—Where a person made a sale of his two annas share "*baistisnae sir* 30 *bigha kham nambarhai zail bila lagan*," and it was admitted that the purchaser paid the revenue for the whole two annas share, *held*, that the reservation of rent excluded the notion that the vendor remained proprietor of the plots, and the stipulation was merely a contract between the parties that the vendor was to remain in possession of the land free of rent. Where the vendor in a sale-deed in respect of certain lands held free of rent made a covenant agreeing to pay rent in case any rent is subsequently assessed on it and decreed against him, *held*, that a claim by the vendee to recover the rent assessed on the land and decreed against him is a claim upon a contract to indemnify and is governed by art. 83, sch. I of Act IX of 1908. TAJAMMUL HUSSAIN v. RAUNAK ALI, **15 C.C. 25=13 Ind. Cas. 979.**

(76)—*Estate subject to charge—Purchaser of a portion liable to satisfy charge.*—It was urged on this special appeal that defendant who was the purchaser of a fractional part of an entire estate which was subject to a charge in favour of the plaintiff, was not liable singly to satisfy that charge out of the portion of the property in his possession; but it was *held* that the whole property being subject to the charge in favour of the plaintiff, he was not bound to follow portions of it in the hands of different persons who had acquired or purchased it, but was at liberty to proceed against the party in possession of any part, leaving such party to recoup himself by contribution from his co-sharers. PROSONNO COMMAR SEIN MOZOOMDAR v. THE REV. B.F.X. BARBOSA, **6 W.R. 253.** [*D.*, 12 B.H.C. 69.]

(77)—*Sale—Unpaid purchase money of land is a charge thereon — Equity — Pleadings.*—Plaintiff and T purchased land jointly with defendants, but failed to pay their share of the purchase money. The other purchasers paid the purchase-money and obtained possession. After their right of suit for contribution was barred, plaintiff sued for possession of his and T's shares (having purchased T's share), and the Court below decreed his claim, without requiring him to make good his and T's share of the purchase money, on the ground that the defendants' claim for contribution was barred. *Held*, (modifying) that the purchase-money of land is a charge thereon, and that he who seeks equity must do equity. The plaintiff was required to pay his and T's shares of the purchase-money before recovering possession.

Sale—continued.

——1.—General—*continued*.

A mere technical mistake in the plea will not affect the relief to which the parties are entitled. VITHOBA v. GYANIRAM, 5 N.L.R. 66 =2 Ind. Cas. 243.

(78)—*Land sold by Government for arrears of revenue--Holder of money decree against owner of such land bringing suit alleging that land bought by purchaser for and as trustee for the owner and praying that the land belonged not to the purchaser but to former owner—Whether it is necessary first to set aside sale of land for arrears of revenue—Plaint containing no allegation of attachment and objection, but allegation, therein showing plaintiff's object was to vindicate the right to attach the property—Whether an amendment of such plaint is allowable on second appeal—Whether a person claiming to be the owner of attached property has a right of suit independent of* s. 283 *of the Civ. Pro. Code (Act* XIV *of* 1882).—The first defendant's land was sold by Government for arrears of revenue and was bought by second defendant. The plaintiffs who had obtained a money decree, against the first defendant, brought this suit, alleging that the second defendant purchased the land on behalf of the first defendant, and in order to evade attachment of the same, and held the land as trustee for the first defendant. The plaint prayed (*inter alia*) that, on payment of the arrears of revenue, the sale be set aside, and for a declaration, under Chap. VI of the Specific Relief Act, that the land was the property of the first defendant and was held by the second defendant as trustee for the first defendant. The District Court held the sale for arrears of revenue could not be set aside (which decision was admittedly correct), and without considering the other prayers in the plaint dismissed the suit. *Held*, that, although the plaint was defective, as it contained no allegation of the attachment and the objection, yet, as the allegations in the plaint (as set out above) showed clearly that the plaintiffs' object was to vindicate their right to attach the property, an amendment of the plaint should be allowed now, more especially, as the second defendant actually suggested the issue "does the second defendant hold the said lands in trust for the first defendant?" It was admitted that Chap. VI of the Specific Relief Act does not apply to the case, but it was argued that, long before the suit was instituted, the plaintiffs attached the land in execution of their decree, and the second defendant applied for the removal of the attachment, but his application was adjourned pending the decision of the suit. *Held* that, a person, who claims to be the owner of the attached property, has a right of suit quite independent of s. 283 of the Civ. Pro. Code (23 B. 266, *F.*) *Held*, also, that there is no reason why a decree-holder should not have a like right of suit, provided he has attached the property, and his right to attach it has been disputed. *Held*, further that, as plaintiffs not only claimed reliefs to which they were not

Sale—continued.

——1.—General—*continued*.

entitled, but also omitted to state all the material facts which would entitle them to any relief, no order for costs should be made. THE SOCIETA COLONIALE ITALIANA v. MAUNG SHWE LE, **14 Bur. L.R. 135=4 L.B. R. 252.**

(79)—*Purchase of land included in village-site by non-resident—Rights of parties, where Government is not a party, how to be decided—Permission to erect shed on land, revocation of.*—It may be undesirable that non-residents should buy up land forming part of a village site and should let it out to others, but in the absence of legislative prohibition, such a purchase cannot be held to be invalid as being against public policy. In the present suit, to which Government is not a party, the only point to consider is the rights of the parties to the land in dispute *inter se*. Permission to erect a building would give no right to remain on the land when the permission to do so was revoked. MAUNG SHWE THA v. MAUNG KYAW ZAN, **L.B.R. 1893—1900, 117.**

(80)—*Sale by Government for general debts—Effect.*—Where property is sold by Government for general debts, and not for arrears of revenue, they sell only the interest of the debtor, and do not guarantee the vendee a title. DOUGLAS v. THE COLLECTOR OF BENARES, **5 M.I.A. 271=1 Sar. 434=1 Suther. 231.**

(81)—*Dispossession by Government—Stipulation for refund of purchase-money—Legality.*—In this case the parties stipulated that, in case the Government dispossessed the plaintiffs of the lands purchased by them from the defendants, the latter would have to refund the purchase money. *Held* that such a stipulation is lawful. VAGADHU v. HADDU MAHARANNA, **8 M.L.T. 312=7 Ind. Cas. 870.**

(82)—*By registered deed to one person—Prior verbal sale to another person—Notice—S.* 48, *Registration Act—S.* 27 (*b*), *Specific Relief Act.*—Where a person sold his land to another verbally, before he sold it to a third person by registered deed, and the subsequent purchaser had actual notice of the prior sale, *held* that the equitable doctrine of notice applied, notwithstanding the provisions of s. 48, Registration Act (4 B. 126, 10 C. 250, 10 C. 710, *R.*) The prior purchaser is entitled, under s. 27 (*b*), Specific Relief Act, to a decree for specific performance of the sale to him, as against both his vendor and the subsequent purchaser, who had notice of the prior sale. TUN ZAN v. MAUNG NYUN, **4 L B.R. 26.**

(83)—*Act* XVI *of* 1864, s. 68—*Registered deeds of sale of same property to several persons—Subsequent purchase—Plea of previous possession under parol contract not maintainable.*--The contest in this case was between two persons each of whom claimed the same property under registered conveyances from the same owner. The lower appellate Court, acting under the provisions of s. 67 of Act XVI of 1864, gave a decree in favour of the plaintiff, inasmuch as

Sale—continued.

——1.—General—*continued.*

the date both of his deed and of its registration were anterior to those of the defendant. On special appeal, the defendant set up also that prior to the plaintiff's purchase he had obtained possession of the property under a parol contract of sale, and that the lower appellate Court was wrong in not having enquired into that fact and given him the benefit of the priority which would have arisen therefrom, but it was held that he could not set up the parol sale against the plaintiff's registered kobala in the face of s. 68 of the Act. Defendant also objected that the lower Court should not have omitted to determine the *bona fides* of the purchase of the plaintiff. But the High Court held that the objection was not as such tenable though there might have been some force in it if the defendant distinctly and, in express terms, had raised an issue as to the nature of the plaintiff's contract of sale, and distinctly stated not only that it was fraudulent but also the way is which the fraud was intended to be carried out against him (the defendant). BOIKUNTONATH SETT v. RUSSICK LOLL BURMONO, **10 W.R. 231.** [*R.*, 12 W.R. 217.]

(84)—*Unregistered sale-deed—Distinction between evidentiary admissions and admissions by the pleadings--Transfer of Property Act, s.* 55 (2) *—Caveat emptor—Restoration of purchase money on sale being void—Contract Act, ss.* 20 *and* 65.—There is a distinction between evidentiary admissions and admissions by the pleadings. S. 58, Evidence Act, governs admissions by the pleadings. Although a sale-deed is inadmissible in evidence as being unregistered, an admission by the (vendor) defendant, in his preliminary examination, of an agreement alleged in the plaint, to the effect that he would make good any loss the (plaintiff) purchaser might incur in respect of the property sold, is not excluded by s. 91, Evidence Act, and renders proof of the agreement unnecessary. Plaintiff sued to recover a certain sum, alleging that he bought for that sum a piece of land as a house site from the defendants, they agreeing to make good any loss he might incur in respect of the transaction, and that the Collector thereafter declared the land to be State and refused permission to him to build on it. *Held* that in the face of such an agreement, the rule of *caveat emptor* cannot be applied. Apart from the agreement, it is doubtful whether the maxim itself is current in India and retains validity in respect of the vendor's title. Moreover, the principle of s. 55 (2) of the Transfer of Property Act, under which the seller passes a covenant for title, ought to be followed as a matter of justice, equity and good conscience, although the Transfer of Property Act itself is not in force in Upper Burma. Again, both the parties believed at the time of the sale that the land was *bobabaing* and they had no knowledge or warning that it would be subsequently declared to be State. This is, therefore, such a mistake as is referred to in s. 20 of the Contract Act, and s. 65 of that Act requires the

Sale—continued.

——1.—General—*continued.*

sellers (defendants) to restore or make compensation for the advantage they receive, apart from any agreement which they admitted to have made. SADHU v. NGA SI GYI, **U.B.R. 1907, Evidence, 1.** (U.B.R. 1897-1901), Vol. II, 1st Qr., 379, *F.*)

(85)—*Sale—Right of re-purchase—Limitation.*—In 1841, A sold certain lands belonging to him, to V. In 1843, V executed an agreement to A which ran thus, "If you and your posterity pay in a lump the 175 Rupees, I will hand over the lands to you." In a suit brought by A in 1867 for the cancellation of the sale, *held* that the suit was barred by limitation, more than twelve years from the date of the cause of action (1843 at the latest) having elapsed before suit. VENKAPPA CHETTI v. AKKU, **7 M.H.C. 219.** [*R.*, 19 A. 434; *D.*, 3 M. 87.]

(86)—*Conveyance alleged to be a colourable transaction in fraud of creditors—Proof of execution and consideration not sufficient—Evidence essential regarding subsequent beneficial possession and conduct of parties.*—This was a suit for a declaration that, under the alleged *kubala* set up by the defendants who were claimants to property sought to be sold by the plaintiff in execution of his decree, the property did not pass from the judgment-debtor. The Court of first instance found for the plaintiff, relying on the evidence as to the conduct of the parties subsequent to the alleged transfer, but this decision was reversed on appeal. In special appeal, it was contended that the lower appellate Court, was wrong in having held that, as the execution of the *kubala* and the passing of the consideration money were proved, it was unnecessary to enquire further into the *bona fides* of the transaction, or to determine whether there was any transfer of the property which was good as against a creditor like the plaintiff. This contention was upheld by the High Court which ruled that where the main issue in an action is whether a conveyance is a real substantial transaction as between the parties to it and is not mere a colourable one in fraud of creditors, the proof of the execution of the deed and the passing of a sum of money as consideration, goes but a short way towards establishing the validity of the transfer as against the creditor who disputes it and, there can be no doubt that evidence as to the subsequent beneficial possession of the property and generally of the mode in which the parties deal with it, is most important. TARA CHUND GHOSE v. MOHESH CHUNDER DOSS, **2 W.R. 30.**

(87)—*Deed of sale of land—Trees standing on land, whether pass to purchaser as legal incident thereof.* — In this case, the question arose whether certain mango trees, which stood on the land sold under a sale-deed to the plaintiff, passed to him along with the land. In such cases the trees would pass to the purchaser of the land, unless a different intention was expressed or necessarily implied, and in the sale-deed in

***Sale*—continued.**

——1.—General—*continued.*

question no such intention was expressed. But it was contended that such an intention was necessarily implied because the trees had been mortgaged to the defendant prior to the sale and no mention was made of the mortgage in the deed of sale. The Court was, however, of opinion that no inference could be made from this circumstance alone, that the intention of the parties was that the interest in the tree should not pass to the plaintiff. PANDURANG v. BHIMRAO, **22 B. 610.**

(88) —*Purchase by debtor's near relative--Mere decision as to execution not sufficient —Good faith to be proved.*—Where the plaintiff, purchaser, happens to be a near relative of the debtor, it is not sufficient simply to decide that a bill of sale is proved to have been executed, but it is also necessary to prove the *bona fides* of the transaction. The case was therefore remanded to the lower appellate Court with directions to that Court to try whether the conveyance was or was not a *bona fide* transaction and also who, since the date of the alleged purchase had actually held real possession of the lands claimed to have been purchased under the deed. JADUBENDUR ROY v. SHAIKH KUMUROODDEEN, **6 W.R. 310.**

(89)—*Sale of land by Hindu widow—Condition that vendee should pay amount of revenue to vendor for payment to Government—Non-registration of vendee's name—Partition under Partition Act (B.C., V of 1897)—Right of vendee to lands allotted to vendor.*—Defendant No. 4, a Hindu widow, sold certain specified *Khamar* lands to plaintiff, but there was a condition to the effect that the vendee should pay the amount of Revenue to the vendor for payment to Government. The result was that the plaintiff's name was not registered as a proprietor. Thereafter a partition was effected under the Partition Act of 1897. The plaintiff could not secure the *khobala* lands, nor any land equivalent to them. He sued to obtain those identical lands or the lands which had been allotted to his vendor. *Held*, that the plaintiff is entitled to follow the lands allotted to his vendor, the widow, in lieu of the lands conveyed to him; and that, if the widow had absolute interest, the plaintiff will get such interest, and if not the conveyance to the plaintiff would not operate after her death. BROJO NATH SAHA v. DINESH CHANDRA NEOGI, **9 Ind. Cas. 67.** (11 A. 106, 21 W.R. 233, 26 C. 434, 3 C.W.N. 209, *Rel.*)

(90) —*Sale of tank and lands—Severance of land from the tank from common ownership—Rights of owner of land—Irrigation—Continuous easement.*—A tank and certain lands originally belonged to a Zemindar. They were sold by him to the defendant. The plaintiff subsequently became owner of portion of land under the tank. The lands were being irrigated with the water of the tank. *Held* that, as the right to irrigation was an apparent and continuous easement, when the plaintiff acquired his right to

***Sale*—continued.**

——1.—General—*continued.*

the above portion of the land, he is entitled to the continuance of the easement. But the plaintiff cannot ask that there should be no tank bed cultivation, provided it does not interfere with or reduce the customary flow to the plaintiff's lands. Nor is the plaintiff entitled to insist as dominant owner that the defendant should keep the tank in good repair. *Held* also that the sale of the land did not in any way enlarge the plaintiff's rights beyond what he was entitled to on the severance of the lands from the common ownership. ABBOY CHETTY *alias* AUTHIAPPA CHETTY v. K. C. DESIKA CHARIAR, **8 M.L.T. 241=8 Ind. Cas. 312.**

(91)—S. 34, *Court-Fees Act*, 1870—*Transfer of Stamps.*—Transfer of a Court-fee stamp on promise of a stamp of equal value being returned is no "sale" under s. 34, Act VII of 1870, and no conviction can be sustained for such transfer. KEDAR NATH SHAHA v. EMPEROR, **30 C. 921=7 C.W.N. 704.**

(92)—*Necessity for sale, purchaser not bound to prove.*—The High Court *held* that the ruling of the Privy Council in *Hanuman Pershad's case* was applicable to the present case and the lower appellate Court should not therefore have required the purchaser to prove the necessity of the sale, such purchaser not being bound to prove the same. RAMKULPO MUNDUL v. SHOHOCHURREE DASSEE, **4 W.R. 64.**

(93)—*Sale by Commissioner of partition—Effect—Effect of conditions of sale—R. 426 of the High Court Rules (Calcutta), scope of—Sale by Court and sale under authority of Court or out of Court—Distinction.*—In this case, a Commissionor of Partition sold certain property in auction under an order of Court that he "be at liberty to sell." The following were among the conditions of sale:—"There are no documents of title, except those mentioned in the abstract of title; the purchaser shall not be entitled to call for any other document;" . . "The purchasor will not be entitled to call for the originals of any document or to object to the title on the ground of the non-production of any other documents . . ." *Held* that the sale in question was not one by the Court, but was one made by the Commissioner of Partition under the authority of the Court, and that the conditions of sale in this case did not preclude the purchasers from raising the question of the vendor's title. The distinction between a sale by the Court and a sale under the authority of the Court or out of Court is that, in the one case, the Court makes the title to the purchaser, and, in the other case, the Courts only authorise either the parties to the suit or the person having the carriage of the proceedings to sell the property and to make a title to the purchaser. (6 B.L.R 492-N., 16 C.W.N. 394, *R.*), The auction-purchaser in the case obtained an order from the Court directing the Registrar to enquire and report as to the vendor's title, under R. 426 of the High Court Rules. On

Sale—continued.

——1.—General—*continued.*

an application for review of judgment, *held* that a review must be granted on the ground that the sale in this case was not a sale by the Court. JOGEMAYA DASEE v. AKHOY COOMAR DAS, **40 C. 140 = 18 Ind. Cas. 954.**

(94)—*Sale—Cancellation of—Suspicious document—Limitation—Circumstantial evidence.*—*Held*, that a document is suspicious which purports to have been executed a year before the purchase of stamp and only scribe has been called to prove it. *Held*, also, that the fact that the suit for possession of landed property is brought 13 years after its purchase, of which even no mutation of names was effected, makes the whole transaction doubtful and supports the plea of the defendant that the sale was afterwards cancelled. GANESHI LAL v. DEWA SINGH, **133 P.W.R. 1912 = 16 Ind. Cas. 684.**

(95)—*Evidence Act, ss. 92, 115—Oral evidence varying terms of document—Estoppel.*—S. 92, Evidence Act, should not be read subject to s. 115 of the Act. Where, in a suit for possession of property on the basis of a sale-deed, the defendant pleaded an oral agreement whereby plaintiff had agreed to return the sale-deed to defendant and to relinquish his claim to the property: *Held*, (1) that evidence of the oral agreement was inadmissible under s. 92 of the Evidence Act; (2) that, as the oral evidence itself was inadmissible, there was no question of the plaintiff being estopped from prosecuting his suit by reason of such agreement. PICHAMMAL v. PONNAMBALA BATTER, **15 Ind. Cas. 326.** (29 M. 336, 1 M.L.T. 153, 16 M L.J. 395, 36 C. 920, 4 Ind. Cas. 414, *R.*)

(96)—*Vendor and purchaser—Evidence Act, s. 92—Rescission of sale-deed by mutual consent—Parol evidence, admissibility of—Non-delivery of possession after sale—Acquisition of prescriptive title*—Onus *of proof.*—Oral evidence to prove that parties to a sale-deed, which was duly executed and registered, subsequently rescinded it by mutual consent, is inadmissible under s. 92, Evidence Act. (2 B. 547, *R.*) Where a sale-deed has been duly executed by one party to another and duly registered, the *onus* of proving that possession was not given to the vendee in accordance with the sale-deed and that the vendor had acquired a title by prescription lies on the party asserting it. BIJJUKALLU PAPAKKA v. YEDDULA ROSI REDDI, **15 Ind. Cas. 282.**

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(97)—*Burden of proof—Sale-deed—Suit for declaration that sale was nominal—Proof of nominal character of transaction—Non delivery of possession.*—In a suit for a declaration that a sale deed executed by one party to another was a nominal transaction, the burden of proof is on the plaintiff to prove any circumstances relied on for the purpose of showing that the sale was not a real and honest transaction. The question whether possession passed under the sale to the vendee is a material element, though not a decisive circumstance, in deciding

Sale—continued.

——1.—General—*continued.*

whether the sale was real or nominal, but even here, it is for the plaintiff to prove that possession did not pass, and not on the defendant to show that possession did pass. SAMA LAKSHMAYA CHETTY v. MANICKA CHETTY, **16 Ind. Cas. 749.**

(93)—*Deed of sale, suit for cancellation of, alleging non-payment of consideration—Burden of proof on plaintiff admitting execution—Failure to prove facts alleged—Liability of suit to dismissal.*—Suit to set aside a deed of sale of a house in favour of the defendant. Plaintiff admitted execution of the deed of sale but alleged that the sale had never been completed, as the agreement was that defendant should pay the purchase-money 10 days after the date of the deed and that he had not done this and refused to return the deed. Plaintiff did not succeed in establishing his allegations, and even if he had proved all of them, he would not have been entitled to set aside the sale, without proof that it was mutually agreed that, on default of payment, the sale should be void. The burden of proof lay upon the plaintiff who had admitted execution of the deed of sale reciting payment of consideration in full and desiring relief upon an allegation of circumstances inconsistent with the terms of his own deed, *viz.*, an unfulfilled promise to pay ten days afterwards. He failed to establish his own case and never divulged the real truth of the transaction and this was fatal to the plaintiff's claim, because, not knowing the true state of facts, it was impossible to determine the relief to which the plaintiff was really entitled. BANNA SHAH v. RAJJAB ALI, **85 P.R. 1879.**

(99)—*Judgment-debtor's right to sell away property until seizure, not affected by mere intent to obstruct judgment-creditor—Fraudulent object of concealing ownership.*—An embarrassed debtor after decree may sell his property right and left till it is actually attached, though this may, in the result, greatly, inconvenience his creditor. He may sell his property until the moment of its seizure, and there is nothing to prevent him from doing so till the property is in *custodia legis*. The question whether or not the intent was to defeat and delay the creditor is not material. The only thing that could vitiate the sale would be to prove that there was really none and that the object was to put the property into a state of concealment as to its owner. The main question in such a case is therefore whether there was or not a sale as a fact, and this is not dependent on the payment of the purchase-money, for a sale is complete when the purchase-money is agreed to be paid. LAKHA MAL v. MULAH, **21 P. R. 1875.** [*R.*, 6 P.R. 1901 = 1900 P.L.R. 513; *D.*, 82 P. R. 1908.]

(100)—*Non-proprietor, power of sale of—Custom—Mouza Bahroki, Tashil Sialkot.*—There is no well-established custom permitting

Sale—continued.

——1.—General—*continued*.

a non-proprietor (a weaver) in Mauza Bahroki, Tashil Sialkot, to sell his house even to one of the co-proprietors of the village. SAHIBA v. PREMA, **93 P R. 1880.** (25 P.R. 1875, *Appl.*) [*Appr.*, 85 P.R. 1882, 124 P.R. 1888.]

(101)—*Non-proprietary residence—Sale of house sites by—Consent of proprietors.*—The general rule, in the absence of evidence of custom to the contrary, is that non-proprietary residents cannot dispose of the sites of their houses without the consent of the proprietors; and the consent of the proprietors, in several such cases, would not prove a custom authorizing sale. By the custom of the village of Nathana a village artizan is not at liberty to sell his dwelling situate within the village site. BIKA SINGH v. LAKHU, **92 P.R. 1880.** [*Appr.*, 85 P.R. 1882, 124 P.R. 1888 ; *R.*, 87 P.R. 1884.]

This circular prescribes the scale of fees to be deducted and credited to Government from proceeds of sales in execution of decrees. **Civ. Cir. No. 18, of 16th May, 1872, 17 W.R. H.C. Ruls. & Ords. 16.**

This circular contains instructions for the better arrangement of business, &c., for sales of property when sold by Civil Courts in execution of decree. **Civ. Cir. No. 21, 20 W.R. Ruls. & Ords. of the H.C., p. 10.**

The circular calls for statement regarding compulsory sales of immoveable property not conducted by the agency of the Collector. **Civ. Cir. Memo. No. 18, 20 W.R. Ruls. & Ords. of the H.C., p. 24.**

This circular deals with the postponement of sale by Collector, pending appeal. **Rev. Cir. No. 2, 24 W.R. Rev. Cir., p. 6.**

This circular deals with the language in which notification of sale is to be published. **Rev. Cir. No. 6, 24 W.R. Rev. Cir., p. 24.**

Of unascertained goods when complete—*See* ACT IX OF 1899, s. 2, 4 S.L.R 20=7 Ind. Cas. 593.

Valuable property sold for nominal price—Application of principle *ut res magis valeat quam pereat*—*See* BEN. ACT I OF 1895, s. 10, 5 C.L.J. 687.

Under Act I of 1895—Necessity of notice under s. 31 of the Act for the validity of a—*See* BEN. ACT I OF 1895, ss. 10, 31, 3 C.L.J. 280.

Suit to set aside—*See* BOM. ACT V OF 1862, ss. 1, 2, 13 B. 203.

See BUR. ACT II OF 1876, ss. 19, 56, 55, proviso 1 (*b*), 17, 1 L.B.R. 277.

See PUN. ACT XXVIII OF 1868, s.5, cl. (2), 19 P.R. 1871.

In course of administration, priority of—Purchase *lis pendens*—*See* ADMINISTRATION SUIT, 9 C. W.N. 225, P.C.=32 C. 198=2 A.L.J. 190.

Sale—continued.

——1.—General—*continued*.

See APPEAL—ORDERS, A.W.N. 1883, 178.

Equity of redemption and attachment of, in execution—*See* ATTACHMENT—MODE OF ATTACHMENT, 21 B. 226.

Execution sale—Ss. 274, 295, Civ. Pro. Code, 1882—*See* ATTACHMENT — MISCELLANEOUS, 81 P.R. 1908=148 P.W.R. 1908.

Vendor's title—Whether attestation amounts to representation as to validity of title—*See* ATTESTATION, 8 M.L.T. 171=7 Ind. Cas. 174 =M.W.N. 1910, 333.

Of a divided portion of property belonging to the family—*See* BUDDHIST LAW—GENERAL, L.B.R. 1872—1892, 76.

By wife of joint property—*See* BUDDHIST LAW—ALIENATION, L.B.R. 1893—1900, 37.

Of immoveable property by husband without knowledge of wife—*See* BUDDHIST LAW—HUSBAND AND WIFE, 1 L.B.R. 11.

Land, mortgage of, or—*See* BURDEN OF PROOF—MORTGAGE, L.B.R. 1872—1892, 642.

See BURDEN OF PROOF—MISCELLNEOUS, 91 P.R. 1902.

Agreement by purchaser to pay price in discharge of incumbrances—Failure to pay—Payment after suit by vendor—Cause of action, —*See* CAUSE OF ACTION, 8 M.L.T. 188=7 Ind. Cas. 269.

Agreement to convey property after decree in lieu of expenses of litigation — Contract for sale—*See* CHAMPERTY, 14 O. C. 139.

Agreement for sale—Vendee put in possession subsequently ejected by vendors—Sale not completed—Suit by vendee for possession and injunction — Similar suit by vendors—Subsequent suit by vendee for specific performance—Omission to set up grounds of defence —*Res judicata*—*See* CIV. PRO. CODE, 1908, s. 11, O. II, r. 2, 24 M. 491=6 C.W.N. 17, P.C.

Prior purchaser—No estoppel by judgment against him in an action after sale—Privity of estate—*See* CIV. PRO. CODE, 1908, s. 11, O. II, rr. 4, 5, 13 Bom. L.R. 268.

Irregularity in publishing sale—*See* CIV. PRO. CODE, 1908, O. V, r. 17, O. XXI, r. 90, A.W.N. 1881, 16.

Suit for cancellation of sale-deed by vendor and for recovery of properties — Decree for unpaid purchase-money — Jurisdiction—*See* CIV. PRO. CODE, 1908, O. VII, r. 7, 8 M.L.T. 433=8 Ind. Cas. 64.

Held for more than seven days—Legality—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 9 and 90, 8 Ind. Cas. 564.

Application for—Whether continuation of former application for attachment—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 10, 21, s. 48, 8 M.L.T. 367=7 Ind. Cas. 707.

***Sale*—continued.**

——1.—General—*continued.*

Conduct of, in a place other than that mentioned in the proclamation, whether a material irregularity—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 66, 70, 90. 132 P.R. 1906=11 P.L.R. 1907.

Order refusing to set aside—Appeal—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 83, 89, and O. XLIII, r. (1) (j), 105 P.W R. 1910=72 P.R. 1910=143 P.L.R. 1910=7 Ind. Cas. 718.

Contract of sale—Default in payment of price—Recision of contract—*See* CONTRACT—BREACH OF CONTRACT, 14 C.P.L.R. 57.

Sale falling through owing to vendors' neglect—Agent negotiating sale—Right to commission—*See* CONTRACT—BREACH OF CONTRACT, 8 M.L.T. 40=6 Ind. Cas. 740.

Delivery order—Effect—*See* CONTRACT—CONSTRUCTION OF CONTRACTS, 21 C. 173.

Contract of—, terms of—How far fulfilled—Tender when defective—Estoppel—*See* CONTRACT—MISCELLANEOUS, 4 C.W.N. 313.

Intended to defeat expected execution—Effect—*See* CONTRACT ACT, 1872, ss. 23, 24, 4 B. 70.

Of property subject to charge for maintenance—Applicability of principle of s. 55 (5) (*d*), Transfer of Property Act, to—*See* CONTRACT ACT, 1872, s. 69, 17 M.L.J. 250=30 M. 461.

Suit for specific performance of contract of sale and for delivery of possession—Court fee—*Forum* of appeal—Value of suit—Consideration—Payment of part—Breach of Contract—Promisee if entitled to refund—*See* COURT FEES ACT, 1870, s. 7, cls. 5, 10, 14 C.L.J. 159.

Covenant in sale-deed to discharge prior incumbrance, whether a covenant running with the land—*See* COVENANT, 6 M.L.T. 264=3 Ind. Cas. 936.

Contract of sale—Default by purchaser in payment of price—Right of re-sale duty of vendor exercising—Measure of damages awardable to vendor—*See* DAMAGES—MEASURE AND ASSESSMENT, 19 A. 535=A.W.N. 1897, 150.

Of goods—Refusal to take delivery—Resale and suit for damages—Measure of damages—*See* DAMAGES—MEASURE AND ASSESSMENT, 22 A. 55, F.B.=A.W.N. 1899, 172.

See DAMAGES—MEASURE AND ASSESSMENT, 25 C. 505=2 C.W.N. 283.

Contract of—Specific performance—Prayer—*See* DECLARATORY DECREE, SUIT FOR—SUITS CONCERNING DOCUMENTS, 13 M. 324.

See DECREE—GENERAL, A.W.N. 1888, 71.

Revenue—of share of estate—*See* DECREE-FORM OF DECREE, 14 C. 109, P.C.=13 I.A. 160.

***Sale*—continued.**

——1.—General—*continued.*

Deed of sale, accompanied by deed granting right to re-purchase on payment of purchase-money—Not a mortgage—*See* DEED—CONSTRUCTION OF DEEDS, 12 A. 387, P.C.=17 I.A. 98.

Document purporting to be absolute sale—Counter-deed by vendee agreeing to re-transfer to vendor on payment of debt—Mortgage and not sale—*See* DEED—CONSTRUCTION OF DEEDS, 23 M. 114.

Sale-deed, the words "as malikana" in a, when creates a heritable charge—*See* DEED—CONSTRUCTION OF DEEDS, 9 A. 591=A.W.N. 1887, 121.

See DEED—CONSTRUCTION OF DEEDS, 13 A. 409=A W.N. 1891, 159.

Railway receipt in name of vendee as consignor—Effect—*See* DELIVERY, 4 S.L.R. 10=7 Ind. Cas. 588.

Charge created in favour of lender of purchase-money—Equitable charge on property purchased—*See* EQUITABLE MORTGAGE, 15 A. 304, P C.

Pre-emption—Sale to minor—Estoppel—*See* ESTOPPEL—ESTOPPEL BY DEEDS, ETC., 4 A. 37=A.W.N. 1881, 129.

Unregistered receipt for earnest money comprising terms of conveyance—Admissibility in proof of contract of sale—*See* EVIDENCE—MISCELLANEOUS DOCUMENTS, 10 C.P.L.R. 107.

See EVIDENCE—MISCELLANEOUS DOCUMENTS, L.B.R. 1893—1900, 212.

Oral evidence showing "sale deed" to be "deed of gift."—Admissibility—*See* EVIDENCE—PAROL EVIDENCE, 28 C. 70.

Oral evidence showing that document purporting to be a sale is a mortgage in reality—*See* EVIDENCE—PAROL EVIDENCE, 9 C. 528=12 C.L.R. 287.

Mortgage—Admissibility of evidence of conduct to prove document to be a mortgage—*See* EVIDENCE—PAROL EVIDENCE, 4 B. 609-N=P.J. 1878, 24.

See EVIDENCE—PAROL EVIDENCE, 22 A. 149, P.C.=4 C.W.N. 153=27 I.A. 58=2 Bom. L.R. 523.

See EVIDENCE ACT, 1872, ss. 91, 101, 102, 110, L.B.R. 1872—1892, 133.

Written instrument—Oral agreement to vary its terms—Sale or mortgage—*See* EVIDENCE ACT, 1872, s. 92, 13 Bom. L.R. 113.

Suit for redemption by vendor as on mortgage—Evidence to show that the sale was a mortgage—*See* EVIDENCE ACT, 1872, s. 92, 25 M. 7=14 M.L.J. 370.

Absolute conveyance or mortgage—Fraudulent dealing with third person's property—Evidence of acts and conduct of parties—Admissibility—See EVIDENCE ACT, 1872, s. 92, 14 C.L.J. 276.

Sale—continued.

——1.—General—*continued.*

Document whether absolute conveyance or mortgage—Evidence of acts and conduct of parties—*See* EVIDENCE ACT, 1872, s. 92, 2 M. W.N. 1911, 30.

Deed of sale — Deed to take effect after certain event—Oral evidence—Admissibility—*See* EVIDENCE ACT, 1872, s. 92, proviso 3, 9 M.L.T. 450.

See EXECUTOR, 1 A. 710, F.B.

Sale benami in name of third person—Intention to defraud creditors of real purchaser—Collusive decree obtained by benamidar, whether could be set aside by real owner—*See* FRAUD—EFFECT OF FRAUD, 11 B. 708.

Sale of property, fraudulent and colourable, nature of—*Indicia* of fraud and collusion—Intention to defeat creditors—*See* FRAUD—FRAUD, ELEMENTS OF, PROOF OF, 22 B. 255.

Property sold below its value—Seller occupying at low rent—Evidence—Good faith—*See* FRAUDULENT TRANSFER, 9 Ind. Cas. 623.

Under Act XI of 1859—Suit by purchaser for recovery of possession or for assessment of rent and *mesne profits*—Reg. XIX of 1793—*See* GRANT—GENERAL, 35 C. 931=9 C.L.J. 119=3 Ind. Cas. 301.

Sale by guardian—Sanction of Court not obtained—*See* GUARDIAN — DUTIES AND POWERS OF GUARDIANS, 15 B.L.R. 350=24 W.R. 46.

Sale by guardian without sanction of Court—Guardian jointly interested in minor's property—Recall of certificate—*See* GUARDIAN—DUTIES AND POWERS OF GUARDIANS, 15 B.L.R. 351, Note=13 W.R. 300.

Hindu widow—Alienation for maintenance by sale or mortgage—See HINDU LAW—ALIENATION, 3 B.L.R. A.C. 375.

Of minor's property—Legal necessity—Equities in favour of purchaser—*See* HINDU LAW—GUARDIANSHIP, 6 A. 417=A.W.N. 1884, 144.

Sale of right of management—Right of succession of member of family—Limitation Act, XV of 1877, art. 12—*See* HINDU LAW—RELIGIOUS ENDOWMENT, 7 B. 188.

See HINDU LAW—WIDOW, 4 C. 677=3 C. L.R. 473.

See INJUNCTION — INJUNCTION UNDER CIV. PRO. CODE, 5 B.L.R. 254, 12 C. 515, 10 A. 80=A.W.N. 1888, 7, 7 A. 550=A.W.N. 1885, 128.

Of unascertained goods — Completion of—Ss. 79 and 83, Contract Act—*See* JURISDICTION—CAUSES OF JURISDICTION, 3 S.L.R. 156=4 Ind. Cas. 1147.

Sale—continued.

——1.—General—*continued.*

Of goods—*See* JURISDICTION—CAUSES OF JURISDICTION, 1 Agra 10.

Zemindar himself in possession during period for which he claimed arrears of rent from patnidars—Zemindar purchaser at a sale—Sale subsequently set aside at the instance of patnidar—Zemindar not to be treated as trespasser while he was in possession—*See* LANDLORD AND TENANT—MISCELLANEOUS, 19 C. 267.

Arrangement between vendor and purchaser that purchaser should pay off vendor's creditor out of purchase-money — Purchaser whether trustee—*See* LIMITATION ACT, 1908, s. 10, arts. 62, 83, 103, 9 Ind. Cas. 988.

Suit for recovery of debt—Sale in consideration of debt—Claim on sale agreement failing through—*See* LIMITATION ACT, 1908, s. 19, 155 P.L.R. 1906.

Agreement by vendee to discharge a prior debt due by vendor to a third party—No time fixed for performance—Breach of contract—Cause of action—*See* LIMITATION ACT, 1908, s. 23, arts. 115, 116, 9 A.L.J. 534.

Meaning of—*See* LIMITATION ACT, 1908, s. 28, arts. 10, 12, 44, 111, 136, 137, 138, 147, 165, 166, 167, 172, 17 M.L.J. 220=2 M.L.T. 350=30 M. 393.

Right of pledgee to sue for sale—*See* LIMITATION ACT, 1908, arts. 57, 120, 27 M. 528, F.B.

Proof of consideration other than that recited in the sale deed—Sale valid if intended to be operative—Sale voidable for fraud—Limitation—*See* LIMITATION ACT, 1908, art. 91, 5 M.L.T. 99=32 M. 72.

See LIMITATION ACT, 1908, art. 131, 25 M. 99, F.B.=11 M.L.J. 323.

See LIS PENDENS, 21 P.R. 1875.

By widow in possession in lieu of dower—*See* MAHOMEDAN LAW—DOWER, A.W.N. 1894, 196.

Plea of, found against—Transaction cannot be converted into a gift—*See* MAHOMEDAN LAW—GUARDIANSHIP, 2 M.W.N. 1911, 18.

Of minor's property by next-friend—Validity of sale—Necessity — *See* MINOR - GENERAL, 33 P R. 1904.

Construction of document—Sale or mortgage—Condition to re-transfer—*See* MORTGAGE—GENERAL, 6 Ind. Cas. 512=8 M.L.T. 100.

Auction sale in execution of decree of immoveable property subject to a mortgage—Rights of mortgagee—Whether mortgagee can get the sale set aside—*See* MORTGAGE—GENERAL, 7 P.W.R. 1908=62 P.R. 1908.

Sale subject to agreement executed on the same day—Reserving right to vendor to repurchase—Effect—*See* MORTGAGE — GENERAL, 7 A.L.J. 998=7 Ind. Cas. 911.

***Sale*—continued.**

——1.—General—*continued.*

Mortgage first without possession—Possession subsequently given to mortgagee—Transaction, a sale, not a mortgage—Burden of proof on the mortgagee—*See* MORTGAGE — GENERAL, 5 L.B.R. 40=2 Ind. Cas. 535.

Sale with condition of repurchase distinguished from mortgage—*See* MORTGAGE — CONDITIONAL SALE, 2 B.L.R. 1058.

Sale convertible into mortgage on contingency—Sale absolute if contingency fails—Right of redemption barred—*Indicia* whether transaction is sale or mortgage—*See* MORTGAGE—FORM OF MORTGAGES, 2 B. 231.

Of perpetual lease with condition of repurchase—No mortgage—*See* MORTGAGE—FORM OF MORTGAGES, 10 C. 30, P.C.=10 I.A. 129 =13 C.L.R. 382.

Mortgage with possession—Second mortgage under an unregistered deed—Delivery of property—Stipulation postponing redemption till payment of the additional advance, not binding on purchaser—*See* MORTGAGE—REDEMPTION, 11 O.C. 248.

When void and when irregular—Purchase by mortgagee, *benamee*, effect of—*See* MORTGAGE—REDEMPTION, 9 C.W.N. 201, P.C.= 2 A.L.J. 71=7 Bom.L.R. 1=1 C.L.J. 584=32 C. 296.

See MORTGAGE — REDEMPTION, L.B.R. 1872—1892, 482, 494.

In execution of money-decree—*See* MORTGAGE—MISCELLANEOUS, 3 C.W.N. 323.

See MORTGAGE—MISCELLANEOUS, 6 W. R. 293.

Purda lady—Suit to set aside sale—Fraud —Parol evidence—*See* PARDANASHIN WOMAN, 1 B.L.R. O.C. 28.

Consideration for—Burden of proof—*See* PLEADINGS, 40 P.L.R. 1910=8 Ind. Cas. 230.

Suit to set aside sale deed—Averment of forgery and fraudulent inducement to execute document—Effect—*See* PLEADINGS, 8 Ind. Cas. 845.

Suit for possession under a sale deed—Sale declared invalid—Prayer for possession as mortgagee—Validity—*See* POSSESSION—SUITS FOR POSSESSION, 4 Ind. Cas. 37=20 M.L.J. 141.

See PRACTICE AND PROCEDURE, 21 C. 566.

Perpetual lease when amounts to a—*See* PRE-EMPTION—CONSTRUCTION OF WAJIB-UL-ARZ, 7 A.L.J. 1022=7 Ind. Cas. 930.

Transfer under compromise of suit, whether amounts to sale—*See* PRE-EMPTION—SUBJECTS OF PRE-EMPTION, 7 A. 917=A.W.N. 1885, 295.

See PRE-EMPTION—SUBJECTS OF PRE-EMPTION, 7 A. 291=A.W.N. 1885, 47.

***Sale*—continued.**

——1.—General—*continued.*

Conducted by officer in spite of Court's order staying it, effect of—*See* PRE-EMPTION, —MISCELLANEOUS, 9 O.C. 289.

Non-service of notice on judgment-debtor, if ground for setting aside the sale—Effect of confirmation of sale—*See* RECEIVER, 14 C. W. N. 560=5 Ind. Cas. 390=11 C.L.J. 489.

Of property worth less than Rs. 100— Prior unregistered and later registered documents—Priority—*See* REGISTRATION, 5 N. L. R. 82=3 Ind. Cas. 58.

Registered conveyance—Unregistered contract for sale—Preference—*See* REGISTRATION, 6 B.L.R. App. 1=15 W.R. 239.

Registered mortgage—Subsequent sale with possession—Priority—*See* REGISTRATION, 2 B. 662.

Deed of sale or mortgage—Priority—*See* REGISTRATION ACT, 1866, 1 B. 574.

Agreement to sell lands—Not registered— Construction of document—*See* REGISTRATION ACT, 1908, s. 17, 18 B. 396.

Of property mortgaged with possession— Subsequent sale by a registered document— Priority — *See* REGISTRATION ACT, 1908, s. 48, P.L.R. 1900, p. 352.

Of immoveable property by registered deed— Prior sale of same property by unregistered deed—Suit for possession by purchaser under registered deed—Admissibility of admission before Registration officer to prove prior sale— *See* REGISTRATION ACT, 1908, s. 49, 7 M. H. C. 13.

Unregistered deed of purchase—Subsequent purchase by another person with notice of prior unregistered purchase—Priority—*See* REGISTRATION ACT, 1908, ss. 49, 50, 9 Ind. Cas. 55=9 M.L.T. 270.

Unregistered mortgage—Subsequent registered sale—Priority—*See* REGISTRATION ACT, 1908, s. 50, 10 Ind. Cas. 233.

See REGISTRATION ACT, 1908, s. 50, 18 B. 355, F.B.

Former decision that plaintiff purchased plot A only—Second suit that he purchased A and B, whether lies—*See* RES JUDICATA—GENERAL, 10 Ind. Cas. 453.

See RIGHT OF SUIT—FRESH SUITS, 29 C. 395, P.C.=29 I. A. 99=6 C.W.N. 473=4 Bom. L.R. 363=8 Sar. 266.

By person not in possession—Suit by purchaser to recover property from trespasser in possession, maintainability of—*See* RIGHT OF SUIT—MISCELLANEOUS, 9 C.W.N. 477, P.C. =8 O.C. 155=27 A. 271=32 I.A. 113=15 M. L.J. 197.

Contract for sale—Building upon it before completion of sale—Rights of vendee—*See* SPECIFIC PERFORMANCE, 1 A.L.J. 688.

***Sale*—continued.**

——1.—General—*continued*.

Mortgage—Agreement to convey mortgaged property in case of default—Contract for sale—Suit for specific performance—*See* SPECIFIC PERFORMANCE, 3 A. 706=A.W.N. 1881, 61.

***See* SPECIFIC RELIEF ACT, 1877, s. 23, cl. (*b*), 1 L B.R. 257.**

***Sir* land—Cultivating rights in—Transfer of—Failure to obtain sanction of Revenue authorities for — Specific relief — Damages — *See* SPECIFIC RELIEF ACT, 1877, ss. 18 (*b*), 21 (*b*), 6 N.L.R. 185=8 Ind. Cas. 1184.**

Sale-deed executed—Executant cannot obtain declaration of his title unless he gets the deed set aside—*See* SPECIFIC RELIEF ACT, 1877, ss. 39, 42, 6 Ind. Cas. 891.

Contract of—Of standing trees chargeable as an agreement and not a conveyance—*See* STAMP ACT, 1879, s. 3, cl. 9, sch. I, art. 21, 22 B. 785.

Receipt for money paid for agreed future sale of shares in Company—Undertaking to execute a formal document of sale—Receipt liable to stamp duty—*See* STAMP ACT, 1879, sch. I, art. 5, 14 B. 316.

***See* STAMP DUTY, 8 M.H.C. 112.**

***See* ST. 11 and 12 VIC., C. 21, ss. 7, 30, 26 M. 214.**

Sale before Transfer of Property Act came into force—No covenant for title—Eviction of purchaser—Right of purchaser to claim refund of purchase-money—*See* TRANSFER OF PROPERTY, 1 C.P.L.R 178.

Effect of registration of sale deed—*See* TRANSFER OF PROPERTY ACT, 1882, 3 Ind. Cas. 177.

***See* TRANSFER OF PROPERTY ACT, 1882, s. 41, 1 L.B.R. 196.**

Transfer by—Of immoveable property less than Rs. 100, how effected—*See* TRANSFER OF PROPERTY ACT, 1882, s. 54, para. 3, 19 C. 628.

Acceptance of personal security from person other than purchaser—Whether vendor's lien destroyed—*See* TRANSFER OF PROPERTY ACT, 1882, s. 55, 10 M.L.T. 189.

Sale or mortgage — Test — Re-purchase — Limitation. *See* TRANSFER OF PROPERTY ACT, 1882, ss. 58, cls. (*a*) & (*c*), 60, 8 Ind. Cas. 981.

Mortgage — Order absolute for — without notice to mortgagor—Maintainability of application to set aside such order—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 87, 89, 32 C. 258, F.B.=9 C.W.N. 81.

***See* TRANSFER OF PROPERTY ACT, 1882, s. 89, 19 A. 205=A.W.N. 1897, 47.**

Mortgage property cannot, under s. 99 of the Transfer of Property Act, be brought to, in

***Sale*—continued.**

——1.—General—*concluded*.

execution of a simple money decree obtained by the mortgagee—but otherwise where it has been completed and confirmed—*See* TRANSFER OF PROPERTY ACT, 1882, s. 99, A.W.N. 1908, 49=5 A.L.J. 121=30 A. 146.

***See* TRANSFER OF PROPERTY ACT, 1882 s. 99, 22 M. 347=9 M.L J. 98.**

Of part of mortgaged property in execution of a decree for costs—Subsequent suit for redemption will succeed only in respect of unsold portion of mortgaged property—*See* TRANSFER OF PROPERTY ACT, 1882, s. 99, A.W.N. 1908, 48.

Confirmation of—Effect on a subsequent application—S. 99, Transfer of Property Act—*See* TRANSFER OF PROPERTY ACT, 1882 s. 99, 5 M.L.T. 84.

Money-decree in favour of mortgagee, sale of mortgaged property in execution of—Sale void as contravening s. 79 of the Transfer of Property Act—*See* TRANSFER OF PROPERTY ACT, 1882 ss. 99, 67, 33 C. 283.

Sale by Hindu widow—Old and illiterate and near to her death—Fraud and undue influence—Inadequacy of consideration—Sale set aside—*See* VENDOR AND PURCHASER—INVALID SALES, 5 B. 450.

***See* VENDOR AND PURCHASER—PURCHASE-MONEY AND OTHER PAYMENT BY PURCHASER, 5 N.W.P. 194.**

——2.—Sale by Anction.

***See* SALE—SALE FOR ARREARS OF RENT.**

***See* SALE—SALE FOR ARREARS OF REVENUE AND CESS.**

***See* SALE—SALE IN EXECUTION OF DECREE.**

(1)—*Court sale by auction—Amount of interest acquired by purchaser*.—Where any property purchased is purchased at a Court sale in execution of a decree, what passes to the purchaser is only such right, title and interest in the property which the judgment-debtor may possess in the property sold. BHUKAN BHAIBAVA v. BHAIJI PRAG, 1 B.H.C. 19.

(2)—*Auction sale—Retractation of bid—Bidding kutchap-putca—Custom*.—A bid made at auction can be retracted before it has been accepted, the reason being that until the goods are knocked down there is no contract with any one. There is by custom no implied agreement or an agreement by the bidder that, in consideration of the agreement by the auctioneers to submit the offer to their principals, the bidder promises not to retract his bid until it has been either accepted or refused. MACKENZEI LYALL & CO. v. CHAMROO SINGH & CO., 16 C. 702.

(3)—*Act* VIII *of* 1859, *s.* 260—*Sheriff's sale—Purchase in name of son—Suit brought in name of father — Maintainability*. — Suit to

Sale—continued.

——2.—**Sale by Auction**—*concluded.*

obtain possession of certain moveable and immoveable property which plaintiff claimed as assignee of a mortgage deed purchased by him at a Sheriff's sale in the name of his son, who was a minor at the time. The defendant objected *inter alia* that the suit should have been brought by the person whose name appeared as purchaser. *Held* that the suit was rightly brought by the plaintiff if he can establish the consent of his son for the institution of the suit. And as to the effect of s. 260 of Act VIII of 1859 in a case of this kind, the Court reserved its opinion, as the present suit was brought before the passing of the Act. BHAISHANKAR NARBHERAM v. HARIVALLABH, **1 B.H.C. 20.**

(4)—*Attachment by superior Court—Sale by inferior Court in ignorance—Validity of sale.*—Where an inferior Court in ignorance of an attachment by a superior Court sells the property so attached, the sale is not void but conveys a good title to a purchaser who is himself ignorant of the irregularity. HIMMAT SINGH v. BHAGWAT, **13 C.P.L.R. 145.** (25 C. 46, *F.*).

See CAUSE OF ACTION, 76 P.R. 1890.

——3.—**Sale for Arrears of Rent.**

a.—GENERAL.
b.—DEFAULTERS.
c.—DEPOSIT OF MONEY AND STAYING SALE.
d.—EFFECT OF SALE.
e.—INCUMBRANCES.
f.—RIGHTS AND LIABILITIES OF PURCHASERS.
g.—SETTING ASIDE SALE AND ITS EFFECT.
h.—SURPLUS PROCEEDS OF SALE, RIGHT TO.
i.—UNDER-TENURES, AND PORTIONS OF, SALE OF.
j.—MISCELLANEOUS.

————*a.*—GENERAL.

(1)—*Sale for arrears of rent, set aside—Indemnification by Zemindar—Reg.* VIII *of* 1819.—The purchaser of a zemindari sold for arrears of rent can, when the sale is afterwards set aside, require the Court under Reg VIII of 1819 s. 14, cl. 1, to compel the Zemindar to indemnify him on account of all payments of rent which he may have made; and, if he does not do so, he cannot set up his loss in answer to a liability which he has incurred. TARA CHAND BISWAS v. NAFAR ALI BISWAS, **1 C.L.R. 236.**

(2)—*Sale for arrears of rent—Right of purchaser—Incumbrances.*—A sale of an under-tenure under Act VIII of 1835 passed only the right, title and interest of the judgment-debtor, and did not void the incumbrances created by the old tenant. MANICK CHUNDER DOSS v. DWARKANAUTH DOSS, **2 Hay 502.**

Sale—continued.

——3.—**Sale for Arrears of Rent**—*continued.*

————*a.*—GENERAL—*continued.*

(3)—*Reg.* VIII *of* 1819, *s.* 8, *cl.* 2—*Patni rent—Sale for arrears—Notice.*—Where an arrear of *patni* rent is due, the zemindar, in applying to the Collector to bring the property to sale, need not recognize any one except the registered *patnidar.* The object of a notice of sale for arrears of rent is to give information, not merely to parties wishing to purchase but to the defaulter; and if the notice is not stuck up in the manner prescribed by law (cl. 2, s. 8, Reg. VIII of 1819) it is open to the defaulter to plead that he has been damaged, and the sale becomes illegal. RAGHAB CHANDRA BANERJEE v. BRAJANATH KUNDU CHOWDHRY, **9 B.L.R. 91, Note=14 W.R. 489.** [*Rel. on*, 10 C.L.J. 453; *Cons.*, 4 C. 41.]

(4)—*Act* X *of* 1859, *s.* 108—*Decree by sharer for his share of rent—Sale of portion of tenure corresponding with share of rent—Effect.*—A sale, by a sharer in an undivided taluk, of only a portion of the tenure corresponding with the share of the rent for which he obtained a decree, has no further effect than any other sale in which the right of the judgment-debtor is sold. NUND LALL ROY v. GOOROO CHURN BOSE, **15 W.R. 6.**

(5)—*Sale in execution of a Revenue Court decree—Title of purchaser—Sale certificate and delivery of possession whether necessary to perfect title—Act* XVIII *of* 1873 (*N.W.P. Rent Act*), *s.* 76.—The title of an auction-purchaser to property sold in execution of the decree of a Revenue Court is complete as soon as the sale is complete and the full price has been paid. A sale-certificate and delivery of possession are not necessary to give him a perfect title, and he can maintain a suit for the property without either of them. MUZAFFIR HUSAIN v. ALI HUSAIN, **5 A. 297=A.W.N. 1883, 41.**

(6)—*Arrears of rent—Sale of sub-tenures—Encumbrances—Regs.* VII *of* 1799, VIII *of* 1819, I *of* 1820 *and* VIII *of* 1831—*Act* X *of* 1859, *s.* 105.—Ben. Reg. VIII, s. 11 of 1819, it is true, gives express power to sell the tenure, free from all incumbrances that may have accrued upon it by the act of the defaulting proprietor, his representatives or assignees: but the power so given is confined to the case of tenures where the right of selling or bringing to sale for an arrear of rent has been specially reserved by stipulation in the engagements interchanged on the creation of the tenure. A mortgage had foreclosed under Ben. Reg. XVII of 1806, and a decree was made in 1854 for possession of the mortgaged taluk. In 1855, a summary suit was brought by the zemindar against the heirs of the talukdar (the mortgagor) for arrears of rent, to which the mortgagee was not made a party. A decree for sale was made *ex parte*, and the taluk sold by auction, under Act VI of 1858. The mortgagee then brought a suit to recover possession of the taluk, and to set aside the sale by the zemindar

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————a.—GENERAL—*concluded.*

for arrears of rent. *Held*, reversing the decision of the High Court, that, as it was an *istimrari* taluk the zemindar had no power, by the Bengal Regulations, or Act X of 1859, s. 105, to sell the tenure, and the sale declared invalid. FORBES v. BABOO LUTCHMEPUT SINGH, **10 B.L.R. 139, P.C. = 17 W.R. 197 = 14 M.I.A. 330 = 2 Suther. 554 = 3 Sar. 27.** (7 W.R. 260, F.B., *Appr.*) [*R.*, 21 W.R. 94.]

(7)—*Revenue sale—Appropriation of payment to specified arrears—Amount if may be credited in the Collectorate towards previous arrears—Sale of property for arrears paid up bad, though previous arrears unpaid—Jurisdiction to sell—Contract Act* (IX *of* 1872), *ss.* 59, 60.—Where money is expressly paid to satisfy debt and is received and appropriated on that account, it is not in the power of one of the parties to the transaction, without the assent of the other, to vary the effect of the transaction by altering the appropriation in which both originally concurred. Where, the September kist of revenue for 1901 and January kist for 1902 being in arrears, the proprietor paid a certain amount into the Treasury specifically appropriating it to the January kist, and the payment was received and accepted on that account, but subsequently the Treasury officers appropriated the amount towards satisfaction of the September kist, and then as far as the money went towards payment of a part of the January kist, and the property was thereafter sold for what was thus shown as remaining unpaid of the January kist: *Held*—That no arrears in respect of the January kist were due at the date of the sale, and therefore the sale was without jurisdiction. SHEIKH MAHOMED JAN v. MUNSHI GANGA BISHUN SINGH, **15 C.W.N. 443.** (10 C.W.N. 948 = 33 C. 1193, *R.*)

See BEN. ACT VIII OF 1885, s. 167, 28 C. 180.

See MAD. ACT VIII OF 1865, s. 33, 24 M. 307.

See JURISDICTION OF CIVIL COURTS, 6 W.R. Act X, 63.

See BEN. REG. VIII OF 1819, s. 14, 12 C. 622.

————b.—DEFAULTERS.

(1)—*Reg.* VII *of* 1799—*Under-renter—Default in payment of rent—Procedure.*—Where plaintiff's land was admittedly held *khas* by the Collector and the plaintiff was admittedly a ryot holding a jote for which he paid a particular rent to the Collector, *held* that the plaintiff was an "under-renter" within the meaning of s. 25, Reg. VII of 1799, and on his failure to pay rent, the proper procedure would be to sell the land at the end of the year. RUNGO KOPOHOOA v. DEHASSUR MUSSULMAN, **13 W.R. 302.**

(2)—*Sale of Putnee—Purchase by defaulter—Reg.* VIII *of* 1819.—A defaulter cannot,

Sale—continued.

——3.—Sale for Arrears of Rent—*continued*

————b.—DEFAULTERS—*concluded.*

under Reg. VIII, 1819, purchase a putnee sold on account of his default to pay the putnee rent, either in his own name or in that of any other person. MIRZA MAHOMED NASSEER v. KISHEN MOHUN GOYEE, **W.R. F.B. 92.**

(3)—Putnee *talook—Sale—Purchase by joint* putneedars—*Defaulter*,—Not only the recorded share-holders, but also those who have been actual defaulters (that is, directly responsible either as joint or separate *putnedars* for the rents) and those who stand in their shoes, are not entitled to purchase the *putnee* at the auction sale. GOUREE KOMUL BHUTTACHARJEE v. RAJ KISHEN NATH, **5 W.R. 106.** [*Expl.*, 14 W.R. 369.]

(4)—*Sale of* putnee *for default of* putneedar—*Rent paid by* dur-putneedar—*Suit for damages by* dur-putneedar.—Where a *putnee* is sold owing to the default of the *putneedar* in paying his rents, a *dur-putneedar* who has paid his rents to the *putneedar* for the period to which the default relates may sue for damages although he was himself a defaulter for a later period MADHUB ANUND MOITHRO v. MUSSUMAT JOY KOOMAREE BIBEE, **5 W.R. 201.**

(5)—*Suit for rent—Joint decree against darpatnidars—Execution purchase by defaulter—Recovery of share by other defaulters—Constructive trust.*—Where the plaintiffs, jointly liable with the defendant under the decree for rent, were as much responsible for the sale of the darpatni as the defendant himself, who purchased it in execution, the plaintiffs would not be entitled in equity to recover their share of the darpatni from the defendant and the defendant could not be regarded as constructive trustee for the plaintiffs. [*F.*, 16 C. 194.] Co-sharers in immoveable property in this property do not occupy the same position towards each other as partners under English Law. RAM LALL MOOKERJEE v. DEBENDER NATH CHATTERJEE, **8 C. 8 = 9 C.L.R. 337.**

(6)—*Act* X *of* 1859, *ss.* 105, 108—*Sale in execution—Sale of share in gantee tenure—Rights passing under sale.*—Where the original decree-holder was only a share-holder in a joint estate, and the property sold in execution was an 8 annas share of a gantee tenure, the sale did not take place under s. 105, of Act X of 1859, but under s. 108, and under that section only the rights and interests of a defaulter can pass and the purchaser cannot have *khas* possession of the land. MEETOONJOY CHOWDHRY v. KHETTUR NATH ROY, **5 W.R. Act X, Rul. 71.**

————c.—DEPOSIT OF MONEY AND STAYING SALE.

(1)—*Sale in execution of decree—Money voluntarily paid by third person to stay sale—Suit for recovery not maintainable as under s.* 102 *or s.* 103 *of Act* X.—In this case, a jageerdar

Sale—continued.

——3.—**Sale for Arrears of Rent**—*continued.*

————*c.*—DEPOSIT OF MONEY AND STAYING SALE—*continued.*

who had deposited a sum of money to stay a sale of crops in execution of a decree against certain ryots, whose personal property the crops were found to be, sued to recover the money. The High Court concurred with the lower Court in its view that the Jageerdar had no right to sue for the money as the decree was issued against the ryots, as the crops attached were theirs, not plaintiff's, and as the deposit would only be considered as recoverable on their suit. Also the Jageerdar could not sue under s. 102 or 103 of Act X of 1859 since he had made the payment voluntarily in his own name when the ryots, against whose crops the execution was issued, were alone justified to make the deposits. MIRZA HUKIM ABDOOL WAHAB v. DRUMMOND, **2 W.R. Act X, Rul. 48.**

(2)—*Reg.* VIII *of* 1819, *ss.* 6, 14, *cl.* 1—*Sale of putnee—Stay of sale by deposit—Who can apply for stay—Application for registration—Injunction.*—Cl. 1, s. 14, Reg. VIII of 1819, does not contemplate that any party may, by depositing, stay a sale of a putnee, but only a party having a *recognised* interest in such putnee. The policy of the said Regulation and of the Revenue Sale Law is the same, *i.e.*, to protect those who are *shown to have interests* when the property in which they have those interests is brought to sale for the default of others. According to s. 6 of the Regulation mere application for registration is not sufficient; that section specifically provides what is legally to be done if the request be refused. KRISTO JEEBUN BUKSHEE v. MR. A.B. MACKINTOSH, **W.R. 1864, 53.**

(3)—*Reg.* VIII *of* 1819—*Putnee in possession of Girurdar—Suit for possession by purchaser—Cause of action.—Payment of Girurdar's debts.*—A person who, having deposited arrears of rent of a putnee, takes possession as Girurdar under Reg. VIII of 1819, is in the position of a mortgagee in possession, and the purchaser of the putneedar's interest in the putnee is in the position of a purchaser from the mortgagor, and has no cause of action for possession until the debt is paid off. Though, strictly speaking, by Reg. VIII of 1819, the fact that the Girurdar has realized his debt from the usufruct of the tenure, should be established "in a suit instituted for the purpose," still, if in a suit for possession by the purchaser of a share of a putnee, the defendant claims to hold absolutely, alleging that he has purchased the putnee in satisfaction of his ancestor's lien as Girurdar, and on failing to prove his plea, is allowed to fall back upon his title as Girurdar, the plaintiff must be allowed to prove that the debt has been realized from the usufruct of the tenure, though it is not "a suit instituted for the purpose." BOISTUB CHURN BHUDRO v. TARA CHAND BANERJEE, **11 W.R. 357.**

Sale—continued.

——3.—**Sale for Arrears of Rent**—*continued.*

————*c.*—DEPOSIT OF MONEY AND STAYING SALE—*continued.*

(4)—*Payment of rent to prevent sale—Payment by plaintiffs' mother—Suit for contribution—Abatement.*—Where, to prevent a sale, plaintiff's mother paid the rent of a portion of a Taluk which she claimed under a Will, and the suit abated by her death and then the plaintiff sued the share-holders in the Taluq to recover the money she had paid, it was held that her interest was such as entitled the present plaintiff to recover from the defendants the money which was paid in discharge of rent for which their property was liable and for which it might have been sold. SHARODA KOOMAREE DOSSEE v. MOHINEE MOHUN GHOSE, **20 W.R. 272.**

(5)—*Act* X *of* 1859, *s.* 105—*Sale of transferable tenures for arrears of rent—Payment made to save estate—Suit to recover payments.*—When a *putnee* is sold for arrears of rent, all intermediate holdings between the zemindar and the ryot are cancelled; but this is not the case when such transferable tenures as *gantee-jummas* are sold under s. 105 of Act X of 1859. The present plaintiff D, took a *mourousee* pottah from A, one of the shares in a *gantee-jumma* and bound himself by certain stipulations to A. The zemindar, after decree obtained, put up the *gantee-jumma* for sale of arrears and D paid the amount of the zemindar's claim; he now sued for a share of the money paid by him in proportion to the extent borne by B and C the other co-sharers in the property. D urged that he had paid the sum to save his interest in the mokuraree lease, and that he was entitled to make the payment in order to stay the sale, which would have injured him, and to recover the money paid for that purpose. This contention was not accepted by the High Court which held that the right to make payments to preserve an interest, and to recover the sums paid, is given by express *statute* in the case of sales for arrears of revenue (s. 19, Act XI of 1859), and a sale of *putnee* tenure (s. 13, Reg. VIII of 1819). But it is not given in respect of the sales of other under-tenures under Act X of 1859. In the result, it was concluded that, though the plaintiff's *mourousee pottah* was liable to cancelment under the sale, still, as the defendants to whom plaintiff was confessedly a stranger, neither expressly nor impliedly requested that he would make the payment for them, the present action against them would not lie it having been a voluntary payment on his part. SREENATH HALDER v. RAM SOONDUR CHUCKERBUTTY, **4 W.R. S.C.C. Ref. 4.**

(6)—*Reg.* VIII *of* 1819, *s.* 13, *cl.* 4—*Under-tenant saving superior tenure from sale by depositing amount of rent—Suit to recover amount deposited—Act* VIII *of* 1859, *s.* 1.—An under-tenant who had saved the superior tenure from sale by depositing the amount of rent due from the holders of that tenure for payment to

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————c.—DEPOSIT OF MONEY AND STAYING SALE—*continued.*

the zemindar is not bound to apply to the Collector for immediate possession of the tenure thus preserved from sale, and he is competent to sue for the recovery of the amount deposited by him in the ordinary way without making any such application. The amount advanced is to be treated as a loan secured upon a mortgage of the tenure preserved from sale and the party by whom the advance is made has every right to recover it by an ordinary suit in a Civil Court, or by obtaining immediate possession through the Collector. F. AMBIKA DEBI v. PRANHARI DAS, **4 B.L.R.F.B. 77=13 W.R. 1.** [*R.*, 12 C.W.N. 55=6 C.L.J. 595.]

(7)—*Civ. Pro. Code*, 1882, *s.* 310-*A*—*Under-raiyat not entitled to make application.*—An under-raiyat cannot come in under s. 310-A, Civ. Pro. Code, 1882, for setting aside a sale held in execution of a decree for rent obtained against the raiyat. ABED MOLLAH v. DILJAN MOLLAH, **29 C. 459.** (29 C. 1, F.B., *D.*; 6 C.W.N. 336, *R.*) [*R.*, 32 C. 107; *Diss.*, 11 C.W.N. 742.]

(8)—*Unregistered purchaser of* dur-putnee, *payments made by, to save* putnee *from sale—Liability of registered* dur-putneedar *to pay rent to putneedar.*—Plaintiff, a *putneedar*, sued his registered *dur-putneedar* for rent. The *dur-putneedar* was held to be liable for rent though he asserted that he had sold his tenure to one S not acknowledged by the *putneedar*. On a sale of the *putnee* for arrears, S paid money to save the *putnee* from sale, and the *dur-putneedar* was held to be not entitled to deduct, as he claimed to do, from the rent due by him, the payments made by S, which were those of a mere volunteer, till S established her interest in the estate and obtained registration. LUCKEE NARAIN MITTER v. SITANATH GHOSE, **6 W.R. Act X, Rul. 8=1 Ind. Jur. N.S. 317.**

(9)—*Non-registered sub-talookdar, when competent to stop sale under decree.*—The plaintiff in this case, a non-registered holder of a sub-talook, was held not to be competent to stop a sale under a decree whose amount had not been paid. He might, however, stop the sale by paying the amount of the decree and then bring a suit against his vendor to establish his right as the sub-talookdar; and, he could, if he really has that character, require the superior talookdar to register his purchase and compel him to do so if necessary. NITYANUND PAUL v. RAM DOOLLUB BUTTOBYAL, **2 W.R. 282.** [*Cons.*, 20 W.R. 380.]

(10)—*Act* XI *of* 1859, *ss.* 11, 13 *and* 14—*Defaulting shareholder having separate account—Voluntary payment by another share-holder—Contribution suit, not maintainable.*—It is evident, from the terms of s. 13 of Act XI of 1859, that, if a sharer voluntarily comes forward and pays a balance due by a defaulting co-sharer who has a separate account, before the share of such defaulter has been put up for sale under the provisions of that section, the party so paying cannot claim to be re-imbursed by such defaulter, for he was in no way bound to make such payment; nor were his interests jeopardized by the default of the co-sharer whose share alone was liable for sale in the first instance, nor consequently, was the defaulter under any legal obligation to re-pay the amount advanced. KISHEN CHUNDER GHOSE v. MUDDEN MOHUN MUZOOMDAR, **7 W.R. 365.**

(11)—*Payment by* darpatnidar *of* patni *rent to save* patni *from revenue sale—Subsequent suit for* darpatni *rent.*—Where a *darpatnidar* had paid the whole *patni* rent to save the *patni* from a revenue-sale, he would be entitled to a set-off of the amount he had paid in excess of his own dues, in a suit for arrears of *darpatni* rent by the execution purchaser of the *patni*. NOBO GOPAL SIRCAR v. SREENATH BUNDOPADHYA, **8 C. 877=11 C.L.R. 37.** [*F.*, 13 C. 331.]

(12)—*Payment by* Darputnidar *to stay rent sale of tenure—Effect—Reg.* VIII *of* 1819—*Bengal Act* VIII *of* 1969. *s.* 62.—The holder of a subordinate tenure, who, for protecting the whole tenure from a rent-sale, makes a payment to the zemindar, which the owner of the tenure above his ought to have paid, is entitled to deduct the amount so paid from the rent payable to his *putnidar*, in whosesoever hands the *putni* may be. LALIT MOHUN SHAHA v. SRINIBAS SEN, **13 C. 331.** (8 C. 877, *F.*)

(13)—*Money paid by* shikmeedar *to preserve estate from sale—Voluntary payment not recoverable.*—Plaintiff alleged his right to recover money paid to save an estate of certain co-parceners from sales, on the ground that he was a *shikmeedar* and had therefore, in making payments, an interest to preserve the estate from sale. *Held* that, even assuming the plaintiff's property had been found to be a *shikmee*, there was no law entitling *shikmeedars* to sue to recover money paid by them to preserve estates from sale. The payment by the plaintiff in this case was a voluntary payment which he could not recover upon the present action. POORNO CHUNDER DOSS CHOWDHRY v. SREENATH GOOPTO, **6 W.R. 173.**

(14)—*Contribution—Execution of decree for rent—Payment by one shareholder of entire amount to save his share from sale—Right to claim contribution from other share-holders.*—Where, in execution of a decree for rent, one of the tenant share-holders paid up the entire amount due under the decree in order to save his share of the tenure, which was also advertized for sale, from being sold, he had a right to claim contribution from the other share-holders, who were in joint possession of the land during

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————*c.*—DEPOSIT OF MONEY AND STAYING SALE—*continued.*

the time within which the arrears accrued, notwithstanding the fact that their share of the tenure stood in the name of a third person and the decree was in consequence obtained against him. SYUD SHAH ASUDOOLLAH v. MONOHUR DOSS, **22 W.R. 531.**

(15) — *Compulsory payment—Right to recover.*—Plaintiff, to save the patni from sale for arrears of rent of a former year which had been adjudged by an apparently valid decree to be due to the defendant, paid the money. *Held* that the payment was made under such circumstances as entitled the plaintiff to recover back the money from the defendant. ANDREW v. LARMOUR, **2 Ind. Jur. O.S. 4=1 Hay 309.**

(16)—*Act* VIII *of* 1865 (*B C.*), *s.* 6—*Attachment of property of judgment-debtor—Payment of money by third party—Suit to recover such amount—Real issue to be tried.*—A putneedar who had obtained a decree for rent against his mouroseedar attached his property, and the plaintiff who held some lands which were within and subordinate to the holding of the said mouroseedar, paid the whole amount of the decree debt to the putneedar, in order to save his lands. He then sued the mouroseedar for the recovery of the money paid by him. The first Court dismissed the suit holding that there was no obligation on the part of the plaintiff to pay the sum. On appeal, the lower appellate Court remanded the case for trial on two issues, *first*, "Whether the payment of the amount under claim by plaintiff was unnecessary and voluntary; and *secondly*, whether the plaintiff was legally bound to deposit the said amount, and whether the defendant had been benefited thereby." *Held* that though the lower appellate Court was right in remanding the case, yet the issue that ought to be tried in the case was, whether the plaintiff was a party who came under the provisions of s. 6 of Act VIII of 1865 (B.C.) read with s. 13 of Reg. VIII of 1819, more particularly with reference to cl. 3 of that section. LUKHEE PREA DEBIA v. BRINDABUN DEY, **12 W.R. 313.**

(17)—*Purchaser at sale in execution—Payment of arrears of prior rent by, to save estate from sale—Right of purchaser to be re-imburs d.*—Plaintiff attached certain putnee-tenure for selling it in execution of his decree. One S having claimed the property and his claim having been allowed, plaintiff instituted a suit and obtained a decree declaring that the property was liable to be sold in execution of his decree. Plaintiff thereon had the putnee sold in execution, became purchaser of it at the sale and got possession. When, subsequently, the zemindar was about to sell the tenures for arrears accrued due prior to the above purchase, the plaintiff paid the amount which was due in order to save the estate, and it was to recover this amount that the present suit was instituted against S and another. Meanwhile on

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————*c.*—DEPOSIT OF MONEY AND STAYING SALE—*continued.*

appeal by S to the Privy Council from the decree under which the plaintiff had sold the putnee, that decree was reversed. S having died, it was contended on behalf of his representative that the payment made by the plaintiff was not made for his benefit or at his request and that he cannot be liable for it, as the plaintiff had all along denied his title. The High Court however *held* that, under the circumstances, plaintiff was entitled to be reimbursed the amount expended by him by those for whom the putnee had been thereby saved. S having succeeded in the Privy Council, and having been restored to possession, his estate was liable, even although the plaintiff did formerly deny his right. The payment was made *bona fide*, and enured to the benefit of S and his heirs. GOPAL CHUNDER CHUCKERBUTTY v. UOODOY LALL DEY, **10 W.R. 115.**

(18)—*Money-decree—Execution—Portion of tenure sold—Subsequent sale of entire tenure for arrears of rent—Deposit of arrears by first purchaser—His rights against proprietor.*—Where an entire tenure is advertised for sale for arrears of rent and the purchaser of a share thereof under a money-decree deposits the whole amount due in order to avert the sale, the proprietor is liable to make good the amount so paid, he having enjoyed the profits of the land and the payment being neither voluntary nor officious. KHETTUR MOHUN BANERJEE v. HARADHUN CHATTERJEE, **19 W.R. 287.**

(19)—*Reg.* VIII *of* 1819, *sale under—Staying of Tender—Nature of—Arrears of rent—Sale—Fraud and collusion.*—For staying a sale under Reg. VIII of 1819, a tender must be of the whole of the Zeminder's demand, and there must not be also any condition that the amount must be kept in deposit by the Collector. Fraud and collusion can be imputed only where a sale is made for arrears of rent not really due. RAMCHURN BUNDOPADHYA v. SREEMUTTY DROPO MOYEE DOSSEE, **17 W.R. 122.**

(20)—*Payment to stay final sale under s.* 13 *of Beng. Reg.* VIII *of* 1819—*Payment to zemindar.*—Money paid under s. 13 of Reg. VIII of 1819, in order to stay the final sale, may be paid to the zemindar and not to the Court; the words "into Court" cannot be literally construed, as "the Court" has nothing to do with such sales, which are managed by the Collector. TARINY DEBEE v. SHAMA CHURN MITTER, **8 C. 954.**

(21)—*Sale of tenure under Act* VIII *of* 1865—*Money deposited to prevent sale—Loan made to proprietor—Right of depositor to possession.*—This was a suit to recover certain moneys deposited by the plaintiff to protect from sale a superior tenure which was advertised for sale under the provisions of Act VIII of 1865. The

Sale—continued.

—3.—Sale for Arrears of Rent—*continued.*

—c.—DEPOSIT OF MONEY AND STAYING SALE—*concluded.*

lower appellate Court gave the plaintiff a decree holding that his tenure was one not protected by s. 16 of Act VIII of 1865. The High Court agreed with the lower Court in holding that the tenure of the plaintiff did not fall within the purview of the said section, but was of opinion that that Court was wrong in having decreed payment with interest of the sum claimed by plaintiff, for, under cl. 4 of s. 13 of Reg. VIII of 1819, which, by s. 6 of Act VIII of 1865, was made applicable to payments of this description, the plaintiff's deposit must be considered as a loan made to the proprietor of the tenure to preserve it from sale by such deposit, and the tenure so preserved becoming security to the plaintiff, he must be considered to have a lien thereon, and the plaintiff would be entitled on applying for the same, to obtain possession of the tenure of the defaulter in order to recover the amount so deposited from any profits belonging thereto. KARTIC SURMAH v. BYDONATH SAEENEE, **10 W.R. 205.** [*Overruled*, 13 W.R. F.B. 1.]

(22)—*Act* VI *of* 1862, *B.C.—Provisions for deposit of rent under application of.*—Act VI of 1862 was intended to apply to ordinary cases where landlords and tenants differ as to the amount of rents due for any particular period, either with reference to *rates* or to the amount of previous payments alleged to have been made, and denied to have been received—to cases, in other words, where the amount which the ryot thinks due is deposited by him—and the landlord may either accept it, or sue for whatever he himself may deem due to him for the same period for which the deposit is made; it could however have no application to suits regarding rents for the period proceeding that for which the deposit has been made. SHAIK MAHOMED SHUHUROOLLAH CHOWDHRY v. MUSSAMUT ROOMYA BIBEE, **7 W.R. 487.**

(23)—*Act* X *of* 1859—*Sale in execution of decree—Money deposited in Collectorate—Suit not maintainable to set aside sale on ground of.*—In a previous suit against the present plaintiffs, tenants, brought for rent due to the landlord, they pleaded that the landlord should not sue for the rents demanded, but that he should pay himself from some money in deposit in the Collectorate. This plea was rejected and a decree given to the landlord who in execution of such decree sold the tenure. Plaintiff now sued to set aside the sale on the ground of illegality owing to the previous alleged deposit. The High Court held that the mere incident of a deposit would not give to the tenants sued any ground to institute a civil action to set aside a sale made in execution of a decree under Act X of 1859. RAM COOMAR HOLDER v. BROJO COOMAR CHOWDHRY, **6 W.R. Act X, Rul. 85.**

Sale—continued.

—3.—Sale for Arrears of Rent—*continued.*

—d.—EFFECT OF SALE.

(1)—*Liability of tenant for rent after sale—Non-registration of transfer.*—Where a patni tenure is sold under a decree against the tenant, he is not liable for any rent which may accrue afterwards, notwithstanding the transfer may not be registered. GOPEEKISTO GOSSAMEE v. RAM COMUL MISTRY, **Marsh 212=1 Hay 563.**

(2)—*Bombay Act* (I *of* 1865)—*Paramount rights of Government with respect to land revenue—Mortgage lien—Registration—Possession—Mortgage—Effect of registration.*—The paramount rights of Government in respect of debts due to the Crown are not transferred to the alienees of Government revenue. The Regulations contain certain special provisions for enabling superior holders to realize their dues from their tenants; but there is not to be found in them any provision which can be construed as making those dues a paramount charge upon the land. If an inamdar fails to recover his rents by any of the special processes provided in the Regulations, and is obliged to go into the Civil Court and obtain a decree for arrears, the sale of the land in execution of such a decree has the same effect (and no more) as a sale of the land in execution of a decree for any other debt. [*R.*, 1 B. 577, 6 B. 169.] When registered, a mortgage deed is valid even without possession. BALAJI NARAYAN KOLATKHAR v. RAMACHANDRA GANESH KELKAR, **1 B.H.C. 37.**

(3)—*Mokurruree ijara—Purchase of share of co-sharer—Transfer not registered—Sale of whole tenure in execution of decree for rent—Onus of proof.*—Plaintiff had purchased and was in possession of N's share in a mokurruree ijara. No mutation of names in the Zamindar's sherista took place, and the names of N and two other co-sharers continued to appear in the Zamindar's books as tenants. Subsequently to the plaintiff's purchase, and in consequence of his default, the whole property was put up to auction-sale in execution of a decree for rent obtained by the Zemindar under Act X of 1859, and purchased by the defendant, who, in taking possession thereof, dispossessed the plaintiff, who thereupon brought this suit to recover possession of the share purchased. *Held* that it was the bounden duty of the defendant to show that the whole tenure passed under the sale, and not only the rights and interests of the judgment-debtor, as was concurrently found by both the lower Courts. PITAMBUREE CHOWDHRAIN v. NOBIN KRISTO MOOKERJEE, **18 W.R. 205.**

(4)—*Act* VIII (*B.C.*) *of* 1865—*Sale of tenure.*—Where a tenure is sold in execution of a decree for arrears of rent under Act VIII (B.C.) of 1865, the tenure itself passes, and not merely the right, title and interest of the tenant whose name is registered in the zemindar's books. FATIMA KHATUN v. THE COLLECTOR OF TIPPERAH, **8 B.L.R. 4, Note=13 W.R. 433.**

Sale—continued.

——3.—**Sale for Arrears of Rent**—*continued.*

————*d.*—EFFECT OF SALE—*concluded.*

(5)—*Howala—Arrears of rent—Sale—Ousut howalas—Co-sharers.*—A share-holder is not prevented from purchasing the *whole* of a *howala*, when *bona fide* sold for arrears due from himself and his co-sharers. All *ousut howalas* created by the other co-sharers fall with the sale of the *howala*, unless specially protected by the *howala* lease. A suit for arrears of rent can be brought by the zemindar only against a tenant whose name is recorded in his sherishta. In execution of a decree in that suit, the whole tenure may be sold, though others not recognized by the zemindar as his tenants may be interested in the lease. HUREE CHURN BOSE v. MAHAROONISSA BIBEE, **7 W.R. 318**.

————*e.*—INCUMBRANCES.

(1)—*Reg.* VIII *of* 1835—*Sale of talook—Lapse of subordinate tenures.*—On the sale of a talook under the provisions of Reg. VIII of 1835, all subordinate tenures, such as ousut talooks, howalahs, neem-howalahs, do not necessarily lapse. It would depend very much upon the terms of the pottah or grant under which the original talook was created, and the reservations therein expressed or implied. DWARKANATH DOSS BISWAS v. MANICK CHUNDER DOSS, **9 W.R. 200.**

(2)—*Reg.* XI *of* 1822, *s.* 30—*Default of auction purchaser to set aside voidable tenure—Bar of limitation—Right of successors to question tenure—Evidence of confirmation of tenure.*—Where, under the powers given by s. 30, Reg. XI of 1822, an auction-purchaser had a right to avoid and annul all tenures which originated with the defaulter or his predecessor, and he omitted to have the same avoided within the period of limitation allowed by law, it was not open to his successor in estate and still less to his lessee to avoid them after the lapse of such a time. The giving of receipts for rent, coupled with the fact that the rent at the old rate had been paid down all along, was abundant evidence that the auction-purchaser and his predecessor had confirmed the tenures. TARA CHUND DUTT v. MUSSAMUT WAKENOONISSA BIBEE, **7 W.R. 91.**

(3)—*Reg* VIII *of* 1819, *s.* 11, *cl.* 1—*Sale of portion of putni tenure—Rights of auction-purchaser.*—A portion of a *putni*-tenure cannot be sold under the provisions of Reg. VIII of 1819, and therefore the auction-purchaser of such portion under the provisions of that law would acquire nothing. If by the sale he has acquired any of the rights of the *putnidar*, he is bound by the acts of the *putnidar* who gave the lease. MOHADEB MUNDUL v. H. COWELL, **15 W.R. 445.** [*Expl.*, 20 W.R. 275; *Appr.*, 22 W.R. 50.]

(4)—*Act* VIII (*B.C.*) *of* 1865—*Sale in execution—Rights of purchaser—Ejectment.*—In a sale, under Act VIII (B.C.) of 1865, of the

Sale—continued.

——3.—**Sale for Arrears of Rent**—*continued.*

————*e.*—INCUMBRANCES—*continued.*

rights and interests of the judgment-debtor, the tenure itself is not sold, much less is it sold free of all incumbrances. A purchaser at such sale is not entitled to eject the tenants who have been occupying and cultivating for more than 12 years. RAJ KISHEN MOOKERJEE v. DUSRUTH SOOTRODHUR, **15 W.R. 234.** [*R.*, 22 W.R. 414.]

(5)—*Act* VIII *of* 1865 (*B.C.*) *s.* 16—*Sale of under-tenure—Auction-purchaser's right to avoid incumbrances.*—Though, under s. 16 of Act VIII of 1865 (B.C.), an auction-purchaser of an under-tenure sold under the Act can, except in certain specified cases, acquire it free of all incumbrances which may have accrued thereon by any act of the holder, his representatives or assignees, he cannot avoid any such incumbrance without any act on his part or any notice of his intention to cancel it. GOBIND CHUNDER BOSE v. ALIMOODDEEN, **11 W.R. 160.** [*F.*, 12 W.R. 383, 12 W.R 378; *R.*, 12 W.R. 153; *Expl.*, 7 C.L.J. 191.]

(6)—*Act* VIII *of* 1865 (*B.C.*), *s.* 116—*Act* X *of* 1859, *s.* 77—*Incumbrance—Rent—Tenure.*—In a suit by a *dur-mokuraridar* against ryots for some portion of the rent of one year (1273) and the full rent of the next (1274), the defendants contested the claim for the year 1274, on the ground that the rights of the *mokuraridar* having been sold in execution under Act VIII (B.C.) of 1865, the right of the *dur-mokuraridar* had been extinguished by the operation of s. 16, and that they had paid the rents for that year to one D, who intervened and was made a party. *Held* that the issue to be framed would be in the first instance between the plaintiff and the intervenor whether the one or the other had been in the actual receipt and enjoyment of the rent before and up to the time of the commencement of the suit. *Quære*:—Would payment to the intervenor shortly before the commencement of the suit constitute the previous *bona fide* enjoyment which the intervenor is required to prove? *Quære*:—Could the purchaser determine for himself whether he acquired the tenure free from all encumbrances, or whether the encumbrances were of the kind excepted in s. 16, Act VIII (B.C) of 1865, which would survive the sale. MUSST. UMASUNDARI DASI v. BIRBUL MANDAL, **3 B.L.R. A.C. 183=11 W.R. 563.**

(7)—*Act* VIII (*B.C.*), 1865, *s.* 16—*Under-tenures.*—S. 16, Act VIII (B.C.) of 1865, does not apply to sales of portions of tenures. HARASUNDARI DASI v. KISTU MANI CHOWDHRAIN, **5 B L.R. App. 37=13 W.R. 257.**

(8)—*Under-tenants—Auction purchaser under Rent Law—Suit to set aside encumbrances.*—Granting that an auction-purchaser of the rights of an original under-tenant in a zamindari would be entitled to set aside any incumbrances made by the under-tenant without the written consent of the landlord, such a right

Sale—continued.

——3.—**Sale for Arrears of Rent**—*continued.*

————*s.*—INCUMBRANCES—*continued.*

could not be executed without first instituting a suit. Tenures created by under-tenants are voidable, and not necessarily void. The mere fact of the purchase would not be sufficient to set aside the incumbrances; the purchaser would have to bring a suit for the purpose. RAJ BULLUBH MITTER v. SREERAM SIRCAR, **25 W.R. 109.**

(9)—*Under-tenures — Incumbrances— Ejectment—Act* X *of* 1859, *s.* 6—*Act* VIII (*B.C.*) *of* 1865, *s.* 16.—An auction-purchaser of an under-tenure at a sale under Act VIII (B.C.) of 1865, finding an incumbrance thereon created by his predecessor in the shape of a *mokurruree* lease, sued the lessee to recover *khas* possession of the land covered by the *mokurruree.* Defendant pleaded a right of occupancy founded on his having cultivated the land for more than 12 years. *Held* that defendant was protected from ejectment by s. 6, Act X of 1859; and that, even if the lease were avoided under s. 16, Act VIII (B.C.), 1865, ejectment must not necessarily follow thereby and therefor. NILMADHAB KARMOKAR v. SHIBU PAL, **5 B.L.R. App. 18=13 W.R. 410.** (5 B.L.R. App. 20 N., *Relied on*) [*F.*, 22 W.R. 133]

(10)—*Landlord and tenant—Non-transferable tenures—Zemindar's rights—Act* X *of* 1859, *s.* 27.—The relation between landlord and tenant is that of parties to a contract. The contract is entire and single. A Zemindar is not bound to recognise the sale of a tenure which is not transferable, or to accept the purchaser as a tenant. The rule that a zemindar is entitled to the rent as an entire demand upon a liability which cannot be sub-divided or distributed without his consent, is clearly recognised in s. 27, Act X of 1859. If a piece of land constituting a portion of a tenure be sold, without the consent of the zamindar, the purchaser can be only treated as holding a rent-free tenure subject to that of the original tenant, such rent-free holding being an incumbrance which can be avoided by the purchaser when the tenure itself is sold under Act VIII (B.C.) of 1865. SHIBDAS BANDAPADHYA v. BAMANDAS MUKHOPADYA, **8. B.L.R. 237=15 W.R. 360.**

(11)—*Act* X *of* 1859, *s.* 105—*Beng. Act* VIII *of* 1865, *s.* 16—*Under-tenure—Sale—Rent—Incumbrance.*—In a sale for arrears of rent under s. 105, Act X of 1859, (not affected by s. 16, Act VIII, B.C. of 1865) the sale is not free of incumbrances created by the defaulter before the sale, unless the right of selling or bringing to sale the tenure for an arrear of rent has been specially reserved by stipulation in the engagements interchanged on the creation of the tenure. SHAHABCODEEN v. FUTTEH ALI, **B. L.R. Sup. Vol. 646 F.B.=2 Ind. Jur. N.S. 135=7 W.R. 260.** [*F.*, 15 W.R. 13, 10 W.R. 123, 6 B.L.R. Ap. 149=15 W.R. 11, 17 W.R. 97; *Appr.*, 8 W.R. 60, 8 W.R. 507; *R.*, 7 W.R. 376, 7 M. 31, F.B.; *Expl.*, 12 W. R. 460; *D.*, 8 W.R. 475.]

Sale—continued.

——3.—**Sale for Arrears of Rent**—*continued.*

————*s.*—INCUMBRANCES—*continued.*

(12)—*Act* X *of* 1859, *s.* 105—*Under-tenure—Sale.*—In executing a decree for arrears of rent, a Court, under s. 105, Act X of 1859, has power only to seize and sell that which at the time is the property of the judgment-debtor. Where, therefore, a decree was obtained against persons who were originally proprietors of the land, but who at the time of the decree and subsequent sale, had ceased to have any interest therein, the purchaser at the sale in execution of such decree took nothing. DOWLUT GAZICHOWDHRY v. MOONSHI MUNWAR, **12 B.L.R. 485, Note=15 W.R. 341.** [*F.*, 12 B.L.R. 487, Note=17 W.R. 417.]

(13)—*Act* X *of* 1859, *s.* 105—*Under-tenure, sale of.*—A purchaser at a sale in execution of a rent-decree under Act X of 1859 against a person who at the time had no interest in the tenure sold in execution of that decree, simply took nothing. WAHED ALI v. SADIQ ALI, **12 B.L.R. 487, Note= 17 W.R. 417.**

(14)—*Act* X *of* 1859, *ss.* 105, 108, 110—*Sale of under-tenure.*—A sale in the Revenue Court upon a decree for rent obtained at the instance of the *ijaradar* and *locum tenens*, not of the sole owner or the whole body of owners but of the owner of a fractional share of the estate, being according to Act X of 1859, ss. 108 to 110, a sale not of the tenure but of the rights and interests of the holder of it as in an ordinary Civil Court execution, cannot prevail against a prior sale in execution of a Civil Court decree. *Quære.*—Whether a sale in the Revenue Court which passed the whole tenure can prevail against a prior sale by the Civil Court. GRISH CHUNDER MITTER v. SHEIKH JHAKU, **12 B.L.R. 488, Note=7 W.R. 352.**

(15)—*Act* X *of* 1859, *ss.* 105, 103—*Sale of under-tenure—Irregularity—Stay of sale—Act* VIII *of* 1865 (*B.C.*), *ss.* 6, 13.—Where an under-tenure has been transferred but the transfer is not registered in the *serishta* of the zamindar or superior tenant, the transferee is nevertheless entitled as a person interested in the protection of the tenure to stop its sale in execution of a decree under Act VIII (B.C.) of 1865, by paying into Court the amount of the decree, though he is not entitled unless the transfer is registered, to come in and allege that the person against whom the decree has been obtained was not the proprietor of the under-tenure, and was not in legal possession. ANUNDLAL MOOKERJEE v. KHALIKA PERSAD MISSER, **12 B.L.R. 489, Note=20 W.R. 59.** [*D.*, 22 W.R. 46.]

(16)—*Reg.* VIII *of* 1819, *ss.* 8, 11—*Reg.* I *of* 1820—*Act* X *of* 1859, *s.* 105—Putnee—Durputnee—*Transfer—Sale of putnee taluk for arrears of rent—Effect on durputnee.*—A zamindar had created a *putnee* tenure in respect of a taluk in his zamindary. The *putneedar* had, in his turn, granted a *durputnee.* In execution of a

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————*e.*—INCUMBRANCES—*continued.*

decree obtained by the zamindar against his *putneedar* for arrears of rent due to him, he brought the *putnee* taluk to sale and purchased it himself. The zemindar was, later on, put in possession of the property purchased by him. The *durputneedar* now sued to recover possession of the taluk by avoiding the sale. The question for decision was whether the purchaser of the *putnee* taluk could disturb the possession of the *durputneedar*. *Held* that, under the description *putnee taluk* and *durputnee taluk*, it must be *prima facie* intended that the tenure called a *putnee* tenure was one transferable by sale, and upon the creation of which, it was stipulated by the terms of the engagements interchanged that, in case of an arrear occurring, the estate might be brought to sale. If so, according to the terms of Reg. VIII of 1819, the tenure might not only be brought to sale, but it might be sold free from incumbrances. Consequently, according to the effect of s. 105 of Act X of 1859 and ss. 8 and 11 of Reg. VIII of 1819 and probably also of Reg. I of 1820, the effect of the sale of the *putnee* taluk was to destroy all incumbrances which had been created by the *putneedar* including the *durputnee*. The suit was therefore not maintainable. BRINDABAN CHUNDER SIRCAR CHOWDHRY v. BRINDABUN CHUNDER DEY CHOWDHRY, **13 B L.R. 408, P.C. = 21 W.R. 324 = 1 I A. 178.**

(17)—*Act* X *of* 1859, *ss.* 105, 106—"*Tenure*," *meaning of—Sale for arrears of rent.*—By the word "tenure" as used in s. 105. Act X of 1859, is meant not the right or interest of any person in the land, but the holding or the interest which has been created by the lease, and it is the latter which is sold on a sale under s. 105. A zemindar who has obtained a decree for arrears of rent of a transferable tenure is entitled to sell the tenure, and a person, who had obtained a transfer of such tenure which he has not registered, and cannot show sufficient cause for not registering it, is bound by the sale and cannot set up a title which he has acquired by a previous sale. SHAMCHAND KUNDU v. BROJONATH PAL CHOWDHRY, **12 B.L.R. 484, F.B. = 21 W.R. 94.** [*F.*, 23 W.R. 289, 25 W.R. 395, 27 C. 789 = 5 C.W.N. 126 ; *Expl.*, 11 C. 562; 12 C. 597; *R.*, 22 W.R. 196, 4 C. 346 = 3 C.L.R. 116, 12 C. 24, 22 C. 364, 2 C.W.N. 29, 9 C.W.N. 134, 37 C. 823 = 14 C.W.N. 905 = 12 C.L.J. 158, *D.*, 22 W.R. 46, 22 W.R. 67, 3 C.L.R. 231, 7 M. 31, F.B., 10 C. 496.]

(18 & 19)—*Act* X *of* 1959, *s.* 105—*Sale for arrears of rent—Rule regarding incumbrances, if applicable where tenure is not sold.*—By the sale that took place for arrears of rent in this case under Act X of 1859, the tenure itself did not pass, but simply the rights and interests of the judgment-debtor in the said tenure which was held in joint tenancy. The purchaser, therefore, was held to be not entitled to the tenure free of all incumbrances, nor would he have been so entitled had the tenure itself passed,

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————*e.*—INCUMBRANCES—*continued.*

unless it were shown that the tenure was one in which the right to sell was specially reserved by the engagements interchanged on the creation of the tenure. DOORGA SOONDUREE DEBIA v. DINOBUNDHOO KYBURTO DOSS, **8 W.R. 475.**

(20)—*Execution sale—Rent—Hypothecation—Act* X *of* 1859, *s.* 112.—The sale by a Civil Court of a judgment-debtor's rights and interests in a tenure in execution of a money-decree is, if not tainted by a fraud, a good sale for what it is worth, and same property cannot be re sold in execution of a decree for arrears of rent against the former tenant. The produce of the land is by law (s. 112, Act X of 1859) hypothecated for the rent payable in respect thereof, but not the land itself. TIRTHANUND THAKUR v. PARESMONJHA, **10 B.L.R. 142, Note = 13 W.R. 449.** [*R.*, 15 W.R 319, 10 B.L.R. 139, P.C. = 17 W.R. 197 = 14 M.I.A. 330.]

(21)—*Act* X *of* 1859, *s.* 109—*Sale of putnee tenure—Passing of tenure free of incumbrances—Sale in accordance with Reg.* VIII *of* 1819.—In the case of the sale of a tenure for arrears of rent effect under s. 108 of Act X of 1859, the tenure will pass free of incumbrances or not, according as the same result would have followed if the same tenure had been sold for arrears of rent under the provisions in that behalf of any law which was in force at the time of the passing of Act X. At the time, the sale of a tenure could only be free of encumbrances if it took place in accordance with the provisions of Reg. VIII of 1819. The material condition precedent to a sale being within the Regulation, as given in s. 8, is that "the right of selling or bringing to sale for an arrear of rent may have been specially reserved by stipulation in the engagements interchanged on the creation of the tenure." If this stipulation did not exist, the sale would not carry with it to the purchaser the benefit of the Registration. BRINDABUN CHUNDER CHOWDHRY v. BRINDABUN CHUNDER SIRCAR CHOWDHRY, **8 W.R. 507.** [*Reversed*, 13 B L.R. 408, P.C.]

(22)—*Suits for kabuliats—Act* X *of* 1859, *s.* 153 *if applicable—Sale of tenure for its own arrears, effect of.*—On special appeal by the plaintiff in this case he urged mainly :—(1) That s. 153, Act X of 1859, does not apply to cases of suits for a kabuliat. (2) That plaintiff's purchase of a tenure sold for its own arrears is one free of all incumbrances, and not of rights and interests only, and that, consequently, the intervenor's rights had lapsed so that they could not come in at all. The High Court considered these objections to be valid, and *held* that s. 153 does not include cases under cl. 1, s. 23 of Act X of 1859, as cases where an appeal lies to the Judge. Further, sales, under s. 15 of Reg. VII of 1799 and Reg. VIII of 1805 of a tenure sold for

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————*e.*—INCUMBRANCES—*continued.*

its own arrears, passed the tenure free of all incumbrances and of all such subordinate proprietary rights as those claimed by the intervenors in the present case. SHEIKH ALLEE BUKSH v. RUBJEE MONDUL, **4 W.R. Act X, Rul. 32.**

(23)—*Act* X *of* 1859, *s.* 105—*Sale for arrears of rent—Auction-purchaser—Extent of interest—Mortgage by defaulter—Extinguishment.*—An auction-purchaser in a sale of a tenure for arrears of rent under s. 105 of Act X of 1859 takes the property free of all encumbrances. Every right and interest which the defaulter had, or whereby he might be benefited, are, by the sale of the tenure, extinguished. A mortgage created by the defaulter on account of a debt contracted by him cannot continue to the prejudice of the auction-purchaser. KALEE KANT CHOWDHRY v. RUMONEE KANT BHUTTACHARJEE, **3 W.R. 217.**

(24)—*Act* VIII (*B.C.*) *of* 1865, *s.* 16—*Under-tenure — Occupation of land by tenant rent free for more than twelve years—Creation of incumbrance.*—Where the holder of an under-tenure allowed the tenant to occupy the land rent free for more than twelve years, the tenant acquired thereby a right of incumbrance upon the under-tenure. It came within the reason of s. 16 of Act VIII (B.C.) of 1865 as if the holder of the tenure had made a grant or a lease to hold without paying any rent or at a merely nominal rent. MAHOMED ASKUR v. MAHOMED WASUCK, **22 W.R. 413.** [*R.*, 3 C.W.N. 13, 14 C.L.J. 136.]

(25)—*Act* VIII (*B.C.*) *of* 1865—*Howla—Right of talookdar to get rid of intermediate holding.*—A howladar is not the actual occupier of land. He is only a person receiving in respect of land a proportionate share of the rent. A purchaser, at a sale held under Act VIII (B.C.) of 1865, is entitled to get rid of an intermediate holding, as a howla, so far as to substitute himself for the howladar in respect of the collection of the ryots' rent with regard to the share purchased by him. MOHIOODDEEN MAHOMED v. RAM KISHORE KOONDOO, **22 W.R. 311.**

(26)—*Act* VIII *of* 1865 (*B.C.*)—*Sale for arrears of rent—Fraud—Purchaser's rights.*—If a lessor enters into an agreement with another person to get rid of his lessee, by means of a fictitious sale for arrears of rent, and to share the profits of the transaction, that is a fraud against the lessee. The person with whom such agreement is made must not be considered as having the rights of an auction-purchaser under Act VIII of 1865 (B.C.) but only those of a private purchaser. SRINATH GHOSE v. HARONATH DUTT CHOWDHRY, **9 B.L.R. 220=18 W.R. 240.** [*R.*, 12 C.L.J. 336 =7 Ind. Cas. 21.]

(27)—*Act* XIV *of* 1865 (*B.C.*)—*Sale of* shikmee *tenure under—Encumbrances—Rights of purchaser.*—Where a *Shikmeedar* who is an under-tenant of the Zemindar sells his tenure under Act XIV of 1865 (B.C.) and the shikmee patta does not give the privilege of making encumbrances, *held* that the purchaser has a right, under s. 16 of the Act, to receive the tenure free of all encumbrances. HUREE NARAIN CHATTERJEE v. WOOMA CHURN MOOKERJEE, **19 W.R. 169.**

(28)—*Suit for possession—Sale—Act* VIII *of* 1865 (*B.C.*), *s.* 16—*Auction-purchaser—Incumbrances.*—Where an auction-purchaser, under Act VIII (B.C.) of 1865, of a *shikmi* tenure, receive possession from an officer of the proper Court in the usual manner, he is not chargeable with unlawful dispossession or forcible dispossession. The auction-purchaser of an under-tenure sold under this Act acquires it free from any *lakhiraj* encumbrance created by the previous holder, if the latter had no authority to create such an encumbrance. ISWAR CHANDRA CHUCKERBUTTY v. BISTU CHANDRA CHUCKERBUTTY, **3 B.L.R. App. 97=12 W. R. 32.**

(29)—*Act* VIII (*B.C.*) *of* 1865, *s.* 16—*Under-tenures, purchase of.*—Under the strict provisions of s. 16, Act VIII (B.C.) of 1865, no sanction of a Zemindar will avail unless the right is vested in the holder of the under tenure by the written engagement under which the under-tenure was created or by the subsequent written authority of the person who created it or his representatives. ESHAN CHUNDER MOJOOMDAR v. HURISA CHUNDER GHOSE, **21 W.R. 137.**

(30)—*S.* 11, *Reg.* VIII *of* 1819 (*Bengal*)—*Arrears of rent—Sale—"Defaulting proprietor" in cl.* (1), *s.* 11—*Previous* putnidar *creating incumbrances—Suit to have* mukurari *lease granted by former* putnidar *set aside.*—*Per Ghose and Beverley, JJ.* (*Rampini, J., dissenting*)—Under Reg. VIII of 1819, the purchaser of a *putni*, at a sale under that regulation, can avoid a *mukurari* which was not created by the *putnidar* for whose default the sale was held, but by a former *putnidar*. *Per Ghose and Beverley, JJ.*—Having regard to the policy and to the principle of the Regulation, the zemindar is entitled to bring a *putni* to sale in the same condition in which it was at the time of its creation, and the purchaser is, therefore, entitled to avoid all incumbrances imposed upon it since its creation, whether by the actual defaulter or by any of his predecessors. *Per Ghose, J.*—Inasmuch as s. 11 distinguishes incumbrances by way of sale, gift, mortgage, or otherwise, from leases creative of an immediate interest, the *mukurari* might not be regarded as an incumbrance within the meaning of cl. 1, but as a lease falling within cl. 2 of the section; when treated as a lease the expression "holder of the former tenure" in cl. 2 may well be applied to any of the *putnidars*, either the last or any previous holder. *Per*

Sale—continued.

——3.—**Sale for Arrears of Rent**—*continued.*

——*e.*—INCUMBRANCES—*continued.*

Beverley, J.—The words "defaulting proprietor in s. 11, cl. 1, mean the proprietor of the tenure in default, and were not intended to be restricted to the particular proprietor, for whose default the tenure was brought to sale. Similarly in cl. 2 of s. 11, a wide interpretation to the word "defaulter" must be given. GOPENDRO CHUNDER MITTER v. MOKADDAM HOSSEIN, **21 C. 702.** [*R.*, 3 C.W.N. 13.]

(31)—*Ss. 3, 11, Reg. VIII of 1819—Incumbrances and leases declared void, on sale taking place—Such effect applicable to acts of last defaulting proprietor and previous defaulting proprietors.*—When the wording of s. 11 of Reg. VIII of 1819 is taken into consideration with the principles so frequently laid down in that law (see ss. 3 and 11) and upon which all incumbrances and leases are declared void, there can be no doubt that the effect of the law is at once to void all such incumbrances and leases upon a sale taking place; this effect is consequently applicable to the acts, not only of the last defaulting proprietor, but also of all previous defaulting proprietors. **21 C. 720, Note.**

(32)—*Rent Act—Sale of land for arrears—Rights of mortgagee.*—The arrears of rent are a first charge on the land, and the Legislature has empowered the landholder to sell the interest of the pattadar, to discharge the arrears of rent without providing for any incumbrances on the interest of the pattadar or notice to him; and when the sale takes place it is valid as against a mortgagee. MUNISAMI v. DAKSHANAMURTHI, **5 M. 371.** [*Overruled*, 7 M. 31; *R*, 10 M. 266.]

(33)—*Rent Recovery Act, s. 38—Sale of tenant's interest for arrears—Prior encumbrances not defeated.*—Where a landlord brings to sale the tenant's interest in the land for arrears of rent under s. 38 of the Rent Recovery Act, the purchaser takes subject to any prior incumbrances on the interest created by the tenant, and not free of them. RAJAGOPAL v. SUBBARAYA, **7 M. 31, F.B.** (5 M. 371, *Overruled.*) [*F.*, 10 M. 266; *R.*, 8 M. 573, 27 M. 401, 18 M.L.J. 494=4 M.L.T. 193.]

(34)—*Rent Recovery Act, s. 38—Sale of tenant's interest by landlord—Attachment—Civ. Pro. Code, s. 276.*—Where, pending the attachment of a tenant's interest in certain land in execution of the decree of a Civil Court, the landlord brings it to sale for arrears of rent, and subsequently the creditor purchases it in execution of his decree, the landlord's purchase must be held to be subject to the creditor's attachment. SUBRAMANYA v. RAJARAM, **8 M. 573.** [*F.*, 16 M. 479.]

(35)—*Rent Recovery Act (Act VIII of 1855)—Lease—Mortgage of tenant's holding—Sale for arrears of rent—Rights of mortgagee.*—Arrears of rent are not a first charge on the tenant's holding. A decree obtained by the landlord, for arrears of rent, cannot be executed by the sale of the tenant's holding free of prior encumbrances on the property effected by the tenant. In the case of a competition between the holder of a money-decree and a mortgagee, the former is not entitled to bring to sale the execution-debtor's property free of existing encumbrances. PADAKANNAYA v. NARASIMMA, **10 M. 266.**

Sale—continued.

——3.—**Sale for Arrears of Rent**—*continued.*

——*e.*—INCUMBRANCES—*concluded.*

(36)—*Arrears of rent—Sale of under-tenures—Incumbrances when extinguished.*—A sale of an under-tenure does not extinguish incumbrances created by the defaulter before the sale, unless there is a written stipulation that the tenure will be sold for its arrears in all sales for decrees for arrears which are not affected by Act VIII of 1865, B.C. A talookdar is liable to enhancement only to the extent of what other similar talookdars in the neighbourhood pay for similar under-tenures with similar lands. MOHIMA CHUNDER DEY v. GOOROO DOSS SEIN, **7 W. R. 285.**

(37)—*Sale for arrears of rent—Incumbrance.*—A landlord who had purchased a tenure sold in satisfaction of his own decree for rent having objected to the attempted possession of a mortgagee who was executing a decree for foreclosure, a suit was framed under s. 239, Civ. Pro. Code, which, having come up in appeal to the High Court, was remanded for the purpose of determining whether the lease, on which the lands had been held, contained any stipulation reserving a right of sale for arrears of rent. It having been found that there was no such reservation, the tenure was held to have been sold subject to incumbrances, and the purchaser to have been bound by the decree of foreclosure passed against the former holder. MOHESH CHUNDER BANERJEE v. CHUNDEE MONEE DEBEE, **10 B.L.R. 150, Note=15 W.R. 237.** [*R.*, 10 B.L.R. 139, P.C.=17 W.R. 197=14 M.I.A. 330.]

See BEN. ACT VIII OF 1869, ss. 59, 60, 66, 9 C.L.R. 449.

See BEN. ACT VIII OF 1885, sub- s. 1, ss. 22, 167, 28 C. 205=5 C.W.N. 310.

See BEN. ACT VIII OF 1885, ss. 148, cl. (*h*) 65 and 167, 22 C. 364.

See BEN. ACT VIII OF 1885, ss. 161, 167, 24 C. 746.

See BEN. ACT VIII OF 1885, s. 167, 28 C. 66.

See BEN. ACT, VIII OF 1885, s. 171, 24 C. 537=1 C.W.N. 519.

See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT, 5 W.R. Act X, 63.

——*f.* RIGHTS AND LIABILITIES OF PURCHASERS.

(1)—*Act X of 1859, s. 105, sale of ryot's tenure under—Right of purchaser to possession of entire tenure.*—The appellant in this case was held

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***Sale*—continued.**

——3.—Sale for Arrears of Rent—*continued*.

————*f*.—RIGHTS AND LIABILITIES OF PURCHASERS—*continued*.

to be entitled to *khas* possession of the land in question as against the defaulter who was her judgment-debtor and whose tenure he brought to sale. Although the respondents who were the sons of the defaulter were found to have been in possession for 20 years yet they were occupying merely as members of the family of the defaulter, and not as having any independent tenure or right of their own. Appellant who had purchased the rights of the outgoing tenant was entitled to be put in possession of the entire tenure as it stood. The outgoing tenant had no right to retain a portion of the tenure while giving up the rest. Also the circumstances that the purchaser happened to be the superior landlord in no way affected his rights. TEELOTTUMA DEBEE v. BROJO LALL SHAMUNT, **8 W.R. 478.**

(2) Nij-jote *lands — Right of auction-purchaser.*—The right to hold *nij-jote* lands necessarily passes with the sale to the auction purchaser. JOY DUTT JHA v. BAYEE RAM SINGH, **7 W.R. 40.**

(3)—*Sale of putnee—Rights of vendee.*—A purchaser of a putnee sold in execution of a decree takes it with all its liabilities including instalments due to the zemindar. SHEIKH KHODA BUKSH v. DEGUMBUREE DOSSEE, **W.R. 1864, 207.** [*D.*, 21 C. 169.],

(4)—Dur-putneedar—*Possession disturbed by zemindar — Rent not collected — Liability—Putnee—Sale for arrears of rent—Petition by zemindar.*—A *dur-putneedar* whose possession was disturbed by the zemindar, and who was prevented from collecting the rents of certain kists, is not liable for those kists. A *putneedar*, whose taluk has been sold for arrears of rent due to the zemindar, is not liable for the rent of the month in which the zemindar presented the petition under cl. 3, s. 8, Reg. VIII of 1819. DARIMBA DEBIA v. NIL MONEE SINGH DEO, **15 W.R. 180.**

(5)—*Arrears of rent—Sale of putnee—Rights of vendee—Contribution—Liability of surety.*—Where X purchased the rights and interests of a putneedar in a putnee taluk at a rent sale, held that he purchased the taluq subject to whatever claims the zemindar has against the surety of putneedar by reason of the name of the latter appearing as the owner of the taluq in the zemindar's papers or otherwise. He may sue the other sharers for the money which he has paid on their account. OBHOY CHUNDER BUNDOPADHYA v. NILAMBUR MOOKERJEE, **W.R. 1864, 72.** [*D.*, 21 C. 169.]

(6)—*Execution of decree—Sale of tenures—Act X of 1865.*—As a general rule, where a tenure is sold in execution of a decree, under the provisions of Act X of 1865, the whole tenure passes unless there is some reservation made at the time of the sale. HURO GOBIN BISWAS v. DUMOUNTEE DABEE, **13 W.R. 304.**

(7)—*Act VIII (B.C.) of 1865—Sale of tenure for arrears—Purchaser of shareholder's right if entitled to possession.*—When a suit is brought against a shareholder in a tenure for arrears of rent, the purchaser of that shareholder's right ought to pay those arrears and then sue his co-sharer for contribution. His purchase does not give him anything more than this privilege, and does not give him a right to retain possession against a person who buys the tenure itself when sold for arrears under Act VIII (B. C.) of 1869. HURO NARAIN GIREE v. DOORGA CHURN GIREE, **15 W.R. 319.** [*R.*, 22 W.R. 414.]

(8)—*Decree for arrears of rent, sale of tenure under, effect of—Joint-liability of co-sharers.*—The decree in this case was for arrears of rent due upon the tenure for which all the co-sharers were jointly liable; and, though the rights and interests of certain parties alone were specified as having been sold by the sale proceedings their names were evidently made use of because they were the parties registered in the books of the zemindar. Under the circumstances, agreeing with the lower Court, the High Court *held* that, notwithstanding the announcement of particular rights and interests in the sale proceedings, the tenure itself should be deemed to have been sold so that the rights and interests of the plaintiff's vendor who was one of the co-proprietors, whatever such rights were, ceased on such sale. ALIMOODDEEN v. SABIR KHAN, **8 W.R. 60.**

(9)—*Sale in execution of decree for rent—Purchase of under-tenure—Rights of purchaser—Suit for* kabuliat.—The plaintiff on special appeal contended that, as he was the purchaser of the tenure in question, he was not bound, either by the nature of his purchase or by reason of uniform payments, to regard the several pottahs, but he was entitled to rent at the rate which similar ryots paid for similar lands in the neighbouring places The High Court upheld this contention. Plaintiff had purchased, not in execution of an ordinary decree but in execution of a decree for rent, and could therefore avoid any lease or holding within his tenure not specially protected by law and was therefore entitled to a *kubuliat* at rates paid for similar lands in the neighbourhood. The case was therefore remanded to the Judge with directions to inquire into the rates paid by similar ryots for similar lands in places adjacent to the lands of the defendant and to give plaintiff whatever rate of rent may, after such enquiry, seem to be fair and equitable. SRISHTEEDHUR MUNDAL v. GOBIND SURUCKAR, **6 W.R. Act X, Rul. 16.**

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————*f.*—RIGHTS AND LIABILITIES OF PURCHASERS—*continued.*

(10)—*Arrears of rent—Sale—Purchaser—Liability.*—The purchaser of a tenure at a sale for arrears of rent was held to be liable for rent from the date on which the sale was confirmed, for, until such confirmation, he could not obtain the certificate of purchase. BEEPIN BEHAREE BISWAS v. JUDOONATH HAZRAH, **21 W. R. 367.**

(11)—*Liability to condition in lease—Right of re-entry.*—A dar-patni lease granted upon the payment of a bonus contained a condition that, if the annual rent remained for a longer period than one month in arrear, the lessor should have a right of re-entry. The lessor, upon default in payment of rent, without availing himself of the forfeiture, instituted a summary suit for the arrears of rent, and upon an award therein the lands were sold for such arrears. *Held* that the purchaser, who bought the patni tenure without notice of the condition for forfeiture, was not subject to that condition. DEENDYAL PARAMANICK v. JUGGESHUR ROY, **Marsh. 252; 2 Hay 21.**

(12)—*Mortgagee-purchaser of under-tenure—Sale for arrears of rent and ejectment of under-tenant—Mortgagee's right to question validity of ejectment proceedings, if no party to the rent-suit.*—A mortgagee of an under-tenure, who had himself purchased it in execution of a decree on the mortgage, was entitled to question in a regular suit the validity of a decree, in a suit for arrears of rent by the superior tenant, ejecting the under-tenant and cancelling the tenure in consequence, if the mortgagee was not made a party to the rent-suit. MADHOO PROSHAUD SINGH v. PURSHAN RAM, **4 C. 520.** (18 W.R. 206, *F.*) [*R.*, 22 C. 364.]

(13)—*Ss. 5 and 7, Reg. VIII of 1819 (Bengal)—Court-sale of putni tenure for arrears of rent—Auction-purchaser obtaining possession of the talug not registering in the zemindari's* serishta *—Zemindar's right to sue former holder for rent prior to sale.*—Where the auction-purchaser at a Court sale of a putni taluq for arrears of revenue had obtained possession of the taluq but did not get himself registered in the zemindar's *serishta*, as he disputed the amount of fee payable by him, and the zemindar brought a suit against the former tenant for arrears of rent due prior to the Court's sale, *held*, that the suit against the old tenant was maintainable and that the rights of the zemindar were not affected by the existence of the remedy provided by s 7, Reg. VIII of 1819. SURENDRO NATH PAL CHOWDHRY v. TINCOWRI DASI, **20 C. 247.** (13 B.L.R. 146, *R.*)

(14)—*S. 13, Bengal Tenancy Act, 1885—Sale of permanent tenure in execution of decree other than a decree for arrears of rent—Non-payment of landlord's fee or fee for service of notice of sale before confirmation—Previous holder,*

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————*f.*—RIGHTS AND LIABILITIES OF PURCHASERS—*continued.*

liability of.—S. 13, Bengal Tenancy Act, prohibits the confirmation of a sale such as is contemplated by the section, unless prior to the confirmation the purchaser pays into Court the fees for which the section provides. A sale of a permanent tenure in execution of a decree other than a decree for arrears of rent, such sale having been confirmed, though either the landlord's fee or the fee for the service of notice upon the landlord has not been paid into Court as required by the Tenancy Act, is invalid. So, the previous holder of the permanent tenure is liable for the rent accruing since the confirmation of the sale. BABAR ALI v. KRISHNAMANINI DASSI, **26 C. 603=3 C.W.N. 531.** [*D.*, 7 C.W.N. 591, 8 C.W.N. 239, 1 C.L.J. 500.]

(15)—*Landlord and tenant—Sale of tenant's interest in execution of decree — Subsequent sale by landlord for arrears of rent—Right of purchaser.*—A landlord has not a lien on the holding for the rent, and a sale of the holding after mortgage, conveys the tenant's interest to the purchaser burdened with the mortgage. After the sale, under the decree of the Civil Court, there remains no interest in the tenant, which is available for sale by the landlord. VIRAPPA v. KATHANA, **6 M. 428.** [*R.*, 8 M. 573, 10 M. 266.]

(16) — Dartaluk, *mortgage of — Subsequent transformation into* putni *taluq—Arrears of* putni *rent, purchaser, in execution of a decree for—Right of purchaser in execution of mortgage-debt.*—Where after the mortgage of a *dartaluk*, the mortgagor, with the consent of the landlord, got the *dartaluk*, transformed into a *putni* taluk, which was, however, sold in execution of a decree for its own arrears, and purchased by the principal defendants, and a suit for possession was brought by the plaintiffs, who represented the purchaser at a sale in execution of a mortgage-decree, *held* that the old *dartaluk* having been transformed into a *putni*, which passed to the principal defendants by the sale in execution of a decree for its own arrears, there was nothing of which the plaintiffs could recover *khas* possession. *Per Banerjee, J.*:—The creation of a mortgage gives certain rights to the mortgagee over the mortgaged property; but it does not necessarily prevent third parties from dealing with the mortgagor still as the owner of the property, nor is the mortgagee entitled in every case to ignore the rights arising out of such dealings in favour of third parties, but this rule is subject to one qualification, *viz.*, that the transactions between the mortgagor and third parties, if free from fraud and collusion, are binding on the mortgagee and persons deriving title from him. JOTINDRA MOHAN PAL v. GODADHUR MADAK, **2 C.W.N. 29.** (15 W.R. 448, 21 W.R. 233, P.C., 20 C. 533, *F.*)

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————*f.*—RIGHTS AND LIABILITIES OF PURCHASERS—*continued.*

(17)—*Sale of putnee talook — Purchaser's failure to register—Subsequent sale by zemindar.*—The purchaser of a putnee talook in a sale for arrears of rent sold the same to the plaintiff by private sale. The plaintiff not having got his name registered, the zemindar caused the putnee talook to be sold again and purchased it himself. In a suit by the plaintiff to have this sale set aside, *held* that, as the plaintiff had neither registered the putnee in his name, nor taken steps to get his name registered, he could not sue to set aside the sale. GOSSAIN MUNGUL DOSS v. BABOO ROY DHUNPUT SINGH BAHADOOR, 25 W.R. 182. [*Not F.*, 12 C. 622; *Diss.*, 15 C.W.N. 5=8 Ind. Cas. 766; *D.*, 15 C. 345.]

(18)—*Sale in execution—Purchase of share of specific* mahal—*Right to possession and* butwara.—A purchaser at a sale in execution of a share of a specific *mahal* in an estate will be entitled to possession and to a *butwara* of his purchase, only after its nature and extent have been clearly determined and defined in the Civil Courts. NIL MONEE DOSS CHUND v. SREEKANT DOSS CHUND, 5 W.R. 49.

(19)—*Sale of patni—Non-service of legal notice of sale—Decree reversing* putnee *sale—Matters to be mentioned in decree.*—The special appellant in this case complained that the lower appellate Court when passing its judgment in reversal of the *putnee* sale because of the absence of service of legal notice should have, as required by cl. 1, s. 14 of Reg. VIII of 1819, taken care to provide for compensating him and should have taken into consideration whether the appellant was entitled to obtain further damages and costs against the zemindar who had caused the sale. The High Court, finding that the decree objected to make no allusion to the return of the purchase-money of the special appellant and did not decide whether he was entitled to obtain any, and if any, what damages from the zemindar, remanded the case to the lower appellate Court with directions to pass a fresh decision taking the above matters into consideration. SHAIKH ABDOOLLAH v. OOMED ALI, 6 W.R. 321.

(20)—*Tenures sold for arrears of rent, rights acquired by purchaser in, free from incumbrances by defaulter.*—The purchaser of a tenure at a sale for arrears of its own rent obtains that tenure as it was originally created, free from all incumbrances created by the defaulter. The lower appellate Court, in this case, was therefore wrong in law, inasmuch as it had upheld the defaulter's under-tenures against such a purchaser. JAN ALI v. SUFFEENA BIBEE, 6 W.R. Act X, Rul. 36.

(21)—*Auction-purchaser — Prior trusts.*—An auction-purchaser buying with full knowledge of a trust advertised in a sale proclamation,

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————*f.*—RIGHTS AND LIABILITIES OF PURCHASERS—*continued.*

holds subject to it. SAHEBZADA SINGH v. GHUNDAREE ROY, 1 W.R. 256. [*R.*, 3 W.R. 217.]

(22)—*Sale under s.* 110, *Act* X *of* 1859—*Suit by purchaser for possession—Appeal.*—Where a house is sold under s. 110, Act X of 1859, the purchaser need not bring a regular suit to obtain possession. An appeal lies to the Judge from the order of a Collector, referring such purchaser to a regular suit in cases where the value of the property exceeds Rs 100 R. SOLANO v. BULBHUDUR SINGH, W.R. 1864, Act X, Rul. 51.

(23)—*Sale of rights and interests of ryots in execution of decree—Subsequent sale of decree for arrears of rent, not affected by priority of execution-sale.*—Plaintiff sued to recover possession of land alleging purchase of it at an execution-sale of the rights and interests of ryots holding heritable and transferable tenures under the zemindar. He had been opposed in taking possession in execution by one K, the present special appellant. This K had purchased the tenure at a sale for arrears of rent due to the zemindar by the above said ryots, judgment-debtors, and the plaintiffs respondent instituted this suit against him for annulment of the sale. K the defendant-appellant replied that the plaintiff respondent's purchase extended only to the rights and interests of the judgment-debtors, whereas, he, as purchaser under Act X of 1859, bought the tenure itself. The High Court held, reversing the decree passed by the Sudder Amin in favour of the plaintiff on the ground of the priority of his purchase, that the first sale at which the plaintiff-respondent was purchaser was of the rights and interests of the ryots, the judgment-debtors. Plaintiff, as such purchaser, stood in the exact position of the old ryots and, whilst he succeeded to their privileges, was bound by their engagements with the zemindar. The first of these was the payment of rent, and, as the plaintiff neglected to discharge it, the zemindar was perfectly justified in bringing Act X into operation, and selling the tenure itself, and the priority of the sale in plaintiff's favour could not affect the point at issue inasmuch as the two things sold to the plaintiff and defendant were not one and the same. KHOOBARI RAI v. RAGHOOBUR RAI, 2 W.R. 131. [*Cons.*, 13 W R. 449; *D.*, 3 B.L.R. A.C. 49=13 W.R. 451, Note.]

(24)—*Purchaser at a sale for arrears of rent—Purchaser in execution of decree of Civil Court—Priority of title—Damages—Act* X *of* 1859, *s.* 105.—A *bona fide* purchaser of a tenure sold under a decree for arrears of rent under s. 105 of Act X of 1859 has a preferential title over a purchaser at a prior sale in execution of a decree of the Civil Court, though damages may be recovered by the latter from the semin-

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————*f.*—RIGHTS AND LIABILITIES OF PURCHASERS—*concluded.*

dar and the defaulting tenant on proof of collusion and fraud. GOPAL MUNDUL v. SOOBHUDRA BOISTOBEE, **5 W.R. 205.** [*D.*, 3 B.L.R. A.C. 49=13 W.R. 451, Note, 13 W.R. 449=B.L.R. 142, Note.]

(25)—*Execution of two out of three decrees for rent—Sale.*—On a jote being sold in execution of two out of three decrees for rent, *held*, it was liable for the claim due under all the three decrees. MR. T. J. KENNY v. GOPEE SOONDUREE DASSEE, **W.R. 1864, 387.**

(26)—*Sale of share in* durputnee *taluq—Suit to set aside—Dismissal—Subsequent suit or possession—Maintainability.*—Where a suit by a co-sharer in *durputnee* taluq to set aside a sale was dismissed, it being held that it was not maintainable because plaintiff was a defaulter, and a second suit to recover possession of his share by the plaintiff was brought on the allegation that the sale must be considered as inoperative because the vendee (a co-sharer) was also a defaulter, *held* that the plaintiff could not maintain the second suit for possession before setting aside the sale. GOUREE KOMAL BHUTTACHARJEE v. RAJ KRISTO NATH, **14 W.R. 369.**

(27)—*Jurisdiction—Sale of immoveable property—Warrant against moveable property—Act X of* 1859, *s.* 88.—A Collector has no jurisdiction to hold a sale of the immoveable property of the judgment-debtor, in a suit under Act X of 1859, while a warrant against his moveable property is in force. Where the return of a Nazir to such a warrant showing that no moveables are forthcoming is made within 60 days from the signing of the warrant, the Collector may, under s. 88, allow the decree-holder more time to point out further moveables belonging to his judgment-debtor. The original warrant so extended remains in full force. SHEIK NABI BAX v. DIDAR BAX SHAH, **3 B.L.R.A.C. 10=11 W.R. 326.**

S. 59, Rent Act VIII of 1869, successive execution-sales for arrears of revenue due at different periods under—Prior sale though set aside by *ex parte* decree, confirmed afterwards—Subsequent sale after *ex parte* decree, and before confirmation of first sale—Title of prior auction-purchaser—*See* BEN. ACT VIII OF 1869, s. 59, 20 C. 25.

See BEN. ACT VIII OF 1885, ss. 3, cl. 5, 65, 161, 21 C. 722.

See BEN. ACT VIII OF 1885, ss. 65, 69, cl. (c) 21 C. 169.

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 8 W.R. 190.

See ENHANCEMENT OF RENT—ENHANCEMENT, EXEMPTION FROM, 6 W.R. ACT X, Rul. 21.

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————*g.*—SETTING ASIDE SALE AND ITS EFFECT.

(1)—*Ben. Reg.* VIII *of* 1819, *s.* 8, *Application of—Jungleburi tenures.*—S. 8, Reg. VIII of 1819, refers to jungleburi tenures that existed at that time, and its provisions do not apply to any tenure created since the passing of that Regulation. MONMOHUN SINGH v. WATSON AND CO., **2 Hay 393.**

(2)—*Reg.* VIII *of* 1819, *s.* 8, *cl.* 2—*Sale of putni taluq—Attestation of service of notice by three substantial persons—Meaning of "substantial."*—This was a suit for the reversal of the sale of a putni taluq, on the ground that the notice required by cl. 2, s. 8, Reg. VIII of 1819, had not been duly served. On second appeal, the High Court agreed with the lower Courts and confirmed the sale on the ground that, as there were three attesting witnesses of comparative respectability to the service of the notice, the requirements of the law had been fulfilled. On an application for review, it was however *held* that, though the attesting parties were sufficient in number and resided in the neighbourhood, yet with the exception of one of them the rest were not what could be called *substantial* persons within the meaning of s. 8 of the above Regulation. It was to protect the *putneedar* from fraud that the above provision has been enacted that the notice of sale must be attested by three substantial persons, by which is meant respectable men of moderate wealth against whom, in case of false attestation, the party injured may have his remedy in a suit for damages, and unless the attesting parties answer to the above common meaning to be put upon the words "substantial," the putneedar would be wholly without remedy in case of false attestation. GOPAL KISHORE SHOOR v. MUDUN MOHUN HOLDAR, **2 W.R. 188.** [*R.*, 14 B.L.R. 394.]

(3)—*Reg.* VIII *of* 1819, *s.* 8—*Notice duly served—Verification of service—Sale.*—Omission to comply with all the directions regarding verification does not vitiate a sale under Reg. VIII of 1819, when the Court finds that the notice prescribed in cl. 2, s. 8, has been duly served. SONA BEEBEE v. LALL CHAND CHOWDHRY, **9 W.R. 242.** [*Diss.*, 18 C. 363, F.B.; *F.*, 1 C. 359=25 W.R. 141; *Cons.*, 4 C. 41=2 C.L.R. 357; *Appl.*, 2 C.L.R. 419; *Expl.*, 27 C. 308; *R.*, 11 W.R. 87; *D.*, 14 C. 365=14 I.A. 30.]

(4)—*Sale of putnee under Reg.* VIII *of* 1819, *reversal of, at suit of one co-sharer—Other sharers not bound to sue again for reversal—Right to mesne profits for absence of possession by reason of sale.*—Where one of four putneedars has sued to reverse a sale under Reg. VIII of 1819 and obtained a judgment absolutely nullifying and setting aside the sale, such judgment would be one *in rem* which cannot, from its nature, be limited to the particular party who has actually put the law in force,

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————g.—SETTING ASIDE SALE AND ITS EFFECT—*continued.*

since the sale cannot be deemed to have been partly reversed and partly upheld. Where one plaintiff has set aside the sale to recover possession of his share, the other shareholders become entitled to recover at their pleasure, there being no sale to set aside. There is no meaning in a shareholder being compelled to sue, so far as regards his own share, for the reversal of a proceeding already declared absolutely null and void at the instance of another shareholder on the ground of material irregularity. In the present case, however, plaintiff prayed not for possession, because, the *putnee* had been sold again ; but, he demanded mesne profits for the time when the sharer whose rights he had purchased was illegally out of possession by reason of a sale which ought never to have taken place and which was therefore reversed. He was, in the result, held to be entitled to the mesne profits sued for by him, the High Court observing that the case was not one similar to an action for trespass in which it may be argued that one sharer could not lawfully take advantage of the activity and the result of a suit brought by another sharer. TARINI PROSAD GHOSE v. BANEE MADHUB PANDAY, **2 W.R. 248.** [*R.*, 7 W.R. 225.]

(5)—*Reg.* VIII *of* 1819, *s.* 9, *cl.* 2—Putni *estate—Arrears of rent—Suit to set aside sale—Notice—Payment into Court.*—An instalment of rent having been due from certain putnidars, a proclamation was issued under the provisions of Reg. VIII of 1819 fixing the day of sale. Before that day, a sum of money sufficient to cover the arrears was deposited in the Collectorate by one of the putnidars, the payment being made to the Collector's accountant, who gave a receipt for it, but no intimation of the payment was given to the Collector. Accordingly, the sale proceeded, and the putnidars sued to have it annulled. *Held* (*Mitter, J., contra*) that there is nothing in Reg. VIII of 1819 which empowers a putnidar to make a deposit either in the Judge's Court, or in the Collectorate before the day of sale, or which gives to such payment, if made, the effect of payment to the zemindar or his agent, and that plaintiffs had no ground to ask for relief on any principle of equity. An application for the sale of a tenure where a right of sale has been specially reserved with a view to the realization of rent, is quite distinct from a suit, proceedings thereon being more nearly analogous to the remedy by distress. It is not competent to a defendant to bring money into Court privately and secretly on an *ex parte* application without notice to plaintiff either before or after payment. KRISHNA MOHUN SAHA v. MUNSHI AFTABUDDIN MAHOMED, **8 B.L.R. 134=15 W.R. 560.**

(6)—*S.* 14, *Reg.* VIII *of* 1819—Putni *sale for arrears of rent—Allegation that notice of sale had not been duly served.*—Where a zemindar, owing to default being made in payment of rent by certain *putnidars*, took proceedings under Reg. VIII of 1819 and caused their *putni* right to be sold, and in consequence of that, the plaintiffs, the holders of a *seputni* interest of a portion of the lands let out in *putni*, being dispossessed by the purchasers (the defendants), brought a suit valued in accordance with the value of their *seputni* right to recover possession of their *seputni* interest thereof, on the allegation that the sale was brought about in collusion between the *putnidars* and the auction-purchaser, that the proceedings taken by the zemindar were bad, because they were taken against a deceased person, who was no longer the *putnidar*, and that the sale notification was not duly and legally served upon the property (they however asking no relief against the zemindar, who was made a formal defendant on the record), *held*, that although the validity of the sale was questioned in the plaint, still the suit was not one under s. 14, Reg. VIII of 1819, no relief being claimed against the zemindar, and that a suit under the provisions of s. 14 to reverse the sale of the whole *putni* was the *only remedy* of the plaintiffs. SURESH CHUNDRA MUKHOPADHYA v. AKKARI SINGH, **20 C. 746.**

(7)—*Reg.* VIII *of* 1819, *s.* 8, *cl.* 2—*Putni estate—Sale for arrears of rent—Suit to set aside sale.*—Personal service of notice of sale on a defaulting *putneedar* is not a sufficient service under Reg VIII of 1819, s. 8, cl 2. The notice should be stuck up in the *cutchery* of the Collector, and a copy or extract of the notice published at the *cutchery* or principal town or village upon the land of the defaulter. The sale in this case having been reversed, the purchaser was held entitled, under s. 14, to a refund of his purchase-money and to recover his costs from the zemindar. BAIKANTHA NATH SINGH v. MAHARAJA DHIRAJ MAHATAB CHAND BAHADUR, **9 B.L.R. 87=17 W.R. 447.** [*D.*, 1 C. 359.]

(8)—*Notice of sale—S.* 8, *Reg.* VIII *of* 1819.—Looking to the terms of s. 8, Reg. VIII of 1819, it was a distinct and an obvious object of the Legislature to provide a sufficient notice to a defaulter before a sale of his tenure, 15 days' time (but not less) being considered sufficient, and without such notice no sale can be a sale duly held under that law. HARANATH GUPTA v. JAGANNATH ROY CHOWDHRY, **9 B.L.R. 89, Note=11 W.R. 87.**

(9)—*Reg.* VIII *of* 1819, *s.* 8, *cl.* 2—Putni *rent—Sale for arrears—Notice.*—Where an arrear of *patni* rent is due, the zemindar, in applying to the Collector to bring the property to sale, need not recognize any one except the registered *putnidar*. The object of a notice of sale for arrears of rent is to give information, not merely to parties wishing to purchase but to the defaulter ; and if the notice is not stuck

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————*g.*—SETTING ASIDE SALE AND ITS EFFECT—*continued.*

up in the manner prescribed by law (cl. 2, s. 8, Reg. VIII of 1819) it is open to the defaulter to plead that he has been endamaged, and the sale becomes illegal. RAGHAB CHANDRA BANERJEE v. BRAJANATH KUNDU CHOWDHRY, **9 B.L.R. 91, Note=14 W.R. 489.** [*Rel. on*, 10 C.L.J. 453 ; *Cons.*, 4 C. 41.]

(10)—*S.* 8, *cl.* 2, *Reg.* VIII *of* 1819 (*Bengal*) —*Publication of notice—Putni taluq sold for arrears of rent — Publication of notice of sale, burden of proof of—Suit for setting aside sale.* —Where a suit is brought to set aside a sale of a putni taluq for arrears of rent, *held*, that it lies upon the defendant to show that the sale was preceded by the notices required by s. 8. cl. 2, Reg. VIII of 1819, the service of which notices being an essential preliminary to the validity of the sale. HURRO DOYAL ROY CHOWDHRY v. MAHOMED GAZI CHOWDHRY, **19 C. 699.** [*F.*, 27 M. 94=13 M.L.J. 479 ; *D.*, **30** C. 1].

(11)—*Minors—Bond on behalf of minor—Set off of interest for rent—Bond found not binding on minors.*—Where the defendant borrowed under a bond executed by him on behalf of himself and his minor brother and cousin, pledging their shares in certain immoveable property as well as his own, and stipulating that a portion of the interest should go to the credit of the rent of the hypothecated share held by plaintiff under a lease, and the Collector, in a suit by the borrower and the minors for arrears of rent, finding that the borrower was not authorized to bind his minor co-sharers, obliged the lender to pay rent to the extent of his interest in the mehal, a suit by the lender to recover from the borrower the rent paid on account of the shares of the minors was properly framed. FUTTEH NARAIN v. DEEN DYALL LALL, **15 W.R. 37.**

(12)—*Reg.* VIII *of* 1819—*Notice—Place of service.*—A notice under Reg. VIII of 1819 ought to be served at the place where the defendant's gomastah habitually transacts business, rather than at the cutcherry which is not in use. HUNOOMAN DOSS *alias* NONNAH BABOO v. BIPRO CHURN ROY, **20 W.R. 132.** [*Cons.*, 9 C. 172.]

(13)—*Reg.* VIII *of* 1819, *s.* 8, *cl.* 2—*Putnee sale—Notice--Publication.*—So long as the cutcherry at which notice on the defaulter, as required by Reg. VIII of 1819, s. 8, cl. 2, is served, is an adjacent one, in which all the business of the defaulting putnee is carried on, and is on land belonging to the defaulter, publication at that cutcherry is a sufficient publication—the object of the law being to give information to the tenant in arrear. Inadequacy of price, supposing the fact to be so, would be no ground for setting aside a sale regularly held. The law does not compel bidders to give a fair price ; it is sufficient if notice is given to

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————*g.*—SETTING ASIDE SALE AND ITS EFFECT—*continued.*

intending purchasers that the sale is going to take place. MUNGAZEE CHAPRASSEE v. SREEMUTTY SHIBO SOONDUREE, **21 W.R. 369.** [*Overruled*, 14 C. 365=14 I.A. 30.]

(14)—*Sale of* putni *taluq by Collector—Jurisdiction—Setting aside of sale*—Onus *of proof—Jurisdiction of Judge—Presumption as to jurisdiction of Collector—Sale—Ground for setting aside sale.*—Where a Collector, in exercise of his lawful functions, has assumed the jurisdiction to sell a *putni* taluq appertaining to a permanently settled estate which is within the civil jurisdiction of a Judge, it lies on the person who impugns that official act, to show that it was done without jurisdiction. The jurisdiction of a particular Judge over a certain place does not necessarily imply the jurisdiction of a Collector, or more exactly the situation of that place within a Collectorate bearing the same name within the Zillah of the Judge. It is no valid ground for impeaching a sale, otherwise good, to say that other sales, which apparently might have been set aside, had been conducted elsewhere. KALEE KOOMAR MOOKERJEE v. THE MAHARAJA OF BURDWAN, **3 W.R. 39.**

(15)—*Rent decree—Execution—Sale—Fraud —Validity of sale—Act X of* 1859, *s.* 107—*Claim — Right of suit—Limitation — Fair trial—Evidence.*—The validity of a sale held in execution of a decree obtained in a rent-suit will not be affected by the badness of the decree if the purchaser is not implicated in the fraud, however fraudulent the conduct of the plaintiff in the rent suit may have been. Where on a claim being presented under the rules contained in Act X of 1859, a Collector passes judgment, the party dissatisfied with the order is not bound to bring a suit to establish his right within one year, unless the claim has been duly heard as prescribed by s.107 of the Act. Where the claimant is not examined, and no evidence is taken as directed by the law, and the Collector merely records a memo on the petition, and disallows the claim, it cannot be said that there has been a fair trial. MOHESH CHUNDER BAGCHEE v. DWARKA NATH MOITRO, **24 W.R. 260.** [*D.*, 8 C.W.N. 230.]

(16)—*Act* XI *of* 1865, *s.* 25—*Jurisdiction—Appeal to Commissioner.*—It is a condition precedent to the exercise of any authority by the Collector under Act XI of 1865 or the institution by him of any proceedings under that Act, that there should be an arrear of revenue due to Government. The appeal to the Commissioner under s. 25 is only necessary where proceedings have been legally taken, and against an irregularity occurring after the sale has been ordered. MANGINA KHATUN v. THE COLLECTOR OF JESSORE, **3 B.L.R. App. 144=12 W.R. 311.**

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————*g.*—SETTING ASIDE SALE AND ITS EFFECT—*continued.*

(17)—*Act* VIII *of* 1865 (*B.C.*)—*Purchaser in execution sale—Rights of.*—Where a sale of a tenure under a decree, passed under Act VIII of 1865 is sought to be set aside, it must be shown that the decree and the sale were fraudulent, and that the purchaser was a party to that fraud or had notice of it. DAMUDAR ROY v. NIMANAND CHUCKERCUTTY, 7 B.L.R. App. 1=15 W.R. 365.

(18)—*Sale of tenure in execution of rent-decree under s.* 105 *of Act* X—*Under-tenures—Fraud and collusion in sale, effect of—Proof of.*—Plaintiffs claimed as purchasers of the interests of one M in certain land under a *se-morosee* pottah granted to him by a third party. The title of BM, one of the defendants was based on a purchase of the property by him at a sale of the tenure in execution of a decree for arrears of rent under Act X of 1859, at the suit of another defendant G against one H. Plaintiffs in the present suit prayed to have it declared that they had an absolute right to the *mourosee* tenure of the land with the buildings thereon at a fixed rate of rent, that the purchase of the defendant BM, gave him no right in the property and that he had therefore no right to claim rent from the plaintiffs. *Held* that the title of the defendant BM, as purchaser under a decree against H., must stand or fall with the decree; the present plaintiffs who were no parties to the decree might show that it was obtained by fraud and collusion and for the purpose of defeating their rights. The question had also to be tried whether H had any interest in the premises included under his original *dur-mourosee* pottah at the time of the sale and, for these purposes, the High Court directed the remand of the suit for re-trial. MESSRS. JOHN BORRADAILE & CO. v. MR. A. C. GREGORY, 2 W.R. Act X, Rul. 63.

(19)—*Principal and agent—Fraud of agent—Sale—Purchase by agent—Constructive trust.*—The plaintiffs and defendants in this case were co-sharers of a putnee talook which was brought to sale under Reg. VIII of 1819. The agent for the plaintiffs and the agent for the defendants were both ready at the Collectorate on the day of sale, prepared to pay their shares of the rent. It was arranged that the agent of the plaintiffs should get ready a petition for the purpose of lodging the rents and that the agent of the defendants should remain in Court to watch the proceedings and should give notice when the sale commenced. Contrary to the terms of this arrangement, the agent of the defendants purchased the putnee at the sale that took place during the absence of the agent of the plaintiffs. *Held* that it was an act of bad faith amounting to fraud on the part of the agent of the defendants to remain and purchase the putnee without making any attempt to inform the Collector or to convey any information to the plaintiffs' agent that the lot was about to be called up. *Held* further that the defendants' agent must be treated as having made the purchase on account of, and as a trustee for, the plaintiffs to the extent of their share. The sale therefore, so far as it creates a title in favour of the defendants to the plaintiffs' share of the putnee, must be declared void, though it was valid as between the Collectors, the Zamindar and the defaulting putneedars. KOYLASH CHUNDER BANERJEE v. KALEE PROSUNNO CHOWDHRY, 16 W.R. 80. [*F.*, 2 C.L.R. 419.]

(20)—*Suit for arrears of rent—Sale brought about by collusion of co-sharer and purchaser — Auction sale — Re-conveyance.* — A sale for arrears of rent brought about by collusion between the party in whose name the tenure stands and the purchaser, with a view to get rid of a co-sharer who neglected to have his share transferred to his name, is not really an auction sale for the purpose of realising the zemindar's rent, but only a private transaction between the purchaser and the zemindar's agent carried on under the appearance of auction sale, and the co-sharer can, on payment of his share of rent, have his share re-conveyed to him. KISHORE CHUNDER SEIN v. KALLY KINKUR PAUL CHOWDHRY, 20 W.R. 333. [*R.*, 17 C.L.J. 96.]

(21)—*Sale of putnee taluq—Suit to set aside—Joint tenants—Estoppel—Civ. Pro. Code (Act* VIII *of* 1859), *s.* 7—*Equity.*—Four suits were brought by four joint tenants to set aside the sale of a putnee taluq, and two of the plaintiffs were not estopped under s. 7 of Act VIII of 1859. *Held* that the Court could not in equity declare the sale to be good or bad in part, but must come to a decision as to whether the sale was to stand or fall for the whole taluq. *Held* further that, if one of the plaintiffs in a former suit claimed a two-anna share instead of a four-anna share, he cannot be allowed to supplement his claim or take interest in the putnee independently of the sale. RAM CHURN BUNDOPADHYA v. SREEMUTTY DROPO MOYEE DOSSEE, 17 W.R. 122. [*R.*, 13 C.L.J. 404=16 C.W.N. 805=10 Ind. Cas. 90, 16 C.W. N. 704.]

(22) — *Reg.* VIII *of* 1819 — *Putnee sale—Absence of arrear of rent at time of sale.*—In the case of a sale of a putnee under Reg. VIII of 1819, where there appears to have been no arrear at all of the rent at the date of the sale, whether notice of the fact had been given to the Collector or not, the sale would be invalid and liable to be set aside. By cl. 2, s. 14 of Reg. VIII of 1819, a summary enquiry may be made at the time of sale as to the fact of arrear or not. It is, however, not imperative on the putneedar to demand such a summary enquiry, he may reserve the question for a regular suit and if, on a regular suit, it should appear that

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

———*g.*—SETTING ASIDE SALE AND ITS EFFECT—*continued.*

there was no arrear, then cl. 1 of s. 14 of the Regulation will have to be applied, the Court taking care that the purchaser is indemnified against all loss which may have accrued in consequence of the reversal of the sale by reason of there being no arrear remaining. SHUROOP CHUNDER BHOOMICK v. RAJAH PERTAB CHUNDER SINGH, **7 W.R. 218.**

(23)—*Reg.* VIII *of* 1819—*Sale of putnee—Rent paid into Court—Illegal service of notice.*—Where a zemindar, at the time he causes a putnee to be actually put up for sale under Reg. VIII of 1819, knows that the putneedar has paid the money into the Court on his account, it is improper in the zemindar to proceed with the sale, and the sale ought to be set aside, although the notice was illegally served on him. MUSSAMUT TARA SOONDUREE DEBIA v. RADHA SOONDUR ROY, **24 W.R. 63.** [*D.*, 10 C.L.J. 453=4 Ind. Cas. 371.]

∝(24)—*Sale for arrears of rent—Notice not served in mofussil—Setting aside sale.*—A sale for arrears of rent is liable to be set aside if there was no service of notice in the mofussil. NUGENDRO CHUNDER GHOSE v. MUSRUFF BIBEE, **15 W.R. 17.**

∞(25)—*Execution-sale—Setting aside decree on review—Writ of* elegit—*Writ of* fieri facias.—A *bona fide* sale under a decree is binding, notwithstanding the decree may be set aside upon review. (7 W.R. 312, *F.*) Of the two kinds of executions in England, *viz.*, a writ of *elegit* and a writ of *fieri facias*, when property is delivered under the former to an executor, in order that he may satisfy his judgment by collecting the rents of the estate, the reversal of the judgment puts an end to the plaintiff's title; but in the case of a *fieri facias*, the sale by the sheriff to a *bona fide* purchaser under a decree is not affected by the reversal of the decree. JAN ALI v. JAN ALI CHOWDHRY, **1 B.L.R. A.C. 56=10 W.R. 164.** [*F.*, 1 B.L.R. A.C. 84, 12 W.R. 503, 8 B.H.C. 37, 19 W.R. 234, 6 N.W.P. 291, 11 C. 362; *Appl.*, 15 W.R. 365; *R.*, 15 W.R. 372, 20 W.R. 120, 2 C.L.R. 223, F.B., 26 B. 543; *Cons.*, 23 C. 857, 26 C. 734; *D.*, 13 W.R. 185, 6 B.L.R. App. 90, 8 B.L.R. 1, 22 W.R. 452, 10 C 220.]

(26)—*Act* X *of* 1859—*Decree and sale—Fraud.*—The mere circumstance that a decree under which a sale has taken place, has itself been set aside, will not invalidate the sale, in the absence of evidence to show that the decree and sale were brought about by fraud and that the purchaser was a party to such fraud. JUGAL KISHORE BANERJEE v. ABHAYA CHARAN SARMA, **1 B.L.R. A.C. 84.** (7 W.R. 312, 1 B.L.R. A.C. 56, *F.*) [*R.*, 2 C.L.R. 223.]

(27)—*Want of material injury—Beng. Reg.* VIII *of* 1819.—A purchaser under a sale for

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

———*g.*—SETTING ASIDE SALE AND ITS EFFECT—*continued.*

arrears of rent is not entitled to have the purchase set aside on the ground merely of an irregularity in sticking up the preliminary advertisement, unless he can show that he has been prejudiced thereby. JOYNUB BEBEE v. AHAMED JAN, **Marsh 31=1 Hay 68.**

(28)—*Sale of under-tenure—Moveable property—Suit to set aside sale.*—Against the provisions of s. 64 of the Rent law, the decree-holder in execution of a decree for rent sold the under-tenure of the judgment-debtor and purchased it himself, without first attaching and selling his moveable property. In a suit by the judgment-debtor for possession of the under-tenure by setting aside the execution-sale as contrary to law, *held*, that such a suit would lie even though no objection to the legality of the sale was taken at the time when the under-tenure was sold. BAMA SOONDUREE DOSSEE v. MUDHOO SOODUN BISWAS, **25 W.R. 156.**

(29)—*Reg.* VIII *of* 1819—*Putnee Taluq—Sale—Refund of purchase money.*—The sale of a putnee taluq for arrears of rent without the notice required by Reg. VIII of 1819, is informal, and can be set aside notwithstanding the *bona fides* of the purchaser. Where the sale of a putnee taluq was set aside, for want of notice and the lower appellate Court refused to order the refund of the purchase money, the High Court in special appeal, with reference to s. 14, cl. 1, Reg. VIII of 1819, declared the purchaser entitled to a refund with interest. MOBARACK ALI v. AMEER ALI, **21 W.R. 252.**

(30)—*Act* X *of* 1859, *s.* 104—*Sale—Fraud—Irregularity—Arrears and costs not clearly specified.*—In the absence of fraud, even if there was any irregularity in not specifying, as clearly as the parties should have specified, what was the amount of the arrears and costs for which the sale took place, or in the mode in which the notice of sale was published, such irregularity does not vitiate the sale. MAHOMED AYENOODEEN v. KALEE DASS CHUNDO, **15 W.R. 279.**

(31)—*Act* X *of* 1859 *and Act* VIII (*B.C.*) *of* 1865, *rent sale under—Name of share-holder, absence of—Effect.*—The absence of the name of a share-holder from the proceedings of a rent sale under Act X of 1859 and Act VIII (B.C.) of 1865 does not render the sale invalid as against him. DOORBIJOY MAHTOON v. PRITHEE NARAIN SINGH, **14 W.R. 30.**

(32)—*Reg.* VIII *of* 1819, *s.* 8, *cl.* 2—*Sale of putnee for arrears of rent—Service of notice—Service of* stahar—*Attestation—Date of sale—Uniform practice.*—Where the sale of a putnee for arrears of rent under Reg. VIII of 1819 is sought to be set aside on the ground that the proper notices were not sent, served, and published as required by s. 8, cl. 2 of Reg. VIII of 1819, in order that the objection should

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

———g.—SETTING ASIDE SALE AND ITS EFFECT—*continued.*

succeed it must be shown to be an objection of substance and not merely of form. [*F.*, 4 C. 41=2 C.L.R. 357; *Appl.*, 25 W.R. 141=1 C. 359; *D.*, 18 C. 363, F. B.] The requirements of the Regulation as to the service of the *istahar* and the signing of the receipt by substantial persons may be considered to have been carried out both in form and in substance where they are signed by persons who usually are expected to attest such documents and who are treated with consideration, *e.g.*, ameens, mookhtears and chowkidars. The intention of the Regulation as regards the date of the sale and the era to be followed was to lay down a uniform practice in each locality. Uniformity was the essential requirement and the particular date only the form for enforcing regularity, and a practice which has been established for a course of years, and which can cause no substantial detriment to any of the parties concerned, and which is reasonable and convenient in itself, is not liable to objection in a mere point of form. Where no tender was made before the sale of the amount of rent due, the Court is not justified in setting aside a sale under Reg. VIII of 1819 merely because some charges were included which might not strictly be recoverable under the Regulation, where the zamindar in his petition clearly distinguished the amount due for rent exclusive of such charges. PITAMBUR PANDA v. BABOO DAMODAR DOSS, **24 W.R. 129.**

(33)—*Putnee tenure in Bengal, Sale of—Reg.* VIII *of* 1819.—Reg. VIII of 1819 prescribes that the sale of a putnee tenure for arrears of rent shall be held on a day in the month of Jeyt. Every sale requires, as conditions precedent to it, to be made at the place where the advertisement says it shall be held, and on the day advertised, or on any subsequent day for which the sale may be adjourned after due notice. Where a sale was held on the 4th Jeyt, which was advertised to be held on the 5th Jeyt, *held*, that such sale was illegal and should be set aside. BECHARAM MOOKERJEE v. ISSUR CHUNDER MOOKERJEE, **W.R. 1864, 4.**

(34)—*Act* VIII *of* 1865—*Sale.*—The Act requires only one proclamation in the Collector's and another in the Judge's Court. The Act does not require any separate attachment in the *Mehal*. Where the date originally fixed for a sale was found to be a holiday and the sale was changed to the next public sale day, *held* that there was nothing in the law to make the change such an adjournment or postponement of the sale as to require any new distinct notification. It is not necessary under the Act that a sale should not take place, except for a full and complete arrear due at the end of the year. It only enacts that sales should take place at the end of the year for such arrears as may be then existing and recoverable under the Rent Law. The Zemindar may sell any tenure where the arrears are those due by the defaulter who is registered in his *sherista*. Attachment by the appointment of sezawal is no bar to a sale for arrears due before such attachment. A.J. FORBES v. PROTAP SINGH DOOGUR, **7 W.R. 409.** [*Reversed*, 10 B.L.R. 139, P.C.]

(35)—*Execution sale—Act* VIII (*B C.*) *of* 1869—*Postponement—Discretion of Court.*—The Court may, in its discretion, grant a postponement of a sale in execution of a decree under Act VIII (B.C.) of 1869 when the granting of it is shown to be beneficial to the judgment-debtor; when he satisfies the Court that, by the postponement, he will be in a position to meet the demand; or when the immediate sale is likely to be attended with ruinous or unduly injurious consequences to the judgment-debtor, while the postponement would cause no serious prejudice to the decree-holder. JANOKEENATH MOOKERJEE v. RADHA MOHUN CHATTERJEE, **20 W.R. 130.**

(36)—*Act* X *of* 1859, *s.* 104—*Sale—Irregularity—Damages.*—S. 104, Act X of 1859, does not enact that the decree-holder is to pay damages whenever it may be found that there has been an irregularity in publishing the sale processes, wholly irrespective of the question whether such irregularity was caused by his acts or omissions. RAM CHUNDER SURMA CHUCKERBUTTY v. RAJAH KALEE CHUNDER SINGH, **7 W.R. 307.**

(37)—*Sale of* putni *tenure by Zemindar—Suit to set aside sale - Zemindar and purchaser made co-defendants—Sale set aside—Purchaser to recover purchase money from zemindar in execution—Reg.* VIII *of* 1890, *s.* 14.—In a suit to set aside a *putni* sale, the zemindar and the purchaser were made co-defendants. The Court set aside the sale and decreed that the purchaser was to recover from his co-defendant the zemindar, his purchase-money. *Held*, that the purchaser may proceed to recover his purchase money in execution, without bringing a fresh suit. PREOLALL GOSSAIN v. GYAN TURUNGINEE DOSSIA, **13 W.R. 161.**

(38)—*Reg.* VIII *of* 1819—*Sale of putnee—Guarantee—Refund of purchase-money.*—A Zemindar who procures a sale of his putnee under Reg. VIII of 1819 guarantees to the purchaser that he is selling a putnee which is to be found and not a myth. In other words, he guarantees a title in the defaulting putneedar. If the purchaser finds that there are no lands appertaining to the putnee he is entitled to recover the consideration which he paid for the purchase. KHELUT CHUNDER GHOSE v. KISHEN GOBIND DEB, **16 W.R. 128.**

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

———*g.*—SETTING ASIDE SALE AND ITS EFFECT—*concluded.*

(39)—*Rent Recovery Act (Madras), Act* VIII *of* 1865, *ss* 18, 39, 40—*Sale set aside for irregularity—Subsequent sale without notice.*—Where a sale of the tenant's holding under the Rent Recovery Act was set aside on the ground of irregularity (the sale not being held on the date originally fixed), and the landlord applied again to the Collector for a fresh sale, without giving notice to the tenant of his intention to sell under s. 39, it was held that a second notice was not necessary, and that the application was a continuation of the original application for sale which was not irregular. OLIVER v. ANANTHARAMAYYAR, **20 M. 498.**

See JURISDICTION OF CIVIL COURTS—B.L.R. Sup. 625, F.B.=2 Ind. Jur. N.S. 111 7 W. R. 183, 6 W.R. Act X, Rul. 11.

See PRINCIPAL AND AGENT—AUTHORITY OF AGENTS, 14 W. R. 36.

———*h.*—SURPLUS PROCEEDS OF SALE, RIGHT TO.

(1)—*Revenue sale—Surplus proceeds in hands of Collector—Attachment—Civ. Pro. Code*, 1859, *s.* 237.—Surplus proceeds of a sale for default of payment of *putnee* rent in the hands of the Collector, is, notwithstanding the attachment of the proceeds by a Civil Court, the property of the *putneedar*. If an order of the Court which passed the decree had been made on the Collector under s. 237, and the Collector had then paid over the money to the plaintiff in the civil suit, it would at that stage have become the money of the plaintiff. SAFFOOLLAH KHAN v. LUCHMEEPUT SINGH DOOGUR, **13 W.R. 58.**

(2)—*Revenue sale of patni—Darpatnidar's decree for compensation—Attachment by putnidar's mortgagee—Priority.*—A darpatnidar's decree for compensation for loss of the darpatni, against the putnidar for his having allowed the patni to be sold for arrears of revenue, has a right to be satisfied out of the surplus sale proceeds of the patni in the hands of the Collector, in preference to a decree by the putnidar's mortgagee, though the latter had attached the monies in pursuance of his decree, prior to the darpatnidar's suit. SURNOMOYE DASSYA v. THE LAND MORTGAGE BANK OF INDIA, LTD., **7 C. 173 =8 C.L.R. 341.**

(3)—*Putni taluq sold for arrears of rent under Ben. Reg.* VIII *of* 1819—*Surplus sale proceeds in deposit with the Collector—Mortgagee of the taluq claiming surplus sale proceeds—Charge of mortgage—S.* 73, *Act* IV *of* 1882 (*Transfer of Property*).—Where a putni taluq had been sold for arrears of revenue under Reg. VIII of 1819, and a suit was brought by the plaintiff-respondent holding a mortgage thereof, to recover from the principal defendants, the surplus proceeds of the putni sale, which were

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

———*h.*—SURPLUS PROCEEDS OF SALE, RIGHT TO—*concluded.*

deposited with the Collector and which were drawn out at intervals by these defendants (the holders of money decrees against the putnidars), *held*, that the proper view to take of the matter was to regard the surplus sale proceeds as the shape into which the mortgage security was converted, and as before such conversion the security could not be split up into parts, the mortgagee was entitled to realize his money out of the whole of it, its conversion by sale into money ought not to affect his rights in this respect. GOSTO BEHARY PYNE v. SHIB NATH DUT, **20 C. 241.** [*F.*, 17 P.R. 1907= 67 P.W.R. 1907=2 P.L R. 1908; *R.*, 10 C.L.J. 150.]

(4)—*Sale of tenure in execution of decree—Application by two zemindars for satisfaction of arrears of rent from sale-proceeds—Satisfaction of the rents of one of them from such proceeds—Sale of the tenure by the other, money paid by purchaser to prevent sale—Suit not maintainable to recover.*—Certain property was sold by a judgment-creditor K and purchased by the plaintiff. Before the sale however, two zemindars D and L petitioned the Collector that the surplus proceeds of the sale might be detained for the satisfaction of the arrears of rent due to them. Such proceeds however happened to be actually attached by D alone, and the debt due to K and the rents due to D were only liquidated therefrom. The remainder of the sale-proceeds was afterwards attached by another creditor M for his own debt and, about that time, the other zemindar, L also put up the tenure for sale for the balance of rent due to him. Plaintiff paid the amount of the claim of the zemindar, L, so as to save the property from sale, and it was to recover the sum so paid by him that the plaintiff instituted the present suit. *Held*, that the plaintiff cannot be permitted to recover and his plea that L ought to have taken his arrears of rent out of the money deposited in the Collectorate was not sustainable. MIRZA SAEFOOLLAH KHAN v. LUCHMEEPUT SINGH DOOGUR, **6 W. R. 154.**

See SUPERINTENDENCE OF HIGH COURT, 2 B.L.R.A.C. 217=11 W.R. 54.

———*i.*—UNDER-TENURES AND PORTIONS OF, SALE OF.

(1)—*Act* VIII *of* 1865 (*B.C.*), *sale under—Appeal.*—A sale under Act VIII of 1865 (B.C.), is a proceeding within the meaning of s. 30 of that Act, and an appeal does lie to the Collector against such proceeding if held by a Deputy Collector. *In the matter of* DWARKANATH SEIN v. CHUNDER MOHUN MITTER, **12 W.R. 326.**

(2)—*Act* VIII (*B.C.*), 1865, *s.* 16—*Pottah—Covenant—Khodkhast ryots, meaning of.*—Where the dur-putnee pottah contains no express provision authorizing the dur-putneedar

Sale—continued.

——8.—Sale for Arrears of Rent—*continued.*

——i.—UNDER-TENURES AND PORTIONS OF, SALE OF—*continued.*

to grant mokurruree leases, such leases must fall to the ground under the provisions of s. 16, Act VIII of 1865 (B.C.). The expression "Khoodkhast ryots" as used in s. 16, Act VIII of 1865, evidently means "resident and hereditary cultivators". KOONTEE DEBEE v. HIRDOY NATH DURREEPA, **16 W. R. 206.**

(3)—*Act* VIII (*B.C.*) *of* 1865, *s.* 16—*Arrears of rent—Right of sharer with limited interest to sell whole under-tenure.*—A purchaser, who applied to enforce the stringent provisions of s. 16 of Act VIII (B C.) of 1865 was bound to show that he had acquired the right given to a purchaser by that section. That right was given to the purchaser of an entire under-tenure, and not to the purchaser of the share of an under-tenure. Consequently, a sharer with limited interest could not sell the whole tenure under Act VIII of 1865 for arrears recoverable either under that Act or under Act X of 1859 SHAMCHAND MITTER v. JUGGUT CHUNDER SIRCAR, **22 W. R. 541.** [*R.*, 16 C.W.N. 1024.]

(4)—*Act* VIII *of* 1865, *s.* 2—*Reg.* VII *of* 1799—*Arrears of rent—Sale—Procedure.*—The only law applicable to the sale of under-tenures in estates under the immediate management of a Collector is Act VIII of 1835, which, so far as procedure is concerned, superseded the substantive law, *viz.*, Reg. VII of 1799. Therefore, sales under Act VIII of 1835 are not required to be in conformity with the procedure laid down in Reg. VII of 1799. MUSSTT. MONOSHEE v. ABDOOL HOOSEIN, **7 W. R. 297.**

(5)—*Act* X *of* 1859, *ss.* 105, 151—*Repeal of s.* 105 *by Act* XVIII *of* 1873—*Application for execution of decree for arrears of rent by sale of holding—Order of Revenue Court disallowing application—Suit by decree-holder to cancel order and to bring holding to sale, maintainability of.*—An occupancy holding which had been mortgaged by its holder was sold under a decree for foreclosure before the passing of a decree in a suit instituted by the zemindars for arrears of rent and for ejectment of the holder. When the zemindars after having obtained the decree applied to execute the decree by sale of the holding, the Revenue Court disallowed the application. The purchaser of the decree from the zemindars sued the purchaser under the foreclosure decree for cancelment of the order of the Revenue Court and for bringing the holding to sale in satisfaction of his decree. *Held* that in so far as the suit sought to set aside the order of the Revenue Court under Act X of 1859, relative to the execution of the decree of the zemindars, such a suit was barred by s. 151 of that Act, and was not admissible merely by reason of its repeal; and that in so far as, irrespectively of that order, the plaintiff sought to recover the amount of the decree,

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

——i.—UNDER-TENURES AND PORTIONS OF, SALE OF—*continued.*

basing his claim under s. 105 of Act X of 1859, by the sale of the holding on which the arrear accrued, the suit was not maintainable, as, at the time when it was instituted, that section had ceased to be law in the N.W.P. (by the repeal of Act X of 1859 by Act XVIII of 1873) and could not be cited in support of the claim. RAM KHILAWAN RAM v. FOX, **7 N.W.P. 239.**

(6)—*Execution sale—Arrears of rent—Act* VIII (*B.C.*) *of* 1869, *s.* 59—*Act* VIII *of* 1859—*Right, title and interest.*—A and his three sisters were joint owners of a certain mouzah, the former holding seven annas seven pies and four krants and the latter together eight annas four pies 16 krants of the 16 annas of the estate. In execution of a decree obtained against A, his right, title and interest in the mouzah was sold to B. The zamindar then brought a suit, under Act VIII (B.C.) of 1869 against A for arrears of rent in respect of the mouzah, and obtained a decree, in execution of which he applied, not for a sale of the tenure, as he might have done under s. 59 of that Act, but for "attachment and sale of the judgment-debtor's property." Upon this application orders for sale were issued under Act VIII of 1859. The sale notification was headed "under s. 246 of Act VIII of 1859" and notified the sale of the rights and interest only of the judgment-debtor. At this sale, C become the purchaser, and was put in possession of the mouzah. Thereupon B, the purchaser at the first execution sale, and a third person D, who had meanwhile purchased the share of A's sisters, sued C for possession. *Held*, that B and D were entitled to possession, for C had acquired nothing under his purchase. DOOLAR CHUND SAHOO v. LALL CHABEEL CHUND, **3 C.L.R. 561, P.C. = 6 I.A. 47 = 3 Sar. 885.** [*F.*, 7 C. 748, 10 C. 996; *R.*, 12 C. 24, 13 C. W.N. 270 = 1 Ind. Cas. 184, 26 C. 677, 10 C.W. N. 176 = 4 C.L.J. 68; *Expl.*, 14 C. 14.]

(7)—*Civ. Pro. Code and Ben. Act* VIII *of* 1869, *s.* 64—*Sale of portion of an under-tenure under—Distinction between.*—There is no substantial distinction between the sale of a portion of an under-tenure under the Civ Pro. Code and under s. 64 of the Rent Act. There is nothing in the language of s. 64 of the Rent Act, which necessarily leads to the conclusion that, under that section, a share of an under-tenure could not be sold, so as to render the sale binding upon the judgment-debtor. ASHANULLA KHAN BAHADUR v. RAJENDRA CHANDRA RAI, **12 C. 464.** (22 W.R. 421, 9 C. 722, *Disc. & Expl.*)

(8)—*Act* VIII (*B C.*) *of* 1869, *ss.* 59, 64—*Decree for rent in favour of separate proprietor—Sale of under-tenure in execution—Application to set aside sale—Jurisdiction.*—Where, in execution of a decree for rent obtained by the owner of a distinct estate on partition, an under-tenure belonging to the defaulting tenants and

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————i.—UNDER-TENURES AND PORTIONS OF, SALE OF—*continued.*

situated within the share of the talook which fell to the plaintiff in the partition was sold, the sale was properly conducted under s. 59 of Act VIII of 1869 (B.C.) and s. 64 of the Act did not apply. RANEE SURUT SOONDUREE DEBIA v. SUMEEROODEEN TALOOKDAR, **22 W.R. 530.** [*Appl.*, 26 C. 832.]

(9)—*Decree for rent against registered tenant—Act X of 1859, s. 105, competency of zemindar to proceed to sale under, notwithstanding intermediate sale of tenure in execution by Civil Court.*—Suit for confirmation of plaintiff's right as purchaser of ryotee tenure at a sale in execution of a decree, and also for the reversal of a sale held under s. 105 of Act X of 1859, at the instance of the defendant zemindar. The facts found by the lower appellate Court did not justify its conclusion of fraud against the defendant. Admittedly, the person sued by the zemindar was the registered tenant whose name appeared in the books of the defendant's *sheristah* and it was also admitted that the decree for arrears of rent was obtained prior to the date of the purchase by the plaintiff at a sale in execution of a decree passed by the Civil Court. Under the circumstances, the defendant was fully justified in proceeding in the manner he had done, and in the absence of any legal proof of fraud on his part, the plaintiff had no right to question the legality of proceedings. MUSST. SUFUROONISSA v. SAREE DHOOPEE, **8 W.R. 384.** [*R.*, 3 B.L.R. 49=13 W.R. 451, Note; *D.*, 13 W.R. 449.]

(10)—*Sale of under-tenure in execution of decree—Act X of 1859—Sale of the interest of cultivator—Notice to zemindar.*—Under s. 105, Act X of 1859, an under-tenure may be brought to sale in execution of a decree for arrears of rent, if there be an arrear of rent adjudged. A person who has bought for valuable consideration the actual rights and interests of the defaulting ryots in a certain land in execution of a decree of a Civil Court cannot be ousted by a zemindar, who subsequently purchased the ryot's rights and interests in the land. Where a person has purchased the rights and interests of a cultivator, he need not under s. 27, Act X of 1859, notify his purchase in the proprietor's register. MAHARAJA SUTTEESCHUNDER ROY BAHADOOR v. MODHOOSOODUN PAUL CHOWDHRY, **W.R. 1864, Act X, Rul. 91.** [*D.*, 13 W.R. 449.]

(11)—*Sale of under-tenures—Execution of decree.*—Under s. 105 Act X of 1859, an under-tenure is liable to sale in execution of a decree for arrears of rent for 11 years. Any party wishing to stay the sale, on the ground of his being the proprietor of the under-tenure, must comply with the provisions of s. 106. DOORGA PERSHAD BOSE v. SREEKISTO MOONSHEE, **W.R. 1864, Act X, Rul. 48.**

(12)—*Act X of 1859, ss. 77, 106, 107—Applicability — Sale of under-tenures — Claim—*

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————i.—UNDER-TENURES AND PORTIONS OF, SALE OF—*continued.*

Remedy of claimant.—Ss. 106 and 107 apply only to cases in which the existence of the under-tenure and the decree-holder's right as landlord are admitted. They do not apply to cases in which they are denied and an adverse proprietary title as owner of the land is set up by the claimant. The remedy of a claimant who sets up such adverse proprietary title exists, under s. 77 of the Act, before the making of the decree. If he allows the decree to be made he cannot afterwards be allowed to set it aside in execution. GOLAM CHUNDER DEY v. NUDDIAR CHAND ADHEEKAREE, **16 W.R. 1.**

(13)—*Act X of 1859, ss. 105, 106—Sale of under-tenure—Irregularity—Stay of sale—Act VIII of 1865 (B.C.), ss. 6, 13.*—Where an under-tenure has been transferred but the transfer is not registered in the *serishta* of the zamindar or superior tenant, the transferee is nevertheless entitled as a person interested in the protection of the tenure to stop its sale in execution of a decree under Act VIII (B.C.) of 1865, by paying into Court the amount of the decree, though he is not entitled unless the transfer is registered, to come in and allege that the person against whom the decree has been obtained was not the proprietor of the under-tenure, and was not in legal possession. ANUNDLAL MOOKERJEE v. KHALIKA PERSHAD MISSER, **12 B.L.R. 489, Note=20 W.R. 59.** [*D.*, 22 W.R. 46.]

(14)—*Under-tenure, Sale of—Sale in execution of decree—Arrears of rent—Enhancement.*—A sale in execution of a decree for arrears of rent (at an enhanced rate) of a subordinate talook, which has been obtained against a party who is in possession of the talook by permission of the owners, but who has no other right or title to it, will not bind those owners, even though their names be not recorded as tenants in the books of the zemindar. REDOY KISSEN DUTT v. RAM COOMAR SEN, **3 C.L.R. 231.** (12 B.L.R. 484, *D.*)

(15)—*Beng. Act X of 1859 (Rent Act)—Sale of* jote *not liable to be set aside for non-attachment and non-publication of sale proclamation—Purchaser of transferable* jote *not registering his name in landlord's* sherishta—*Effect.*—There is no provision in Act X of 1859, which entitles a person to have the sale of a *jote* for arrears of rent set aside on the ground of non-attachment and non-proof of publication of the sale proclamation. A purchaser of a transferable *jote* not registering his name in the landlord's *sheristha* has no *locus standi* as against a subsequent auction-purchaser in execution of a decree against the recorded tenant. He has no right to impugn such auction-purchaser's purchase of the *jote*. PATIT SHAHU v. HARI MAHANTI, **27 C. 789.** (21 W.R. 94, *F.*)

(16)—*Sale of under-tenure—Standing crops.*—The sale of an under-tenure under s. 66 of

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————i.—UNDER-TENURES AND PORTIONS OF, SALE OF—*continued.*

Act VIII of 1869 (B.C.) vests, in the auction-purchaser, a right to the standing crops on the land, in the absence of proof of special custom to the contrary, or unless the crops were excepted by the notification of sale. AFATOOLLA SIRDAR v. DWARKA NATH MOITRY, 4 C. 814 =4 C.L.R. 98.

(17)—*Rent-sale of under-tenure—Share of owner of a portion thereof.*—Where the plaintiff was the registered owner of an one-anna out of a ten-anna share of a jamma and had been regularly paying rent, his share did not pass at a sale in execution of a decree for arrears of rent of the entire ten-annas, the sale certificate relating only to the share of the owner of the ten-annas. BHUGEERUTH BERAH v. MONEERAM BANERJEE, **4 C. 855.**

(18)—*Decree for rent—Execution—Sale of superior under-tenure—Subordinate under-tenures, effect on.*—Where a superior under-tenure is sold in execution of a decree for arrears of rent, the subordinate under-tenures which are not created in good faith, but only to defraud the purchaser, are not protected. DOORGA CHURN KUR SIRCAR v. ANUND MOYEE DEBIA, **3 W. R. 127.**

(19)—*Reg.* VIII *of* 1819, *s.* 13, *cl.* 4—*Under-tenant saving superior tenure from sale by depositing amount of rent—Suit to recover amount deposited—Act* VIII *of* 1859, *s.* 1.—An under-tenant who had saved the superior tenure from sale by depositing the amount of rent due from the holders of that tenure for payment to the zemindar is not bound to apply to the Collector for immediate possession of the tenure thus preserved from sale, and he is competent to sue for the recovery of the amount deposited by him in the ordinary way without making any such application. The amount advanced is to be treated as a loan secured upon a mortgage of the tenure preserved from sale and the party by whom the advance is made has every right to recover it by an ordinary suit in a Civil Court, or by obtaining immediate possession through the Collector. AMBIKA DEBI v. PRANHARI DAS, **4 B.L.R. F. B. 77=13 W. R. F. B. 1.** [*R.*, 12 C.W. N. 55=6 C.L.J. 595.]

(20)—*Sale proclamation, effect of, with respect to description of property.*—The declaratory portion of a sale proclamation is not, by itself, sufficient to override the description of the property in the body of the document. DWARKA NATH v. ALOKE CHUNDER SEAL, **9 C. 641.** [*R.*, 29 C. 813.]

(21)—*Act* VIII *of* 1869 (*B.C.*), *ss.* 34, 59, 60, 66—*Sale under Rent Law—Right of auction-purchaser—Encumbrances.*—The rent law prescribes no special procedure for sales of under-tenures, and consequently such sales must, by

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————i.—UNDER-TENURES AND PORTIONS OF, SALE OF—*continued.*

virtue of s. 34 of Act VIII of 1869, be conducted under the provisions of s. 249 of the Civ. Pro. Code; but it does not follow that a notification of sale of rights and interests under this last section is to nullify the provisions of ss. 59, 60 and 66 of the Rent law which provides that, if for arrears of rent due on a tenure, the tenure itself is sold at Court auction, the auction-purchaser takes it free of all encumbrances. GIRISH CHUNDER GHOSE v. MUSSAMUT KALEE TARA, **25 W.R. 395.** [*Not F.*, 4 C. 855.]

(22)—*Execution sale of under-tenure—Decree-holder—Mortgagee's right to notice.*—A person, who advances money on the security of a tenure, upon terms which, if the money is not repaid, enable him to make the tenure his own, and avails himself of those terms by foreclosure, is bound to fulfil the requirements of the tenancy and the obligations of the person under whom he claims. So, if rent was due from the tenant (mortgagor) and the zemindar obtained a decree for rent, the zemindar is not bound to give notice to the mortgagee of the tenure, before the former sells the same under the decree for rent. LAIDLEY v. GUNNESS CHUNDER SAHOO, **4 C. 438.** (8 W.R. 96, *Disc.*)

(23)—*Execution of decree for rent—Sale of under-tenure—Ben. Act* VIII *of* 1869, *ss.* 61, 64.—In execution of a decree for rent, the under-tenure can be sold only if the judgment-debtor is in receipt of the entire 16 annas share of the rent. RAI DWARKA NATH CHAKRAVURTI v. RAI SUVRIDRA NATH CHOWDHURI, **8 C.L.R. 407.**

(24)—*Under-tenure—Decree for share of rent—Sale of portion of under-tenure in execution—Validity of sale.*—Where a sharer in a joint undivided estate obtained a decree for his share of the rent of the estate and brought to sale so much of the estate as bore a proportionate share of the jumma, the sale was not valid and conferred no title on the purchaser, as, under s. 105 of the Rent Law, the entire under-tenure, and not a part of it, can be sold. GOBIND CHUNDER ROY CHOWDHRY v. RAM CHUNDER CHOWDHRY, **22 W.R. 421.** [*Expl.*, 12 C 464.]

(25)—*Act* X *of* 1859, *s.* 108—*Joint undivided estate—Suit by sharer for his share of rent of under-tenure—Distinct patta by sharer—Act* VIII *of* 1865, *s.* 4—*Suit for rent of undivided share.*—A suit by a sharer in a joint-undivided estate for money due to him on account of his share of the rent of an under-tenure situate in such undivided estate, falls within the provisions of s.108, Act X of 1859. [*R.*, 16 C.W.N. 1034.] Where the owner of an undivided estate, by giving a patta and taking a kabuliat, lets his share of the property to a tenant, and agrees to receive rent from such tenant in respect of a tenure which may consist of his undivided share, a suit for rent of such undivided

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————*i.*—UNDER-TENURES AND PORTIONS OF, SALE OF—*continued.*

share, treated as a separate and distinct under-tenure, may come under the provisions of s. 4, Act VIII (B.C) of 1865. DWARKANATH CHUCKERBUTTY v. DHUN MONEE CHOWDHRAIN, **15 W.R. 524.**

(26)—*Act* X *of* 1859, *s.* 103—*Sale under decree for rent of portion of tenure—Sale certificate passing right and interest of under-tenant—Nature of interest acquired by purchaser.*—Suit for possession of land purchased by the plaintiff in execution of a decree for rent. The rent suit had been for balances due on account of a 7 anna *rukkum* of a tenure, and the sale certificate purported to pass the right and interest of the defaulting under-tenant. The schedule annexed to the sale certificate indicated that only a portion of the jote was concerned in the sale. *Held*, that under s. 108, Act X of 1859, which applied to the case, the whole tenure could not be sold, but only the right and interest of the defaulting tenant. Consequently, the plaintiff could not be entitled to more than the 7 anna share of the tenure, which belonged to the defaulting under-tenant. AUKHIL CHUNDER MOOKERJEE v. CHUNDER COOMAR MITTER, **22 W.R. 414.**

(27)—*Act* VIII (*B.C.*) *of* 1869, *s.* 64—*Sale of judgment-debtor's rights—Effect on previous sale.*—A sale under s. 64, Act VIII (B.C.) of 1869, conveyed only the right, title and interest of the judgment-debtor and not the tenure as in the case of a sale under s. 59 of the Act. Consequently, the decision of the Full Bench, 21 W.R. 94, which provided that the right of a purchaser in execution of a rent-decree prevailed over that of an earlier purchaser, had no application to the case of a sale under s. 64 of that Act. LUCHMUN RAMANOOJ DOSS MOHUNT v. RAM HUREE ROY, **22 W.R. 67.**

(28)—*Rent sale—Purchaser of portion of tenure, privileges of Bengal Act* VIII *of* 1869, *ss.* 59 *and* 64.—A portion of tenure cannot be the subject of a sale under s. 64 of the Bengal Rent Act and the purchaser of the portion does not take, with respect to his title, the privileges attaching to the purchase of an entire tenure under s. 59. REILY v. HUR CHUNDER GHOSE, **9 C. 722=12 C.L.R. 398.** [*Disc. & Expl.*, 12 C. 464.]

(29)—*Decree against one of several joint-holders of tenure—Interest sold in execution, how determined—Substance of execution proceedings, rather than form, should decide question—Decree for rent—Manager and sole registered owner of tenure—Execution sale—Bengal Act*, VIII *of* 1869, *ss.* 59, 64.—Where it is clear from the proceedings, (in execution of a decree against one of several joint-holders of a tenure) that what is sold, and intended to be sold, is the interest of the judgment-debtor only, the sale must be confined to that interest, although the decree-holder might have sold the whole

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————*i.*—UNDER TENURES AND PORTIONS OF, SALE OF—*continued.*

tenure, if he had taken proper steps to do so, or although the purchasers may have obtained possession of the whole tenure under the sale. (*Illustrated by* 6 I.A. 47). But if, on the other hand, it appears that the judgment-debtor has been sued *as representing the ownership of the whole tenure*, and that the sale, though purporting to be of the right and interest of the judgment-debtor only, was intended to be, and in justice and equity ought to operate as a sale of the tenure, the whole tenure must then be considered, as having passed by the sale. (*Illustrated by* 6 I.A. 233.) [*Appl.*, 23 C. 302; *Dist. and Doubted*, 13 C.W.N. 270.] If the question in the case stated above is a doubtful one on the face of the proceedings, or one part of those proceedings may appear inconsistent with another, the Court must look to the substance of the matter, and not the form or language of the proceedings. [*R.*, 14 B. 597.] Where, therefore, a decree for rent was obtained against only one of the three joint-owners of a tenure, who was not only the manager, but the sole registered owner (in the *sherista* of the zemindar), *held*, on the principle stated above, that as the judgment-debtor represented his brothers, who were equally liable for the decretal amount, the whole tenure passed in execution sale, especially as the decree-holder in the case was unable, on account of her ownership of a share only in the zemindari, to sell the whole tenure under s. 59 of the Rent Act, and as she had in consequence only to proceed, as she did, under s. 64 of the Act. JEO LALL SINGH v. GUNGA PERSHAD, **10 C. 996.** [*F.*, 26 C. 677; *Appl.*, 2 N.L R. 101; *Expl.*, 4 C.L.J. 68=10 C.W.N. 176; *Dist.*, 6 C.W.N. 302, 1 C.L.J. 500, 9 C.L.J. 479=13 C.W.N. 746.]

(30)—*Registered tenant's right, title and interest — Execution-sale — Effect—Nature of interest passed.*—As the law required tenants to register their names in the landlord's office, unregistered co-owners of a tenure, by their omitting to have their names registered must be taken to have acquiesced in the registered tenants representing them in their dealings with the landlord. Where a suit is barred, and a decree is obtained against the registered tenant alone, under circumstances binding against the whole body of unregistered co-owners whom he represents, the sale in execution of the decree, though it was in terms of the right, title and interest of the judgment-debtor, really passes the rights of the unregistered co-owners. NITAYI BEHARI SAHA PARAMANICK v. HARI GOVINDA SAHA, **26 C. 677.** (10 C. 996, *F.*; 6 I.A. 47, 7 C. 357, 23 C. 302; *R.*, 12 C. 24, 17 C. 390, *D.*) [*F.*, 25 A. 57=22 A.W.N. 190, 2 N.L.R. 101; *R.*, 16 C.P.L.R. 19, 29 C. 813, 13 C.W.N. 110; *D.*, 27 C. 545, 6 C.W.N. 302, 1 C.L.J. 500, 9 C.W.N. 843, 10 C.W.N. 176=4 C.L.J. 68, 9 C.L.J. 479=13 C.W.N. 746.]

Sale –continued.

——3.—Sale for Arrears of Rent—*continued.*

————i.—UNDER-TENURES AND PORTIONS OF, SALE OF—*continued.*

(31)—*Ss.* 15, 16, 26, *Bengal Tenancy Act* (VIII *of* 1885)—*Right to recognition by the heirs of an occupancy raiyat—Sale in execution of rent-decree against some of several heirs of a recorded tenant—Effect.*—On the death of an occupancy-tenant, who was a recorded tenant, his right will devolve on his heirs. So, the heirs of the last recorded tenant, with respect to an occupancy-holding, are entitled to claim recognition from the landlord. If the latter, ignoring them, brings a suit for arrears of rent, and in execution of a rent-decree thereof, sells the whole *jama* (tenure and not an occupancy-holding), the right of the former is not affected. ANANDA KUMAR NASKAR v. HARI DASS HALDAR, **27 C. 545=4 C.W.N. 608.** (26 C. 677; *D.*; 24 C. 642, 26 C. 615, *R.*) [*D.*, 2 N. L.R. 101, 13 C.W.N. 1110.]

(32)—*Act* VIII *(B.C.) of* 1869, *s.* 64—*Sale of* ganti — Gantidaree *right against under-tenants.*—In a suit for arrears of rent, the defendants pleaded that no relationship of landlord and tenant existed between them and the plaintiff, and the Court found that the plaintiff was the sole owner of an estate of which the *gantidar* held in part, that is to say, as to a 12 anna share of his under-tenure, he being liable to pay the rent of the other 4 annas to the owner of the neighbouring estate. Plaintiff brought the *ganti* to sale in execution of a decree for arrears of rent due on the 12 anna share and purchased it himself, and the decree not being fully satisfied caused the tenant right in the 4 anna share to be sold and purchased it also. *Held* that s. 64 of Act VIII (B.C.) of 1869 did not apply, because the plaintiff was not a sharer in a joint undivided estate and that by his purchase, the plaintiff had become the absolute owner of the 12 annas' *ganti*, that is to say, of the share which fell within his estate, and as to the other 4 annas, he had acquired the right, title and interest of the last registered tenant. The result of that was to place him in the position, as against the under-tenants, of holding the 16 annas' *gantidaree* right subject to some possible question to be raised as regards the ultimate right to the 4 annas, which question, however, did not concern the under-tenants, they being bound to pay to the plaintiff as *de facto gantidar*, unless any of them should be found to have occupied the land without payment of rent. JOGENDRO CHUNDER GHOSE v. SHONA KALEE, **24 W.R. 313.**

(33)—*Act* XI *of* 1859, *s.* 54—*Lease of share.*—A lease of a share is protected under s. 54 of Act XI of 1859. That section does not apply only to incumbrances affecting the whole estate. KALEE PUDDO GHOSE v. MONOHUR MOOKERJEE, **7 W.R. 295.**

(34)—*Sale by Government to plaintiff's predecessors—Recognition of plaintiff's talook—*

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————i.—UNDER-TENUERS AND PORTIONS OF, SALE OF—*concluded.*

Absence of disclaimer of talookdaree right by plaintiff—Estoppel of Government.—Plaintiff sued for confirmation of his right as a *shikmee* talukdar under the Zemindar, the Government who became the purchaser of the estate under a sale for arrears of revenue. The Government pleaded that plaintiff had taken from it farming leases and executed kubooleuts inconsistent with the existence of the talook and that therefore it was now incompetent to him to claim under a title which, on the supposition that it once existed, he had advisedly relinquished. *Held* that Government had recognized the talook of the plaintiff and had sold it for arrears of rent to parties from whom the plaintiff claimed; and no clear disclaimer of his talookdaree title had ever been made by plaintiff. It was not competent to Government to deny the title of a tenure which they had, by selling once, guaranteed to the purchasers JEEBUN SINGH BURMONO v. THE COLLECTOR OF BACKERGUNGE, **2 W.R. 77.**

(35)—*Rent—Attachment of under-tenures—Legality of claim.*—There is no law authorizing the attachment of an under-tenure for arrears of rent, unless express power to do so be reserved in the lease. Rents becoming due after the right of the plaintiff to continue in possession legally ceased, cannot be recovered by a landlord who thus wrongfully kept his tenant out of possession. MUST. BIBEE COOLSOOM v. DHUNPUT SINGH, **7 W.R. 293.**

See APPEAL—ORDERS, 5 W.R. Act X, Rul. 35.

————*j.*—MISCELLANEOUS.

(1)—*Rent sale under Beng. Reg.* VIII *of* 1819—*Notice of Sale—Mode of service—Validity of sale.*—The procedure laid down in Reg. VIII of 1819 as to service of notice must be strictly followed to give validity to a sale under it; so that where service upon the defaulter personally was proved, but not service at his Kachari, *held*, the sale must be set aside. MAHOMED ZAMIR v. ABDUL HAKIM, **2 C. 67.** (9 C. 619=10 I.A. 19, 9 C. 931, *F.*) [*F.*, 27 M. 94=13 M.L.J. 479; *Appl.*, 19 C. 699; *Expl.* 19 C. 703.]

(2)—*Suit for share of arrears of rent—Jurisdiction—Act* VIII *(B.C.) of* 1869, *s.* 29—*Limitation — Deduction.*—A suit against putnidars under Act X of 1859 to recover half the rent mentioned in their kabuliyat having been dismissed on the objection that plaintiff's co-sharer had not been joined as co-plaintiff, and that judgment having been upheld in appeal, plaintiff brought a fresh suit under Act X of 1859, making the co-sharer a defendant. Defendants again objected that the question as to plaintiff's share being still open it could not be decided in the Collector's Court. This suit was also dismissed, and the dismissal

Sale—continued.

—— 3.—Sale for Arrears of Rent—*continued.*

———*j.*—MISCELLANEOUS—*continued.*

upheld on appeal. Plaintiff then brought her suit in the Civil Court. *Held* that s. 29, Act VIII (B.C.) of 1869 was not applicable to this suit, which was for a fractional share of certain arrears of rent after determination of a question raised by defendants for their own purposes, and came under the ordinary Procedure Code, Act VIII of 1859. *Held* that plaintiff was, under s. 14, Act XIV of 1859, entitled to an allowance of the period during which she was *bona fide* prosecuting her claim in the Revenue Court which from defect of jurisdiction, was not able to try it. HARISCHENDRA DUTT v. SRIMATI JOGADAMBA DASI, **8 B.L.R. 190, Note=16 W.R. 61.** [*F.*, 16 W.R. 287; *D.*, 8 B.L.R. 160=16 W.R. 235.]

(3)—*Execution by Civil Court not* ipso facto *legal—Persons not parties to decree or exempted from it, not liable to be proceeded against—Tenure, how far liable for its own arrears.*—It was urged on special appeal in this case: 1st.—That cl. 6, s. 23, Act X of 1859, contemplates suit only for illegal ouster, and as plaintiff's ouster was by process of Court,—*i.e.*, under orders of the Civil Courts, there was no illegal ouster, and consequently plaintiff's action was not maintainable. 2nd.—That every tenure is hypothecated for its own arrears so that every tenant of such tenure is liable to ejectment on failure to pay any rents due on the tenure and that thus the plaintiff was liable to be ejected from the tenure of the defaulter as he had not paid the arrears, and, consequently, there was the absence of any such illegal ejectment as could warrant the lower Courts giving the plaintiff a decree for possession. Both of the above grounds were held by the High Court to be untenable. On the first, the High Court observed that the fact of there being action under process of a Civil Court does not make such action *ipso facto* legal. Such an action would be illegal where it has been taken against persons who are not parties to the decree or, as was the case with the plaintiff here, or are distinctly exempted from the operation of the decree with possession reserved in express terms. On the second plea, the Court remarked that it is only when tenures are sold for their own arrears that there is a hypothecation and a liability of the tenure itself, in other hands than the defaulter's; for the arrears, and, that even then each case must be decided by its own circumstances. UMRUT LALL BHOSE v. SOORUBEE DOSSEE, **2 W.R. Act X, Rul. 86.**

(4)—*Execution-sale—Rent—Hypothecation—Act X of* 1859, *s.* 112.—The sale by a Civil Court of a judgment-debtor's rights and interests in a tenure in execution of a money-decree is, if not tainted by fraud, a good sale for what it is worth, and the same property cannot be resold in execution of a decree for arrears of rent against the former tenant. The produce of the land is by law (s. 112, Act X of 1859) hypothecated for the rent payable in respect thereof,

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

———*j.*—MISCELLANEOUS—*continued.*

but not the land itself. TIRTHANUND THAKUR v. PARESMONJHA, **10 B.L.R. 142, Note=13 W.R. 449.** [*R.*, 15 W.R. 319, 10 B.L.R. 139, P.C.=17 W.R. 197=14 M.I.A. 330.]

(5)—*Act* IV *of* 1870 (*B.C.*), *s.* 75—"*Holds a tenure direct from the Collector*," *meaning of the expression—Reg.* VI *of* 1822.—The words "holds a tenure direct from the Collector" as used in s. 75, Act IV of 1870 (B.C.), describe tenures which the Collector has himself created, during his management of the minor's estate, under his powers as manager. It is only those tenures which are so created that are described as being held "under the Collector" in Reg. VI of 1822. KALA BIBEE v. THE COLLECTOR OF CHITTAGONG, **23 W.R. 362.**

(6)—*Priority among putnidar—Creditor and other decree-holders of darputnidar—Surplus sale proceeds of darputni after satisfaction of prior rent-decree*—Where the balance of the sale proceeds of the darputni, after satisfaction of the putnidar's decree for arrears of rent, was attached by the same putnidar, in execution of a subsequent decree for arrears of rent, for the current year, along with holders of other ordinary decrees against the darputnidar, it was held that the putnidar could claim no priority over the other creditors and the surplus sale proceeds in the hands of the Collector were simply assets of the darputnidar liable to be divided rateably amongst his judgment creditors. GRISH CHUNDER MUNDAL v. DOORGA DOSS, **5 C. 494.**

(7)—*Sale of patni taluq—Suit to set aside.*—Suit to set aside a sale of *Putni Taluks*, for arrears of rent, on the ground of an irregularity in the proclamation of sale, as the lease was alleged to be held by the lessee in the *benamee*, and that the proper parties' name did not appear, dismissed, the *Ikrarnamah* creating the alleged trust being declared a forgery. MUSSUMAT KRIPOMOYE DEBIA v. GERISCHUNDER LAHORE. **8 M.I.A. 467 =1 Sar. 805.**

(8)—*Decree for arrears of rent—Sale—Surplus sale proceeds, right of unregistered tenant to.*—Where, in execution of a decree for arrears of rent, the tenure has been sold and there is a substantial surplus after satisfying the landlord's claim, an unregistered tenant who is the purchaser of a share of the tenure after the date of the above decree can maintain a suit for recovery of his share of the surplus sale proceeds. MATANGINI CHAUDHURANI v. SREENATH DAS, **7 C.W.N. 552.** [*R.*, 9 C.L.J. 479=13 C.W.N. 746.]

(9)—*Transferable cultivating tenure—Sale in execution—Prior incumbrances.*—A sale in execution of a decree for arrears of rent due on a transferable cultivating tenure does not void incumbrances created by the defaulter,

Sale—continued.

——3.—Sale for Arrears of Rent—*continued.*

————*j.*—MISCELLANEOUS—*continued.*

but is subject to prior incumbrances. SHAMBHAL DUBEY v. HAZARI MISR AND RAM DAS. **A. W. N. 1882, 11.**

(10)—*Decree for arrears of rent—Execution sale—Suit to set aside—Right of plaintiff.*—Where T obtained a decree declaring his right to and giving him possession of, a certain *jote* which was sold in execution of a decree for arrears of rent due from the former owner of the jote, and the appellate Court upset the decree on the ground that the plaintiff had no *locus standi*, he not having deposited the rent or given security and thus stopped the sale, *held* that there was no authority or any countenance for this in law. KOONJO BEHAREE ROY v. KAMINEE SOONDUREE DEBIA, **19 W.R. 230.**

(11)—*Tenure purchased in execution of decree for current rent not saleable for arrears of former years, such arrears recoverable from former proprietor.*—A tenure purchased in execution of a decree for the current rent, that may be due therefrom, cannot be again re-sold for the arrears that had accrued in respect of the rents of former years. The arrears of the former years, having become the personal debt of the former proprietor, would have to be recovered from him. The tenure itself should be deemed to have been hypothecated for the rent of the current year and sold therefore for the arrears of the current year. MUSSAMUT LUTEEFUN v. SHAIKH MEAH JAN, **6 W.R. 112.** [*F.*, 12 C. 597.]

(12)—*Sale of tenure for arrears of rent—Surplus sale proceeds—Suit by one co-sharer against the other—Suit for share of proceeds of immoveable property — Jurisdiction of Small Cause Court.*—Where a tenure belonging to two co-owners was sold in execution of a decree for rent against one co-sharer, and the sale proceeds, after satisfying the decree, were taken by such co-sharer, *held*, a suit by the other co-sharer to recover his moiety of the sale proceeds would lie against the former. The value of immoveable property is not within the purview of s. 6, Act XI of 1865; such a suit is not cognisable by a Small Cause Court, and a second appeal will lie. RAM COOMAR SEN v. RAM COMUL SEN, **10 C. 388.**

(13)—*Tenure, execution sale of—Non-statement of amount of rent in sale-proclamation—Material irregularity—Decree by sharer of rent—Execution sale of portion of tenure—Validity.*—An omission to state the amount of rent payable in respect of a tenure in the sale-proclamation of an execution sale is not a material irregularity under s. 311 of the Civ. Pro. Code, though perhaps an over-statement of such rent might be such an irregularity, as tending to lessen the price at which purchasers might be willing to buy. In execution of decree for arrears of rent obtained by a sharer in a tenure, it is not necessary that the entire tenure should

Sale—continued.

——3.—Sale for Arrears of Rent—*concluded.*

————*j.*—MISCELLANEOUS—*concluded.*

be sold; such sharer being entitled only to the right, title and interest of the judgment-debtor, and having no lien on the tenure, a sale of half the tenure only, the other half having been sold in execution of a mortgage-decree, was held a valid and good one. MOHENDRO COOMAR DUTT v. HEERA MOHUN COONDOO, **7 C. 723.**

(14)—*Sale—Notice—Value of the purchase.*—The notice of the interests to be put up for sale is alone what must be looked to as affording an estimate of the value and extent of the purchase. WOOMANATH ROY v. JOYUNTEE DEBIA, **W.R. 1864, 55.**

——4.—Sale for Arrears of Revenue and Cess.

a.—GENERAL.

b.—DEPOSIT OF MONEY AND STAYING SALE.

c.—PROCEEDS OF SALE, RIGHT TO.

d.—PURCHASERS, RIGHTS AND LIABILITIES OF.

e.—SALE OF SHARE OF ESTATE.

f.—SETTING ASIDE SALE AND ITS EFFECT.

g.—TENURES THAT ARE PROTECTED IN SUCH SALES.

h.—MISCELLANEOUS.

————*a.*—GENERAL.

(1) *Arrears of land revenue — Government's power to sell land.*—Whenever the land revenue is in arrears, Government is entitled to sell the land, whoever may be the defaulter, and thus to realize its due. BALKRISHNA VASUDEV v. MADHAVRAO NARAYAN, **5 B. 73.**

(2)—*Burden of proof—Sale of portion of zemindari for arrears of revenue—Rights of purchaser.*—Plaintiff, as purchaser at a revenue sale for arrears of revenue due on a zemindari, sued for arrears of rent collected by the defendant who was in occupation of a portion of the property purchased by plaintiff. Defendant contended that the portion occupied by him was, when it was waste and uncultivated, granted by a former zemindar to his predecessor in title, under a pottah, that the grantee brought the waste under cultivation and had ever since been in possession; he also contended that the lands so held by him were not included in the assets upon which the permanent assessment was fixed. The lower Courts had found that the plaintiff failed to make out that the lands in dispute had been included in the Permanent Settlement and that the defendant had made out the grant under which he claimed. *Held* that the plaintiff having failed to establish that the lands had been included in the Permanent Settlement, the revenue sale could give him no title. The suit

Sale—continued.

——**4.—Sale for Arrears of Revenue and Cess** —*continued.*

————*a.*—GENERAL—*continued.*

was accordingly dismissed. SREE RAJA ROW VENKATA NILADRY ROW v. VUTCHAVOY VENKATAPUTTY RAZ, **5 W.R. P.C. 80.**

(3)—*Equitable charge—Suppression of such a charge at a revenue sale, effect of.*—A purchased certain villages in the name of his son B. A being indebted to C, executed a mortgage-bond, and deposited the title-deed of these villages with C as security for the debt. C. afterwards, sued A, for recovery of the mortgage-debt, and ultimately obtained a decree in his favour. Pending this suit A died and was succeeded by B, his heir, against whom the suit was revived. B became a defaulter to Government, when the Government authorities seized the villages, and took steps for bringing them to sale to satisfy the Government demands. C informed the Government officer of his claim, and petitioned to have the sale stayed, but the Collector sold the villages as the property of B, suppressing the notice of the equitable charge of C upon the villages. C then sued B, the Collector and the auction-purchasers, claiming to be entitled to the sale-proceeds of the villages in the hands of the Government in satisfaction of his mortgage-debt. The Sudder Dewanny Court dismissed the claim of the plaintiff on the ground that the decree, made in the suit against A, was against the effects of A, and only applied to such property as B was in possession of at that time; that, as it had been sold to realise the demands of Government, the decree did not apply to the villages. Such judgment, on appeal, reversed, Judicial Committee holding: First, that the suit was properly instituted for recovery of the sale-proceeds in possession of Government, as the decree obtained by C against B operated as a conversion of the estate of A, making it assets in B's hands, which C had a right to follow. Secondly, that, as the Government had notice of C's equitable charge upon the villages, and suppressed that fact at the auction-sale to the purchasers, there was a clear equity in C to call upon the Government for payment out of the auction-proceeds received by them, and to have an account directed of the amount received by the Collector from the sale of the villages with interest, so far as the amount received would extend to the payment of his mortgage-debt. DOUGLAS v. THE COLLECTOR OF BENARES, **5 M.I.A. 271=1 Sar. 434.**

(4)—*Right of auction-purchaser—Act* I *of* 1845, *s.* 26.—An auction-purchaser of a zemindari at a sale for arrears of revenue is not entitled, under s. 26, Act I of 1845, to eject a holder of a lakhiraj tenure though *held* under an invalid title. DOORGA PERSHAD CHOWDHRY v. RAJENDRA NARAIN ROY, **2 Hay 121.**

(5)—*Reg.* VIII *of* 1819—*Purchaser of under-teuure—Decision against defaulting* putnidar—

Sale—continued.

——**4.—Sale for Arrears of Revenue and Cess** —*continued.*

————*a.*—GENERAL—*continued.*

Res judicata.—In the case of a person purchasing an under-tenure sold at the suit of the landlord, the purchaser is entitled to acquire rights higher than an ordinary purchaser by private contract only to the precise extent to which such privileges are conferred by express terms of law. The purchaser of a *putnee* talook is not entitled to set at naught all decisions arrived at against the defaulting *putnidar*. TARAPRASAD MITTRA v. RAM NIRSING MITTRA, **6 B.L R. App. 5=14 W.R. 283.** [*Expl.*, 12 C. 82; *R.*, 34 C. 868]

(6)—*Sale for arrears of revenue—Auction-purchaser from Government—Dependent talook—Talookdari right—Estoppel.*—At a sale for arrears of revenue, Government purchased a pargannah containing a certain talook belonging to A. The talook was not cancelled and the Government made successive temporary settlements with A in which his talookdari right was recognised. The right and interest of Government in the pargannah were afterwards sold to B who ousted A. A afterwards joined with C in taking a putni lease of the same land which he had in the talook. *Held*, in a suit by A against B and C, that his conduct estopped him from recovering possession of the defendant talook from which he was ousted by B. GOOROO PERSHAD CHUCKERBUTTY v. BANI NATH CHUCKERBUTTY, **2 C.L.R. 216.** (13 M. I.A. 317, 13 W.R. 24, *D.*)

(7)—*Bombay Survey Act* I *of* 1865, *s.* 36—*Purchaser—Registration—Tender—Collector's refusal to accept rent tendered by defaulter's mortgagee.*—The purchaser at a revenue sale, held in default of the payment of assessment, takes free of all incumbrances, although the revenue authorities without otherwise depriving the defaulter of his right of occupancy, under s. 36 of the Bombay Survey Act I of 1865, have only sold his right, title and interest. What operates to create the property recognised as a right of occupancy in the entry of the occupant's name in the Collector's books. A mere memorandum, therefore, declaring a person to be the successful bidder at the sale is not an instrument creating or declaring an interest in immoveable property, and requiring registration under s. 18, Act XX of 1866. The Collector may be responsible to the mortgagee of a revenue defaulter for refusing to accept the tender made by him of the Government rent, but if he does refuse it and the land is sold, the title of the purchaser is unimpeachable. GHELABHAI BHIKARIDAS v. PRANJIVAN ICHHARAM, **11 B.H.C. 218.** [*F.*, 5 B. 73; *R.*, 1 B. 577.]

(8)—*Ben. Act* X *of* 1871, *sale for arrears of Road Cess under—Right of purchaser.*—Where a portion of a mortgaged *lakhiraj* property had been purchased at an auction sale for arrears of road cess due under Ben. Act X of 1871, *held* in a suit by the mortgagee upon the mortgage, that the land so purchased was not saved from

Sale—continued.

——4.—Sale for Arrears of Revenue and Cess —*continued*.

————*a*.—GENERAL—*continued*.

liability on the mortgage bond, but that the entire property was liable to be sold in satisfaction of the claim in the suit. UMACHURN BAG v. AJADANNISSA BIBEE, **12 C. 430.**

(9)—*Sale in execution of decree for arrears—Liability of purchaser for rent for period anterior to sale—Notification of sale—Bengal Tenancy Act* VIII *of* 1885, *s.* 65.—Where a tenure or holding was sold in execution of a decree for rent with a notice that it was saddled with liability for arrears of rent for a period anterior to the date of sale, it was held that the purchaser was liable for the rent of such period. HARADHAN CHATTORAJ v. KARTIK CHANDRA CHATTOPADHYA, **6 C.W.N. 877.** (24 C. 37, *R* ; 21 C. 169, *D.*)

(10)—Kistbundy—*Revenue fixed by monthly instalments—Sale for arrears of monthly kist —Reg.* V *of* 1812—*Liability of whole estate to sale—Surety bond for payment of kist—Liability of zemindari to sale.*—A written instrument or *kistbundy*, for securing the payment of the kist by monthly instalments, though usual and advisable, is not necessary to entitle the Government to enforce such payment, if the revenue be a fixed monthly kist or instalment. By Regs. XIV of 1793 and VII of 1799, the Governor-General in Council may legally order a sale for the arrears of a monthly instalment of revenue before the close of the year, but to warrant that act, there must be an arrear of a previous year or of a monthly instalment. By Reg. V of 1812, if there be an arrear of the annual assessment or of a fixed monthly kist or instalment of that assessment unpaid on the first day of the following month, the Governor General in Council may order a sale and the Board of Revenue may direct the *whole* estate of the defaulting zemindar to be sold. Where the monthly payments are fixed and ascertained, the Government does not forego the right of selling the zemindari if default should be made in paying these instalments, by taking a bond from sureties, by which the estates of the sureties also were rendered liable for the due payment. KIRT CHUNDER ROY v. THE GOVERNMENT, **5 W.R.P.C. 41=1 M I.A. 383=1 Suther. 63=1 Sar. 131.**

(11 & 12)—*Mortgagor and mortgagee—Failure of mortgagor's widow to pay revenue—Deposit of money by mortgagee to prevent sale—Action by mortgagee under Act* I *of* 1845—*Decree against widow, executable only against her interest.*—The owner of a talook having mortgaged it, died leaving a childless widow S.K., who continued in possession of the talook. Respondent was the daughter of the mortgagor by a previous marriage. The mortgagee died shortly afterwards leaving S.G., his widow, who became entitled to the rights of her husband as the mortgagee of the talook. S.K., having failed to pay the revenue due to Government, the

Sale—continued.

——4.—Sale for Arrears of Revenue and Cess —*continued*.

————*a*.—GENERAL—*continued*.

talook would have been put up for sale and sold under Act I of 1845, if S G., in order to save it from sale, had not borrowed and deposited the necessary amount to discharge this debt. On a decree having been obtained by S.G., against S.K , the rights and interests of the former under that decree had been transferred to the appellant. The question raised on this appeal was, whether the appellant was entitled to charge on the talook and to have it sold in its entirety to pay the amount of the money paid to the Government as revenue. Their Lordships of the Judicial Committee were of opinion that what they had to decide was not whether such a charge originally existed or subsisted at present, but whether appellant could enforce such a charge in the present suit. The question was not whether one who pays the arrear of the rent does not acquire thereby a charge on the talook which he saves from sale, but whether, if he seek to enforce that right, he must not do so in a suit properly framed for that purpose and not merely in a suit confined to a personal remedy against the person in possession of the talook Their Lordships, *held*, concurring with the opinion of the High Court, that where the person who had paid the arrears sought re-payment only under s. 9, Act I of 1845, as against the person in possession of the talook having but a limited interest therein, and confined his suit to that object, the decree so obtained against the person in possession can only be made effectual against the property of that person, including such interest as she had in the talook Their Lordships wished it to be understood that the above ruling should not be taken to impair the general rule that in a suit brought by third person, the object of which is to recover or to charge an estate of which a Hindu widow is the proprietress, she could, as defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest. NUGENDER CHUNDER GHOSE v. SREEMUTTY DOSSEE, **8 W.R. P.C. 17=11 M.I.A 241=2 Suther. 77=2 Sar. 275.** [*Appr.*, 24 W.R. 306 ; *Rel.*, 30 C. 794=7 C.W.N. 609 ; *R.*, 17 W.R. 421, 22 W.R. 411, 1 C. 133=2 I. A. 275, 2 C. 222, 3 C. 198, P.C.=1 C.L.R. 49 =4 I A. 247, 2 C.L R. 538, 4 C. 539=6 C.L.R. 28, 5 C. 144=4 C.L R. 465, 5 C. 425=5 C.L. R. 112, 8 C. 517, 8 C. 898=10 C.L.R. 505, 4 A. 532=2 A.W N. 133, 6 B. 564, 7 B. 91, 10 C. 823, F.B., 8 A. 384, 11 B. 119, 11 B. 313, 14 C. 809, F.B., 14 A. 273, F.B., 22 C. 974, 20 B. 338, 22 B. 440, 22 M. 332=9 M.L.J. 166, 3 Bom. L R. 322, 26 B. 437=4 Bom. L.R. 90, 5 Bom. L.R. 885, 26 M. 686, F.B., 6 C.L.J. 490, 17 M.L.J. 160 ; *Cons.*, 13 A. 195=10 A. W.N. 228 ; *D.*, 23 W.R. 174.]

(13)—*Sale for arrears of revenue—Revenue Sale Law (Ben. Act* XI *of* 1859)—*Revenue, payable in several kists—Proprietor, if entitled to pay entire demand in last kist.*—A proprietor is

Sale—continued.

——4.—Sale for Arrears of Revenue and Cess *—continued.*

——a.—GENERAL—*continued.*

bound to pay the revenue of a kist within the date fixed by the Board of Revenue for the payment of that particular kist, and is not entitled to pay the whole demand on the date fixed for the last kist, and so where he makes default in payment of one kist, his estate is liable to be sold for arrears of revenue on any subsequent day. KALI PROSUNNO BOSE v. KRISHNA CHANDRA, **7 C.W.N. 570.**

(14)—*Arrears sent by revenue money-order in time but* Towiz *number wrongly described—Sale of estate—Land Revenue Rules, R.* 25—*Duty of Collectorate to point out mistake—Sale set aside.*—The exact amount of revenue due in respect of an estate was sent by a revenue money-order to the Collectorate, but the estate was described by a wrong *Towiz* number. The Collectorate credited the amount to the estate covered by the wrong number and brought to sale the estate in respect of which the money was remitted, the remitter having been lulled into a belief that the amount was properly credited by means of a receipt sent by the Collectorate. In a suit to set aside the sale, the defence relied on an endorsement on the back of the money-order that the remitter would be liable for any mistake and the Collectorate would be guided by the *Towiz* number mentioned in the money-order. *Held*, that, notwithstanding the existence of the endorsement on the money-order, the sale was liable to be set aside, as under R. 25 of the Land Revenue Rules, it was the duty of the Collectorate to draw the attention of the remitter to the mistake and give him an opportunity of rectifying it. The endorsement did not relieve the Collectorate from this responsibility. SYED SHAW HAMID HOSSEIN SAJADA NASIN v. CHOWDHRY SHAIK MUKHDUN RAZA, **9 C.W.N. 300=32 C. 229.** (25 C. 833, *Appl.*)

(15)—*Revenue—Irregularity in sale advertisement—Act* I *of* 1845, *s.* 6—*Act* IX *of* 1854—*Sale set aside.*—Sale for arrears of Government revenue set aside. The sale advertisement being irregular, first, in not being published in conformity with s. 6 of Act No. I of 1845; and secondly, the *Mehals* not being sold in their consecutive numbers, in the *Towjee*, or Register of the Collector of the District, as provided by s. 14 of that Act. Such an irregularity is not cured by Act No. IX of 1854, which relates only to technical errors of procedure in the Lower Court, which are not productive of injury to either parties. MAHARAJAH MAHASHUR SINGH BAHADOOR v. BABOO HURRUCK NARAIN SINGH, **9 M.I.A. 268=1 Sar. 854.**

(16)—*Revenue sale—Share in default, extent of—Erroneous supposition—Third person's right sale of, validity of.*—An act of Collector, if without jurisdiction, cannot affect the title of the owner. Where the officers in the Collectorate erroneously supposed that the share in

Sale—continued.

——4.—Sale for Arrears of Revenue and Cess *—continued.*

——a.—GENERAL—*continued.*

default was much larger in extent than it really was, and under that impression, exposed for sale the share of the plaintiffs in respect of which no default had been made, the sale was beyond the statutory authority vested in the Collector and could not prejudice their rights. GANGA PERSHAD SAHU v. IRSHAD ALI KHAN, **15 C.L.J. 54=13 Ind. Cas. 959.**

(17)—*Defaulting co-sharer's right to purchase at revenue sale—S.* 53, *Ben. Act* XI *of* 1859—*Intentional default—Fraud—Dissuasion of bidders.*—Every co-sharer in a zamindari may if he chooses bring it to sale by not paying the revenue; but every other co-sharer can save it from sale by paying the arrear and can recover the amount from the defaulter. The fact of the defaulter being a co-sharer in the property would not clothe him with any fiduciary character which would disqualify him from buying the property, unless it be for the benefit of all the co-sharers. Under s. 53, Act XI of 1859, a defaulting co-partner is at liberty to buy the estate in arrear. The right of a co-sharer to buy an estate at a revenue sale is not based upon any right or interest that is common to him and his co-sharers. [*R.*, 1 C.L.J. 565.] In the absence of misrepresentation or concealment, the fact that a co-sharer intentionally defaults does not constitute fraud. Dissuasion of bidders is not necessarily an act of fraud. DOORGA SINGH v. SHEO PERSHAD SINGH, **16 C. 194.** (3 C. 300, *D.*) [*F.*, 18 B. 342, 97 P.L.R 1901=37 P.R. 1901; *R.*, 19 M. 315, L.B.R. 1893—1900, 477, U.B.R. 1897—1901, Vol. II, 317, 24 B. 622, 1 C.L.J. 85.]

(18)—*Sale for arrears of revenue—Notification, contents of—Revenue sale, setting aside for fraud—Act* XI *of* 1859, *s.* 33.—The notification of a sale for arrears of revenue need only specify the estates or shares of estates and their number in the Collector's office; but not necessarily the names of the mouzas included in the property to be sold. [*Appl.*, 13 C. 208; *R.*, 8 C.W.N. 337.] S. 33 of Act XI of 1859 does not mean that a suit to set aside a sale on the ground of fraud can, under no circumstances, be brought. AMIRUNNISSA KHATOON v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **10 C. 63=13 C.L.R. 131.** [*F.*, 32 C. 111=8 C.W.N. 757.]

(19)—*When brought about by fraud, cannot be set aside—No equitable relief if there are innocent and* bona fide *purchasers.*—A sale for arrears of revenue cannot be set aside on the ground of fraud, if the sale would have taken place whether or no there was fraud. Further, the auction-purchasers cannot be compelled, by way of equitable relief, to re-convey the property purchased to the party affected by the

Sale—continued.

—4.—Sale for Arrears of Revenue and Cess—*continued.*

—*a.*—GENERAL—*continued.*

fraud, if there are innocent and *bona fide* purchasers, not being parties to the fraud. DEONANDAN SINGH v. MANBODH SINGH, **32 C. 111=8 C.W.N. 757.** (10 C. 63, *F.*; 3 C. 300, *D.*)

(20)—*Impeaching sale for arrears of revenue —Reg* XI *of* 1822.—The right to impeach a sale of lands for arrears of Government revenue extends not only to the defaulting proprietor, but to derivative holders under him. By Ben. Reg. XI of 1822, s. 30, all under-leases are extinguished by a Government sale of the proprietor's land for arrears of revenue, and an auction-purchaser takes the lands clear of all under-tenures. At a sale by Government for arrears of revenue, the Government became purchasers, and afterwards granted a lease of the lands for a term of years, and put their lessees into possession. At the time of the sale, the lands were subject to an *istimrary* lease. No suit was instituted to reverse the sale, but the Government, some time afterwards, in consequence of doubts as to the legality of the sale, offered to give up their rights under the sale, and to restore the lands to the original proprietors subject to the recognition of the claims of their lessees. This offer resulted in an arrangement between the Government, the original proprietors, and the Government lessees, and, eventually, the original proprietors upheld the lease to the Government lessees to a part of the lands called the *Jungle Mehal*, for a term of years at a reduced rent. In a suit by the *istimrary* lessee for possession, *held* (reversing the decree of the Sudder Court), that by Ben. Reg. XI of 1822, s. 30, the *istimrary* lease was determined by the sale for Government arrears, and that the arrangement by which the lands were restored to the proprietors, subject to the rights of the Government lessees, was in the nature of a compromise, and not such an unconditional restoration as amounted to a reversal of the sale, and the consequent revival of the *istimrary* lease. *Aliter*, if a suit had been brought, and a decree of the Court made for the reversal of the sale. WATSON v. SREEMUNT LAL KHAN, **5 M. I.A. 447=1 Sar. 468.**

(21)—*Execution sale—Purchase benamee for judgment-debtor — Subsequent sale* —Plaintiff sued to recover possession of a share in a certain estate, alleging that he had purchased that share at a sale in execution of a decree obtained by one N against the owner S, that, under a sale held by the Collector in execution of a decree under Act X of 1859, the same estate had been knocked down to another party, and thereupon the Collector, on the application of that party, had illegally dispossessed the plaintiff. It was found that the purchase by the plaintiff was not *bona fide*, but that previously the right, title and interest of the decree-holder in that decree had been purchased *benamee* on behalf

Sale—continued.

—4.—Sale for Arrears of Revenue and Cess—*continued.*

—*a.*—GENERAL—*continued.*

of and for the benefit of S, the judgment-debtor. *Held* that the person who really purchased was the judgment-debtor himself, and that consequently, the person who obtained the decree in the rent suit could properly sell either the estate or the right, title, and interest of the judgment-debtor in that estate. LALLA JUGGESSUR SAHOY v. GOPAL LALL, **15 W.R. 54.**

(22)—*Sale for arrears of revenue, liability of, to be set aside notwithstanding lapse of time*—Bona fide *sale—Compensation awardable to purchaser.*—Plaintiffs sued in the year 1821 to set aside a sale of a zemindari made in the year 1802 for arrears of revenue. The long delay in filing the suit, though forming matter for consideration with reference to the judicial discretion to be exercised by the Court, and the mode of exercising it, was admitted on the part of the appellant not to form an objection to the jurisdiction or a bar to relief in the case. The main question was whether the case fell within either of the predicaments enumerated in cl. 2 of s. 3 of the Reg. I of January 1821, under which the proceedings arose. For, if not, the Commissioners might well have been contended to be without authority in the matter. The Judicial Committee was of opinion that, without any undue extension of the wordings of the said Regulation, this case might be held to go within one of the predicaments described in the Act; the Committee however did not agree with the Sudder Commission in their conclusion that justice did not require the power of directing payment by the successful party to the party deprived of possession or the power conferred by cl. 2 of s. 4 to be exercised. They thus concurred in the conclusion that the sale was liable to be set aside irrespective of the great lapse of time, but were of opinion that both justice and policy required that each of the powers above mentioned should be called into account and thus ordered that in consideration of the *bona fide* character of the sale, the purchaser should be awarded compensation. BABOO DEEP NARAIN SINGH v. LAL CHUTTERPUT SINGH, **6 W.R. P.C. 27 =3 M.I.A. 100=1 Sar. 245.** [*R.*, 2 C.L.J. 516, 6 C.L.J. 273, F.B.=11 C.W.N. 983=35 C. 34, 7 C.L.J. 563=35 C. 701=12 C.W.N. 657.]

(23)—*Share of estate, ownership in—Benami transfers—Actual possession or receipt of rents, importance of.*—Where there are benami transactions in respect of a share of an estate, and the question is who is the real owner, the actual possession or receipt of the rents of the property is most important. Such fact of actual possession or receipt of rents would also be material with reference to the bar of limitation by adverse possession. IMAMBANDI BEGUM v. KAMLESWARI PERSHAD, **14 C. 109, P.C.=13 I.A. 160=4 Sar. 732.**

Sale—continued.

——4.—Sale for Arrears of Revenue and Cess—*continued.*

———*a.*—GENERAL—*continued.*

(24)—*Sale for arrears of revenue—Collector, incompetent to sell whole talook in one lot—Confirmation by Board of Revenue of unauthorised sale by Collector—Appropriation of surplus proceeds by defaulting proprietor, effect of.*—The question was whether the sale of the whole talook in one lot for arrears of revenue which might have been paid off by the proceeds of some definite portion of the talook, was out of the scope of the authority of the Collector; for, if the Collector had no authority to sell the whole talook under the circumstances at the time of the sale, there could be no implied validation of the sale by the subsequent appropriation of the surplus proceeds by the defaulting proprietor. Also, any subsequent confirmation of the sale by the Board of Revenue cannot render valid the act of the Collector which he was not competent to do by the principles of the regulation and by the general rules or by specific authority from the Board of Revenue, which should have been conferred previous to the sale. On the contention that the irregularities, in the improper and unnecessary sale of the whole talook in one lot, in the form of the advertisement and the manner of the service, had been waived by the defaulting proprietor having appropriated the surplus proceeds to her own purposes, so as to deprive her of the claim to annul the sale on the ground of irregularities, their Lordships were of opinion that the proprietor's acquiescence on the belief that there was the authority of the Board of Revenue for the sale, cannot give legal efficacy to a sale altogether void on account of the absence of any such previous authority. In this case, the Court below, without entering into any investigation of the profits made by the purchaser, appellant, during his occupation of the estate, had assumed that he had re-imbursed himself of the purchase-money with interest out of the profits of the estate. Being of opinion that there was no ground upon which the Court could found such a decision, their Lordships directed that an account should be taken of the principal and interest due to the appellant in respect of the purchase-money already paid by him, and also of the net profits made by him out of the estate during his occupation, and that, upon payment to him by the respondent of what might be found due on taking such account, possession of the talook should be delivered to the proprietor. Further, because the appellant stood acquitted of any blame whatever in the transaction, their Lordships reversed the decrees of both the Courts below so far as they condemned the appellant in costs, and ordered that each party should bear his own costs in all the Courts. MITTERJYEET SINGH v. THE HEIRS OF THE WIDOW OF JUSWUNT SINGH, **6 W.R. P.C. 15=3 M.I. A. 42=1 Sutherl. 114=1 Sar. 235.**

(25)—*Act* XI *of* 1859, *s.* 5—*Scope—Attachment—Sale for arrears of revenue—Appointment of manager by Court—Effect on attachment.*—Act XI of 1859 is to a great extent a remedial Act passed for the benefit of the subject, and in order to relax the stringency of former Statutes whereby the Crown was empowered to sell estates for non-payment of revenue. Where an estate or a share in an estate not severed for the purposes of revenue is under attachment by order of a Civil Court in execution of a decree, such estate or share cannot under s. 5, Act XI of 1859, be sold for arrears of revenue without the notice required by s. 5 of that Act. The words "arrears of estates under attachment by order of any judicial authority" apply to attachments in execution under the Civ. Pro. Code, 1859. The words are not limited to attachments by the revenue authorities. The words "arrears of estates under attachment" are not confined to estates the whole of which are under attachment. The section would apply even if a portion of an estate is not under attachment. The appointment by Court of a surbarakar or manager for an estate under attachment in execution of a decree does not supersede the attachment. BUNWARI LAL SAHU v. MOHABIR PERSAD SINGH, **12 B.L. R. 297, P.C.=1 I.A. 89=3 Sar. 338.** [*R.*, 11 C. 200, 13 C. 208, 17 C. 398, 21 C. 354, 22 C. 738, 1 C.L.J. 565.]

(26)—*Decree against defaulting proprietor, admissibility of, against purchaser at—Thak map, value of.*—A suit was brought for the recovery of *khas* possession of certain lands. The plaintiffs alleged that the plaint lands originally formed part of a certain permanently settled *mehal* which was sold for arrears of revenue, that the purchaser of the *mehal* mortgaged the plaint lands to the plaintiffs, that the plaintiffs brought a suit upon the mortgage and, in execution of their mortgage decree, they purchased the plaint lands at the Court sale, and that, when they went to obtain delivery of possession of the lands, they were obstructed by the defendants. Hence the present suit. The second defendant was the real contesting defendant. The contention of this defendant was that the plaint lands did not belong to the *mehal*, which was sold for arrears of revenue, but to another estate, from the proprietor of which estate she traced her title. The defendant placed reliance upon a compromise-decree of 1863, which was passed in a litigation between the original proprietor referred to by her and another person. The plaintiffs relied upon a *thak* map prepared in 1859 and 1860. The decree of 1863 was passed in a suit brought to rectify the mistake alleged to be found in the *thak* map. The Subordinate Judge, who tried the case, holding that the decree of 1863 was relevant, binding and admissible as against the plaintiffs, dismissed the suit. Plaintiffs appealed to the High Court. *Held*, the decree of 1863, though binding upon

Selbstverständlich. Selbstverständlich. Selbstverständlich.

—continued. —continued. —continued.

Sale—continued.

— 4.—Sale for Arrears of Revenue and Cess —*continued.*

——— *b.*—DEPOSIT OF MONEY AND STAYING SALE—*continued.*

property had been mortgaged. BADAUM KOOWUR v. LALLA SEETUL PERSHAD, **5 W.R. 126.** [*F.* 10 W.R. 115.]

(4)—*Act* XI *of* 1859, *s.* 9—*Decree for possession obtained by mortgagee—Subsequent payment of revenue—Suit to recover such money whether maintainable.*—Where a mortgagee who had obtained a decree for possession with mesne profits, subsequently paid a quarterly kist of of Government revenue, he could not afterwards institute a suit against the mortgagor for its recovery, as he was the proprietor of the estate in arrears when the kist was paid by him, and he was not the party contemplated in s. 9 of Act XI of 1859. JUSSODA DOSSEE v. MATUNGINEE DOSSEE, **12 W.R. 249.**

(5)—*Sale in execution—Payments by inchoate purchaser to save property—Arrangement with Mokurrureedar for payment—Suit for money paid.*—A person who has acquired an inchoate right in a property by his purchase at an auction sale in execution of a decree is justified, while the proceedings with regard to the validity of the sale are pending, and before the confirmation of sale, to protect the property from sale to another, whether for arrears of Government revenue or for payment of the amount of a decree for which the property has been attached. If the sale to him is set aside, he is entitled to the amounts *bona fide* paid by him for the preservation of the estate, and his remedy lies against the party to whom the estate is restored. If the latter had come into any arrangement with *mokurrureedars* whereby they have stipulated to pay the Government revenue for him, the mokurrureedars cannot be made liable to the inchoate purchaser for the payments made by him, there being no privity of contract between them and him. RAJAH HOSSEIN BUKSH KHAN v. BABOO ROY DHUNPUT SINGH BAHADOOR, **18 W.R. 289.** [*R*, 17 B. 375.]

(6)—*Putneedar paying revenue—Receipt of Zemindar—Effect.*—Where a putneedar pays revenue into the Collectorate for saving the estate from sale, when the payment by zemindar is credited by the Collector as deposit but not as revenue and a receipt is given to the zemindar accordingly, *held*, that such receipt is a sufficient payment of the putnee rent to the zemindar. JOTINDER MOHUN TAGORE v. MUSSAMUT KISHEN MONEE DABEE, **W.R. 1864, Act X, Rul. 10.**

(7) *Act* XI *of* 1859, *s.* 9—*Payment of arrears of revenue due by defaulting proprietor—Payer's right of action—Privity.*—In order that a person, who pays into the Collectorate under s. 9, Act XI of 1859, arrears of revenue due by a defaulting proprietor, may maintain a suit against the latter to recover the amount paid, it is not necessary that there should be any

Sale—continued.

— 4.—Sale for Arrears of Revenue and Cess —*continued.*

——— *b.*—DEPOSIT OF MONEY AND STAYING SALE—*continued.*

privity between the parties. It is enough that the payment is made in order to protect an interest of the payer which would have been endangered or damaged or which he believed in good faith would have been damaged or endangered by the sale to prevent which the payment was made. Thus, where a lessee of one of the proprietors of an estate, paid arrears of revenue due by them, he was held entitled to sue his lessor's co-proprietors for their share of the revenue which he paid. WOOMA MOYEE BURMONYA v. J. HILLS, **11 W.R. 377.**

(8)—*Revenue paid by a* mokurrureedar *for his predecessor, recoverability of—Payments of revenue in excess of lease, not recoverable.*—Where a purchaser of the *mokurruree* of four out of five mouzahs of the estate pays certain instalments of revenue due to Government on account of his predecessor, he has a right to sue to recover the sum so paid from the former *mokurrureedar*. The lower court had wrongly directed that the plaintiff should sue under Act X of 1859. But the High Court held that that Act was not applicable, the parties not standing in the position of landlord and tenant and the instalments claimed not being due as arrears of rent. Further, payments made by the plaintiff were not voluntary payments but necessary payments made in order to save the estate from sale. The whole five mouzahs of the estate would certainly have been sold, had not the plaintiff as *mokurrureedar* of the four mouzahs paid the Government revenue for his neighbour, the *mokurrureedar* of the fifth mouzah. Plaintiff had also appealed as respects a claim which he had made against the Zemindar in the suit for some excess payment made by plaintiff on account of the Government revenue of the four mouzahs which he held under the Zemindar. But the High Court concurring with the lower Court decided that plaintiff could not recover on the said account. It was his duty to pay the Government revenue according to his *mokurruree* lease. If he had paid more than he ought, he must bear the loss if it was a loss. But, under such circumstances the excess might be credited to the revenue of the following year. BUNWAREE KISHORE v. JOY CHUNDER GOSSAIN, **2 W.R. 262.**

(9)—*Debt—Necessity—Lender—His obligation.*—A lender is not bound to enquire into the exact amount necessary to be borrowed. It is sufficient if he satisfies himself of the existence of a necessity to justify him in looking to the estate for re-payment. NUFFER CHUNDER BANERJEE v. GUDDADHUR MUNDLE, **3 W.R. 122.**

(10)—*Revenue Recovery Act,* II *of* 1864, *s.* 35 — *Part owner paying whole revenue due to save his interests—Contribution—Contract Act, ss.* 69, 70.—Where one of two part owners of

Sale—continued.

——4.—Sale for Arrears of Revenue and Cess —*continued.*

————*b.*—DEPOSIT OF MONEY AND STAYING SALE—*concluded.*

land held under one patta pays the whole of the revenue due on the patta to protect his own interests, he is entitled to claim contribution from the other, of his share of the revenue, and to a charge in respect of it on his share of the holding. SESHAGIRI v. PICHU, **11 M. 452.** [*F.*, 17 M. 247, 26 M, 686, F.B.; *R.*, 24 M. 96, 4 M.L.T. 469; *D.*, 15 M. 258.]

(11)—*Revenue Recovery Act, s.* 35—*Defaulter —Registered proprietor.*—Not only registered proprietors but real owners and their holdings may be treated as defaulters within the meaning of s. 35 of the Revenue Recovery Act. SRINIVASA THATHACHAR v. RAMA AYYAN, **17 M. 247=4 M.L.J. 73.** (11 M. 452, *F.*) [*R.*, 4 M.L.T. 469, 19 M.L.J. 279.]

(12)—*Revenue Recovery Act* (*Madras*), *Act* II *of* 1864, *s.* 37—*Attachment for arrears of revenue—Tender of full amount due—Sale for arrears accrued since attachment.*—The revenue due on the plaintiff's mitta for a certain fasli fell into arrear, and a portion of it was attached and advertised for sale. The plaintiff tendered the full amount due. Meantime the revenue payable for the next fasli had become due and had not been fully paid up. The Collector refused to stay the sale and sold the land attached in order to recover the arrears due for the said second fasli. The Government became the purchaser at the sale. Plaintiff sued to set aside the sale. *Held* that the sale was not valid. SECRETARY OF STATE FOR INDIA v. RAJAH GOUNDAR, **22 M. 5=8 M.L.J. 224.**

————*c.*—PROCEEDS OF SALE, RIGHT TO

(1)—*Mortgage—Revenue sale—Surplus proceeds—Mortgagee's lien.*—When mortgaged lands are sold for arrears of Government revenue, not accrued through the default of the mortgagee, any proceeds which may arise from the sale in excess of the arrears belong to the mortgagee, and he has a right of action for their recovery. HEERA LALL CHOWDHRY v. JANEKEENATH MOOKERJEE, **16 W.R. 222.** [*F.*, 6 C. 142=7 C.L.R. 896; *R.*, 1 Ind. Cas. 45=13 C.W.N. 357.]

(2)—*Arrears of revenue—Sale in execution of decree of portion of mahal—Payment out of surplus sale-proceeds of arrears due on part sold —Judgment-debtor's right—Act* XIX *of* 1873 (*N.W.P. Land Revenue Act*), *s.* 146—*Civ. Pro. Code*, 1877, *s.* 316.—Where an execution-sale took place under the Civ. Pro. Code, 1877, the title of the purchaser, under s. 316 of that Code, dated from the sale. Therefore, where the surplus sale-proceeds on the sale of part of a mahal were attached by the Collector for arrears of Government revenue due upon the whole mahal, the purchaser, being the proprietor of the part purchased, and being, therefore, under s. 146 of the Land Revenue Act, liable

Sale—continued.

——4.—Sale for Arrears of Revenue and Cess —*continued.*

————*c.*—PROCEEDS OF SALE, RIGHT TO. —*concluded.*

for the arrears due on such part, is liable to reimburse the judgment-debtor (the person entitled to the surplus sale-proceeds) the amount of the arrears due on his part of the land, which must be held to have been paid *in invitum* by the judgment-debtor. RAM CHAND v. FATEH SINGH, **6 A. 112=A.W.N. 1883, 240.**

(3)—*Attachment in execution, withdrawal of, on agreement—Attachment by another decree-holder—Sale in execution—Purchase by first decree-holder—Suit for recovery of price paid from sale-proceeds—Act* VIII *of* 1859, *s.* 270.—In executing a decree obtained by the plaintiff against the estate of one H L., he attached a house appertaining to that estate; plaintiff subsequently agreed with a son of H.L. to take the amount of the decree by instalments on certain terms set forth in an application filed by the parties to the agreement, which provided that the attached property should remain hypothecated and attached under the decree. Subsequently, the present defendant obtained another decree against the said son of H L. and attached the house in execution. Plaintiff afterwards obtained a fresh attachment of the house in execution of his decree, and contention arose as to whether the house should be sold in satisfaction of the plaintiff's or the defendant's decree. It was sold in satisfaction of the latter's decree according to the order of the Munsiff and purchased at auction by the plaintiff, and the sale-proceeds made over to the defendant under the provisions of s. 270 of Act VIII of 1859. In the present suit, the plaintiff claimed to recover the sale price paid by him, from the defendant, on avoidance of the above orders, by establishment of his own superior right in virtue of his decree and the agreement filed with reference to it. The High Court concurred in the decision of the lower Courts that the plaintiff's first attachment had been removed by the Munsiff's order and could no more be pleaded as giving the plaintiff a right superior to that of the defendant. Also, the fact that the house was said to be hypothecated, by means of the petition filed, for the purpose of securing the judgment-debt under the plaintiff's decree, could not be treated as supporting the claim. The plaintiff might perhaps have enforced his lien on the house if he had let somebody else to buy it, and any one else so buying would have bought it subject to the lien of the plaintiff. As however, plaintiff chose to himself buy the house in auction with his lien upon it, his lien ceased to be of any use to him. GURSAHAI v. RAM DIAL, **7 N.W.P. 91.**

————*d.*—PURCHASERS, RIGHTS AND LIABILITIES OF.

(1)—*Sale of Talook for arrears of revenue—Purchaser of rights of Government not bound by*

Sale—continued.

—— 4.—Sale for Arrears of Revenue and Cess —*continued.*

——— *d.*—PURCHASERS, RIGHTS AND LIABILITIES OF—*continued.*

another estate, the acts and settlements of any holder of the estate done diligently and in faithful performance of the duty of a good landlord, with due regard to the interests of the estate, bind and ought to bind all his successors by whatever title. BOY KUNTNATH CHATTERJEE v. AMEROONISSA KHATOON, **2 W.R. 191.** [*R.*, 6 W.R. 197, 8 A. 324=A.W. N. 1886, 101, 34 C. 868; *D*, 8 W.R. 222.]

(15)—*Sale for arrears of revenue, right of purchaser at, to recover revenue paid by him from defaulter—Act* XI *of* 1859.—Plaintiff, a purchaser at a revenue sale under Act XI of 1859, claimed from the defendant, who was the defaulter, the revenue on the property. The first Court held that the defendant was not liable but the appellate Court gave plaintiff a decree. On special appeal the High Court *held* that the plaintiff could not recover on any ground. He bought the estate subject to all liabilities under the law and subject to all the rights of the defendant under that law. The fact on which the lower appellate Court based its decree, even if it be correct, *viz.*, that the greater part of the rents of an estate are paid in the *Pous kist*, could not give any claim under the Act to the purchaser of the estate to be reimbursed the revenue which he is obliged under the law to pay for the month of *Pous*. The purchaser knew full well the rights and liabilities of himself as well as that of the defaulter under the law, and made the purchase subject to the provisions of the law. KHEMA SOONDAREE DOSSIA v. NUND KOOMAR GOOPTO, **4 W.R. 75.**

(16)—*Sale law under and prior to Act* XI *of* 1859—*Rights of persons acquiring estate by purchase in auction.*—The principle under which purchasers of estates at revenue sales acquire such estates in the condition they were at the Permanent Settlement, is equally recognised by Act XI of 1859 as by the sale laws previous to it, and the principle applied as much to actual encroachments on the talook or estate by neighbours as to incumbrances or under-tenures created on it by the old proprietor or by his laches. GOLUCK MONEE DOSSEE v. HURO CHUNDER GHOSE, **8 W.R. 62.** [*Appr.*, 22 C. 244; *R.*, 8 W.R. 222, 14 C.L.J. 137.]

(17)—*S.* 28, *Act* XI *of* 1859—*Sale for arrears of revenue, purchaser at—Sale certificate showing that estate sold was "entire estate"—Estate recorded under distinct number on* touzi—*Effect.*—The mere fact of the estate sold comprising undivided shares in certain villages does not prevent its being an entire estate, when it is recorded under a distinct number on the *tozi* or rent-roll of the Collector with a separate revenue assessed upon it, and when the sale certificate, granted to the auction-purchaser under s. 28, Act XI of 1859, shows that the estate sold was an entire estate. PREONATH MITTER v. KIRAN CHANDRA ROY, **27 C. 290.** (2 C.W.N. 229, *F.*; 20 W.R. 44, 15 C. 555, 3 C.W.N. 341, *R.*)

(18)—*Act* XI *of* 1859, *s.* 32—*Howala and neem-howala tenures—Regular payment of jumma—Right of purchaser of ousut talook to eject tenure holders.*—S. 32, Act XI of 1859, did not authorise the purchaser of an ousut talook to eject the holders of certain howala and neem-howala tenures, which were never set aside by the Revenue Settlement or Revenue Commissioner's orders, from the time they were recorded as existing rightful hereditary tenures of those classes at the first settlement, so long as the holders of the tenures paid their jumma according to the settlement jummabundee. BURODA KANTH LAHA v. GOBIND CHUNDER GOOHO, **7 W.R. 50.**

(19)—*S.* 34, *Act* XI *of* 1859 (*Revenue Sale Law*)—*Execution sale for arrears of Government Revenue—Suit to set aside sale by defaulting tenant—Decree obtained not executed within six months—Suit by auction-purchaser for recovery of possession of share bought at sale.*—Default in payment of Government Revenue having been made by some co-sharers in an estate, wherein they held shares separately, their shares were sold up. A suit was brought to set aside that sale by one of the defaulters, and he obtained a decree: but he brought himself within the operation of s. 34 of the Revenue Sale Law in 1859, inasmuch as he failed to execute his decree within six months from the date thereof. Subsequently, the plaintiff who was the purchaser brought a suit to recover possession of the recorded share that he bought. *Held*, that the effect of s. 34 of the Revenue Sale Law, by reason of the neglect on the part of the defaulter to take advantage of the decree obtained by him annulling the sale, was to restore that sale so far as concerned the defaulter or those whose rights were sold at that revenue sale, and who had not thought it proper to join in the suit to have the sale set aside. ABDOOL LATIFF v. YOUSUFF ALI, **21 C. 255.**

(20)—*Act* XI *of* 1859, *s.* 36—*Sale for arrears of Government revenue—Suit by certified purchaser—Plea of* benamee.—Where a certified purchaser at a sale for arrears of Government revenue sues to recover possession of the property from which he has been ousted, he would not be debarred from the benefit of s. 36, Act XI of 1859 and from pleading that the defendants were not entitled to oust him as being only a *benamidar*, unless he has acknowledged to the defendants before their purchase that his holding was merely that of a trustee and that the property in truth was not his, but belonged to those from whom the defendants

Sale—continued.

——4.—Sale for Arrears of Revenue and Cess
—*continued.*

———d.—PURCHASERS, RIGHTS AND LIABILITIES OF—*continued.*

were purchasing. JADUB RAM DEB v. RAM LOCHUN MUDUCK, **5 W.R. 56.** [*R.*, 10 W.R. 167 ; *Cons.*, 14 W.R. 10.]

(21)—*Act* XI *of* 1859, *ss.* 36, 53—*Sale for arrears—Purchase by original owner, validity of—Suit to oust certified purchaser on ground that purchase was* benami—*Admission of receipt of consideration in ekrarnamah, evidentiary value of.*—An estate having been sold for arrears under Act XI of 1859, one of the co-sharers in the estate sued to recover her share from the certified purchaser M who was also one of the original owners, on the ground that plaintiff had provided her portion of the purchase money, but that her name was not entered in the register on account of M having no written authority to act on her behalf, and that, to secure her interests, M had executed an ekrarnamah in which he admitted receipt of the purchase money of her share, and covenanted to give her possession of the same. The defendant, while admitting execution of the ekrarnamah denied having received any consideration, and alleged that the purchase was made entirely with his own funds. *Held* (*a*) that there was nothing in Act XI of 1859, which made it illegal for a former proprietor or co-sharer to be a purchaser of his estate at a sale for arrears due on that estate ; (*b*) that the suit was substantially one to oust a certified purchaser on the ground that the purchase was made on behalf of another person not the certified purchaser, and was barred by s. 36 of the Sale Law, and that no separate title was given to the plaintiff by the *ekrarnamah* so as to take the case out of the operation of that section ; (*c*) that even supposing that the ekrarnamah fully and unequivocally admitted payment of the money, that would not be conclusive evidence of payment against the defendant, and that further proof would have to be given. MUSSAMUT NEYNUM v. MUZUFFUR WAHID, **11 W.R. 265.**

(22)—*Act* XI *of* 1859, *s.* 53—*Revenue sale—Purchase by co-proprietor—Incumbrances.*—The words of s. 53 are very distinct ; they do not say that where of three co-proprietors of an estate, two default and one pays up his share, and the non-defaulting proprietor purchases the estate, he purchases it free from all incumbrances made by the non-defaulting proprietor. On the contrary, the section lays down that any co proprietor purchasing an estate repurchases it subject to all incumbrances. The rights of purchasers under the section are very nearly of the same nature as the rights conferred on purchasers at a sale in execution of decrees of Civil Courts. MAHOMED GAZEE CHOWDHURY v. PEAREE MOHUN MOOKERJEE, **16 W. R. 186.**

(23)—*Bombay Act* I *of* 1865, *s.* 36—*Land revenue—First charge—Arrears—Sale—Title.*—

Sale—continued.

——4.—Sale for Arrears of Revenue and Cess
—*continued.*

———d —PURCHASERS, RIGHTS, AND LIABILITIES OF—*continued.*

The land revenue is the paramount charge upon the land. The right of occupancy depends on payment of that revenue, Bombay Act I of 1865, s. 36. Whoever, whether by mortgage or otherwise, derives title under the occupant, takes the land subject to that liability. Government in respect of land revenue is only bound to recognise the occupant, who is defined by s. 2, cl. (*j*). A purchaser at a sale held by the Mamlatdar for arrears of Government revenue is entitled to the land free from any mortgage lien. ABDUL GANI v. KRISHNAJI BHIKAJI, **10 B.H C. 416.** (5 B.H.C. 23, *R.*) [*F.*, 11 B.H.C. 218 ; *Expl.*, 11 B.H.C. 37 ; *R.*, 10 B.H.C. 419, 5 B. 73.]

(24)—*Bombay Survey Act* I *of* 1865, *s.* 36—*Land revenue—First charge—Occupant—Private sale—No mutation of names—Revenue sale—Notice—Validity of sale.*—Government revenue is a paramount charge on the land ; and being of this character it adheres to the land and to every portion of it independently of the hands into which it passes or the subordinate rights that may have been created by the occupant out of his own qualified proprietorship. According to the Bombay Survey Act I of 1865, the right of conditional occupancy vests in the registered occupant alone. The Collector may put up the land for sale for arrears of revenue after giving notice of the failure to pay the revenue to the registered occupant alone (10 B H.C. 416, *R.*). A purchaser at such revenue sale gets occupancy rights free from all claims. His right cannot be defeated by any prior purchaser from the occupant, especially when such prior purchaser has neglected to get his name registered in the revenue Rogister. GUNDO SHIDDHESVAR v. MARDAN SAHEB, **10 B.H.C. 419.** [*F.*, 11 B.H.C. 218 ; *R.*, 5 B. 73 ; *D.*, 1 B. 577.]

(25)—*Regulation* XXV *of* 1802 (*Madras*), *s.* 12—*Revenue Recovery Act* II *of* 1864 (*Madras*), *ss.* 32, 41.—The purchaser at a Revenue sale is prima facie entitled to demand the faisal rate. PALANI v. PARAMASIVA, **13 M. 479.**

(26)—*Revenue Recovery Act* (*Act* II *of* 1864), *ss.* 1, 39, 42—*Rights of* jenmi *in Malabar—Grant of waste land—Cowle—Patta—Sale for arrears.*—Some waste land (which is private property in Malabar) was put into the possession of a tenant by Government under a cowle, and a patta was issued to him later on. The tenant allowed the revenue to fall into arrears and the land was sold under the provisions of the Revenue Recovery Act. The *jenmi* had no notice of the grant by cowle or patta and the sale was conducted without reference to him. Under these circumstances, the revenue sale did not pass the *jenmi's* interest in the land.

Sale—continued.

——4.—Sale for Arrears of Revenue and Cess *—continued.*

———*d.*—PURCHASERS, RIGHTS AND LIABILITIES OF—*concluded.*

SECRETARY OF STATE v. ASHTAMURTHI, **13 M. 89.** [*R.*, 21 M. 169=8 M.L.J. 117, 28 M. 526=15 M.L.J. 419.]

(27)—*Madras Revenue Recovery Act* (II *of* 1864), s. 42—*Permanent lease, an encumbrance.*—A permanent lease of the property, at a rate far below both the *faisal* assessment and the proportion of the revenue payable on it, amounts to an encumbrance within the meaning of s. 42 of Madras Act II of 1864. The absence of a declaration by the Collector, as to its invalidity, is immaterial, and will not preclude the purchaser of the property at the revenue-sale from avoiding the lease on the ground of its being an encumbrance under the said s. 42. NARASIMMA v. SURYANARAYANA, **16 M. 144.**

(28)—*Revenue Recovery Act—Revenue Sale—Purchaser, rights of—Eviction—Damages.*—A purchaser at a revenue sale is in rightful possession of the property he has purchased until the decree of the Revenue Court is set aside. He is not a trespasser liable to make good the loss sustained by the rightful owner by being kept out of possession, but is bound to account for mesne profits. PERUMAL UDAYAR v. KRISHNAMA CHETTIAR, **17 M. 251.** (20 I.A. 160, *Cited and F.*)

See BEN. ACT XI OF 1859, ss. 13 and 54, 22 C. 641.

See ENHANCEMENT OF RENT—ENHANCEMENT, RIGHT TO. 2 B.L.R. P.C. 23=12 M. I.A. 263=11 W.R. P.C. 10.

———*e.*—SALE OF SHARE OF ETATE.

(1)—*Act* XI *of* 1859, *object of*—"*Shares*" *scope of the word.*—The object of Act XI of 1859 was to protect recognized share-holders in an estate by permitting them to pay in their *quota* of the Government revenue separately, and declaring that such payment would, except under particular circumstances, bar any sale of that share in the event of other shares of the estate being sold for arrears of revenue. The portion of an estate for which a separate account under the provisions of ss. 10 and 11 of Act XI of 1859, is opened on the application of the proprietor entitled to it, and the portions from which it is separated, are "shares" of the estate within the meaning of s. 10 of the Act. MONOHUR MOOKERJEE v. HUROMOHUN MOOKERJEE, **1 W.R. 26.**

(2)—*Act* XI *of* 1859—*Sale for arrears of revenue—Application for separate account—Validity of sale.*—A sale of land held under Act XI of 1859 for arrears of Government revenue was not rendered invalid by the fact that an application had been made for a separate account. Such a sale became invalid if the Collector had ordered a separate account. MAHARAJAH RAJENDROKISHORE NARAIN SINGH BAHADOOR v. MUSSAMUT DOORGA KOONWAR, **7 W.R. 154.**

Sale—continued.

——4.—Sale for Arrears of Revenue and Cess *—continued.*

———*e.*—SALE OF SHARE OF ESTATE *—concluded.*

(3)—*Act* XI *of* 1859, *s.* 11—*Sharer in joint talook, protection of from revenue sale—Registry as* shikmee *talook under Act, maintainability of suit for cancelment of.*—Plaintiff sued to obtain *khas* possession of land which he claimed as situated within a talook purchased by him at a sale for arrears of Government revenue. Defendant claimed the land as a *shikmee* talook. In fact, however, the defendant was not the proprietor of a *shikmee* talook at all. She was merely a sharer of a joint talook, whose share consisted of a specific portion of land. And, if she sought protection from a sale for arrears of revenue, she could have obtained it under s. 11 of Act XI of 1859. The property in question had been previously conveyed to the mother and, on application by the mother to the Collector for common registry of property as a *shikmee* talook, such registry was sanctioned and the defendant attempted to rely on the registration, contending that it was conclusive. But the High Court *held* that, under s. 48, a suit may be brought to set it aside and the mere fact of registry cannot preclude any person wronged by it from suing for the cancelment of the same. GOUR CHUNDER GOOPTO v. TARA MONEE, **6 W.R. 217.** [*Diss.*, 12 W.R. 90.]

(4)—*Act* XI *of* 1859, *ss.* 11, 13, 54—*Reg.* II *of* 1885, *s.* 3—*Limitation—Lakhiraj—Adverse possession.*—Where a grant of *lakhiraj* was made subsequently to the 1st December 1790, the cause of action founded on the proprietor's right to dispossess the grantee under s. 10, Reg. XIX of 1793, arose immediately after the passing of that law, and no suit could be maintained upon it after the 1st May 1853, (*i.e.*) 60 years after the date when it first arose. KASHINATH KOOWAR v. BANKUBEHARI CHOWDHRY, **3 B.L.R. A.C. 446=12 W.R. 440.**

(5)—*Act* XI *of* 1859, *s.* 33, *scope of—Actions against individual wrong-doers.*—This suit was brought against a Government officer and against the co-sharers of the plaintiff in the property concerned. The plaintiff did not show that there was any cause of action against the Government officer individually or that there was any intention to have him declared personally liable. No cause of action having been shown against the officer defendant who had been made the sole respondent in this appeal, the appeal was held to be not maintainable and was dismissed with costs. GUNGA NARAIN BOSE v. MR. WILLIAM CORNEL, COLLECTOR OF BULLOOAH, **10 W.R. 442.**

***Sale*—continued.**

——4.—Sale for Arrears of Revenue and Cess —*continued*.

————*f*.—SETTING ASIDE SALE AND ITS EFFECT.

(1)—*Act* XI *of* 1859 (*Sale law*), *scope and object of—Ground for setting aside revenue sale —Act* XI, 1859, ss. 25, 26—*Irregularity in conducting sale—Appeal to Commissioner within 15 days of sale—Government's power to set aside sale under* s. 26.—The object of the Sale Law is to give a title to the purchaser which shall not be open to challenge by anybody; hence it fences about the auction-purchaser against any claims of the defaulter or others, and provides another remedy for them should any one have suffered injury by the sale. The only ground on which a revenue sale can be set aside is, as appears from s. 25 of the Act, on the score of irregularity in conducting the sale; and then, the Commissioner, on a petition of appeal presented to him within 15 days of the sale, can set it aside. The terms of the petition, however, need not be limited to pointing out only irregularities. It may set forth any other cause for setting the sale aside; it may disclose a case of hardship or injustice where no irregularity in conducting the sale exists, for instance, that the sale has taken place where no arrear is actually due, and, under such circumstances, the Government, under the provisions of s. 26 of the Act, may set aside the sale. If the Commissioner will not interfere to set aside the sale, the party who considers himself aggrieved may bring an action in the Civil Court under s. 33 of the Act, and may ask to have it set aside on the score of irregularity, and the Court may set it aside on proof of the existence of such irregularity, and of substantial injury caused to the plaintiff by such irregularity. Such suit must be brought within one year from the date of the sale becoming final and conclusive as provided in s. 27 of the Act. If, therefore, no irregularity producing substantial injury is pleaded, a Civil Court cannot entertain an action to set aside a sale for arrears of revenue orother demands realizable in the same manner as arrears of revenue. The only course thus open to a party who considers himself to be injured by the sale of his property, should the Commissioner under s. 25 or the Government under s. 26 refuse to interfere, is by a suit for damages, as provided for in the latter part of s. 33. WOMESH CHUNDER CHATTERJEE v. THE COLLECTOR OF THE 24 PERGUNNAHS, 8 W.R. 439.

(2)—*Act* XI *of* 1859, s. 33—*Sale for arrears—Notice of sale not given—Material injury*.—To sell a man's estate for arrears after lulling him into a false sense of security, by failure to give him a notice which the law prescribes as a condition precedent of a sale, is an injury of itself, wholly irrespective of the amount of purchase-money, a very material injury and one amply sufficient to warrant a Court in annulling a sale under s. 33, Act XI of 1859.

***Sale*—continued.**

——4.—Sale for Arrears of Revenue and Cess —*continued*.

————*f*.—SETTING ASIDE SALE AND ITS EFFECT—*continued*.

MOHABEEN PERSHAD SINGH v. THE COLLECTOR OF TIRHOOT, **15 W.R. 137.** [*Diss.*, 32 C. 111=8 C.W.N 757; *R.*, 17 C. 398.].

(3)—*Revenue-sale—Kists, if should be specified—Inquiry by Civil Court—Act* XI *of* 1859, *sale under—When can be set aside—Irregularity in issue of notice*.—A revenue sale need not specify the kists in respect of which the arrears have accrued. And where the Officer conducting the sale—the Collector—so specifies the kists, that does not prevent the Court from inquiring into whether arrears existed in respect of those kists or not. An irregularity in the issue of notice is a ground for setting aside a sale made under Act XI of 1859, only when it is shown that the defaulter has sustained loss or damage by reason of such irregularity. MUSST. LULEETA KOOER v. THE COLLECTOR OF TIRHOOT, **19 W.R. 283.**

(4)—*Execution—Attachment and sale—Notice —Description of property*.—The circumstance that a given estate paying revenue to Government includes in it *dakhilee mouzahs* or appurtenances does not oblige the execution-creditor to insert in the notice of sale the names of all those appurtenances, and the fact that the property was described by its ordinary name with the full Government revenue affixed to it shows beyond dispute what it was that was attached and sold. ZERKALEE KOOER v. LALLA DOORGA PERSHAD, **16 W.R. 149.**

(5)—*Suit to set aside revenue-sale—Secretary of State, if necessary party*.—The Secretary of State is not a necessary party to an action to set aside a sale held for arrears of revenue. JAHNNOVI CHOWDHRANI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **7 C. W.N. 377.** (25 C. 833, 9 C. 271, *Rel. on.*)

(6)—*Arrears of revenue, Sale for—Who can set aside—Beng. Act* XI *of* 1859, *ss.* 5, 17—*Property sold need not be under attachment—When sale* ultra vires.—The right to impeach the sale of land, for arrears of Government revenue under Act XI of 1859, extends not only to the defaulting proprietors, but also to derivative holders, having interest in property antecedent to its sale (5 M.I.A. 447, *Rel. on.*) [*F.*, 7 C.W.N. 377.] There is nothing in s. 5, Act XI of 1859, which indicates that the property sold for arrears of Government revenue, should be under attachment at the time of sale. A sale held in contravention of ss. 5 and 17, Act XI of 1859, is *ultra vires* and void. GOBIND LAL ROY v. BIPRODAS ROY, **17 C. 398.** (11 C, 200, *Appl.*) [*R.*, 21 C. 354.]

(7)—*Surplus proceeds of revenue sale—Purchase in execution of decree—Setting aside Revenue sale—Suit to recover purchase-money*.—Certain property in which the defendant had

Sale—continued.

——4.—Sale for Arrears of Revenue and Cess —*continued.*

———*f.*—SETTING ASIDE SALE AND ITS EFFECT—*continued.*

a right as co-sharer, was sold at a revenue sale. Surplus sale-proceeds amounting to Rs. 35,000, after satisfying the arrears of revenue, were held in deposit by the Collector. Certain creditors of the defendant, in spite of his objections, attached his right, title and interest in the said sum of Rs. 35 000; and at the Court sale which followed, the plaintiff purchased the same for Rs. 8,000 which having been paid into Court, was distributed among the said attaching creditors. Defendant, thereupon, brought a suit for the cancellation of the original revenue sale and finally succeeded in getting the same cancelled. The said sum of Rs. 35,000 was returned to the purchasers at the revenue sale. Plaintiff brought the present suit against the defendant for the recovery of Rs. 8,000 paid by them into Court and distributed to the attaching creditors. *Held* that the doctrine of Courts of equity—that a plaintiff who comes into Court to be relieved from his own act or the act of one whom he represents on equitable grounds must do equity and submit to those equitable conditions which the Court may deem fit to impose on its grant of relief—was not applicable to this case, because it was not the defendant that sought the aid of the Court, but he was sued as defendant, and the money sought to be recovered had not been paid under any contract of his, or in any transaction to which he was a consenting party, but under proceedings taken *in invitum*. *Held*, also, the plaintiffs, having with their eyes open, purchased the defendant's interest in the surplus sale-proceeds, subject to the contingency of his succeeding in a suit to set aside the revenue-sale, in which event that interest would become nil, they were not entitled to get back Rs. 8,000 which they had paid on account of the purchase. *Held*, also, that the payment made by the plaintiff was voluntary and that, though the defendant might have benefited by it, he was not legally bound to re-pay the money to the plaintiffs. RAM TUHUL SINGH v. BISESWAR LAL SAHOO, **15 B.L.R. 208, P.C.=23 W.R. 305=2 I.A. 131=3 Sar. 477.** [*F.*, 27 B. 390=5 Bom.L.R. 301, 3 C.L.J. 288, 10 Bom. L.R. 764=32 B. 612; *R.*, 1 C. 55, 2 B. 258, 3 B. 237, 4 C. 807=4 C.L.R. 148, 5 A. 577=A.W.N. 1883, 130, 11 A. 234 = A.W.N. 1889, 67, 12 C.P.L.R. 4, 25 C. 305, 7 O.C. 146, 29 A. 627=4 A.L.J. 501=A.W.N. 1907, 214, 32 B. 32, 9 Bom.L.R. 710, 30 A. 167=A.W.N. 1908, 58=5 A.L.J. 163, 3 Ind. Cas. 672=8 L.B.R. 58, 6 M.L.T. 162=3 Ind. Cas. 110=33 M. 15=19 M.L.J. 409, 14 C.W.N. 945=6 Ind. Cas. 810; *D.*, 18 B. 86.]

(8)—*Act* I *of* 1845, *s.* 24, *one year's limitation under—Civil suits to set aside revenue sales—Limitation applicable to minors except when they are sole owners.*—It was contended for the plaintiffs, that the suit would lie because, on the date of the sale for arrears of revenue, they were minors and the present suit was brought within one year from the date of their attaining their majority. The Chief Court did not accept the contention. It held that there was no warrant for the application of such a rule of limitation to the present case. Had the minors been the sole owners of the tenure, it would have been protected from revenue sale by s. 10 of Act I of 1845, but as they formed only a very small minority of the owners, their minority would not avail towards protecting their shares. YEOSUF v. THE GOVERNMENT, **62 P.R. 1869.**

(9)—*Revenue sale by Deputy Collector—Sale set aside on appeal to Collector—Appeal to Commissioner—Sale held good—Effect—Sale Law, Act* VIII *of* 1865 (*B.C.*), *ss.* 13, 14.—Where a sale effected by order of a Deputy Collector, was set aside on appeal by the Collector, whose order was finally reversed by the Commissioner, who declared that the sale was good, *held* that the sale did not become confirmed or final and conclusive, before the date on which the Commissioner passed his order. PRANNATH ROY v. TROYLOCKHONATH ROY, **14 W.R. 284.**

(10)—*Act* VII *of* 1868 (*B.C.*), *ss.* 18 *to* 24—*Sales of land for Government demands other than arrears of revenue—Procedure—Act* XI *of* 1859, *ss* 5, 6—*Sale notification under—Notice under Reg.* XIX *of* 1814—*Defaulters—Fine—Substantial injury.*—All sales for recovery of Government demands, other than arrears of revenue, must be preceded by the steps prescribed in ss. 18 to 24, Act VII of 1868 (B.C.); and if the proprietor of an estate in respect of which a certificate of demand has been made under that Act comes into Court either before or at the time of sale, and, before the property is actually sold, tenders the amount of the demand, the Collector is bound to receive it and to abstain from selling the property. [*R.*, 17 C. 414, 13 C.W.N. 710=1 Ind. Cas. 871=11 C.L.J. 254.] A sale-notification having been issued under ss. 5 and 6, Act XI of 1859, with a view to realize a fine which had been imposed for non-attendance after due notice under Reg. XIX of 1814, the proprietors, before the day fixed for sale, tendered the fine; but the tender was refused, and the estate sold. *Held* that the sale was illegal, irrespective of the question of substantial injury. MOHAN RAM JHA v. BABOO SHIB DUTT SING, **8 B.L.R. 230=17 W.R. 21.**

(11)—*Revenue sale—Collector bound to sell to highest bidder—Suit for damages against Collector personally—Measure of damages.*—The Collector sold a mehal belonging to the plaintiff for default of payment of Government revenue. After the lapse of more than 12 months from the sale, plaintiff instituted the suit to recover from the Collector personally damages caused

Sale—continued.

——5.—Sale for Arrears of Revenue and Cess —*continued.*

———*f.*—SETTING ASIDE SALE AND ITS EFFECT—*continued.*

to her by his not having sold the estate to the highest bidder. The lower Courts awarded her the full amount of her claim. It was objected on special appeal that, if any damage had been done to the plaintiff, the amount awarded was excessive and improper, and that no damages at all ought to have been awarded. The High Court held that the Collector committed a wrongful act by selling the property to the second highest instead of the first highest bidder. But it was the difference between these two bids that could be taken as the proper measure of the plaintiff's loss. The actual or probable value of the estate, if it could be arrived at *dehors* the bidding could afford no guide to the loss sustained by the plaintiff. MR. CORNELL v. MUSST. OODOY TARA CHOWDHRAIN, **8 W.R. 372.**

(12)—*Revenue Sale Law, Act* XI *(B.C.) of* 1859, ss. 18, 33, 7, 6—*Payment of arrears of revenue before sale—No order under s.* 18 *exempting property from sale—Setting aside of sale — Irregularity — Effect — Irregularity not contrary to Act, but contrary to practice—Notice —Object—Non-service of notice—Irregularity—Objection not taken in appeal to Commissioner—Objection in regular suit—Combination among bidders—Irregularity—Fraud—Revenue sale—Act* VII *of* 1868 *(B.C.)*, s. 8—*Service of notice.*—Where the plaintiffs sued to set aside a sale for arrears of Government revenue held on the 26th March 1879, alleging that the arrears had been paid into the Collector's treasury on the 25th March, that, according to the practice which had grown up in the Collectorate of the District, it was usual to accept payment of arrears of revenue, however late, and to exempt the estate from sale if, at the time it was put up for sale all arrears had been paid into the treasury, and it appeared that the arrears had been paid as alleged but without obtaining any order from the Collector, or from any one else, authorizing their doing so, or exempting the property from sale. *Held* that the sale was valid and that there was no irregularity in the sale, as no order exempting the property from sale had been obtained under s. 18 of Act XI of 1859 and as mere payment of the arrears into the treasury without such an order would not in itself have the effect of exempting the property from sale. [*F.*, 10 C.W.N. 137=2 C.L.J. 325; *R.*, 21 C. 844.] The irregularity upon the ground of which the Civil Court has, under the provisions of s. 33 of Act XI of 1859, jurisdiction to set aside a revenue sale, is an irregularity of a specific nature, namely, that the sale has been made contrary to the provisions of the Act. But a sale made contrary to a practice which had grown up in the Collectorate of the District even if such a practice would amount to a custom, is not a sale made contrary to any of the provisions of the Act. The notice under s. 7 of Act XI of 1859 (B.C.) is a notice to the ryots not to pay their rent to the defaulting zamindar or to defaulting tenure-holders. That notice is intended for the protection either of the tenants or of the purchasers at the revenue sale, or perhaps of both, and the non-service of such a notice is no ground for setting aside the auction sale. [*F.*, 2 C.L.J. 325=10 C.W.N. 137, 5 C.L.J. 425=34 C. 381; *R.*, 21 C. 354, 30 C. 1=6 C.W.N. 688, 8 C.W.N. 337.] The irregularity in the service of notice under s. 6 of Act XI of 1859 (B.C.), if not taken in the grounds of appeal which had been presented to the Commissioner, cannot be urged in a regular suit as a ground for setting aside the sale. [*F.*, 21 C. 844, 2 C.L.J. 325=10 C.W.N. 137.] A revenue sale is not invalid by reason of a combination among certain of the purchasers not to bid against one another, in consequence of which the price fetched was below the value of the property. There is no fraud or impropriety in intending purchasers combining not to bid against one another. [*F.*, 16 C. 194, 97 P.L.R. 1901=37 P.R. 1901, 1 C.L.J. 85; *R.*, U.B.R. 1897—1901, 317, 36 C. 134=13 C.W.N. 87.] *Quære*:—Whether s. 8 of Act VII of 1868 (B.C.), is sufficient to make the sale-certificate conclusive as to the service of notices issued under s. 7 of Act XI of 1859, in a suit in which it is sought to set aside the revenue proceedings on the ground of their being contrary to the provisions of the Revenue Sale Law? GOBIND CHUNDRA GANGOPADHYA v. SHARAJUNNISSA BIBI, **13 C.L.R. 1.**

(13)—*Surplus proceeds in deposit—Liability of person without title drawing out proceeds.*—Where a person took out his own share of surplus proceeds in deposit in a Collectorate, jointly with another who was in possession of a certificate of the Civil Court, *held*, that he was not liable for the money drawn by that other, although the latter had no right to draw the money. GUNGA DHUR KUR v. ROOP CHAND KOOER, **23 W.R. 82.**

(14)—*Act* XI *of* 1859—*Sale for arrears of revenue—Suit to recover possession.*—A sale of land which is made when no arrears of revenue exist is absolutely null and void independently of Act XI of 1859 altogether; and the fact that the purchase has been made *bona fide* at a regularly conducted sale is of no avail whatever to the purchaser in a suit brought by the owner of land to recover possession of it. SREEMUNT LALL GHOSE v. SHAMA SOONDUREE DASSEE, **12 W.R. 276.** (10 W.R. F.B. 66, *F.*) [*F.*, 12 W.R. 311=3 B.L.R. App. 144.]

(15)—*Act* XI *of* 1859—*Sale when arrears of revenue are due—Sale certificate.*—Whatever is sold under Act XI of 1859 can only be sold

Sale—continued.

——**4. —Sale for Arrearsof Revenue and Cess** —*continued.*

————*f.*—SETTING ASIDE SALE AND ITS EFFECT—*concluded.*

for arrears of Government revenue ; and unless it can be shown that arrears of Government revenue were due on account of a particular estate, any sale would be void, inoperative and without legal effect, and in fact no sale at all, and consequently the title supposed to be given by the sale certificate must always be subject to such defect, and would not be an absolute title as against the law by which alone the sale and certificate can be operative. RAM GOBIND ROY v. SYUD KUSHUFFUDDZA, **15 W.R. 141**, *on review from*, **14 W.R. 1.**

(16)—*Estate—Julkur, phulkur rights—Alluvion.*—An estate would not necessarily mean land. Julkur, phulkur, and bunkur rights are all estates, and in this particular case, even where land has been entirely washed away, there would still remain the right to possession of any alluvion that might subsequently re-appear on the same site, and there would, therefore, in accordance with the decision of the Privy Council in 14 W.R. P.C., 11, still be an estate to sell. THE GOVERNMENT v. BABOO RADHAY SINGH, **20 W.R. 117.** [*F.*, 6 C. 725=8 C.L.R. 90 ; *R.*, 2 B. 19.]

(17)—*Beng. Act*, VIII *of* 1869, *s.* 61—*Sale for arrears of rent—Warrant against moveable property—Suit to set aside auction sale of rent.*—Under s. 61 of Act VIII (B.C.) of 1869, a sale for arrears of rent is void if it is held while a warrant against the moveable property of the debtor is in force. [*R.*, 15 C. 179 ; *D.*, 17 C. 769.] A suit is maintainable to set aside an auction sale for rent, where the purchaser is the decree-holder himself, on the ground of irregularity in conducting and publishing the sale, unless it be proved that the judgment-debtor had failed to set aside the sale in a proceeding under s. 257, Act VIII of 1859, or that he had full opportunity of proceeding under that section, and that he neglected to take advantage of it. UJOLLA DASI v. DHIRAJ MAHATAB CHAND, **7 C.L.R. 215.** [*R.*, 15 C. 179; *D.*, 17 C. 769.]

See BEN. ACT XI OF 1859, ss. 5, 7, 21 C. 354.

Setting aside sale—Misjoinder—*See* BEN. ACT XI OF 1859, ss. 10 and 11, 6 C.L.J. 163.

See BEN. ACT I OF 1895, ss. 10, 21, 28 C. 813=6 C.W.N. 331.

————*g.*—TENURES THAT ARE PROTECTED IN SUCH SALES.

(1)—*Purchaser at revenue sale when entitled to annul incumbrances.*—In this case the High Court upheld the respondent's contention that it is only, the purchaser of an "entire estate," that acquires the same free of all the incumbrances except those specially reserved by s. 37. This view was also held to be further

Sale—continued.

——**4.—Sale for Arrears of Revenue and Cess** —*continued.*

————*g.*—TENURES THAT ARE PROTECTED IN SUCH SALES—*continued.*

strengthened by the provision in s. 33 of Reg. XIX of 1814 that, when a *butwara* has actually commenced, and the estate falls in balance, only the portions of the defaulting share-holder shall be sold and not those of the share-holders who have paid their balances, and that the purchaser of a share, under such circumstances, shall acquire all the rights of the defaulting proprietors. As the power to annul and avoid incumbrances was thus limited to purchasers of entire estates, and as the defendant in the present case had not purchased such an estate, the issue whether he had a right to avoid all incumbrances on the estate purchased by him was decided against him. KALI DASS GHOSE v. CHANDRA MOHINI DASI, **8 W.R. 68.**

(2)—*Act* X *of* 1859, *s.* 77—*Question of title—Conflicting interests.*—S. 77, Act X of 1859, was never intended to allow the title to receive rents to be tried in a rent suit in cases in which parties might have conflicting interests, as it reserves such questions to be determined in a regular suit. RAM CHUNDER BANERJEE v. SHAIK EKRAMOOLLAH, **12 W.R. 153.** (11 W. R. 161, *R.*)

(3)—*Act* X *of* 1859, *s.* 23 (6)—*Dispossession of tenant—Putni tenure—Buying in by Government at Revenue sale of putnee taluk—Sale of taluk brought in—Rights of purchaser—Revenue sale laws—Sale law before* 1882 *and after Reg.* XI *of* 1822.—Where tenants are dispossessed of their lands by a zemindar who disputes their title, the proper remedy is to sue under Act X of 1859. [*R.*, 23 W.R. 460 ; *D.*, 20 W.R. 455.] An hereditary, transferable *putnee* taluq, created subsequent to the Perpetual Settlement, and held at a fixed rent, was sold by Government, in the year 1835, for arrears of revenue, and the Government itself became the purchaser at such sale. No steps were taken by the Government under Beng. Reg. XI of 1822, to cancel or destroy the talookdary tenure, but, on the contrary, the Government, after reducing the tenure from a taluk at a fixed to a variable rent, made various settlements with the talookdars as late as 1862, agreeing to preserve their rights. The Government afterwards sold the taluk subject to the rights of the talookdars. *Held* that, as the Government had not effectually annulled the tenure before the year 1842, it had lost its statutory right to do so, as Ben. Reg. XI of 1822, under which that right depended, was repealed by Act XII of 1841. *Held*, further, that the purchaser from the Government had no higher rights than were possessed by his vendor, at the date of the sale, and the purchaser's title was subject to the vendor's agreement to preserve the talookdar's rights. [*R.*, 24 W.R. 247, 18 W. R. 469, 25 W.R. 536, 2 C.L.R. 13, 9 C. 683=12 C.L.R. 304 ; *D.*, 23 W.R. 245, 2 C.L. R. 216.] The general policy of the Revenue

Sale—continued.

——5.—Sale for Arrears of Revenue and Cess —*continued.*

————*g.*—TENURE THAT ARE PROTECTED IN SUCH SALES—*continued.*

Sale Laws that have been passed since the Perpetual Settlement has been to protect the public revenue by placing the purchaser of an estate sold for arrears of revenue in the position of the person who, at the time of the Decennial Settlement, engaged to pay the revenue then fixed. They, therefore, gave or sought to give the purchaser, the power of abrogating all engagements made by the defaulting zemindar or his predecessors since the settlement, whereby the zemindaree rents and profits, which were the security of Government for the payment of revenue, were diminished. A talookdar could not be dispossessed of his land at the will of the purchaser at the sale; he was at the most liable to pay the district rate for them, and could only be ejected from them if he finally declined to hold it at the enhanced rent. Under Reg. XI of 1822, the law respecting dependent talooks created subsequently to the Settlement was that "such talooks were liable to be wholly avoided and annulled at the option of the purchaser at a sale for arrears of revenue, unless they fell within the class contemplated by s. 32 of the Regulation." KHAJAH ASSANOOLAH v. OBHOY CHURN ROY, **13 W.R. P.C. 24=13 M.I.A. 317=2 Suther. 306=2 Sar. 535.**

(4)—*Act* XI *of* 1859, *s.* 37—*Sale for arrears of revenue—Transfer by purchaser of his right—Right of transferee.*—A purchaser at a sale for arrears of revenue could transfer his rights under the sale to another, and the transferee acquired all the rights conferred on the purchaser at such sale, under s. 37 of Act XI of 1859, provided the transfer followed immediately upon the sale, or followed within a reasonable time after the sale. KOYLASH CHUNDER DUTT v. JUBUR ALI, **22 W.R. 29.** [*F.*, 5 C.L.J. 264, 1 C.L.J. 529, 10 C.W.N 148; *R.*, 12 C.W.N. 1029.]

(5)—*Sale for arrears of revenue—Putnee—Tenure—S.* 37, *Act* XI *of* 1859.—A putnee granted by a Hindu widow was, in appearance, a duly registered tenure falling within the 3rd exception to s. 37, Act XI of 1859, but was in truth the result of a fraudulent device which, had there been no revenue sale, the real owner or the reversioner might have avoided. *Held*, that, under such circumstances, the right to avoid it passed to the auction-purchaser and did not remain in the old proprietor. RAMCHUNDER CHUCKERBUTTY v. KASHINATH MOETRO, **W.R. 1864, 66.**

(6)—*Planting of garden by landlord on his estate—Sale of tenures for arrears of revenue—Act* XI *of* 1859, *s.* 37.—Where a landlord plants a garden in any portion of his estate, he does not become, *quoad* those plantations, his own ryot. Therefore, if his estate is sold for arrears of Government revenue, he cannot claim, the protection of s. 37, Act XI of 1859. BOOL CHAND JHA v. LUTHOO MOODEE, **23 W.R. 387.** [*R.*, 12 C. 82.]

(7)—*Revenue sale—Evidence of tenure—Ben. Act* XI *of* 1859, *s.* 37 (4).—Lands, on which gardens have been made, are protected by s. 37 (4), Act XI of 1859, from the effect of a sale for arrears of revenue, even though they may not have been expressly leased for that purpose. GOBIND CHUNDRA SEN v. JOY CHUNDRA DOSS, **12 C. 327.** (3 C. 293, *F.*) [*F.*, 9 C. W.N. 852.]

(8)—*Act* XI *of* 1859—*Revenue sale—Settlement under Reg.* VII *of* 1822—*Rights of* lakherajdars *as against auction-purchaser.* — An auction-purchaser at a sale under Act XI of 1859 cannot eject a *lakherajdar*, whose tenure has been resumed under Reg. II of 1819 and settled under the provisions of Reg. VII of 1822 in respect of the payment of Government revenue due thereon. The *lakherajdar* could not be disturbed in his possession so long as the revenue assessed on him under the settlement is paid regularly. RAM GOBIND ROY v. SYUD KUSHUFFUDOZA, **14 W.R. 1.**

(9)—*Act* VIII *of* 1835 *and Reg.* VII *of* 1799, *s.* 15, *cl.* 7, *effect of sales under, towards destroying tuppa right.* — The appellant contended that the lower Court was wrong in having held that his tuppa right was swept away by the sale held under Act VIII of 1835 and the provisions of cl. 7, s. 15, of Reg. VII of 1799. The ruling in 3 W.R. 197 relied on by the lower Court was to the effect that, under-tenures and incumbrances are annihilated by sales of tenures for arrears of revenue held under the above Acts. The appellant was not able to show that the sale in the present case was for arrears of rent and not for arrears of revenue, nor did he adduce any precedent to the contrary effect; the High Court therefore refused to interfere and dismissed the appeal. MUSSAMUT ZEENUT BEBEE v. MUSSAMUT RAHATOONISSA, **7 W.R. 243.**

(10)—*Zamindary—Encumbrances—Sale for arrears of revenue—Collusion—Lessee's right.* —An estate in which the plaintiff's predecessor in title was holding a hereditary istemraree mowrosee lease was sold for arrears of revenue and brought by the Government. Subsequently, the Government restored the estate to the defaulting zamindar on condition of his recognising the encumbrances that existed on the estate before the revenue sale. The estate having been subsequently mortgaged by the zemindar, a decree was passed thereon, in execution of which it was purchased by the decree-holder. A purchaser from the decree-holder, in collusion with a third party, allowed the property to be sold for arrears of revenue, and the third party purchased the same. The

Sale—continued.

—— 4.—Sale for Arrears of Revenue and Cess —*continued.*

———*g.*—TENURE THAT ARE PROTECTED IN SUCH SALES—*concluded.*

purchaser at this revenue sale dispossessed the plaintiff, as the effect of the revenue sale was to extinguish all encumbrances. The zemindar subsequently came to know of the fraud and ousted the purchaser at the revenue sale, in due course of law. In the present suit against the zamindar for recognition on the plaintiff's lease, *held* that the plaintiff was entitled to be put in possession as lessee, and that the suit was not barred by limitation. RAM DYAL KHAN v. RAJAH OJOODHYA RAM KHAN, **25 W.R. 455.**

(11)—*Revenue-sale—Existing tenures, annulment of—Question of evidence.*—It is not a necessary inference that, by the sale of a zamindary for arrears of revenue, the Government intended to annul all the previously existing tenures, though it has a right to do so. Even where the Government had asserted its right to do so, it is a matter to be decided upon the evidence whether the Government afterwards enforced its right. TRILOCHUN CHUCKERBUTTY v. KOMALA KANT CHUCKERBUTTY, **25 W.R. 536.**

(12)—*Embankments—Encumbrances.*—Embankments are not encumbrances liable to be extinguished under s. 26, Act I of 1845, which refers only to tenures and leases. THE COLLECTOR OF THE 24 PERGUNNAHS v. JOYNARAIN BOSE, **W.R. F.B. 17=1 Ind. Jur. O.S. 101.**

See BEN. ACT XI OF 1859, s 37, 3 C. 293.

See ESTOPPEL—ESTOPPEL BY CONDUCT, **2 W.R. 139.**

———*h.*—MISCELLANEOUS.

(1)—*Act XI of 1859, s. 5—Notification—Attachment.*—A notification issued under s. 5, Act XI of 1859, does not operate as an attachment by the Civil Court. That notification is for the information of the debtor and of the public, that it may be known that an arrear or demand is due from the debtor, which will be received if paid on or before a fixed date. It is simply a public call on the debtor to pay his debt by a fixed date. NURKOO RAM v. RAMJOORAWUN SINGH, **9 W.R. 481.**

(2)—*Sale for arrears of revenue—Act XI of 1859, s. 6, non-compliance with, effect of.*—A non-compliance with the provisions of s. 6 of Act XI of 1859, in respect of a sale for arrears of revenue, would avoid the sale altogether, and is not a mere irregularity or one of those errors in procedure, which are intended to be cured by s. 8 of Bengal Act VII of 1868—*Per Garth, C.J; Mitter, Prinsep and Pigot, JJ.*—Where the date fixed in the sale notification is less than thirty clear days from the date of its being affixed in the Collector's office, there is a legal defect in the notification, such as cannot

Sale—continued.

——4.—Sale for Arrears of Revenue and Cess —*continued.*

———*h.*—MISCELLANEOUS—*continued.*

be cured by s. 8 of Bengal Act VII of 1868; such a sale is not, however, *ipso facto* null and void, but is liable to be annulled (by s. 33 of Act XI of 1859), only on proof of substantial injury by reason of the informality in the notification—*Per Tottenham, J.* LALA MOBARUK LAL v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **11 C. 200, F.B.** [*F.*, 17 C. 414, 7 C.W.N. 377; *Appl.*, 14 C. 1, 17 C. 398; *R.*, 13 C. 208, 21 C. 360, 19 A. 308, 1 C.L.J. 565, 6 C.L.J. 163; *D.*, 2 C.L.J. 325=10 C.W.N. 137.]

(3)—*Transfer of revenue jurisdiction—Payment of revenue.*—If an estate is transferred from one Collectorate to another, the holder of the estate is not entitled to take credit for payment of rent to the Government treasury of the district to which the estate originally belonged, if he has notice of such transfer, unless he has got a regular transfer receipt; if he has no notice and pays and takes receipt, it is a sufficient quittance as against Government. THAKOOR CHURN ROY v. THE COLLECTOR OF THE 24 PERGUNNAHS, **13 W.R. 336.**

(4)—*Government revenue paid by one proprietor on behalf of co-proprietor in default—Putneedar of defaulter not liable to pay.*—The respondent and the lessor of the appellant, a putneedar, were co-proprietors. To save the estate from sale on account of arrears of Government revenue, the respondent paid his share and his defaulting co-proprietor's share of the revenue, and the question had to be decided whether the sum paid by the respondent for his defaulting co-proprietor, could be recovered by the respondent from the appellant, the putneedar. *Held* that the putneedar could not be held liable to pay any such sum. The respondent could recover the money paid for his co-proprietor by separate action against him, but not from the putnidar having the right to all the profits of the putnee after payment of rent to his lessor. And, even if the putneedar had not paid rent to the lessor, that would be a question between him and his lessor which might give the latter a right of action against him, but could not render the putneedar responsible to the respondent. BYKUNTNATH ACHARJEE v. GOOROO CHURN BOSE, **7 W.R. 247.**

(5)—*Auction sale for arrears of revenue—Cancellation of under-tenures.*—Where, at an auction sale for arrears of revenue, the Government becomes the purchaser of the property and afterwards makes settlements with the former proprietors of the under-tenures, the question whether or not the Government cancelled the under-tenures existing at the time of the sale, is one to be decided solely according to the effect of the proceedings taken by the Collector in each case. It is a mistake to suppose that their Lordships of the Privy Council

Sale—continued.

——4.—Sale for Arrears of Revenue and Cess
—continued.

——h.—MISCELLANEOUS—*continued.*

in the case of *Khaja Asannullah* (13 M.I A. 317, 13 W.R. P.C. 24) intended to lay down a general rule according to which all questions of this nature are necessarily to be decided. SHOOK DEB SHAHA v. SREEMUTTY ALLADI, **2 C.L.R. 13.**

(6)—*Sale of land for arrears of revenue—Fraudulent purchase by tenant in possession—Trustee for owner—Forfeiture of tenancy.—Suit for setting aside of revenue sale and for possession—Amendment of plaint.*—Where a tenant who, as between him and the owner of the land, was bound to pay the land revenue to Government, either wilfully or negligently omitted to pay, and thereby occasioned a sale for arrears of revenue, and himself became the purchaser, he was in equity liable to be declared a trustee of the land so purchased for the owner thereof, discharged of his tenancy in consequence of his conduct which worked a forfeiture of any right to be continued as tenant. [*R.*, 21 B. 396, 22 B. 271, 3 Bom. L.R. 92, 30 B. 466=8 Bom. L.R. 360; *D.*, 12 B. 595.] Where, under the circumstances mentioned above, the owner brought a suit for the setting aside of the revenue sale and for possession, *held* that the plaint ought not to have contained any prayer for setting aside the sale, but that as it contained a prayer for possession, it might be read as praying (or at least that the plaintiff should be permitted to amend it so that it might simply pray) that the defendant should, under the circumstances alleged by the plaintiff, be declared a trustee of the land for the plaintiff. BALKRISHNA VASUDEV v. MADHAVRAV NARAYAN, **5 B. 73.**

(7)—*Bombay Land Revenue Code (Act V of 1879)—Revenue sale for arrears—Declaration of forfeiture by Collector, if essential to validity of sale.*—A sale of a holding for default of payment of assessment is not to be deemed invalid, merely because, prior to the sale, there has been no declaration of forfeiture by the Collector. A declaration of forfeiture may be necessary for some purposes but it does not constitute so essentially a necessary preliminary of a sale, that a sale without it would be altogether illegal and invalid. The fact that a sale has taken place is itself strong *prima facie* evidence that forfeiture had been declared. There is nothing to prevent forfeiture being presumed to have taken place, whenever the Collector has proceeded to sell the occupancy, his right to do so being founded on the liability of the occupancy to forfeiture and sale. GANPATI v. GANGARAM, **21 B 381.**

(8)—*Revenue Recovery (Madras) Act II of 1864, ss 39, 59—Irregularity in conduct of sale—Right of suit in Civil Court—Suit to set aside revenue sale—Irregularity—Substantial injury—Proof—Failure to put up notice.*—Where an application to a Collector under

Sale—continued.

——4.—Sale for Arrears of Revenue and Cess
—concluded.

——h.—MISCELLANEOUS—*concluded.*

paras. 1 and 2 of s. 38 of Act II of 1864, to have a sale set aside on the ground of material irregularity in conducting or publishing it, is dismissed, the party aggrieved by such order can, under s. 59 of the Act, sue in a Civil Court for redress, and such right is not affected by the words "except as hereinafter provided" in para 3 of s. 38, since the words refer only to the case of a sale being set aside by the Collector *suo motu*. The plaintiff in a civil suit to set aside a revenue sale on the ground of material irregularity should also prove, as required by s. 38, that substantial injury has resulted from the irregularity. No direct evidence need be offered connecting the irregularity with the injury, if both are proved, for the relation of cause and effect may be inferred. But where the irregularity proved is non-publication of the notice of sale at the Collector's office, several miles distant from the place of sale, no such inference is possible. BOMMAYYA NAIDU v. CHIDAMBARAM CHETTIAR, **22 M. 440.**

This circular directs that a note be made in sale papers at the time of sale, showing the probable cause of sale of an estate sold for arrears of revenue. **Rev. Cir. No. 4, 20 W.R. Rev. Cir. p. 10**

——5.—Sale in Execution of Decree.

a.—GENERAL.
b.—DECREES AGAINST REPRESENTATIVES.
c.—DESCRIPTION OF PROPERTY SOLD, ERRORS IN.
d.—JOINT PROPERTY, SALE OF.
e.—MORTGAGED PROPERTY, SALE OF.
f.—PROCEEDS OF SALE. RIGHT TO.
g.—PURCHASERS, RIGHT OF.
h.—RE-SALES.
i.—RIGHT OF PURCHASER ON SETTING ASIDE SALE.
j.—RIVAL DECREE-HOLDERS.
k.—SETTING ASIDE SALE.
l.—STAY OF SALE.
m.—WRONGFUL AND INVALID SALES.
n.—MISCELLANEOUS.

See CIV. PRO. CODE, 1908, S. 47.

See CIV. PRO. CODE, 1908, O. XXI, rr. 64-96.

——a.—GENERAL.

(1)—*Execution sale and ordinary sale.*—No distinction can be made between a person claiming under an execution sale and one claiming under an ordinary conveyance. BRINDABUN CHUNDER ROY v. TARA CHAND BUNDOPADHYA, **11 B.L R. 237=20 W.R.114.**

Sale—continued.

5.—Sale in Execution of Decree—*contd.*

a.—GENERAL—*continued.*

(2)—*Sale in execution and sale* inter partes. —A sale in execution differs in many essential particulars from a sale *inter partes*. BARODA KANTA BOSE v. CHUNDER KANTA GHOSE, **29 C. 682=6 C.W.N. 706.**

(3)—*Right of a purchaser at Court-sale.*—A purchaser under a decree in a civil suit takes merely the right, title and interest of the judgment-debtor, and is subject to the subsisting interests in the land which have been granted or created by any former zemindar. BABOO DHUNPUT SINGH v. GOOMAN SINGH, **11 M.I.A. 433.**

(4)—*Sale—What passes.*—At a sale in execution of ordinary money decree only the right, title and interest of the judgment-debtor passes. JIBAN KRISHNA v. BROJO LAL, **5 Bom. L R. 428=30 C. 550=7 C.W.N. 425=30 I.A. 81=8 Sar. 444.**

(5)—*Execution—Extent of interest passed by such sale—Contract—Right of the parties—Law governing the parties.*—In the case of a sale in execution of a money decree the questions are what did the Court intend to sell, and what did the purchaser understand that he bought. These are questions of fact, or rather of mixed law and fact; and must be determined according to the evidence in the particular case. ABDUL AZIZ v. APPAYASAMI, **6 Bom. L.R. 7 =27 M. 131=31 I.A. 1=8 C.W.N. 186, P.C.= 8 Sar. 568.** (17 I.A. 11, 14 I.A. 77, 14 I.A. 84, *R.*) [*R.*, 6 C L.J. 490.]

(6)—*Court-sale—What was intended to be sold and purchased—Question of mixed law and fact—State of law at time of sale—Evidentiary value—View of Privy Council—Effect—Weight to be attached.*—The question what, at a Court sale, the Court intended to sell and what the purchaser understood that he bought is one of mixed law and fact. The state of the law as understood at the time of the sale is only a piece of evidence, to be considered with other evidence in the particular case, in determining what the Court intended to sell and what the purchaser understood he bought. (34 M. 188, 29 M. 484, 4 M. 1, *R.*) Though a prior judgment of the Privy Council may not operate as *res judicata*, yet the fact that, on a mixed question of fact and law, the Privy Council came to a conclusion, necessarily carries great weight. VIRUTHUROYER MECHIVEERAPATTAM UGNIPARIYADAYA VALLAVATTU TIRUMALA RAGURAMA IMMUDI KANAKA RAMAYA ALAGARAYA GOUNDER v. MINAKSHI NAIDU, **10 M L.T. 298=2 M.W.N. 1911, 328=12 Ind. Cas. 389.**

(6-*a*)—*Hindu Law—Ancestral property—Rights of son—Decree against father—Sale in execution—Legal necessity.*—According to Hindu law, the son has inchoate rights of his own in the family ancestral property distinct from those of the father, and, consequently, the

Sale—continued.

5.—Sale in Execution of Decree—*contd.*

a.—GENERAL—*continued.*

rights of the son are not saleable in execution of a decree against his father, unless the debt covered by the decree had been incurred for purposes of sufficient legal necessity to justify alienation by a father, under Hindu law, without the consent of the son. RUGHUNATH v. RUHEEM BUX, **53 P.R. 1869.** [*R.*, 11 P.R. 1871, 77 P.R 1876.]

(7)—*Right of* sebait, *whether can be sold.*—The right of *sebait* to perform services for a Hindu idol cannot be sold in execution of a decree. DUBO MISSER v. SRINIBAS MISSER, **5 B L.R 617=14 W.R. 409.** [*Appr.*, 6 M. 76; *R.*, 5 B. 393, 6 B 298, 23 B. 131.]

(8)—*Sale of* mauza *consisting of two* mahals —Mahal *submerged at time of sale not mentioned in sale notification—Right of purchaser to submerged* mahal.—The rights and interests of a judgment debtor in a *mauza* consisting of two *mahals* were sold in Court auction. At the time of the sale one of the *mahals* was covered with water. The submerged *mahal* was not mentioned in the sale notification. Subsequent to the sale the river having receded, the submerged *mahal* re-appeared. The auction-purchaser attempted to obtain possession of that *mahal* also. The judgment-debtor resisted on the ground that the submerged *mahal* did not pass by the sale. *Held*, that the proprietary rights of the judgment-debtor in the *mauza* were sold without limitation or restriction of any kind, and the mere fact of the mention in the sale notification of one *mahal* only did not affect what passed by the sale, since the other *mahal* was at the time submerged. The whole rights of the judgment-debtor in both the *mahals* passed to the purchaser, with the accessory and contingent right to any lands which might subsequently appear from the river's bed and accrete to such *mahal*. MUHAMMAD ABDUL KADIR v. KUTUB HUSSAIN, **9 A. 136 =A.W.N. 1886, 327.**

(9)—*Sale of property attached in execution completed.*—When the sale of the property attached in execution has been completed and the purchase-money has been paid into Court, nothing more remains to be done in respect of the execution of the decree as against that property. ANANDA MOHAN ROY v. HAR SUNDARI, **23 C. 196.**

(10)—*Insanity of judgment-debtor—Sale in execution without* guardian ad litem — *Validity of sale —Per Best, J.*—When a judgment-debtor has been declared a lunatic under Act XXXV of 1858, after decree, and before execution, and the decree-holder applies for execution, and the judgment-debtor's property is attached and sold without the latter being represented by a *guardian ad litem*, objection can be taken to the validity of the sale without a guardian, under s. 311, Civ. Pro. Code, and it must prevail if taken before the sale is

Sale – continued.

——5.—Sale in Execution of Decree—*contd.*

————*a.*—GENERAL—*continued.*

confirmed and a certificate issued to the purchaser. *Per Subramania Ayyar, J.*—These facts amount only to an irregularity of which the judgment-debtor cannot avail himself, unless he can also show that he has suffered substantial injury by the irregularity in the sale. NARAYANA KOTHAN v. KALIYANASUNDARAM PILLAI, **19 M. 219.** [*R.*, 22 M. 119.]

(11)—*Decree—Execution—Sale of agriculturist's house, whether illegal.*—The sale of a house belonging to an agriculturist in execution of a mortgage decree is not illegal. JANKI DAS v. SANDAL, **9 Ind. Cas. 825.**

(12)—*Execution sale of mortgage property—Right to standing crops.*—Where mortgage lands were in the hands of tenants under an agreement, the purchaser of the right, title and interest of the mortgagor in those properties in execution sale, is entitled also to the crops on those lands which had been cut and stored by the tenants since the date of the sale; and consequently it is not subject to attachment by any other judgment-creditor of the mortgagor. LAND MORTGAGE BANK OF INDIA (LD.) v. VISHNU GOVIND PATANKAR, **2 B. 670.** [*F.*, 13 M 15; *R.*, 15 C.P.L. R. 141.]

(13)—*Execution against property of testator—Life interest in residue of testator's property, whether saleable under.*—In this case the testator declared that his son G shall be his heir and executor for the purpose of executing his intentions. The son thereby became a trustee for the purpose of executing the different dispositions contained in that instrument. Those dispositions were to this effect. There was first a charge by way of an annuity of Rs. 1,200 in favour of the present appellant; all the debts were to be paid; there were very large legacies to be discharged; and after all these charges, debts, legacies and annuities had been satisfied or provided for, as to the remainder of the estate, G was to be tenant for life with remainder to his sons. He, therefore, was entitled to nothing for his own benefit but a life-interest in the residue of the real and personal property of the testator after all the charges upon it had been satisfied and provided for, and after a full administration had taken place of the assets for the purpose of discharging the said several dispositions; and such an interest was held to be one not liable to sale under an execution issued in the Supreme Court against the property of the testator. BEEBEE TOKAI SHEROB v. DAVOD MULLICK FUREEDOON BEGLAR. **4 W.R.P.C. 87=6 M I A. 510=1 Suther. 259=1 Sar. 577.** [*D.*, 16 A. 286=A.W.N. 1894, 84.]

(14)—*Legacy secured by mortgage of real estate of testator — Equitable charge—Sale by sheriff under writ against executor — Supreme Court — Immoveable property beyond jurisdiction.*—A legacy, reserved by a testator from his estate and devised in favour of his great-granddaughter, which has been, in pursuance of the directions contained in the Will, put in strict settlement by the executor and subsequently secured by a mortgage of the real estate of the testator to the trustee of the settlement is an equitable charge upon the whole of the real estates of the testator, and, in the absence of evidence of payment extinguishing such charge, the seizure and sale of a portion of the legacy under a writ against the executor is invalid. *Quære:*—Whether the Supreme Court had a right to proceed against lands situated beyond the jurisdiction limited by the Charter, and whether the Sheriff, under a writ of *fiori facias* requiring him to seize goods and chattels within the jurisdiction, can seize lands situated beyond such jurisdiction? STEPHEN LAZAR v COLLA RAGHAVA CHETTY, **5 W.R. P.C. 126=2 M.I.A. 83=1 Suther. 90=1 Sar. 157.** [*R.*, 5 M. 54, 7 M. 56.]

(15)—*Sale in execution—Sanction—Discretion of Commissioner.*—The Deputy Commissioner or Commissioner is bound to forward to the Financial Commissioner for his sanction, applications for sale of judgment-debtor's property in execution of decree. JAHAN KHAN v. AMIR BAZ, **1 P.R. 1887, Rev.**

(16)—*Execution of decree—Auction-sale of property both ancestral and self-acquired—Sanction of Government for sale of ancestral property—Sanction given after sale, sufficiency of.*—Part of a share sought to be sold in execution of decree was the self-acquired property of the appellant, and the remainder, of his ancestral estate. The Commissioner, while forwarding the sale statement to the Local Government for sanction with respect to the ancestral state, remarked "...when sanction is accorded to the sale of the ancestral portion, I will sanction sale of the self-acquired portion." The sale statement was sanctioned by the Local Government and was sent direct to the Deputy Commissioner. *Held*, that the sale of the self-acquired share was never sanctioned by the Commissioner and the Government sanction was not sufficient. *Held*, further, that sanction given after the sale had taken place was not sufficient. *Held* also, that the sale of no part of the share could be upheld, as it was impossible to say which part of the share was sold first. MOHAMMED AHMAD v. MUNSHI PRAG NARAIN, **14 O.C. 115.**

(17)—*Parties—Suit to eject by auction-purchaser—Joinder of judgment-debtor—Necessity—Court-sale—Right to question validity thereof—Right of strangers.*—*Held*, that, in a suit brought by an auction-purchaser to eject strangers in possession of the lands purchased by him, it is unnecessary to join the judgment-debtors as parties to the suit, because their interests, if any, in the property become vested in the auction-purchaser and no good purpose can be served by joining as defendants persons

***Sale*—continued.**

——5.—Sale in Execution of Decree—*contd.*

————*a.*—GENERAL—*continued.*

who are merely predecessors-in-title of the parties already on record. *Held*, also, that, whatever may have been the irregularities in obtaining the decree, the Court sale cannot be treated as a nullity, and that it is not open to strangers in possession of property to plead that the sale is bad. The judgment-debtors may be in a position to file a suit to have the sale set aside, but that question cannot be decided in a suit between the auction-purchaser and strangers in possession. GURDINOMAL HARDASMAL v. KESSANDAS, **2 S.L R. 80.**

(18)—*Civ. Pro. Code*, 1882, *ss.* 295 (=*s.* 73), 311 (=*O.* XXI, *r.* 90, *new Code*)—*Execution of decree — "Decree-holder," meaning of.*—The word "decree-holder" in s. 311, Civ. Pro. Code, is not limited to the decree-holder who instituted the execution proceedings. It covers also the case of a decree-holder who is entitled to come in and share in the proceeds of the sale under s. 295, Civ. Pro. Code. AJUDHIA PRASAD v. NAND LAL SINGH, **15 A. 318=A.W.N. 1893, 119.** (10 M. 57, *Appr.*) [*Diss.*, 4 C.W.N. 542]

(19)—*Act* VIII *of* 1859, *s.* 270—*Applicability —Rival decree holders.*—S. 270 of Act VIII of 1859 applies only to rival decree-holders claiming under different decrees, and not persons claiming under the same decree. MIRZA ABID ALI v. MUNNU BYAS, **2 Agra 183.**

(20)—*Execution sale — Judgment-debtor's saleable interest—Purchaser's rights—Failure of consideration.*—When there is a total failure of consideration, and the judgment-debtor has no saleable interest whatever in the property, the sale can be set aside. and the purchaser can get a refund of his purchase-money. But, when the judgment-debtor has a saleable interest, however small, the purchaser purchases at his own risk, and there is no warranty, that the property will answer to the description given of it. He is entitled to no relief in such a case. SONARAM DASS v. MOHIRAM DASS, **28 C. 235.** (17 M. 228, *F.*) [*R.*, 27 M. 131, P.C., 10 C.L.J. 492=3 Ind Cas. 438.]

(21)—*Court sale—Purchaser—Improvements made by him—Sale set aside subsequently on account of irregularity—Purchaser's right to get compensation for improvements*—Bona-fides, *if necessary—Nature of good faith*—Caveat emptor, *doctrine of—S.* 51, *T. P. Act*, 1882, *Inapplicability.*—Where an auction-purchaser who is a stranger enters upon the land purchased at a Court sale and makes permanent improvements upon the land, he is entitled to compensation therefor, upon the reversal of the judgment and the sale becoming invalid thereby, irrespective of any question of *bona-fides* on his part. (10 A. 166, 25 B. 357, 14 C. L.J. 300, *R.*) Even assuming that *bona fides* must be proved on the part of the purchaser making improvements, the good faith required

***Sale*—continued.**

——5.—Sale in Execution of Decree—*contd.*

————*a.*—GENERAL—*continued.*

does not go beyond an honest belief in the purchaser in the validity of his title. (12 C.L. J. 391, 32 M. 530, 33 C. 1119, *R.*) The principle of *caveat emptor* is not applicable to the case of a purchaser at a Court sale. It is no doubt well settled that there is no covenant for title implied in a Court sale. But this means nothing more than that the auction-purchaser takes only the interest in the property sold, which his judgment-debtor had in law at the time of sale. The scope of the doctrine does not extend to the consequences of defects or irregularities in the proceedings leading up to the sale, which might render it void or voidable. S. 51 of the Transfer of Property Act is also inapplicable to a purchaser at a Court sale. The fact that an auction-purchaser had, prior to making improvements, notice of the application made by the guardian *ad litem* of a minor defendant to set aside the Court sale, does not disentitle him from claiming compensation for the improvements made by him. MATHUNSA ROWTHEN v. APSA BIN, **21 M.L J. 969=10 M.L.T. 373=12 Ind. Cas. 444.**

(22)—*Sale in execution of decree—Confirmation of sale—Title of auction-purchaser—Validity—Certificate of sale.*—Where property has been sold in execution of a decree, it is not competent to a party to the suit in which the decree was passed or his representative in interest to dispute the title of the auction-purchaser at the sale after the confirmation of sale, although no certificate of sale had been obtained by the purchaser. The order confirming the sale would complete the title of the latter as against the former, and a certificate of sale is unnecessary. KHUSHAL PANACHAND v. BHIMABAI, **12 B. 589.** [*R.*, 16 A.W.N. 36, 36 P.L.R. 1903=9 P.R. 1903.]

(23)—*Absence of certificate of sale, effect of, on title of purchase in execution sale.*—The defendants in this case were the purchasers at an auction sale who, have been put in possession by Court in execution of a decree against the plaintiff's father, were held to be entitled to retain it as against the plaintiff notwithstanding their not having obtained the certificate of sale or not having got it registered. SHIVARAM NARAYAN MEKAL v. RAVJI SAKHARAM PRADHAN, **7 B. 254.** [*F.*, 12 B. 589; *R.*, 9 B. 10]

(24)—*Execution of decree—Sale in execution—Purchaser not bound to inquire into validity of order of sale.*—Where certain property was sold under a mortgage decree, and the sale was confirmed and possession given to the purchaser, the title of the purchaser would not be affected by the fact that the decree was one which the Court ought not to have made. It is not necessary for an intending purchaser at a sale under a decree to go behind the decree, to see

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*a.*—GENERAL—*continued.*

whether the decree has been rightly made. KAUNSILLA v. CHANDAR SEN, **22 A. 377 = A.W.N. 1900, 123.** (14 C 18, *R.*; 13 A. 432, 19 A. 541, *D.*; 6 C. 734, *R.*) [*Overruled*, 25 A. 214.]

(25)—*Purchaser at sale in execution—Plea of want of notice—Priority of registered over unregistered deeds—Scope of rule.* — The High Court has, in the rules made by it under s. 287 of Act X of 1877, provided for notice being given to purchasers that the sale only extends to the right, title and interest of the judgment-debtor, and that the Court ordering the sale does not warrant the title. Consequently a purchaser who buys at such a sale an avowedly doubtful title, pays for it on that understanding, and cannot claim to be a purchaser for value without notice. SOBHAGCHAND GULABCHAND v. BHAICHAND, **6 B. 193, F.B.** [*F.*, 6 Bom.L.R. 1013, 62 P.R. 1908=7 P.W.R. 1908; *Appr.*, 11 B. 588; *R.*, 6 B. 490, 6 B. 495, 8 B. 489, 9 B. 10, 7 M. 248, 10 B. 453, 9 M. 495, 9 A. 97, 13 A. 28=10 A.W.N. 216, 17 B. 375, 21 B. 205, 22 B. 945, 29 B. 234=7 Bom.L.R. 200, 1 N.L.R. 125, 142 P.R. 1908, F.B., 1 S. L.R. 104; *D.*, 16 B. 91.]

(26)—*Purchaser at judicial sale, right of mortgagee without possession as against private purchaser and purchaser at Court sale, distinction between.*—Possession or registration is necessary to validate a mortgage in the Deccan or elsewhere in the Presidency of Bombay, except Gujarat, against a private purchaser for valuable consideration without notice. In the case of a judicial sale, however, the purchaser at such a sale takes only that which the judgment debtor could honestly dispose of, and so a mortgage without possession which would be binding on the mortgagor himself would also be binding on the purchaser in execution of a decree obtained against the mortgagor. BAPUJI BALAL v. SATYABHAMABAI, **6 B. 490.** [*F.*, 6 B. 495, 62 P.R. 1908 =7 P.W.R. 1908; *R.*, 13 A. 28= A.W N. 1890, 216, 27 B. 452.]

(27)—*Transfer of Property Act* (IV *of* 1882), *s.* 88—*Purchase of property in execution by the mortgagee decree-holder—Execution for balance of decretal amount after sale—Mortgagee to give credit only for amount of purchase-money.*—Where part of the mortgaged property is sold in satisfaction of a decree for sale obtained on the mortgage, and the mortgagee purchases it with the leave of the Court, but the mortgage-debt is not fully satisfied by such sale, the mortgagee is entitled to seek out execution for the balance of the decretal amount against the remaining property covered by the mortgage, giving credit to the mortgagor only to the extent of the amount of the purchase-money without reference to the actual market value of the property purchased. MUHAMAD HUSEN ALI KHAN v. THAKUR DHARAM SINGH, **18 A. 81=A.W.N. 1895, 144.** (16 C. 682, 16 C. 182, 19 C. 4, *R.*) [*R.*, 4 C.L.J. 246.]

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*a.*—GENERAL—*continued.*

(28)—*Mortgage-bond—Attachment—Sale*—If at the date of the sale of a decree on a bond which only establishes a lien as incident to a money-debt the property over which the lien extends has already been attached, the attachment enforces the lien; and if the property is sold pending the attachment, the lien is transferred from the property to the purchase-moneys. SYUD NADIR HOSSEIN v. PEAROO THOVILDARINEE, **14 B.L.R. 426, Note=19 W. R. 255.** [*R.*, 22 W. R. 98, 14 C. 464.]

(29)—*Execution—Court sale, duly confirmed, when it can be questioned in a different proceeding—Mortgage—Effect of the purchase of equity of redemption in a portion of hypotheca by mortgagee—Whether such purchase extinguishes mortgage altogether.*—The validity of a Court sale in execution of a decree cannot be questioned in an execution proceeding arising out of another decree, to which all persons interested in the original decree and sale are not parties. (32 M. 242, *Cons.*) The purchase by a mortgagee of a portion of the hypotheca does not *necessarily* operate as a full discharge of the mortgage, without regard to the value of the property purchased and the price paid. (20 A. 23, *Appr.*; 18 M. 153, 30 M. 461, *D.*) Where 33 out of the 34 items of hypotheca were purchased by the mortgagees subject to the mortgage liability, and the value thereof was fully equal to the amount due on the mortgage-decree, *held*, the mortgagees cannot proceed against the 34th item in execution of the mortgage-decree. SAMI ROWAPPA v. KUPPU SAMI IYENGAR, **10 M.L.T. 240=12 Ind. Cas. 130.**

(30)—*Execution—Sale—Property not comprised in the mortgage sold—Subsequent application for sale of property comprised in the mortgage cannot be allowed.*—In 1897, the decree-holder applied for execution of his decree which he had obtained on foot of his mortgages. A portion of the property, which he sought to have sold, was not comprised in the mortgage. The Subordinate Judge so held it and set aside the sale. The decree-holder, however, got the decision of the Subordinate Judge set aside by the High Court. He subsequently made another application for execution and sought to have the portion really comprised in the mortgage sold, alleging that the part of the property which had been sold in 1897 was not comprised in the mortgage, and that he now proceeded against the real property and that he should not be prevented from putting it to sale: *Held*, that it was not, under the circumstances, equitable and just to allow the decree-holder to sell the property in dispute. JUGAL KISHORE v. GANESH PARSHAD, **3 Ind. Cas. 22.**

(31)—*Execution of decree — Purchase by decree-holder, under s. 294, Civ Pro. Code, of mortgaged land—Value paid includes the sum due to the prior mortgagee.*—The owner of land

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

———*a.*—GENERAL—*continued.*

subject to a mortgage sold it in consideration of the purchaser paying off the mortgage. The latter having failed to do so, the vendor brought a suit against him for damages for loss sustained by him in consequence of such non-payment, and obtained a decree. In execution of this decree he purchased, with the leave of the Court, the equity of redemption vested in the vendee. In further execution of the same decree for the balance still remaining due, the question arose as to the amount to which credit ought to be given by the decree holder purchaser in favour of the judgment-debtor. *Held* that, having obtained leave of the Court, the decree-holder must be considered to be in the position of an independent purchaser, and that the price which such a purchaser must be taken to pay when he buys property subject to a mortgage for cash payment made to the mortgagor on account of his right of redemption —namely, the actual cash paid *plus* the amount of the mortgage debt—was the amount to which credit should be given by the decree-holder. KRISHNASAMI AYYAR v. JANAKI AMMAL, **18 M. 153**. [*Not Appr.*, 18 A. 31 ; *D.*, 24 M. 96.]

(32)—*Act* VIII *of* 1859, *s.* 271—*Equity of redemption—Execution of decree—Sale.*—Under Act VIII of 1859, an equity of redemption can be sold in execution of decree. SRIMATI SARASWATI DEBI v. NABADWIP CHANDRA GOSAIN, **5 B.L.R. 380.**

(33)—*Civ. Pro. Code*, 1882, *s.* 311 (=*O.* XXI, *r.* 90, *new Code*)—*Application to set aside sale in execution—Decree-holder necessary party.*—The decree-holder is a necessary party to an application under s. 311, Civ. Pro. Code, by the judgment debtor to set aside a sale in execution. Accordingly, where a judgment-debtor applied under that section, and did not implead the decree-holder until long after the period of limitation had expired, the application was dismissed. ALI GAUHAR KHAN v. BANSIDHAR, **15 A. 407=A.W.N. 1893, 173**. (A.W.N. 1891, 121, *R.*)

(34)—*Agreement to set aside sale—Power to modify agreement—Appeal against order in execution-proceedings.*—If initially an agreement (such as an agreement between the decree-holder and the judgment-debtor that an execution sale would be set aside on payment to the former the whole amount of decree with costs, and on default the sale would stand good) is entered into by the parties with the assent of the Court, it is open to the parties, at a subsequent stage, with the approval of the Court, to modify that agreement. The Court, cannot, at the instance of one of the parties and in spite of the protest of the other, vary the terms of the agreement. (6 C.L.J. 176, *D.*) An appeal need not be preferred against every order in an execution proceeding. It is open to the party aggrieved to challenge, on appeal

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

———*a.*—GENERAL—*continued.*

against the final order which determines the rights of the parties, the propriety of the interlocutary orders made in the course of the proceedings. CHANDANBALA DEBI v. PROBODH CHANDRA ROY CHOWDHRY, **9 C L J. 251=36 C. 422=2 Ind. Cas. 338.** (18 C. 469, *F.*) [*R.*, 5 Ind. Cas. 489.]

(35)—*Execution—Application to cancel sale—Dismissal of—Fresh application—Cancellation of sale—Propriety—Review, powers of.*—Where a Judge at first dismissed for default an application by a judgment-debtor under O. XXI, r. 89, Civ. Pro. Code, and where, on a second application made by him, the Judge re-heard the petition and cancelled the sale, *held*, that the Judge had power to do so. It was quite open to the lower Court to treat the second application as one for review, and it is open to uphold the order passed thereon on the ground that it could have been passed on review. R.N. SWAMINATHA NAIKER v. MESSES. R. D. PAUL, **10 M.L.T. 569=12 Ind. Cas. 351=22 M. L.J. 148=M.W.N. 1912, 547.**

(36)—*Execution sale — Agreement between judgment-debtor and decree-holder, before confirmation, setting aside sale — Auction-purchaser, if bound—"Party"—Right to object—Right of appeal—Civ. Pro. Code (Act V of 1908), O. 21, rr. 89, 90, 92, s. 148—Limitation Act* (IX *of* 1908), *s.* 5—*Extension of time to deposit decretal money, etc., to set aside sale.*—Where, after the sale of a property in execution of a decree but before confirmation thereof, the decree-holder consented to the sale being set aside on payment of the decretal amount by the judgment-debtor, and the payment was made and certified in Court : *Held*—That this did not preclude the auction-purchaser, whose right is independent of that of the decree-holder, from asking for confirmation of the sale in his own right. He would also, if his application were rejected, be entitled to appeal from that decision, being a party prejudicially affected by that order. The High Court has no power to extend the time allowed to the judgment-debtor by O. 21, r. 92, sub-r. (2) to deposit the decretal amount, etc , with a view to setting aside the sale, either under s. 5, Limitation Act, or under s. 148, Civ. Pro. Code, BIBI SHAROFAN. v. 3 MAHOMED HABIBUDDIN, **15 C.W.N. 685=13 C.L.J. 535.**

(37)—*Execution sale—Suit to set aside as collusive and fraudulent, after application refused under s.* 311, *Civ. Pro. Code (Act* XIV *of* 1882)—Benami *purchase, allegation of—Misrepresentation by judgment-debtor's pleader—auction-purchaser if to be held responsible—Concurrent findings of fraud, reversed.*—In a suit to set aside an auction sale, on the ground that it was brought about by the fraud of the decree-holder and the judgment-debtor, it being alleged further that the auction-pur-

***Sale*—continued.**

——5.—Sale in Execution of Decree—*contd.*

————*a.*—GENERAL—*continued.*

chaser was a *benamidar* of the judgment-debtor, it was found that the debt and the decree of the decree-holder were genuine, that the property was purchased by the auction-purchaser who was a man of substance out of his own funds which thereupon went to pay off the judgment-debtor's creditors : *Held*, on the evidence, that the allegation of fraud and conspiracy made against the auction-purchaser had not been brought home to him, and that, under all the circumstances, there was no sufficient ground for setting aside a sale confirmed by the Court after prompt local enquiry and for inflicting on the auction-purchaser a forfeiture of the considerable purchase-money paid by him out of his own funds. *Held*, further, that, if the allegation that the plaintiff's men were dissuaded from bidding at the sale by the pleader for the judgment-debtor falsely assuring them that he had instructions to apply for a postponement, was true, the auction-purchaser could not be held responsible for the misrepresentation. The concurrent judgments of the Courts in India holding the sale to be fraudulent and collusive, *reversed*. BISHUN CHAND BACHHAOT v. BIJOY SINGH DUDHURIA, **15 C.W.N. 648. P.C.=8 A.L.J. 587=13 Bom. L.R. 440=13 C.L.J. 588=21 M. L.J. 652=10 M.L.T. 335=11 Ind. Cas. 399= 1 M.W.N. 1911, 418.**

(38)—*Execution-sale—Setting aside decree on review—Writ of* elegit—*Writ of* fieri facias.—A *bona fide* sale under a decree is binding, notwithstanding the decree may be set aside upon review. (7 W.R. 312, *F.*) Of the two kinds of executions in England, *viz.*, a writ of *elegit* and a writ of *fieri facias*, when property is delivered under the former to an executor, in order that he may satisfy his judgment by collecting the rents of the estate, the reversal of the judgment puts an end to the plaintiff's title; but in the case of a *fieri facias*, the sale by the sheriff to a *bona fide* purchaser under a decree is not affected by the reversal of the decree. JAN ALI v. JAN ALI CHOWDHRY, **1 B.L.R.A.C. 56=10 W.R. 154.** [*F.*, 1 B.L.R.A.C. 84; 12 W.R. 508; 8 B.H.C. 37, 19 W.R. 234, 6 N.W.P. 291, 11 C. 362; *Appl.*, 15 W.R. 365; *R.*, 15 W.R. 372, 20 W.R. 120, 2 C.L.R. 223, F.B., 26 B. 543; *Cons.*, 23 C. 857, 26 C. 734; *D.*, 13 W.R. 185, 6 B.L.R. App. 90, 8 B.L.R. 1, 22 W.R. 452, 10 C. 220.]

(39)—*Sale in execution of* ex-parte *decree subsequently set aside, if a nullity—Fraud allegation of—Proof—Dishonesty, essential element.*—On an application to set aside an execution sale on the ground of fraud : *Held*—that any irregularity should not be taken to be fraud with the consequences that such a finding involves. A finding of fraud should be reserved for that which is dishonest and morally wrong, and it is not sufficient to come to a vague general finding of fraud. Actual

***Sale*—continued.**

——5.—Sale in Execution of Decree—*contd.*

————*a.*—GENERAL—*continued.*

fraud must be established. *Quære.*—Whether an auction-purchaser who is himself innocent is affected by any fraud proved concerning the sale. (10 M.I.A. 454, *R.*) A purchase by a stranger at a sale in execution of an *ex parte* decree stands good, notwithstanding that subsequently thereto the decree is set aside on the ground that no summons had in fact been served on the defendant. An *ex-parte* decree which is subsequently set aside is not a nullity. PARESH NATH MULLIK v. HARI CHARAN DEY, 15 **C.W.N. 875.** (32 C. 296=9 C.W.N. 201, *R.*)

(40)—*Waiver — Judgment-debtor foregoing right to object for irregularity and inadequacy of price, not on the ground of fraud—Investigation—Honest combination and dishonest concert, distinction between—Execution sale, when vitiated—Fraud — Decree-holder or auction-purchaser—Combination among bidders, lawful or unlawful — Test—Auction sale, bidders' combination.*—A judgment-debtor, who obtains an adjournment of sale upon the condition that he would not raise any objection on the ground of irregularity and inadequacy of price, does not waive his right to question the sale on the ground of fraud. He is entitled to have his allegation of fraud fully investigated. (6 C.L.J. 62, *F.*) It cannot be affirmed as an inflexible rule of law that a combination among intending purchasers not to bid against each other cannot under any circumstances amount to fraud. (27 I.A. 17=23 M. 227, *Expl.*) All judicial sales of property should be free from undue influence, controlling or stifling competition and threat; but there is nothing to prevent persons from combining from honest motives to purchase property at such sales. (7 W. R. 81, *R*). There is a distinction between an honest combination among intending purchasers and a dishonest concert for the suppression of all competition. (1 C. L. J. 85, *R.*) The test, in each case, is, what was the object of the agreement among the bidders; it is the end to be accomplished which determines whether a combination is lawful or otherwise. If the object be to obtain the property as a sacrifice by artifice, the combination is fraudulent; if the object be to make a fair bargain or even to divide the property for the accommodation of the purchasers, the combination cannot be said to be fraudulent. If fraud is established on the part of either the auction-purchaser or the decree-holder, the execution-sale is vitiated. AMBIKA PRASAD SINGH v. R. H. WHITWELL AND SITARAM SINGH, **6 C.L.J. 111.** (6 C. W. N. 279, 6 C.W.N. 283, *R.*; 20 M. 10, *Diss.*) [*Diss.*, 36 C. 139=13 C.W.N. 87=1 Ind. Cas. 784; *F.*, 12 C.W.N. 156, *Note.*]

(41)—*Execution-sale of tenure—Misdescription in sale-proclamation, effect of.*—Where the services attaching to a tenure are not private or personal to the Raja, but are of a public nature, a proclamation for the sale of the tenure

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*a.*—GENERAL—*continued.*

describing it as an ordinary rent-paying one and ignoring the important fact that it is a service tenure is sufficient misdescription to vitiate the sale held under the proclamation—*Per White, J.* BHUKRONATH SINGH v. NILMONI SINGH, **5 C. 389=4 C.L.R. 583.** (6 W. R. 121, 18 W. R. 321, *R.*)

(42)—*Civ. Pro. Code* (1882), *s.* 311 (=*O.* XXI, *r.* 90, *new Code*—*Sale in execution of decree without previous attachment—Material irregularity—Substantial injury.*—The absence of attachment prior to an execution sale is no more than a material irregularity and does not, in the absence of proof of substantial injury, vitiate the sale. SHEODHYAN v. BHOLANATH, **21 A. 311=A.W.N. 1899, 84.** (10 A. 506, 11 A. 333, A.W.N. 1898, 212, 21 C. 66, *R.*; 5 A. 86, *D.*) [*R.*, 5 C.L.J. 687, 34 C. 811=5 C.L.J. 696=11 C.W.N. 756.]

(43)—*Auction-sale of property not void if time and place, fixed in the proclamation, changed—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 311—*Mere irregularity does not vitiate a sale.*—Where the sale of a judgment-debtor's immoveable property was held at a place different from that fixed in the proclamation of sale, but it was not alleged that the judgment-debtor was ignorant of this fact, *Held*, that this was not such an irregularity as rendered the sale void. KRISHNAJI RAMACHANDRA DATAR v. BOMANJI EDALJI, **11 Bom. L.R. 380=33 B. 657=2 Ind. Cas. 459.**

(44)—*Publication and conduct of sale, irregularity in—Waiver by judgment-debtor.*—A petition by the judgment-debtor, praying for a postponement of an execution-sale, would not amount to an admission that the publication and proclamation of sale were properly made, and would be no ground to refuse to hear evidence on the matter, when irregularities are alleged by the judgment debtor in the publication and the conduct of the sale. THAKOOR MAHATAB DEO v. LEELANUND SINGH, **7 C. 613=9 C.L.R. 398.** [*F.*, 17 M. 304.]

(45)—*Sale in execution—No notice to proper legal representative of judgment-debtor—Validity of sale—Irregularity.*—Where the property of a deceased judgment-debtor was brought to sale without the proper legal representative of the deceased having had notice of the sale, and with a wrong person brought on record, the sale was not a nullity but was valid until it was vacated, inasmuch as the error committed by the Court did not destroy the jurisdiction which the Court otherwise had. MALKARJUN BIN SHIDRAMAPPA PASARE v. NARHARI BIN SHIVAPPA, **10 M.L.J. 368, P.C.=25 B. 337=27 I.A. 216=5 C.W.N. 10=2 Bom. L.R. 927=7 Sar. 739.**

(46)—*Execution of money-decree—Sale without attachment void—Civ. Pro. Code,* 1882, *s.* 311—"*Material irregularity.*"—A regularly

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*a.*—GENERAL—*continued.*

perfected attachment is an essential preliminary to sales in execution of simple decrees for money; and where there has been no such attachment, any sale that may have taken place is not simply voidable, but *ipso facto*, void. (5 A. 86, *F.*) Such a sale can be set aside even without proof of substantial injury. [*R.*, 12 A. 440, 5 C.L.J. 687, 18 A. 469=16 A.W.N. 154, 21 A. 311.] In the first paragraph of the section, the phrase "a material irregularity in publishing or conducting" a sale must be construed broadly and liberally. (3 A. 424, 6 C. 103, 7 A. 289, 9 A. 511, *R.*) Absence of attachment at the time of the sale is "a material irregularity," within the meaning of the section, attachment being the first step which the Court, in executing simple money-decrees, has to take to assert its authority to bring property to compulsory sale. RAM CHAND v. PITAM MAL, **10 A. 506=A.W.N. 1888, 195.** (6 M. 237, *D.*)

(47)—*Inadequacy of price fetched at sale being result of irregularity, complained of, established how?*—The fact that inadequacy of price is the result of irregularity may either be established by direct evidence or be inferred, where such inference is reasonable, from the nature of the irregularity and the extent of the inadequacy of the price. SHEORUTTON SINGH v. NET LALL SAHU, **30 C. 1=6 C.W.N 688.** (9 C. 656, 11 C. 200, 20 C. 599, 24 C. 291, 6 C.W.N. 44, 48, 24 A. 412, *F.*) [*R.*, 132 P.R. 1906=11 P.L.R. 1907, 31 C. 815.]

(48)—*Sale—Proclamation that property would be sold subject to charge—Subsequent sale of same property free from incumbrance without first proclamation, whether valid.*—A property was advertised for sale subject to certain charges, but was subsequently sold free of all charges, without a fresh sale proclamation, and the purchase was made by the decree-holder: *Held*, that a purchase at an execution sale held under those circumstances, especially a purchase by the decree-holder, ought to be scrutinized with great care, and an opportunity should be given to the judgment-debtor to show that he had suffered substantial injury by reason of material irregularity. MALIK FAZIR RAHAMAN v. JAWAHIR SINGH, **9 Ind. Cas. 383.**

(49)—*Suit for possession of immoveable property—Fraud—Execution sale—Hindu widow, her position—Representation of her husband's estate—Costs, decree for, against Hindu widow, if and when binding on the reversioners—Sale-certificate, if creates or proves title*—Lis pendens—*Purchaser's right to prove what passed by sale.*—Where a Hindu widow along with her co-sharers brought a suit to set aside an auction sale, in a Court which ultimately held that that Court had no (pecuniary) jurisdiction to entertain the suit and returned the plaint for presentation to the proper Court and directed the plaintiff to pay the costs of

Sale –continued.

——5.—Sale in Execution of Decree—*contd.*

————*a.*—GENERAL—*continued.*

the proceeding to the defendants, and the plaintiff subsequently brought a suit in the proper Court and obtained a decree for recovery of the property on setting aside the sale, and where, in execution of the decree for costs made in the infructuous proceedings, property was attached, sold and purchased by the decree holder: *Held*, that the suit to set aside the sale and to recover possession of the property was commenced by the Hindu widow as the representative of the estate of her husband and for the benefit thereof, and when, as in the present case, her claim was well founded on the merits, as the result of the trial before the competent Court subsequently manifested, the decree for costs in the preliminary proceeding must be taken to have been made against her as representative of the estate, and when in execution the property was brought to sale, it must be taken that not merely her limited interest but the entire inheritance passed to the auction-purchaser, the decree for costs being capable of execution against the estate of the husband in the hands of the widow. (6 C. 479, 23 C. 636, 7 C.W.N. 678, 8 C.W.N. 843, *R.*) The authority of the widow to throw the liability upon the estate in her hands cannot be taken to be more restricted than that of a *shebait* to charge *debutter* property under similar circumstances. (7 C.L.J. 514, *R.*) The law as to the liability of a trustee in such circumstances discussed. The position of a Hindu widow, so far as the present question is concerned, is not inferior to that of a trustee, for she represents the estate fully, and the only limitation upon her title is that she has a qualified right of alienation. In order to determine the exact interest which passes at a sale in execution of a decree against a Hindu widow or a qualified proprietor similarly situated, the test to be applied is whether the suit, in which the sale was directed, was brought against the widow upon a cause of action personal to herself or one which affected the whole inheritance of the property in suit. Where it appears that the decree against the widow is in respect of the husband's estate and binds the reversionary heirs, the purchaser of her right, title and interest in execution takes the estate absolutely. No inference can be drawn from the circumstance that the sale certificate describes the property sold as right, title and interest of the widow. (6 C.L.J. 490, 7 C. 357, 11 I.A. 66, *R. and F.*; 1 C. 183=2 I.A. 275, 12 C.W.N. 769, 30 A. 394, *Expl. and D.*) In the case of a mortgage suit, the *lis* continues after the decree *nisi*, and the doctrine of *lis pendens* is applicable to proceedings to realize the mortgage after the decree for sale. (2 C.L.J. 288, *R. and F.*) A purchaser of immoveable property at an auction sale can establish his title by evidence independently of the sale certificate, as a sale certificate does not create title, but is merely evidence of title. **BRAJA NATH PAL v. JOGGESWAR BAGCHI, 9 C.L.J. 346=1 Ind. Cas. 62.** (7 C.L.J. 384, *R.*)

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*a.*—GENERAL—*continued.*

(50)—*Execution — Sale of the property—Rights of the auction-purchaser*—Lis pendens—*Application of the doctrine to purchasers buying in execution under decree of the very suit in which the decree is passed—Appeal from the decree—Sale under the decree—Stay of the sale.*—A sale in execution of a money decree is not affected by the subsequent reversal of the decree. A purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties; and that it has on that investigation properly decreed a sale. He has no right to call upon the Court to protect him for a title not in issue in the cause, and no way affected by the decree, but if he gets a proper conveyance of the estate, so that no person whom the decree affects can invalidate the title, although the decree may be erroneous and therefore to be invalidated, the title of the purchaser ought not to be invalidated. Where an appeal is presented from a decree directing a sale of property in dispute in a suit, then the only course is to take such steps as will secure that by stay or otherwise no detriment shall be suffered by the appellant in case the appeal succeeds. Ordinarily, no greater interest passes on the realization by sale of a mortgage security than is comprised in the mortgage, for apart from special circumstances, a man cannot pass more than he has. The Court will not ordinarily disturb a purchaser under a Court's order or decree in favour of a person bound thereby. SHIVLAL v. SHAMBHUPRASAD, **7 Bom. L.R. 585=29 B. 433.**

(51)—*Sale in execution of decree—Deposit of portion of purchase-money by purchaser—Withdrawal of deposit by Nazir for his commission—Order of fresh sale by Court—Right of purchaser to refund.*—Where a sale had been treated as incomplete by the Court ordering a fresh sale without setting aside the previous one, the purchaser of property in the prior sale, whose deposit of a portion of the sale price had been withdrawn by the Nazir for his commission, is entitled to the refund of his money, and the Court has authority to direct the Nazir to refund it, there being no cause of action against the judgment-debtor. PALA SHAH v. SYUD HAMID SHAH, **68 P.R. 1885.** (183 P.R. 1883, *Appr.*) [*F.*, 46 P.R. 1886, Note.]

(52)—*Execution of decree—Sale—Confirmation of sale, effect of absence of attachment on.*—A sale in execution of decree, after it is confirmed and after a sale certificate is granted to the purchaser, cannot be regarded as a nullity by reason of the absence of attachment. KISHORY MOHUN ROY v. MAHOMED MUJAFFAR HOSSEIN, **18 C. 188.** (8 W R 9, *F.*; 5 A. 86, *D.*) [*Affirmed*, 22 C 909, P C.; *F.*, 21 C. 639; *R.*, 30 M. 255=17 M L.J. 201=2 M. L.T. 167, 34 C. 787=11 C.W.N. 745, 11 C.W. N. 756=5 C.L.J. 696=34 C. 811=2 M.L.T. 371.]

Sale—continued.

——5.—**Sale in Execution of Decree**—*contd.*

————*a.*—GENERAL—*continued.*

(53)—*Execution— Order confirming sale—Limitation.*—Until the order is passed confirming a sale in execution of a decree, the decree-holder should be considered as executing his decree, and limitation runs against him only from the date of the order confirming the sale. BROJUNGONA DASSEE v. SHONA MOOKHEE DASSEE, **15 W.R. 51.**

(54)—*Execution of money decree—Sale of property without attachment, invalidity of—Civ. Pro. Code, Ch.* XIX *and s.* 254.—A regularly perfected attachment is an essential preliminary to sales in execution of simple money-decrees, and where there has been no such attachment, any sale that may have taken place, is not simply voidable, but "*de facto*" void MAHADEO DUBEY v. BHOLA NATH DICHIT, **3 A. 86, F.B.=A.W.N. 1882, 186.** [*Diss.*, 18 C. 188 ; *F.*, 10 A. 506 ; *Appr.*, 7 A. 702=5 A. W.N. 179 ; *R.*, 7 A. 38, 9 A. 136, 16 B. 91, 18 A. 469=16 A.W.N. 154, 21 A. 140, 11 C.W.N. 756, F.B=5 C.L.J. 696 ; *D.*, 10 M. 169, 21 A. 311.]

(55)—*Purchaser at Court sale—Valid liens created by judgment-debtor.*—The purchaser at an auction sale in execution of a decree buys only the right, title and interest of the debtor burdened with all valid liens created by him, *e.g.*, a previous *san* mortgage. RANCHODDAS DAYALDAS v. RAMCHODDAS NANABHAI, **1 B. 581.** (7 B.H C. A C. 24, 9 B.H.C. 304, *F.*) [*R.*, 6 B. 168, F.B., 6 B. 193, F.B.]

(56)—*Sale of immoveable property in execution of decree—Decree-holders with liens—Right of priority.*—Where immoveable property is sold in execution of decrees declaring a lien upon it, the decree-holders have a right to be paid out of the sale proceeds, in the order of the priority of their claims, provided they have, before the order for distribution, taken out execution of their decrees against the judgment-debtor. MANIK SINGH v. PARAS RAM, **1 A. 727.**

(57)—*Execution of decree—Attachment of property in execution of decrees of two Courts—Postponement of sale by Court of higher grade—Sale of property by Court of lower grade—Invalidity of sale—Civ. Pro. Code*, 1877, *ss.* 295, 311.—When several decrees of different Courts are out against a judgment-debtor, and his immoveable property has been attached in pursuance of them, the law contemplates, no matter whether such Courts be of the same or different grades, that one Court and one Court only, shall have the power of deciding objections to the attachment, of determining claims made to the property, of ordering the sale thereof, and receiving the proceeds, and of providing for the distribution under s. 295. Where the Courts are of different grades, the one upon which this duty devolves is that of the highest grade ; where they are of the same grade, that which first effectuated the attachment. Where, therefore, the immoveable property of a judgment-debtor was attached in execution of decrees passed by a Subordinate Judge and a District Munsif, and the Subordinate Judge postponed the sale of such property, but the Munsif refused such postponement and ordered the sale of the property, *held*, that the sale of the property was void as having been made in pursuance of the order of a Court which had no jurisdiction to pass such order. *In the Matter of the Petition of* BADRI PRASAD v. SARAN LAL, **4 A. 359=A.W.N. 1882, 69.** [*Diss.*, 19 C. 651, 34 C. 836=6 C.L.J. 130 ; *F.*, 5 A. 615, 29 C. 773=1 C.L.J. 97, 24 A.W.N. 95=26 A. 538; *Appr.*, 18 A. 348 ; *R.*, 12 C. 333, 18 B. 458, 22 B. 88, 13 C.P.L.R. 145 ; *D.*, 6 A 255.]

(58)—*Sale under Acts* VIII *of* 1859, *and* X *of* 1877—*Sale in execution of decree enforcing lien.*—Under Act X of 1877, what is sold in execution of a decree purports to be some specific property ; whereas, under Act VIII of 1859, what was sold in execution was the right, title and interest of the judgment-debtor in the "property sold." Similarly, while a sale certificate under the Act of 1859 declared that the purchaser had purchased the right, title and interest of the judgment-debtor in the property sold, a certificate under the Act of 1877, mentions the property sold and the name of the person, who, at the time of sale, declared to be the purchaser. [*R.*, 3 Bom. L.R. 322.] Where property is purchased at a sale in execution of a money-decree with notice that another person has obtained a decree enforcing a lien upon it, the purchaser cannot maintain his possession, against another purchaser of the same property, in execution of the decree enforcing the hypothecation. SHEO RATAN LAL v. CHOTEY LAL, **3 A. 647=A.W.N. 1881, 43.**

(59)—*Execution of decree—Sale of Zamindari rights—Building appurtenant to zamindari rights.*—The sale, in execution of a decree, of the "rights and interests" of a zemindar in a village, passes also the buildings appurtenant to the zemindari rights, in the absence of evidence that they were excluded. ABUHUSAN v. RAMZAN ALI, **4 A. 381.** (S.A. No. 245 of 1876, *F.*) [*R.*, 24 A. 218.]

(60)—*Execution sale—Impartible estate governed by law of primogeniture—Sale of right, title and interest of Zemindar—Inadequacy of price paid—Interest bought by purchaser.*—Certain villages belonging to an impartible estate governed by the law of primogeniture had been subjected to a lease. In execution of certain decrees againt the Zemindar, his right, title and interest in the villages were sold. The price fetched was very inadequate as compared with the value of the villages. On the death of the Zemindar, the lease having expired by that time, the purchaser sued to recover possession of the villages. *Held* that, considering the law as it stood at the time of sale and the

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————a.—GENERAL—*continued.*

very low price paid, the interest purchased by the plaintiff was only the life estate of the Zemindar in the villages, which determined with the death of the Zemindar. ABDUL AZIZ KHAN SAHIB v. APPAYASAMI NAICKER, **22 M. 110**. [*R.*, 3 Bom. L.R. 322, 27 M, 131, P.C.]

(61)—*Decree against father—Extent of right of purchaser in execution—Son's share when passes.*—In this case, the Subordinate Judge held that the purchaser at the sale in execution of a decree, obtained against the father of the plaintiffs, got not only the right, title and interest of the father, but that the share of one of the two sons, the plaintiffs, also passed by the sale, as he had been made a party to the suit and proceedings in execution after his father's death as his legal representative. On appeal by the defendants, the District Judge rejected the plaintiffs' plaint. The High Court, without expressing any opinion on the Subordinate Judge's view as to the liability of one of the sons, reversed the decree of the District Judge, holding that what the execution-purchaser really bought was only the right, title and interest of the appellant's father in the property in dispute, namely, his share in it. GULAPA v. BASOWA, **9 B. 307, Note.**

(62)—*Civ. Pro. Code, s.* 292—*Auction sale—Vakil purchaser.*—S. 292 of the Code of Civil Procedure does not prohibit vakils of parties to a suit from purchasing property sold in execution of the decree. ALAGIRISAMI v. RAMANATHAN, **10 M. 111.**

(63)—*Delivery of formal possession to auction-purchaser, effect of—Limitation saved not only against the judgment-debtor but also against his co-sharer.*—*Held*, that formal possession obtained by an auction-purchaser of an undivided share saves limitation not only as against the judgment-debtor but as against the co-sharers with whom he is in joint possession. HANUMAN DAS v. AMBIKA PARSHAD, **3 A.L.J. 659=A.W.N. 1906, 278.**

(64)—Gaontia *rights—Saleability in execution of decree.*—A general restriction on assignment does not apply to an assignment by operation of law, taking effect *in invitum*. Consequently the rights of a *Gaontia* with protected status are liable to sale in execution of a decree. SHAMSUDDIN AHMED KHAN v. SHAIKH AMIR ALEE, **9 C.P.L.R. 134.**

(65)—*Sale by Court having jurisdiction—Purchaser not bound to enquire into correctness or otherwise of decree.*—Where a property attached in execution of a money decree was sold by a Court having jurisdiction to sell the same the purchaser had nothing to do with the correctness or incorrectness of the decree, which was being executed. He got his title to the property sold by reason of the authority given by law to the Court to sell it to him. SADASHEO BALKRISHNA v. KRISHNA RAO DEORUS, **2 C.P.L.R. 9.**

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————a.—GENERAL—*continued.*

(66)—*Invalid decree—Sale in execution—Limitation—Act* XIV *of* 1859, *s.* 20.—A sale in execution of a decree is vitiated by the circumstance of the decree being at the time of sale invalid, *e.g.*, barred by limitation. GOLAM ASGAR v. LAKHIMANI DEBI, **5 B.L.R. 68=18 W.R. 273.** [*F.*, 5 N.W.P. 242; *Appr.*, 20 W.R. 5; *D.*, 20 W.R. 5.]

(67)—*Attachment—Execution sale of one property—Non-payment of purchase-money—Right to sell other properties.*—In execution of a decree for Rs. 148, several properties belonging to the judgment-debtor were attached and put up for sale. At the sale, the first of these properties was knocked down to a bidder for Rs. 154, and that being sufficient to satisfy the debt, the sale proceeded no further. The purchaser having failed to pay the purchase-money, the sale was not completed, and the decree-holder subsequently applied that this and other properties of the judgment-debtor which had been attached should be put up for sale. The Munsif ordered the sale to proceed, and also directed the debtor to proceed against the former purchaser, if the property fetched a less price than it did at the former sale. At the second sale, the property which was sold at the previous sale was knocked down to the decree-holder for Rs. 74 and other property of the judgment-debtor was also sold. The District Judge on appeal set aside that part of the Munsiff's order which directed the debtor to realise the difference from the defaulting purchaser and directed the Munsiff not to confirm the sale of the properties other than the property originally sold. *Held* that, so far as the judgment of the Judge set aside that part of the Munsiff's order which related to the defaulting purchaser, he was right as the defaulting purchaser was not before the Court. *Held* also that the judgment-creditor was not debarred in consequence of what took place at the former sale from proceeding upon his decree against any property of the judgment-debtor other than that which was originally sold. KHERODA MAYI DASI v. GOLAM ABARDARI, **13 B.L.R. 114=21 W.R. 149.** [*F.*, 8 C. 291; *R.*, 24 M. 307.]

(68)—*Decree passed in one district—Execution—Attachment and sale of property in another district—Act* VIII *of* 1859, *s.* 284, *necessity for certificate under* —Where attachment and sale of immoveable property have been ordered in execution of a decree by a Court other than that which passed it without application made to the executing Court and without obtaining the necessary certificate and other papers from the Court which passed the decree, as provided by ss. 284 and 285 of Act VIII of 1859, such proceedings in execution should be taken to have been without jurisdiction. (*Per Jackson, J.*) No particular form is prescribed in the law for the certificate, and so when it contains all the necessary information it would be a good and

***Sale*—continued.**

——5.—Sale in Execution of Decree—*contd.*

————*a*.—GENERAL—*continued*.

valid certificate under s. 284 of the Code, it being immaterial that certain portions might have been written more precisely. Also, where the certificate has been actually sent to the executing Court it is immaterial whether it was asked for or not. MOOKTAKESHEE DEBIA v. LUCHMEEPUT SINGH DOOGUR, **10 W.R. 137.**

(69)—*Sale in execution of decree—Existence of saleable interest in judgment-debtors—Error as to extent of interest—Decree-holder if liable to purchaser—Rule of* caveat emptor—*Act* X *of* 1877, *s.* 315.—In this case, the judgment-debtor had a saleable interest in the property which purported to be sold and the only error was as to the extent of the interest. The purchaser had an equal opportunity with the decree-holder of ascertaining the extent of the judgment-debtor's interests. Having purchased only the right, title and interest of the judgment-debtor in the property sold, the purchaser could not, upon finding the interest of the judgment-debtor less than he had supposed, hold the decree-holder responsible, as such, for the deficiency, the principle of *caveat emptor* having application in such a case. BUTA SINGH v. CHATTAR SINGH, **131 P.R. 1879.**

See BOM. ACT VI OF 1888, s. 31, cl. 2, 17 B. 289.

Mortgage of a zemindari village—Court-sale in execution of the decree—Payment by mortgagee of proportionate share of peishcush—Mortgagee-purchaser not a zemindar to enforce acceptance of patta—*See* MAD. ACT VIII OF 1865, s. 3, 5 M. 145.

See ATTACHMENT — GENERAL, A.W.N. 1881, 5.

Application to set aside — Dismissal for default—No application to set aside dismissal—Fresh application cannot be made—*See* CIV. PRO. CODE, 1908, O. IX., rr. 8, 9, s. 47, O. XXI, r. 90, s. 141, 2 Ind. Cas. 156.

Inaccurate description—Wrong date — No prejudice—Sale valid—*See* CIV. PRO. CODE, 1908, O. XXI, r. 12, 9 M.L.T. 319=9 Ind. Cas. 729.

Execution of decree—Proclamation of sale—Sale before expiry of thirty days—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 54, 67, 68, 90, 4 A. 300.

Setting aside of—Effect of notice to judgment-debtor—Effect of debtor not objecting—Omission to specify hour of sale in sale proclamation—Material irregularity—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 66, 90, 14 C.L.J. 541.

Effect on a, of failure to deposit purchase-money—*See* CIV. PRO. CODE, 1908, O. XXI, r. 84, 3 L.B.R. 225.

Application by third person disputing right of auction-purchaser to dispossess him—See CIV. PRO. CODE, 1908, O. XXI, rr. 97, 99, 103, 15 C.P.L.R. 49.

***Sale*—continued.**

——5.—Sale in Execution of Decree—*contd.*

————*a*.—GENERAL—*concluded*.

Sales under direction of Court—Fraud—Duty of Court towards purchasers—*See* CONTRACT ACT, 1872, s. 19, 6 A.L.J. 34, P.C=13 C.W.N. 249=5 M.L.T. 126=9 C.L.J. 165=11 Bom. L. R. 227=36 C. 323=19 M.L.J. 115=5 L.B.R. 25=1 Ind. Cas. 122=36 I.A. 32.

Purchaser *pendente lite* only bound by proceedings which, from nature of suit and relief prayed, he might expect would take place.—Appeal, possibility of—Consent decree—Estoppel—*See* ESTOPPEL—ESTOPPEL BY CONDUCT, 18 C. 188.

See HINDU LAW—JOINT FAMILY, 5 B. 130.

Application to set aside—Fraud—*Onus* and nature of proof—*See* LIMITATION ACT, 1908, s. 18, 36 C. 654=2 Ind. Cas. 844.

Objection by third party to attachment and sale of immoveable property—Objection disallowed—Sale confirmed—Suit for possession by objector—Objector no party to decree—Limitation—*See* LIMITATION ACT, 1908, arts. 12, 144, 203 P.L.R. 1911.

Of property to which judgment-debtor had no title—Sale of property found to be non-existent—Suit for recovery of price—Limitation—*See* LIMITATION ACT, 1908, arts. 62, 97, 14 O.C. 74.

Execution sale, if subject to *lis pendens*—*See* LIS PENDENS, 13 C.W.N. 226=9 C.L.J. 96=3 Ind. Cas. 696.

Co-parcenary consisting of mother and daughter—Joint property—Suit against mother alone—Sale in execution of decree—Validity as against daughter—*See* MAHOMEDAN LAW—GENERAL, 2 S.L.R. 76.

Decree against heir in possession of deceased Muhammadan—Sale in execution of decree—Right of other heirs to recover possession—Conditions thereto—*See* MAHOMEDAN LAW—MISCELLANEOUS, A.W.N. 1887, 59.

Title of purchaser when accrues—Mesne profits—*See* MESNE PROFITS—GENERAL, 24 A. 475=A.W.N. 1902, 145.

See PRE-EMPTION—RIGHT TO PRE-EMPT, 7 N.W.P. 97.

Non-transferability of occupancy rights to purchaser on—*See* RIGHT OF OCCUPANCY—TRANSFER OF RIGHT, 11 C.W.N. 76.

Right of decree-holder to sell mortgaged property in execution of simple money decree—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 88, 99, 67, 6 A.L.J. 43=31 A. 114=1 Ind. Cas. 162.

————*b*.—DECREES AGAINST REPRESENTATIVES.

(1)—*Effect of sale in execution of decree against the representative of a deceased person.*—In execution of a decree obtained against a widow in a suit against her on a bond given by her husband, the latter's property was put up and

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

———b.—DECREES AGAINST REPRESENTATIVES—*continued.*

sold, but the sale proclamation described the property in one place as that of the widow and in another as that of the widow's husband or as the rights and interests of the debtor. *Held* by the majority that the property advertised for sale and sold was that of the widow as her husband's representative but not that of the widow personally. BUKSH ALI SOWDAGUR v. EASSAN CHUNDER MITTER, **W.R.F.B. 119.**

(2)—*Act* VIII *of* 1859, s. 203—*Decree against legal representatives—Execution sale—Personal decree—Construction.*—Where property is described at the time of sale as the property of judgment-debtors who are sued as mere representatives of a deceased debtor, *prima facie* what is sold is the property of the deceased debtor. Although the decree is in terms as if it were a personal decree, and although it does not follow the terms of s. 203, Act VIII of 1859, yet it is the same thing as if the decree had stated that it was for the debt of the deceased. LALLA SEETA RAM v. RAM BUKSH THAKOOR, **24 W.R. 383.** [*Cons.*, 2 C.L.R. 223, F.B. = 4 C. 142; *R.*, 20 B. 338.]

(3)—*Act* VIII *of* 1859, s. 212—*Application for execution—Omission to give names of all parties—Notification and proclamation of sale—Reference to contents of decree—Guardian and minor—Sale of minor's property—Sale in execution—Description of property to be sold—Execution against representatives of deceased person—Sale of minor's property.*—Where an application for execution of a decree omits to give the names of all the parties, even if it should appear from other parts of the proceedings who those parties are, the persons named must be understood to be the parties against whom execution of the decree is sought. [*D.*, 21 W.R. 93, 24 W.R. 3.] Parties who are present at a sale are not bound to refer to the decree and cannot be considered as knowing its contents, unless they are stated in the notification of sale. The proclamation and notification under s. 249 of Act VIII of 1859 are intended to inform persons what is to be sold, and to give the names of the parties whose rights and interests in it are to be sold. A guardian has no right or interest in the minor's property; he represents the minor for the purpose of defending suits, and he manages the property for the minor, but that is not having a right or interest in it which can be sold. The Courts ought to be extremely careful with regard to allowing the property of minors to be sold in execution of decree. In a sale in execution against the representative of a deceased person, the description of the property to be sold should contain the name of defendant, and should say "the right, title, and interest of the defendant as representative of the deceased." Where the property of a minor is not described as such, the purchaser at a sale in execution

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

———b.—DECREES AGAINST REPRESENTATIVES—*continued.*

acquires no title thereto. SHAIKH ABDOOL KUREEM v. SYUD JAN ALI, **18 W.R. 55.**

(4)—*Property sold as right and interest of widow—Property wrongly described—Right of deceased debtor—Purchaser, Right acquired by.*—Where in execution of a decree in the presence of the widows of the original debtor, the property in dispute was sold as the right and interest of the widows. *Held* that the auction-purchaser, under the circumstances of the case, acquired by the purchase the right and interest of the original debtor in the property, though in the sale notification those of the widows were advertised to be sold. TARA KANT BHUTTACHARJEE v. LUKHEE DABEEA AND WISE, **2 Hay 8.**

(5)—*Representatives of deceased Mahomedan—Sale subject to mortgage—Power of heirs to alienate.*—The heirs of a deceased Mahomedan mortgaged some property of their ancestor. After the mortgage, a judgment-creditor, in respect of a debt due from the estate of their ancestor, attached and sold the mortgaged property in execution of his decree. *Held* that the sale was subject to the mortgage. *Held* also that the question with respect to the powers of the heirs and the rights acquired by the mortgagee and the purchaser under the execution, in a suit between the latter, was to be determined, not by Mahomedan law, but by the principles of "justice, equity and good conscience." *Semble.*—That even if the Mahomedan law applied, the sale in execution would be subject to the mortgage. CAMPBELL v. DELANEY, **Marsh 509.**

(6)—*Mahomedan Law—Decree against one heir of deceased Mahomedan—Effect on other heirs Parties—Mortgage—suit—Sale—Right of heir not made party to recover her share—Limitation.*—Under Mahomedan Law, a decree by consent against one heir of a deceased debtor cannot legally bind the other heirs (2 C.L.R. 223, F.B., *F.*) A Mahomedan, after having executed a mortgage of his property in favour of A, died leaving behind him a widow, a daughter and a sister. A sued upon his mortgage against the widow and the daughter alone, without making the sister a party to the suit, and a compromise decree was passed, in execution of which the right, title and interest of the mortgagor was purchased by B, the defendant. C, who had purchased from the sister her six annas share in the property, sued to recover the same from the purchaser B, without making the original mortgagee A, a party. *Held* that (*a*) the original mortgagee was not a necessary party, inasmuch as the question whether the sister's share of the property could be affected by proceedings to which she was not a party, was distinct from the question whether the original mortgagee could, by a suit properly instituted for the purpose, make that share liable for a proportion of

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*b.*—DECREES AGAINST REPRESENTATIVES—*continued.*

a debt secured by the mortgage of the whole property ; (*b*) the contention of the defendant that the original mortgagee having conveyed to the defendant benefit of his own lien, the plaintiff was bound to pay him the mortgage-debt before he could recover possession, was not good, inasmuch as the sister was no party to the mortgage suit, the fact of sale in execution of the decree obtained in that suit could not affect her six annas share so as to convey to the purchaser any interest either of the mortgagor or of the mortgagee ; (*c*) the share of the sister was not affected by the sale although what the defendant purchased was the right, title and interest of the mortgagor, and the plaintiff was entitled to recover a six annas share ; (*d*) the suit was not barred by limitation, even though it was not instituted within one year from the date of the execution sale. SITANATH DAS v. ROY LUCHMEPUT SINGH, **11 C.L.R. 268.**

(7) — *Hindu Law — Separated members — Legal representative—Execution sale—Bonafide purchaser for value—Question whether defendant is legal representative of deceased.*—So long as no legal administrator has been appointed, the childless widow of a separated Hindu is the only person who can defend a suit as his representative ; and while a decree obtained against a widow will enable the creditor to attach and sell not only the widow's life-estate in the immoveable property, but also the reversionary estate of the remainderman, yet a decree obtained against the remainderman will not enable the creditor to touch the estate in the hands of the widow. [*R.*, 1 B. 577, 11 B. 119.] A *bona fide* purchaser should not, as a general rule, lose the benefit of his purchase by any irregularity of the proceedings in a case. This rule applies when the person whose property is sold has been a party to the suit (even though he may have been ignorant of the suit until after the sale). The purchaser is bound to satisfy himself that the party sued as the representative of the deceased person was really h legal representative, or that, if it turns out be otherwise, the purchaser is entitled to be protected. [*R.*, 21 B. 424, F.B.] Although when a decree has been obtained against A in his life-time and A dies before execution, A's estate is properly described in the proceedings in execution as the estate of A, and in the certificate of sale, the purchaser is properly described to have purchased the right, title, and interest of A in the property sold, this procedure is improper in cases in which the debtor dies before or pending the suit, and the suit is brought or continued against his representative. In such a case, the representative and not the deceased person is the defendant, and in the notification and certificate of sale, it ought to be set forth that what is sold is the right, title and interest of the representative on the record and not of the deceased person.

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*b.*—DECREES AGAINST REPRESENTATIVES—*concluded.*

Where the legal representative of a deceased person, knowingly allowed another to defend the suit brought against the estate, or knowing of a sale in execution of a decree brought against the mother as legal representative, took no measures to prevent the sale, he will be bound by the execution sale. If he did not knowingly allow the other to defend the suit or did not know of the sale, then the decree-holder should have given an opportunity of proving as against him, that the debt for which the decree was passed was really due. NATHA HARI v. JAMNI, **8 B.H.C.A.C. 37.** [*R.*, 9 B. 86.]

———— *c.*—DESCRIPTION OF PROPERTY SOLD, ERRORS IN.

(1)—*Notification of sale—Sale certificate—Sale under Beng. Act* VIII *of* 1859, *s.* 249, *in execution of decree for arrears of rent.*—Where, on an execution-sale, there is a discrepancy between the conditions in the notification of what is to be sold and the certificate of what has been sold, the conditions in the notification are to be taken as of superior authority in dealing with the conflicting claims of innocent third parties whose rights are affected by the variation. In execution of a decree for arrears of rent, an application was made for a sale of the tenure for the arrears of which the decree had been obtained. A notification was issued purporting to be a sale proclamation under Act VIII of 1859, s. 249, and, in pursuance of that notification, the sale of the right, title and interest of the judgment-debtor took place. *Held* that the tenure did not pass by that sale notwithstanding that the sale-certificate stated it was the tenure itself which had been sold. UMA CHURN SEN v. GOBIND CHUNDER MOZUMDAR, **1 C.L.R. 460.**

(2)—*Conveyance of immoveable property—Construction—Descriptive words.*—Where the language of conveyance is comprehensive enough to include not only an estate or taluka sold, but also the lands appertaining to it by means of alluvion, and the intention to convey such appurtenant lands is otherwise apparent, the mere mention, in the conveyance, of the jama of the estate or taluk alone, and the omission of that of the alluvial lands, cannot be held to exclude the latter from the operation of the conveyance. In such a case, the entry of the jama is merely descriptive. The same principle applies to a sale contract, a plaint, and to a decree. GANPATJI v. SAADAT ALI, **2 A. 787.**

(3)—*Compensation—Execution sale under decree in suit not on the original side of High Court—Area of property sold, exaggeration of—Abatement of rent for deficiency — Auction-purchaser's right to compensation—Not essential to make out fraud against decree-holder—Purchaser at private sale and at an execution sale—*

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

——c.—DESCRIPTION OF PROPERTY SOLD, ERRORS IN—*continued.*

Right to compensation.—Where, in a suit by an auction-purchaser at a sale in execution of a decree obtained outside the jurisdiction of the original side of the High Court, against the decree-holder, for refund of a portion of the purchase-money by reason of a deficiency in the quantity of the land actually sold, as compared with the area stated in the sale proclamation, and also for abatement of rent in respect of such deficiency of area, the plaintiff had failed to make out, that he had sustained loss by misdescription in the sale proclamation, and where the purchase-money was not in Court and the decree-holder's offer to pay back the purchase-money and to release the auction-purchaser from his purchase had been refused, *held*, that the auction-purchaser was not entitled to compensation, but was entitled to an abatement of rent for such deficiency. (1 C.W.N. 106, *D.*) In order to enable the auction-purchaser in the above case to successfully claim compensation, it is not essential for him to make out a case of fraud against the decree-holder. *Per Maclean, C.J.* (18 A. 822, *Diss.*) The considerations on which the right of a purchaser at a private sale rests, to recover from the vendor, compensation for the deficiency in the area of the property sold, differ from those on which a purchaser at an execution sale can claim such compensation. The price paid by the purchaser at an execution sale is determined not by contract but by competition. DOYAL KRISHNA NASKAR v. AMRITA LAL DAS, **29 C. 370.**

(4)—*Misdescription of property in sale notification—Purchaser's remedy.*—If the misdescription of the property in the sale notification goes to the essence of the contract and materially alters the substance of it, the purchase cannot be enforced upon the purchaser. But if such misdescription does not materially alter the substance of the contract, the remedy which the purchaser can claim is adequate compensation and not annulment of sale. ADMINISTRATOR-GENERAL OF BENGAL v. AGORE NATH MOOKERJEE, **29 C. 420=6 C. W.N. 873.**

(5)—*Execution sale—Misdescription of property sold—Cancelment of sale.*—Where there is substantial error as to the subject-matter of sale, that sale cannot be repaired and made efficacious by a subsequent investigation as to the nature of the property sold irrespectively of the terms of the sale. The question must be what the purchaser had a right to consider as sold to him according to those terms. If the Court cannot decide this, or is satisfied that there was error as to the substantial subject of the sale, the proper course is to cancel the sale. JOWREE MULL v. T.C. FENWICK, **89 P.R. 1868.**

(6)—*Court-sale—Sale of tenure as* jote jumma *—Purchase by person knowing unreal character of tenure—Subsequent sale of same property as* shamilat *talook—Second sale by real name—Right of first purchaser as against subsequent purchaser.* — Where a tenure styled a *jote jumma* was sold and purchased by a person who had knowledge of its unreal character, and the same property was subsequently brought to sale by the decree-holder by its real name, *shamilat* talook, and purchased by another person, the right of the former could not prevail as against the latter inasmuch as he was not an innocent purchaser for valuable consideration, but a purely speculative purchaser, having knowledge that a tenure by the name of *jote jumma* had no real existence. BABOO HURONATH ROY v. MOTHOORANATH ACHARJEE, **7 W.R. 4.**

——d.—JOINT PRORERTY, SALE OF.

(1)—*Sale of joint propety as if separate—Effect of sale—Right taken by purchaser.*—Under a sale in execution of a decree no property can be sold except that which belongs to the defendants in the suit. Accordingly, if under a decree in a suit against A alone, for a debt for which B is jointly liable, an estate be sold in which B is entitled to an equal share with A, the interests of A alone is acquired by the purchaser. KISHEN CHUNDER GHOSE v. MT. ASHOORUN, **Marsh 647.** *See also*, SREE PERSHAD SURMAH BHUTTACHARJEE v. SHUROOPA DOSSIA, **9 W.R. 452.**

(2)—*Joint right—Whether sale in execution of decree affects it.*—A joint right is affected by a sale in execution of a decree, though not by a private sale without necessity. A voluntary private sale by a joint co-sharer without the consent of his fellows is inoperative. OODHUN MISSER v. HOOBDAR SINGH, **1 N.W.P. 271.**

(3)—*Joint family property—Purchaser of interests of member.*—The purchaser of the rights and interests of one member in joint family property obtains no more than that member's share in the property. SREEPERSHAD SURMAH BHUTTACHARJEE v. SHUROOPA DOSSIA, **9 W.R. 452.** [*D.*, 25 W.R. 532.]

(4)—*Joint Hindu family consisting of father and sons—Decree against father—Sale of "right, title and interest" of father in family lands—Evidence — Service* vatan *lands—Fraud.*—Certain money-decrees were passed against R who lived with his sons as a member of an undivided Hindu family. The decree-holders took out execution, and the suit lands were sold to various persons, from whom the defendant purchased them. After the death of R, his sons and grandsons instituted the present suit to recover the lands in dispute from the defendant. The plaintiffs contended (1) that the lands in dispute being service *vatan* lands were

Sale –continued.

— 5.—Sale in Execution of Decree—*contd.*

———*d.*—JOINT PROPERTY, SALE OF —*continued.*

inalienable, (2) that the sales in execution passed only the life interest of R, and that, on the death of R, they became entitled to the suit lands, (3) that even, if it be found by the Court that the lands were not service *vatan* lands, they were ancestral property, and the execution sales could not affect their interest therein, they not having been made parties to the suits in which the decrees had been passed against R, and (4) that the decrees against R had been fraudulently obtained. On the evidence in the case, it was held (1) that, although the sale proclamation and the sale certificates related only to the "right, title, and interest" of R as being offered for sale and purchased by the auction-purchaser, the entire family interest in the property was, as a fact, the subject of the auction sale in execution, (2) that only two fields (among the suit lands) were service *vatan* lands and that they remained inalienable *vatan* lands, although the services as regards those lands had been dispensed with. The words "right, title and interest" of the judgment-debtor are ambiguous words, which may either mean the share which he would have obtained on partition, or the amount which he might have sold to satisfy his debt, and it is in each case a mixed question of law and fact to determine what the Court intended to sell and what the purchasers expected to buy. APPAJI BAPUJI v. KESHAV SHAMRAV; KESHAV SHAMRAV v. APPAJI BAPUJI, **15 B. 13.** [*R.*, 21 B. 616, 3 Bom. L.R. 322.]

(5)—*Hindu Law—Joint family—Father's debt—"Necessity"—Execution sale—Right of sons to set aside sale.*—The father in an undivided Hindu family under the Mitakshara law has no interest that can form the subject of a sale beyond his share of the proceeds. Until partition is effected, he has merely a life-interest in a common property, which interest he can neither give away nor sell. The decree under which the estate in this case was put up for sale was one made on a debt which was not incurred for any necessity. The sons sued to set aside the sale. The purchaser contended that a portion of the sale-money was applied to pay off a decree on a debt which was admittedly incurred by the father for necessity and so the sale was not liable to be set aside. *Held* that, as the sale was in execution of a decree made on a debt which was not a necessity, it was not valid and must be set aside. But in such a case, however, the sons suing for annulment of the sale are in equity bound to pay the purchaser so much of the debt as would have been a burden on the estate. BHYRO PERSHAD v. BASISTO NARAIN PANDEY, **16 W.R. 31.** [*R.* 22 W.R. 214.]

(6)—*Ancestral property, sale of, in execution of decree for father's debt—Son's interest when passes by sale—Nature of debt, not of property, to be considered.*—Where the rights and interests of a Hindu father have been put up and sold under a decree for debts incurred by him and not alleged to be incurred for an immoral purpose, the interests of the sons as well as the interest of the father in the property, although it was ancestral, are liable for the payment of the father's debts, and a purchaser under execution of a decree against the father is not bound, for the security of his title, to go behind the decree itself. When the purchaser has taken care to see that there was a decree against the father, and that the property was liable to process and sale in satisfaction of the decree, and has purchased the property *bona fide* under the execution, for valuable consideration, the sons cannot come in and set aside all that has been done under the decree and execution and recover back the property from the purchaser. It has often been laid down by their Lordships of the Judicial Committee, that, in such a case as the present, the nature of the debt, and not the nature of the estate, is to be considered, and, further, that, unless it can be shown that the debt was contracted for an immoral purpose, the question as to the nature of the debt must be held to be determined against the sons' claim by there having been a decree against the father and his rights and interest in the family property. PANDIT HAIT RAM v. MUSSAMAT MULU, **7 N.W.P. 110.**

(7)—*Joint family—Mortgage by father—Discharge of antecedent debt—Court sale—Right, title and interest of judgment-debtor.*—The father of a Mitaksbara joint family mortgaged a certain mouzah, a portion of the joint family property, in order to discharge an antecedent debt. In execution of the decree obtained on the mortgage, "the right, title and interest of the judgment-debtor," as set out in the proclamation of sale, was sold. *Held* that the mortgagor must be taken to have mortgaged the entire interest of the family, and the whole interest must be taken to have passed under the execution sale to the purchaser. E. J. C. STUDD v. BRIJ NUNDUN PERSHAD SINGH, **9 C.L.R. 350.**

(7-a)—*Hindu Law—Co-sharer's interest in joint ancestral property—Liability to sale in execution of decree—Purchase of share of house by widow—Her power of disposal over her husband's property.*—The share and interest of one co-sharer in joint ancestral property may be sold in execution to satisfy a decree obtained against him personally, even if he be incompetent to make a valid alienation of his share voluntarily. [*R.*, 113 P.R. 1886.] A Hindu widow, though entitled to the absolute and uncontrolled possession of the moveable estate of her husband, and to the full enjoyment or the usufruct thereof, may not waste the *corpus* and, if she converts it into immoveable property

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

———d.—JOINT PROPERTY, SALE OF —*continued.*

she may not dispose of such property otherwise than she might have disposed of it if it had descended to her in that form from her husband. DHANPAT v. HAKU, 58 P.R. F.B. 1880.

(8)—*Co-sharer paying Government revenue in respect of another share—Decree obtained against such other sharer only—Sale of share in execution—Right of other sharers not affected.*—A two anna's share in a Talook was recorded in the name of one D.N. of which share the plaintiffs, in the present case, who were the widows of the brother and nephew of D.N., were entitled to a three-fourth's share. N.K., a co-sharer in the same talook paid the Government revenue in respect of the entire share and sued D.N., for the amount and obtained a decree against him. Plaintiffs instituted the present suit against the purchaser of the entire share at the sale in execution of the above decree and obtained a decree for their portions of the share. On second appeal, it was urged that the debt being one for the benefit of the family of which the plaintiffs were also members, their shares were bound by the sale under the decree against D.N. This contention was not accepted by the High Court which held that though N.K. might have instituted his suit against all the parties interested in the entire share, yet, he having failed to include the widows as co-defendants, the purchaser under the decree was not in a position to say that their interests were affected by a decree to which they were no parties or by a sale which did not profess to bind their interests. SATH BATHEE DOSSEE v. MUTHUNGEENEE DOSSEE, **2 W.R. 38.**

(9)—*Execution sale—Partnership property—Decree against one partner—Partial partition—Proper remedy.*—In a suit brought against one of the partners of a firm as manager of that firm against the firm itself, a decree was passed in terms of the plaint. There was no specification in the suit of the names of the partners of the firm. In execution of the decree so obtained, the right, title, and interest of the manager named in the decree, in a stable belonging to the firm, was sold, and the plaintiff purchased it. He then sued the other partners of the firm to recover possession of the stable. *Held*, that the plaintiff was in no better position than the purchaser at a sale of partnership property, made in execution of a decree against a single partner, and that he cannot be allowed to effect a partial partition, which the judgment-debtor, to whose right he succeeds, would not have been entitled to obtain. All that he can do is to bring a suit for an account and settlement of the partnership concerns and thus entitle himself to that interest in the property which, upon a final settlement, may be ascertained to belong to

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

———d.—JOINT PROPERTY, SALE OF —*concluded.*

the execution partner. KALYANBHAI v. MOTI RAM JUMNA DAS, **10 B.H.C. 378.** [*Cons.*, 11 B.H.C. 76.]

(10)—*Decree for personal debts — Execution against property devolving on judgment-debtor.*—A decree-holder is entitled to execute his decree against any property devolving on the judgment-debtor before the decree has been fully executed, and this without reference to whether the property was hypothecated to him; and the denial of the judgment debtor that he is interested in the property, which it is sought to make subject to execution, can have no effect. Property to which the judgment-debtor succeeded on the death of his brother's widow will be liable to satisfy the decree against him to the same extent to which in ordinary cases immoveable property of a Hindu having sons is liable. BULDEO SINGH v. DWARKA DASS, **1 Agra 169.**

(11)—*Sale-deed—Interests conveyed.*—Where property belonging to three brothers was sold by two of them and no mention was made in the sale-deed of the interests of the other brother, a minor whose guardians they were, *held* that, the minor's interests were not affected, and the fact that the sale was made in consequence of execution proceedings taken in respect of an ancestral debt made no difference. NETYE ROY v. ODEET ROY, **10 W.R. 241.**

(12)—*Right of purchaser—Sale of reversionary interest.*—A, a Hindu, was possessed of an undivided moiety in certain property, and was also entitled to a reversionary interest in the other undivided moiety contingent on his surviving his mother. In a suit against A, the Sheriff, under a writ of *fi. fa.*, seized and sold to B the right, title, and interest of A in the premises. In an *ex parte* suit by B, asking for a declaration that he was entitled to the contingent reversionary interest of A, as well as to his present possessory right, Macpherson, J., gave a decree for the present possessory right, but refused to make any decree as to the contingent reversionary interest of A. KISTO DHONE GANGOOLY v. RABUTTY DOSSEE, **1 Ind. Jur. N.S. 324.**

(13)—*Act* VIII *of* 1835 — *Tenure inherited by widow—Sale for arrears—Purchaser's rights.*—The purchaser of a tenure inherited by a Hindu widow from her deceased husband and sold for arrears of rent under Act VIII of 1835 does not acquire merely her personal rights nor do his rights cease at her death. CHOWDHRY ZUHOORUL HUQ v. GOOROO CHURN ROY, **15 W.R. 329.**

See EXECUTION OF DECREE—MODE OF EXECUTION, 8 W.R. 239, 5 B.H.C.A.C. 63.

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*e.*—MORTGAGED PROPERTY, SALE OF.

(1)—*Auction-purchaser — Prior lien.*— An auction-purchaser buying an estate with full knowledge of a prior lien upon it, must either pay off the said debts or suffer the property to be sold in execution of the same. JOY KISSEN MOOKERJEE v. CHUNDER MONEE GOSSAINEE, **1 W. R. Mis. 8.**

(2)—*Execution-sale—Property subject to encumbrance—Rights of purchaser.*—If there are legal encumbrances upon a property at the time when it is sold in execution of a decree, the sale can only take place subject to those encumbrances, and the purchaser can recover possession of the property only on paying off those encumbrances. GOLUCK MONEE DEBIA v. MAHOMED ENOOS, **24 W.R. 348.**

(3) — *Decree based upon sham mortgage — Right of innocent purchaser.*—A decree based upon a colorable mortgage did not affect the right of a subsequent *bona fide* purchaser for value of the property mortgaged. What was bought by the purchaser was the real interest of the judgment-debtor in the property, and not his interest as diminished by a fictitious derogation arising out of a sham transaction. GOPI WASUDEV BHAT v. MARKANDE NARAYAN BHAT, **3 B. 30.** [*R.*, 6 B. 703, 10 B. 659, 11 B. 708, 19 B. 36.]

(4)—*Sale of mortgagor's rights — Auction-purchaser ejecting mortgagee — Liability of mortgagor.*—If the purchaser of the rights of a mortgagor at a sale in execution of a decree against him forcibly dispossesses the mortgagee, the mortgagor is not liable for the purchaser's illegal acts. KHAJAH MAHOMED HOSSEIN KHAN *alias* KHAJA MEERUNJAN v. SHEIKH NIZAT ALI, **W.R. 1864, 348.**

(5)—*Mortgage decree—Execution — Sale of other property of judgment-debtor.*—In a suit to recover certain monies which were secured by a mortgage of landed property, the decree ordered that property to be sold in satisfaction. *Held* that the decree-holder must carry out the terms of the decree, and first bring to sale the property covered by the mortgage, before he can sell any other property belonging to the judgment-debtor. BROMOMOYEE DEBIA v. BOYKUNT CHUNDER GUNGOPADHYA, **5 W. R. Mis. 52.** [*Not F.*, 24 W. R. 305.]

(6)— *Sale in execution—Sale under simple mortgage-decree—Right of subsequent mortgagee.*—Where property was sold under a simple mortgage-decree, the right of the purchaser prevailed over that of a mortgagee by conditional sale, whose mortgage was executed only after the simple mortgagee had obtained the decree, though before the actual sale of the property under that decree. BABOO RAJ NARAIN SINGH v. SHEIRA MEAN, **7 W. R. 67.** [*F.*, 10 W. R. 151.]

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*e.*—MORTGAGED PROPERTY, SALE OF—*continued.*

(7)—*Act* XI *of* 1865, *s.* 20—*Mortgage-deed—Immoveable property—Sale of mortgage interest by Small Cause Court.*—The rights and interests of a judgment-debtor under a mortgage deed hypothecating to him immoveable property are not saleable by a Small Cause Court. As a decree-holder is entitled to have these rights brought to sale, a sale of such rights by the Civil Court by virtue of a certificate issued under s. 20, Act XI of 1865, is valid. BUDDOO MULL v. MAHAROOP, **6 N.W.P. 129.** [*F.*, 9 M. 5.]

(8)—*English mortgage containing power of sale to mortgagee—Right of mortgagee to sell without mortgagor's consent—Sale not affected by prior attachment by third party—Act* VIII *of* 1859, *s.* 240.—The question in this case was as to the effect of a mortgage deed with a power of sale as regards the right of the mortgagee to sell with or without the consent of the mortgagor afterwards obtained. A house was mortgaged to the Simla Bank, the mortgage deed having been drawn up in the English form with a power of sale contained in the agreement that, in case of default in payment of the monthly instalments by the mortgagor, the mortgagee bank might sell the premises without any consent obtained from the mortgagor. *Held* that the effect of such a power of sale in a mortgage in the English form and between parties acting, as the present parties were, according to English Law, was to give the mortgagee complete power of sale whenever he may choose to exercise it, without further reference to the mortgagor. And the validity of a sale effected in the exercise of such power could not be affected by an attachment of the property by a third party—whether such attachment was made before or after the default on the part of the mortgagor entitled the mortgagee to exercise the power of sale. BYRNE v. BAIN, **68 P.R. 1875.**

(9)—*Mortgage by one co-sharer— Decree—Sale—Subsequent sale by all co-sharers—Right, title and interest of judgment-debtor—Right of subsequent purchaser.*—Certain property was mortgaged by one of the several co sharers. The mortgagee got a decree for sale on his mortgage, and, in execution, the property was sold to the defendant. In the meanwhile all the co-sharers including the debtor sold the same mortgaged property to the plaintiff. Now the plaintiff sued to set aside the execution sale. *Held*, that the defendant purchased only the right, title and interest of the judgment-debtor. The other co-sharers whose rights had not been affected by the execution sale could sell their rights to the plaintiff and the defendant was not entitled to retain possession of those shares. MUDDEN LALL DOSS v. ASHOOTOSH BANERJEE, **3 W.R. 119.** [*D.*, 25 W.R. 532.]

***Sale*—continued.**

——5.—Sale in Execution of Decree—*contd.*

————*e.*—MORTGAGED PROPERTY, SALE OF—*continued.*

(10)—*Mortgage decree — Sale of decree in execution—Purchaser if entitled to set aside pottah previously granted by mortgagor—Encumbrances.*— The purchaser of property in execution of a decree in favour of a mortgagee sued to set aside a ticca pottah granted by the mortgagor as being prejudicial to his rights. But it was found that his rights were not in existence when the ticca was granted. *Held* that the purchaser could not claim to set aside the pottah. It was also contended that the plaintiff having purchased the property under the decree in favour of the mortgagee took it free from all alienations or incumbrances created subsequently to the mortgage. *Held*, that the contention was not maintainable if the term "incumbrance" be taken to include temporary arrangements by way of lease or farm which the owner might have found to be expedient or convenient. The mortgagor is restrained from alienating the property which he has pledged, but he is not divested of or restricted in the management of the property: and as long as nothing takes place which impairs the value or impedes the operation of the mortgagee's lien, the mortgagor, in creating a temporary lease, acts within his powers, and the purchaser has no legitimate cause of complaint. BANEE PERSHAD v. REET BHUNJAN SINGH, **10 W.R. 325.**

(11)—*Mortgage—Sale of property subject to mortgage—Purchaser's rights.*—The purchaser of a mortgagor's rights and interests in property already mortgaged and liable to sale in satisfaction of the mortgage-debt, purchases merely the mortgagor's right to redeem. LALLA JOAGUL KISHORE LALL v. BHUKA CHOWDHRY, **9 W.R. 243.** [*F.*, 10 C. 567.]

(12) — *Rights of mortgagee.*— A mortgage made by way of security for money advanced remains a mortgage until the debt is satisfied, and the mortgagee (creditor) has every right to sue to obtain a decree, and sell that which is held by him as security for his money, without any regard to the proceeding of any other subsequent mortgagee or purchaser. A purchaser at a sale in execution of such a decree under a prior mortgage, as well as the original holder of a prior mortgage, have rights far superior to those of any other mortgagee or purchaser of a subsequent date. A subsequent purchaser, by payment of an earlier mortgage, and obtaining a decree for the money so paid, does not acquire any right belonging to that mortgage. His payment was a voluntary act, and his decree against his vendor was a personal one for a simple debt not secured by any security connected with any portion of the land in dispute. DHOREE ROY v. BULDEB NARAIN SING, **W.R. 1864, 345.**

(13)—*Mortgage—Decree on mortgage—Sale in execution—Conveyance of property—Second mortgage—Sale of equity of redemption.*—Where

***Sale*—continued.**

——5.—Sale in Execution of Decree—*contd.*

————*e.*—MORTGAGED PROPERTY, SALE OF—*continued.*

a mortgagee sues upon his mortgage bond, the Court should pass a decree for satisfaction of the claim from out of the property mortgaged and not from the right, title and interest, which remained in the mortgagor. A sale in execution of a decree under the mortgage passed all the interest which passed by the mortgage to the mortgagee and any interest which remained in the mortgagor. Where there has been a second mortgage, all that passes under that is the interest that remained in the mortgagor after the first mortgage had been made, *i.e.*, the equity of redemption. In a suit brought on the second mortgage, the mortgagee will only be entitled to a decree for sale of the equity of redemption, unless the first mortgagee has been made a party to the suit and his mortgage has been declared invalid as against the second mortgagee. DOOLAL CHUNDER DEB v. GOLUCK MONEE DEBIA, **22 W.R. 360.**

(14)—*Mortgage—Prior mortgages—Purchase of mortgaged property—Rights of purchaser—First mortgage—Second mortgagee purchaser—Rights of latter.*—What the purchaser of the rights and interests of the mortgagor in property subject to two prior mortgages takes, is only the right to redeem; and, where he purchases with full notice, he can retain possession only on paying off both the mortgages. Where there were two mortgages on certain property, and the second mortgagee, in execution of a decree obtained on his mortgage, purchased the mortgaged property, *held* that he purchased not merely the equity of redemption, but also the mortgagor's rights and interests as they were when the second mortgage was created subject to the first mortgage, but free from subsequent encumbrances. NARAIN SAHOO v. ACHOOT SAHOO, **14 W.R. 233.** [*R.*, 24 W.R. 47.]

(15)—*Mortgage—Prohibition of alienation—Subsequent mortgage—First mortgagee getting only simple money decree buying mortgaged property—Condition against alienation available as against subsequent mortgagee.*—The holder of a hypothecation bond, who, in execution of a money-decree obtained on such bond, purchases the hypothecated property, can avail himself of a condition in the hypothecation deed prohibiting alienation to resist the claim of a subsequent encumbrancer. RAJAH RAM v. BAINEE MADHO, **5 N.W.P. 81.** [*Diss.*, 1 A. 240, F.B.]

(16)—*Purchase in execution—Rights and interests of judgment-debtor—Right of purchaser to property subject to existing encumbrances.*—At the sale in execution of a decree under Act X of 1859, plaintiff, who brought only the rights and interests of the judgment-debtor, was held to be entitled to take the lands subject to the deeds of encumbrances, if any. The lower Court was wrong in having said, without looking into the merits of the deed of mortgage

Sale—continued.

——5.—**Sale in Execution of Decree**—*contd.*

————*e.*—MORTGAGED PROPERTY, SALE OF—*continued.*

relating to the lands, that the plaintiff had every right to enter into possession of the lands in dispute. The case was accordingly remanded with directions to the lower Court to enquire whether the deeds under which the defendants claimed were valid against the judgment-debtor or not, because plaintiff could only obtain possession of the lands subject to those deeds. OOJAGUR ROY v. RAM KHELAWAN SINGH, **10 W.R. 384.**

(17)—*Sums realized in execution, order for distribution of, among various decree-holders—Appeal*—From an order distributing sums realized in execution, among various decree-holders, no appeal can be preferred to the High Court. *Held*, also, where a person has a mortgage on a property, the sale of it in execution of the decree of another party will not extinguish his lien. He can follow the property into the hands of the purchaser whether notification of the mortgage had or had not been given at the time of sale. JUNGEE LOLL MAHAJUN v. BRIJO BEHARE SINGH, **2 W.R. Mis. 21.**

(18)—*Civ. Pro. Code*, 1859, s. 246—*Objection to sale of attached property—Order allowing objection—Appeal—Separate suit.*—On the objection of an intervenor under s. 246 of the Civ. Pro. Code, who claimed to have a mortgage on the property attached in execution of decree, it was ordered that the claimant's mortgage should be first discharged out of the sale proceeds. *Held* that the proper order to have been made was one directing that the property should be sold subject to the mortgage. But though the order was wrong, there was no appeal from it, the remedy of the party aggrieved being by separate suit to establish his right, brought within one year of the order. DEVA v. HURNARAIN, **76 P.R. 1868.**

(19)—*Suit by purchaser for rent—Intervenor having prior lien.*—Where an intervenor, as a party to a suit, has a lien on a house which is anterior to the sale under which plaintiff purchased it, the plaintiff cannot maintain a suit for rent against the tenant. POORNO CHUNDER v. NOBIN CHUNDER GHOSE, **14 W.R. 77.**

(20)—Bona fide *purchase of decree — Prior assignment—Lien.*—A *bona fide* purchaser of the rights and interests of the decree-holders in a decree sold in execution who made the purchase with no knowledge of a previous assignment of those rights and interests, is entitled to the proceeds of that decree free from any trust or obligation in favour of the assignee. NUNHUK SAHOO v. JUGGESSUR OOPADHYA, **20 W.R. 408.**

(21)—*Agreement between debtor and creditor—Payment of debt by instalments—Sale in default—Decree—Effect—Purchaser from judgment-debtor—Previous mortgage—Rights and*

Sale—continued.

——5.—**Sale in Execution of Decree**—*contd.*

————*e.*—MORTGAGED PROPERTY, SALE OF—*concluded.*

duties of purchaser—Execution sale—Agreement among purchasers.—Where certain debtors offered to pay their debt by certain instalments and pledged their property, agreeing that the same may be sold if they defaulted in paying the *kists* due and prayed that the decree might be drawn up accordingly, *held*, that the effect of the decree and the sale thereunder (on default) was to make the property liable for sale in liquidation of the decree and that the sale passed the property as it stood at the time when it was originally mortgaged. *Held*, that a purchaser from the judgment-debtor was entitled to recover the amount paid by him in respect of previous mortgages if, in making those payments, he merely acted for the debtor who had borrowed the money from him and what he did was to see that the money so borrowed was properly applied in clearing off those debts which rendered his own purchase unsafe and of the existence of which he was at that time cognizant. It is questionable whether a person claiming by purchase from a judgment-debtor is in a position to succeed under s. 246, Act VIII of 1859. [*Appl.*, 24 W. R. 47 ; *Cons.*, 13 A. 432, F.B., 1 O.C. 105 ; *D.*, 2 C.L.J. 288.] Where, at an execution sale, the whole of certain property was sold, the purchasers agreeing among themselves as to what shares they should take in the property, *held* that, because one of the purchasers misbehaved in that, after having been a pleader for the other party, he became one of the purchasers of the property, which he knew to have been previously purchased by his clients, the Court cannot either limit the extent of that sale or set aside the pleader's title to the property. SYED WAJID HOSSEIN v. HAFEZ AHMED REZAH, **17 W.R. 480.**

Sale of mortgaged property attached in execution, validity of—*See* CIV. PRO. CODE, 1908, O. XXI, r. 46, 14 C.P.L.R. 5.

————*f.*—PROCEEDS OF SALE, RIGHT TO.

See CIV. PRO. CODE, 1908, s. 73.

See RATEABLE DISTRIBUTION.

(1)—*Execution—Attachment in execution of decree barred by time—Right of rival decree-holder—Distribution of sale-proceeds.*—One decree-holder is quite competent to show that the decree of another decree-holder under which the property has been attached is no more a subsisting decree and is barred by lapse of time and that the processes issued by the Court in execution of that decree should not have been issued at all. If the Court is satisfied that that decree is really barred, it is competent to see that he should not have any benefit in the distribution of the sale proceeds. Parties aggrieved by such order may contest the justness of it by a suit. RADHA GOBIND SHAH v. SHAIKH OOZEER JEMADAR, **15 W.R. 219.** [*Appl.*, 16 C.L.J. 582.]

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

———*f.*—PROCEEDS OF SALE, RIGHT TO —*continued.*

(2)—*Civ. Pro. Code*, s. 270—*Attaching creditors—Suit to set aside order—Maintainability—Jurisdiction.*—A suit will lie by a prior attaching creditor to compel a decree-holder whose attachment is subsequent in date to refund money obtained by him under an order of a subordinate Court in contravention of the provisions of s. 270 of the Code. But the suit must be a suit to set aside the Court's order; because, as that order is an adjudication in a matter in which a Judge executing a decree has jurisdiction, it must be treated as binding until it is set aside. (9 W.R. 544, *R.*) The Court which can adjudicate between the conflicting claims of attaching creditors is the Court in which the money is in deposit. WOOMA MOYEE BURMONYA v. RAM BUKSH CHETLANGEE, **16 W.R. 11.** [*R.*, 13 C. 159.]

(3)—*Attachment under Reg.* II *of* 1806 *and Act* VIII *of* 1859—*Suit to set aside sale—Subsequent attachment of same property—Collusive decree—Fraud.*—When a decree-holder has attached certain property under Reg. II of 1806 there is no law which could prevent other decree-holders attaching the same property and having it sold in execution of their decrees, notwithstanding the existence of the previous attachment A question might arise at the time of the distribution of the sale proceeds whether the party who has made the attachment under Reg. II of 1806 would be entitled to have his claim satisfied before the other decree holders. But it is clear that any sale under those circumstances would be a good and valid one. An auction-sale in execution of a decree cannot be set aside, as regards the auction-purchaser, against whom no fraud has been alleged, whether the order of the Court under which the sale took place was illegal or not. And even if the decree in execution of which the sale took place were a collusive one, the rights of the auction-purchaser would not be affected thereby, if he was no party to the fraud, and therefore there would be no ground for setting aside the sale. MAHOMED KUZUL-BASH KHAN v. MAHOMED SHAH, **12 W.R. 48.**

(4)—*Civ. Pro Code*, 1877, s. 231—*Execution of joint decree—Rights of several decree-holders.*—It is within the discretion of a Court of execution, under s. 231, Act X of 1877, to allow one of several joint decree-holders to execute a decree. The Court should act only if it sees sufficient cause for allowing such a course. Notice to the other decree-holders should be given before one of them is allowed to execute the entire decree. Where an application by one of several joint decree-holders was incomplete, as a fresh list of property of the judgment-debtor to be attached and sold had to be put in, and before this could be done, another decree-holder applied and was allowed to execute the decree, but the Court refused to allow the first applicant to take out

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

———*f.*—PROCEEDS OF SALE, RIGHT TO —*continued.*

execution separately, or to be associated with the latter in the execution proceedings, *held* that the lower Court ought to have allowed the first applicant to join with the second in execution proceedings. *Held*, further, that this execution of the same decree could simultaneously proceed, so far as attachment of different properties of the judgment-debtor was concerned, though ordinarily the sales would not take place simultaneously. SHEIKH AHMED CHOWDHRY v SHAHZADA KHATOON, **7 C.L R. 537.** [*D.*, 33 C. 306=10 C.W.N. 297=3 C.L.J. 112.]

(5)—*Execution of decree—Attachment by several creditors—Priority of claim—Rateable distribution.*—Certain Government promissory notes were attached in execution of several decrees against the same person, but were not brought to sale, apparently under the impression that they could not be sold. Subsequently, in consequence of an expression of opinion by the High Court in an appeal, one of the decree-holders again attached the notes and brought them to sale. The Court directed full payment to him and to two other decree-holders, who were acting jointly in execution with him, and rateable distribution in respect of the remaining decree-holders. Thereupon one of these latter brought a suit for a declaration of his preferential claim. *Held*, that, looking to the very ancient dates of the proceedings and the evident intention of the parties not to sell the property when each attachment was made, the plaintiff could not be regarded as being the first attaching creditor within the purview of s. 270 of Act VIII of 1859, as the attachment contemplated by that Code was an attachment with the intention of sale. The decree-holder, who brought the notes to sale immediately after the opinion of the High Court, that they were saleable, was entitled to be paid in full and not the other two decree-holders, who were also paid in full along with him. These latter were directed to refund the excess they had got to the remaining decree-holders. SHIB NARAIN PAL v. KOONJO KAMINEE DABEE, **22 W.R. 466.**

(6)—24 *and* 25 *Vic*, *c.* 104, *s.* 15—*Superintendence—Jurisdiction of High Court—Execution of decree.*—In execution of a decree, the only parties that are before the Court, and over whom the Court has jurisdiction, are primarily the judgment-creditor and the judgment-debtor; and if any third party wishes to intervene and to have any rights of his decided in reference to the property disposed of as between the judgment-creditor and the judgment-debtor, he can come in only under certain conditions of specific provisions of law. When a claimant can only be allowed to come in under certain provisions of law, a person who appears on behalf of that claimant, must show that he has a right to be heard. Where

Sale—continued.

——5.—**Sale in Execution of Decree**—*contd.*

————*f.*—PROCEEDS OF SALE, RIGHT TO —*continued.*

a claim was disallowed to certain property attached in execution of a decree, and the property was sold and after satisfaction of the decree, it was ordered that the surplus proceeds should be rateably distributed among the judgment-creditors who had subsequently attached, *held* that the Principal Sudder Amin had no jurisdiction to make another order setting aside the previous order for distribution, so far as it affected some of the creditors, on the application of the unsuccessful claimant again preferring his claim to the property. The High Court could, therefore, interfere to set it aside under its general power of superintendance. Excepting in some special cases of obvious and gross illegality, the High Court cannot be called upon to exercise the extraordinary powers given to it by s. 15 of the Charter Act, as if they were ordinary powers of appeal. *In re* MAHARAJADHIRAJ MAHTAP CHAND BAHADUR, **2 B.L.R.A.C. 217=11 W.R. 54.** [*R.*, 1 A. 101, F.B.]

(7)—*Act* VIII *of* 1859, *s.* 271—*Construction* —"*Subject to a mortgage.*" — The words "subject to a mortgage," in s. 271, Civ. Pro. Code, 1859, must be taken to mean "sold with notice of the mortgage," and do not refer merely to properties which, being the subject of an undisclosed mortgage, happen to be sold in execution. JOY CHUNDER GHOSE v. RAM NARAIN PODDAR, **21 W.R. 43.**

(8)—*Act* VIII *of* 1859, *ss.* 237, 271—*Waiver of right as mortgagee or pledgee—Right to proceed against other property of judgment-debtor —Waiver.*—A mortgagee or pledgee who has obtained a decree directing that his debt should be satisfied out of the property pledged or mortgaged to him, is competent to waive his right as mortgagee or pledgee and to come in under s. 271 of Act VIII of 1859, for a share in the surplus sale proceeds, and it is equally competent to him to waive his right as mortgagee or pledgee and to come in under s. 237 and proceed against other property of the judgment-debtor. PURMUSSUREE DOSSEE v. NOBIN CHUNDER TARUN, **24 W.R. 305.** [*D.*, 27 C. 285.]

(9)—*Act* VIII *of* 1859, *s.* 271—*Suit by mortgagee—Money decree—Execution.*—The word "mortgage" in "subject to mortgage" does not mean a mortgage of another portion of the same estate. A mortgagee may take a money-decree without declaration of his lien. S. 271 contains no reservation in favour of secured creditors. The Legislature did not intend any other exception to be made. RADHA KANT ROY v. MIRTA SUDAFUT MAHOMED KHAN, **21 W.R. 86.**

(10)—*Mortgages—Sales—Single mortgagor.*—Three different mortgagees decree-holders of seven properties belonging to the same mortgagor, brought to sale simultaneously the properties mortgaged to them. *Held*, that the

Sale—continued.

——5.—**Sale in Execution of Decree**—*contd.*

————*f.*—PROCEEDS OF SALE, RIGHT TO —*continued.*

mortgagees should be satisfied out of the entire sale proceeds according to the priorities of their mortgages. GOPEE SINGH v. BABOO KISHA LALL, **25 W.R. 187.** [*R.*, 17 M.L.J. 332; *D.*, 10 C. 567.]

(11)—*Execution of decree— Rateable distribution of proceeds of decree—Civ. Pro. Code, s.* 295, Bona fides of *decree-holders.*—The Court distributing the proceeds of execution under s. 295 of Civ. Pro. Code, should inquire into the *bona fides* of the decree-holders, if called in question, and decide it in the same manner as all other questions that arise in execution. The party aggrieved will be entitled, under the last clause of s. 295, to bring a regular suit to compel the successful judgment-creditor in execution to refund. CHHAGANLAL v. FAZARALI, **13 B. 154.** [*Doubted*, 1 C.W.N. 633.]

(12)—*Decree against estate of deceased person —Purchase of decree by legal representative— Realization of amount under decree—Right of purchaser to rateable distribution under s.* 295, *Civ. Pro. Code*, 1882.—In execution of a decree against a firm, of which H (deceased) was a partner, property belonging to H was attached. On the 9th November 1886, V (the legal representative of H) purchased the decree from the decree-holder with money borrowed from C and Co., with whom he entered into an agreement to re-pay the debt out of the proceeds realized by the sale of the property in execution of the decree which he had purchased. Meanwhile W purchased another decree obtained against the same firm from another decree-holder, and applied for execution of the decree prior to 9th November, 1886. The proceeds realised by the sale of the attached property were ordered to be rateably distributed between V and W. The latter preferred an appeal and contended that the purchase of the decree by V from the decree-holder extinguished it as against the estate of H and that it amounted to a purchase of the attached properties on behalf of the estate of H. *Held* that V was entitled to rateable distribution. *Held* also that (1) V was only liable for the debt of W as the representative of H, (2) that, so far as he might have had property of his own available for the purpose—not derived from the estate of H—he stood in the same position as a third party who might have purchased the decree-holder's share of the proceeds before they were realised, (3) that the purchase by V of the decree-holder's share with his own money could not prejudice W any more than if an entire stranger had purchased, (4) that if the money did not come from the estate of H, it could not matter whether it came directly from the pocket of V or from another person at his request, and (5) that, if the money was derived from a source having no connection, directly or indirectly with the estate indebted, there was no distinction in principle between

Sale – continued.

——5.–Sale in Execution of Decree—*contd.*

————*f.*—PROCEEDS OF SALE, RIGHT TO —*continued.*

the representative of the indebted estate and a stranger. MUNMOHANDAS JAIKISONDAS v. VIZBAI, **13 B. 171.**

(13)—*Civ. Pro. Code*, 1882, *s.* 295—*Attachment of fund before judgment—Assignment of fund—Attachment by other creditors subsequent to assignment—Rights of assignee and attaching creditors—Attachment—Scope—Misdescription of property attached — Effect.*—W sued G for Rs. 2,237 and obtained an attachment, before judgment, of certain money belonging to G in the hands of a Railway Company. Subsequent to the decree in the above suit, G assigned the fund belonging to him (expressed to be Rs. 7,818) in the hands of the Railway Company to A, subject to the attachment of W. Subsequent to the assignment other creditors of G attached the same fund. The Railway Company paid over to the Sheriff under a consent order, the sum of Rs. 8,084. A contended that he was entitled to the fund subject only to the claim of W, and the subsequent attaching creditors had no claim on it. *Held*, (*a*) that the fund must be regarded as "assets realized by sale or otherwise, in execution of a decree" within the meaning of s. 295, Civ. Pro. Code. A prohibitory order under s. 268 served upon a debtor of a judgment-debtor is a process in execution of the decree, and when the debt is paid into Court by the debtor in compliance with such order, all the conditions with respect to the character of the fund to be dealt with, which are prescribed for the application of s. 295, are satisfied, and the moneys in the hands of the Sheriff must be deemed subject to the provisions contained in that section. (*b*) The claims of subsequent execution creditors entitled as under s. 295 to distribution of the fruits of an attachment ought to be treated as falling within the words "all claims enforceable under the attachment" in s. 276, Civ. Pro. Code. [*Diss.*, 4 C.W.N. 542, 25 A. 431=23 A.W.N. 92; *F.*, 15 A. 318, 21 B. 205; *R.*, 23 M. 478, 28 B. 264, 9 C.W.N. 225 =32 C. 198=32 I.A. 1=2 A.L.J. 190, 5 Ind. Cas. 92=7 M.L.T. 143=20 M.L.J. 330; *D.*, 23 A. 106, 28 M. 380=15 M.L.J. 202.] Looking *inter alia* at ss. 277, 284, and 305 of the Civ. Pro. Code, it is plain that the Code itself contemplates the possibility of property being attached in excess of what is needed to satisfy the decree. The attachment was not limited in this case merely to such portion of the fund as covered the amount of the decree, but was a valid attachment in the form in which it was made, namely, on the whole fund in the hands of the Railway Company. The misdescription of the property in the order of attachment in this case was held to be a mere *falsa demonstratio*, and it was held that the entire sum in the hands of the Railway Company was attached. The description of the property must be reasonably accurate under the circumstances and such as

Sale—continued.

——5.– Sale in Execution of Decree—*contd.*

————*f.*—PROCEEDS OF SALE, RIGHT TO —*continued.*

with reasonable certainty identifies the property. If it is such, it ought to be held sufficient. SORABJI EDULJI WARDEN v. GOVINDU RAMJI F.N. WADIA, **16 B. 91.**

(14)—*Surplus sale proceeds—Person entitled to withdraw.*—A Court which has in deposit surplus sale proceeds of an estate sold in execution of a decree, standing in the name of the judgment-debtor, is perfectly justified in refusing to pay the money to any one but the judgment-debtor or his agent. *In the matter of* PUDDABUTTY DOSSIA, **12 W.R. 352.**

(15)—*Second attaching creditor—Balance of sale proceeds.*—An appeal to the High Court by a second attaching creditor, whose claim to surplus sale-proceeds has been disallowed by the District Judge, is really a question between rival creditors, and cannot be heard. Where an execution-sale had taken place, the second attaching-creditor and others are equally entitled, under Act VIII of 1859, s. 271, to a rateable distribution of the surplus proceeds, the first attaching creditor alone having right to have his claim satisfied in full. JUGOBUNDHOO SHAH PORAMANICK v. THE OFFICIAL ASSIGNEE, **21 W R. 194.**

(16)—*Sale of property in execution—Order directing proceeds to be given to Official Assignee—Appeal.*—No appeal lies on the part of a decree-holder against an order of a Judge directing the proceeds of property sold in execution of a decree to be handed over to the Official Assignee of the Court for the relief of Insolvent Debtors. *N.B.*—To save further litigation, the order was also held to be correct, as the Court's order vesting the judgment-debtor's property in the Official Assignee bore date previous to the sale in execution. INDUR CHUNDER DOOGUR v. THE OFFICIAL ASSIGNEE ON BEHALF OF TARA CHAND DOOGUR, **11 W.R. 100.** [*F.*, 11 W.R. 420.]

(17)—*Rival decrees — Attachment — Sale — Priority—Civ. Pro. Code* (VIII *of* 1859), *s.* 270. — The attaching decree-holder and not be at whose instance the property is sold, has a prior claim to the proceeds of the sale. HUREE MOHUN SHAHA v. PANCHOO BEPAREE, **17 W.R. 89.**

(18) — *Rival decree-holders — Decree-holder first attaching, right of, to be first paid out of sale-proceeds—Act* VIII *of* 1859, *s.* 270.—On a sale of property in execution of a decree, under the provisions of s. 270 of Act VIII of 1859, it is not the person at whose instance the sale has taken place, but the party by whom the property was first attached and thus secured from alienation by the debtor, that is entitled to be paid first. The Court has to look to the attachment and not to the sale. KARTICK CHUNDER SINGH v. GOGARAM, **2 W.R. Mis. 48.** [*F.*, 6 C.L.R. 85.]

Sale—continued.

——5. —Sale in Execution of Decree —*contd*.

———*f*.—PROCEEDS OF SALE, RIGHT TO —*concluded*.

See ATTACHMENT—ALIENATION DURING ATTACHMENT, 11 B.H.C. 159.

See MORTGAGE—SALE OF MORTGAGED PROPERTY, 6 W.R. Mis. 13, 22 W.R. 98.

———*g*.—PURCHASERS, RIGHT OF.

(1)—*Auction-purchaser—Nature of interest acquired*.—An auction purchaser of the judgment-debtor's right and interest cannot seek to recover what his judgment-debtor could not have recovered. ZALIM v. CHOONEE LALL, **3 Agra 194.**

(2)—*Private sale—Judicial sale—Rights of purchasers under*.—A purchaser at a judicial sale is in a position different from that of a mere representative of the old proprietor or one who comes in by a voluntary sale made by the latter. A judicial sale transfers to the purchaser the property of the judgment-debtor against the debtor's will, and places the purchaser in a higher position than that which the judgment-debtor by any private alienation could confer on him. Such a purchaser is competent to defend his possession and title by showing, as the decree-holder before the sale might have done, that the charge which it is sought to establish against the estate if fraudulent and collusive, and, therefore, void. OOMRAO SINGH v. SHUMBHOO NATH, **2 N.W.P. 38.** [*Cons*., 7 N.W.P. 362.]

(2-*a*)—*Civ. Pro. Code*, 1859, *s*. 240—*Execution sale--Moveable property*.—Where the right, title, and interest of a debtor in certain moveable property claimed by B as part owner under s. 246, Act VIII of 1859, is sold in execution, the judgment creditor is not liable. The purchaser becomes entitled to an undivided share to be used as such, and is not liable to the owner of the other undivided share merely for using it. TAMIZUDDIN MULLA v. NYANUTULLA SIRKAR, **3 B.L.R. App. 73, Note=11 W.R. 528.** [*R*., 9 B.H.C. 92; *D*., 5 B.L R. App. 71=14 W.R. 120=11 B.H.C. 46, 3 B. 74.]

(3)—*Reg*. IV *of* 1827, *ss*. 62 *and* 66—*Court's sale — Right of owner to contest right of auction-purchaser — Title — Limitation*.—A Court's sale under Reg. IV of 1827 (like a similar sale under the Civ. Pro. Code) transfers only the right, title, and interest of the judgment-debtor, whose property was advertised for sale, and a person claiming such property as his own could dispute the right of the auction-purchaser and those claiming under him to interfere with his possession at any time within twelve years of the occurrence of the disturbance. KUSHABA *bin* SANKROJI v. PITAMBARDHARI, **12 B.H.C. 15.**

(4)—*Execution sale—Nature of right passing by sale—Interest of person advertised*.—A decree had been obtained on a bond which was

Sale—continued.

——5.—Sale in Execution of Decree—*contd*.

———*g*.—PURCHASERS, RIGHT OF—*ctd*.

executed by two persons and gave as security the property of one of them. In execution of the decree the property of the other debtor was seized and she paid the whole of the debt to avoid a sale of her property. She then brought a suit for contribution against her co-sharer and in the execution of the decree obtained in the suit attached the mortgaged property. The attachment having been raised on the objection of a subsequent purchaser of the property, she sued for a declaration of her right to attach the property in execution of her decree for contribution and having obtained a decree in her favour in the Appellate Court, she sold the property in execution. The decree of the Appellate Court was however set aside by the High Court in special appeal. The question now was what was the right of the purchaser under the above sale. *Held* that what was sold was the interest of the co-debtor in the property. The High Court having set aside the decree in execution of which the property was sold, the co-debtor had no interest in the property that could be sold. Consequently, the purchaser bought what was worthless. RAM SUHAI SINGH v. CHUTTUR KOOER, **22 W.R. 452.**

(5)—*Sale in execution—Necessity of attachment and advertisement of sale—Extent of rights and interests passing by sale*.—The respondent in this case argued that, when a sale takes place of the rights and interests of a debtor, the position and property of the debtor at the *time of sale*, but not that at the *time of attachment and advertisement*, fixes the exact extent of the rights and interests which passed by the sale. The High Court, however, was of opinion that it is only that which is attached and advertised that could pass by the sale. The property not attached and not advertised for sale cannot at all be sold in execution of a decree; and it follows from this that the quantity and nature of rights and interest existing in the debtor at the time of advertisement and attachment can alone pass by the sale in execution. RAM ONOOGROHO SINGH v. MUSSAMUT MONTORUM, **6 W.R. 223.**

(6)--*Revenue paying estate—Sale in execution—Effect on released rent-free lands*.—When the rights and interests of a judgment-debtor as the recorded proprietor of a Government rent roll and revenue paying estate are sold in execution, the released rent-free lands therein do not pass to the purchaser. DOL GOBINDMONY DABAE v. SHAIKH IMDAD ALI, **5 W.R. 170.**

(7)—*Deceased judgment-debtor—Sale of rights of—Rights of heirs and auction purchaser*.—In cases where the right of inheritance really vests, the purchaser of the rights of a deceased judgment-debtor, whose representatives hold under a certificate under Act XXVII of 1860, does not acquire the entire estate, but acquires

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*g.*—PURCHASERS, RIGHT OF—*ctd.*

it subject to all legal and equitable rights of inheritance. SHAM COOMAR ROY v. JUTTUN BIBEE, **14 W.R. 448**. [*Cons. & Expl.*, 2 C. L.R. 223 F.B. = 4 C. 142 ; *R.*, 20 B. 338.]

(8)—*Execution of decree—Attachment of land and house—Purchase of land by decree-holder—Sale of house to another—Right of latter to have house continued on land.*—A land and a house upon the land were attached in execution of a decree. The decree-holder caused the land to be sold first, and himself became the purchaser. He then caused the house to be put up for sale, and it was purchased by another. *Held* that the decree-holder could not be permitted to commit fraud on the purchaser of the house. The former was considered to have bought only the land upon which the house stood, subject to the right of the person, who bought the house, to have it continued there. MOOKTA SOONDUREE CHOWDHRAIN v. MUTHOORANATH GHOSE, **22 W.R. 209**.

(9)—*Execution-sale—Rights of purchaser.*—The purchaser, at a sale in execution, of the rights pledged for the debt, for which the decree was obtained was held not bound by any incumbrance made by the original proprietor subsequent to the pledge. BABOO BHUGOBAN CHUNDER DOSS v. LALLA THAKOOR PERSHAD, **W.R. 1864, 359**.

(10)—*Execution of decree—Sale—Rights of purchaser.*—A purchaser at a Court-auction held in execution of a decree has no greater rights than a purchaser under a decree in Chancery whose rights are liable to be defeated by a re-opening of the biddings by order of the Court. MADHUB CHUNDER DUTT v. JOY KISSEN MOOKERJEE, **W.R. 1864, Mis. 29**.

(11)—*Rent—Distribution—Revenue paid from collections before sale—Rights of purchaser.*—Where the whole of the Government revenue, which was payable in three kists of nearly equal instalments, was paid by the *surburakar* out of the collections before the plaintiff purchased in execution the rights and interests of the former proprietor, the plaintiff was entitled, not to two-thirds of the collections made by the *surburakar*, but to a share of those rents in proportion to the actual term of her proprietorship in the estate. MAHARANEE ADHEERANEE NARAIN COOMAREE v. RAJAH MURDRAJ BIDDAYADHUR SINGH NURENDRO BAHADOOR, **18 W.R. 44**.

(12)—*Sold out tenant—Suit for arrears of rent—Decree—execution—Purchase of tenure by landlord—Rights of* bona fide *purchaser.*—Where, in execution of an *ex parte* decree obtained by a Zemindar in a suit against a sold-out tenant for arrears of rent, the tenure was sold and purchased by the decree-holder, *held* that the latter took nothing by the purchase and must give way to a *bona fide* purchaser. MAGON MALLO v. DOOLA GAZEE KOOLAN, **10 W.R. 198**.

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*g.*—PURCHASERS, RIGHT OF—*ctd.*

(13)—*Attachment — Alienation* — Bona fides *and good consideration—Right of purchaser.*—A person who in good faith and for valuable consideration purchased certain attached property belonging to two debtors, cannot plead that he got the rights of both when in fact he purchased the property from one of them in whose name the property stood. MIRZA LOTFOOLIA KHAN v. RAJAH LEELA NUND SINGH BAHADOOR, **3 W.R. 171**.

(14)—*Relinquishment—Alienation before attachment—Sale in execution—Rights of purchaser.*—Plaintiff's father in execution of a simple money decree dated 29th January, 1867, attached the right, title and interest of A in certain property and purchased it himself in Court-auction in 1868. In a suit by plaintiff for possession of the said property, the defendant J's contention was that only a 4 anna share belonged at the time of sale to A, and that the other 4 annas claimed by plaintiff belonged to R who transferred them to the defendant J on the 13th of May 1868. The plaintiff's case was that the 4 annas which once belonged to R had passed from him to A and belonged to her at the time of sale. But, before the plaintiff's father purchased in 1868, various proceedings had been taken in which the right to the 4 annas' share which was said to have passed under a hibba from R to A was discussed and as a result of those proceedings it appeared that in a regular suit a decree was made on the 20th July 1867, which declared that the 4 annas belonged to R and not to A. It was in fact substantially decided that the property had not been transferred by a hibba or otherwise to A. *Held* that inasmuch as the attachment effected by plaintiff's father, which was the foundation for the plaintiff's title was *subsequent* to the decree of the 20th July 1867, plaintiff had no interest in the property and no right to interfere with it. JUGO MOHUN DUTT v. ABDOOL AZEEZ, **24 W.R. 455**.

(15) — *Prior mortgage-decree — Subsequent money decree against same judgment-debtor—Execution of latter decree against property mortgaged—Sale—Rights of purchaser.*—Where in execution of a money decree obtained by A against B, certain property was sold, and before the sale took place, the lien of one T, who had previously obtained a mortgage-decree in respect of the property against the same judgment-debtor, was duly notified, *held*, on application being made by the representatives of T to take out execution as against the property mortgaged, that there was nothing to prevent the application being granted, all that the purchaser took at the execution sale being only the rights and interests of the judgment-debtor subject to the lien of the prior mortgage-decree-holder. DEBEE DOSS v. GRISH CHUNDER BAGCHEE, **23 W.R. 196**.

(16)—*Auction sale—Right of purchaser of right and interest of ryot—Village custom.*—

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*g.*—PURCHASERS, RIGHT OF—*ctd.*

An auction-purchaser of the right and interest of a *ryot* in his house in a village cannot acquire more title than can be transferred by private sale. It is necessary in such cases to inquire whether according to the village custom, the *ryot* was competent to alienate the house with its site without the permission of the zemindar. SHIB LALL v. LOCHAN SINGH, **3 Agra (Ap. Rev.) 7.**

(17)—*Execution sale—Duty of purchaser where Court has jurisdiction.*—Bona fide *purchaser at execution sale—Cross decrees—Civ. Pro. Code*, s. 246.—A purchaser at an execution sale is not bound to enquire whether the judgment-debtor had a cross-judgment of a higher amount, any more than he would be bound in an ordinary case to enquire whether a judgment upon which an execution issues has been satisfied or not, such being questions for the determination of the executing Court. If the Court has jurisdiction, a purchaser is no more bound to enquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues. Where there is a *bona fide* purchaser for fair value in execution of a valid decree, the mere existence of a cross-decree for a higher amount in the judgment-debtor's favour would not, in the absence of fraud, be sufficient to set aside such sale. REWA MAHTON v. RAM KISHEN SINGH, **14 C. 18=13 I.A. 106, P.C.=4 Sar. 746.** [*F.*, 15 C. 557; *Expl.*, 76 P.R. 1890, 26 M. 428=12 M.L.J. 398; *D.*, 25 A. 214=23 A.W.N. 21, F.B., *R.*, 17 M. 58=3 M.L.J. 211, 14 C. 627, 19 M. 219, 21 B. 424, F.B., 21 B. 463, 22 B. 88, 26 C. 734, 22 A. 377, 23 A. 25, 24 A. 981=22 A.W.N. 126, 26 B. 543, 5 C.L.J. 696=11 C.W.N. 756 F.B., 2 M.L.T. 371=34 C. 811.]

(18)—*Purchaser at sale in execution, locum tenens of, whether bound by award in fraud of decree.*—It was contended on behalf of the appellants in this case that, notwithstanding the fraudulent nature of the award sought to be challenged by the plaintiff, it was not competent for him to challenge it, being the representative, or *locum tenens*, by purchase, of persons who were bound by it, *viz.*, the judgment-debtors. But the High Court *held* that the plaintiff in the present case was the immediate representative or the *locum tenens* of the auction-purchaser of the rights of the judgment-debtor and not of the judgment-debtors themselves, and was therefore not bound by any award in fraud of the decree to which the judgment-debtors were parties. But it was competent to the plaintiff to call in question the *bona fides* of the arbitration proceedings and the validity of the award itself. ALFATUN v. RASKARAN SINGH, **7 N.W.P. 362.**

(19)—*Sale in execution—Rights of purchaser—Right to question validity of deed.*—A purchaser at a sale in execution of a decree of the

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*g.*—PURCHASERS, RIGHT OF—*ctd.*

right, title and interest of a judgment-debtor, does not acquire by that purchase any right or title, which the judgment-creditor might have, to set aside or question the validity of any deeds which had been previously made, even it might be by the judgment-debtor himself. LALLA RAM SURUN LALL v. MUSSAMUT LOKEBAS KOOER, **18 W.R. 39.**

(20)—*Mortgagor and mortgagee—Covenant not to alienate—Sale of mortgaged property in execution—Right of purchaser.*—Where the rights and interests of a mortgagor were sold in execution of a decree declaring the mortgaged property liable for the mortgaged debt, it was held that a putneedar, who had obtained a pottah from the mortgagor subsequent to the mortgage and in violation of its conditions, had no right or title to hold possession against the purchaser. The purchaser in such a case buys the rights and interests of the judgment-debtor as they stood at the time of the execution of the mortgage, and not as they stood at the time of the sale. BRAJARAJ KISORI DASI v. MAHOMED SALAM, **1 B.L.R.A.C. 152=10 W.R. 151.** (7 W.R. 67, *F.*; 8 W.R. 292, *R.*) [*R.*, 23 W.R. 187.]

(21)—*Easements—Court-sale—Purchaser's right.*—There is no distinction between a sale in execution of a decree and a sale by the owner himself. All easements appurtenant to the property are conveyed by Court-sale in the same manner as by a private sale. HUREE MADHUB LAHIREE v. HEM CHUNDER GOSSAMI, **22 W.R. 522.**

(22)—*Execution of decree—Sale of zamindari—Rights of purchaser—Rents—Limitation.*—The purchaser of a zemindari sold in execution of a decree is entitled to all the rents accruing due from the date of his purchase; and if the tenants or ryots, after having had notice of his title, choose to continue to pay their rents to, or for the use of, the former proprietor, they do so at their peril, and cannot plead such payments in answer to a suit for rent by the new owner. A plea of limitation cannot be allowed to be urged orally in appeal. THE COLLECTOR OF RAJSHAHYE v. HURSOONDERY DEBEA, **W.R. 1864, Act X, Rul., 6.**

(23)—*Sale in execution of decree—Putnee—Agreement between putneedar and other zemindars—Validity.*—A vendee at a sale in execution of an estate let with others in one putnee is not bound by any agreement between the putneedar and other zemindars and he could not claim from the putneedar a share of rent proportioned to the sudder jumma. PORESH NATH ROY v. BISHROOP DUTT, **W.R. 1864, Act X, Rul. 16.**

(24)—*Sale in execution of decree—Implied warranty of title—Fraud*—Caveat emptor—*Wrongful attachment and sale of property not belonging to judgment-debtor—Damages.*—In sales of immoveable property made by a Civil

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————g.—PURCHASERS, RIGHT OF—*ctd.*

Court in execution of a decree, there is no implied warranty, by the execution-creditor who has caused the sale, of the title of the judgment-debtor. The purchaser is bound to satisfy himself of the character and interest of the judgment-debtor in the property before he bids; and in case it should turn out that the judgment-debtor has no interest whatever in the land put up for sale, the purchaser has no remedy against the execution-creditor, unless he can establish fraud or wilful misrepresentation on the part of that person. [*F.*, 6 B.H.C. 258, 9 B.H.C. 92, 2 B. 258.] A person whose property has been wrongfully sold in execution of a decree passed against some other person, can recover damages against the execution-creditor for any loss which he may have suffered in consequence of the act of the latter in attaching and selling property which did not belong to his judgment-debtor. DHONDU M. NAIK v. RAMJI *valad* HANUMANTA KAKDA, **4 B.H.C.A.C. 114.** [*F.*, 9 B.H.C. 92, 2 B. 258.]

(25)—Caveat emptor—*Purchase with notice of other persons' claim.*—The rule of *caveat emptor* applies where a party purchases an estate sold in execution after full notice that persons other than the judgment-debtor claim rights and interests in the property. SHAHABOODEEN CHOWDHRY v. RAM GUTTY CHUCKERBUTTY, **9 W.R. 556.**

(26)—*Execution of decree—Sale in execution*—Caveat emptor.—H sold his house to K, who after six months conveyed it to his wife by deed of gift. Prior to these transactions, H had given to G a lien on his house in order to secure the payment of a decree by instalments. When he made default, G attached the house in question and brought it to sale in spite of the objections of K's wife under s. 246, Civ. Pro. Code, K became the auction-purchaser of H's rights and interests under his decree, notwithstanding the previous sale to him by H, and the deed of gift to his wife. K's wife sued to set aside the auction sale and obtained a decree by which she got possession of the house. K then sued to recover the money paid by him as auction-purchaser to the decree-holder. *Held* that he took the risk of a buyer under the circumstances and that the decree-holder was certainly in nowise responsible for his mistake in buying the house and paying the money without enquiring into or considering the question of the title to it, or even the effect in that respect of his own deed of gift to his wife, his own act. W. M. KELLY v. SETH GOBIND DASS, **6 N.W.P. 168.** [*D.*, 1 A. 568, F.B.]

(27)—*Sale in execution of decree—Purchaser's title—Limitation.*—Where property is sold in execution of a decree, the title of the purchaser at the sale accrues from the date of sale. KALEE DOSS NEOGEE v. HUR NATH ROY CHOWDHRY, **W.R. 1864, 279.**

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————g.—PURCHASERS, RIGHT OF—*ctd.*

(28)—*Purchaser in execution—Title of purchaser from date of sale and not of its confirmation.*—The title of a purchaser at a judicial sale which has been confirmed and been made absolute relates back to, and takes effect from, the date of the sale, and does not commence only on the date of the confirmation of the sale. RAJA LUCHMIN NATH v. MAHARAJAH OF VIZIANAGARAM, **7 N.W.P. 310.**

(29)—*Execution sale—What passes—Right, title and interest.*—A sale in execution is simply what the sale notification in express terms says; it is "a sale of the rights and interests of a party, whatever they may be," in certain property. CAPTAIN J. C. BARTON v. BRIJONATH SURMAH, **3 W.R. 65.** [*R.*, 8 W.R. 291.]

(30)—*Sale in execution—Effect of sale—Right, title and interest of judgment-debtor conveyed.*—Though there is a specification of the subject of sale at the time of sale, yet it is not the property specified, but only the right of the judgment-debtor therein that is offered for sale and is conveyed, there appearing no provisions in the Civ. Pro. Code, to contemplate the sale or transfer of anything more than the right and interest of the judgment-debtor; and the auction-purchaser at a sale in execution acquires by the express terms of the conveyance to him not the presumed title of the person in possession of the apparent title in the Collector's books, but the right, title and interest of the judgment-debtor in the property sold. MAHOMED BUKSH v. MAHOMED HOSSEIN, **3 Agra 171** [*Ap.*, 7 N.W.P. 288; *R.*, 1 A. 240, F.B.] *See also* BALUK DASS v. NIMAYE CHUNDER SIRCAR, **17 W.R. 511.**

(31)—*Execution—Money-decree—Sale of property by judgment-debtor—Right, title and interest.*—Execution of a money-decree cannot be had against the property of the judgment-debtor which has been purchased by and is in the possession of a third person, unless the purchaser is made a party to a suit to enforce the supposed lien. All that would be sold under a money-decree would be the right, title and interest of the judgment-debtor. MAHARAJAH DHERAJ MAHTAB CHAND BAHADOOR v. HURDEO NARAIN SAHOO, **16 W.R. 119.** [*R.*, 9 M.L.T. 423=21 M.L.J. 550=10 Ind. Cas. 424=1911 2 M.W.N. 315.]

(32)—*Act* VIII *of* 1859, *s.* 224—*Execution of decree—Joint Hindu family—Dwelling house—Right to share.*—A person, who, at a sale in execution of a decree, has purchased the share of a member of a joint undivided Hindu family, and subsequently sued for and obtained a decree against other members of the family for possession of such share in property consisting of the joint family dwelling house and land in execution of the decree is entitled to be put into actual possession of a portion of the dwelling

Sale—continued.

— 5.—**Sale in Execution of Decree**—*contd.*

———*g.*—PURCHASERS, RIGHT OF—*ctd.*

house (*dissentiente Kemp, J.*). KOWAR BIJOI KESAL ROY BAHADUR v. SAMASUNDARI, **B.L.R. Sup. Vol. 172, F.B.=2 W.R. Mis. 30.** [*F.*, 8 W.R. 239, 4 B.L.R. App. 55=13 W.R. 74 ; *Com. on*, 10 C. 244.]

(33)— *Hindu Law — Joint Family — Jote recorded in member's name—Sale under decree for rent—Fresh settlement with heir of that member—Sale in execution of decree against said heir—Right of purchaser.*—A jote belonging to a family had been recorded in the zemindar's sherishta in the name of one of the members of the family. On the death of that member, the zemindar brought a suit for rent against his heir only, and in execution of the decree obtained in the suit purchased the property himself and took khas possession thereof. Subsequently, the zemindar made a settlement of the property with the said heir. Sometime after, the right and interest of the latter in the property was sold in execution of a decree obtained against him by a third person and the purchaser obtained possession of the jote property. Thereupon, the plaintiff brought the present suit for possession of a share of the property, as representing her husband who was another member of the family. It was proved that the zemindar had been receiving rent from the plaintiff's husband also. *Held*, that the rights and interests of the plaintiff were not extinguished by the fresh settlement made by the zemindar with the heir of the member, whose name had been registered. The zemindar having known the rights of the plaintiff's husband in the family and having received rent from him, could have made the fresh settlement only with regard to the rights and interests of the heir of that member, and the purchaser got that right alone. The plaintiff's right in the property was not affected by the sale, and she was entitled to recover possession of the share claimed by her. SURBANUND DOSS SIRDAR v. BRISTOO PREA DOSSEE, **22 W.R. 382.**

(34)—*Auction-purchaser — Lease.*—Auction-purchaser, not bound by leases made after decree. HUNOOMUN DOSS v. KOOMEROONNISSA BEGUM, **W.R.F.B. 40.**

(35)—*Purchase of house sold in execution—Knowledge of incumbrance created by owner—Purchaser entitled to house subject to equity.*—A purchaser in execution generally takes whatever right, title and interest the judgment-debtor and the decree-holder together could give him at the date of his purchase, free from the incumbrances to the discharge of which the purchase-money was to be and was applied. The purchaser can therefore acquire the property subject to the equity created by the owner through whom he derived title to it, unless he can show that he purchased without notice of it. RAMJI DAS v. HIRA LAL, **148 P.R. 1879.**

Sale—continued.

—5.—**Sale in Execution of Decree**—*contd.*

———*g.*—PURCHASERS, RIGHT OF—*ctd.*

(36)—*Mortgage—Mortgagee obtaining money-decree, rights of—Lien of mortgagee—Preference to other mortgagees, dependent on priority and bona fides of several mortgages.*—The holder of a money-decree, though having a mortgage, is in no better position than an ordinary decree-holder, and, if he require to obtain the property through his lien, must bring an action against any third party who may be in possession ; he cannot execute the money-decree against the property in the hands of the subsequent purchaser. In the present case, a decree-holder having failed to enforce his lien in his original suit in consequence of having obtained therein a mere money-decree, sued to have his lien established and given effect to. He was *held* to be entitled to have the rights and interests of the mortgagor, as they were at the date of the mortgage, sold in satisfaction of his claim ; and so, if, as a matter of fact, his mortgage was prior to any of the others, the sale under the decree obtained by him would practically override any sales which may have taken place. The exact nature of the claims of the opposing mortgagees and the decree-holders not having been properly tried or decided by the lower Court, the case was remanded to that Court for a clear finding of the nature and dates of the several claims of the parties, in order that the question of priority might be settled. MOHUN RAM v. SHEO NARAIN SINGH, **2 W.R. 130.**

(37)—*Execution-sale of interest of judgment-debtor in decree executed in part with delivery of constructive possession—Right of purchaser.*—Where, in execution of a decree, the judgment-debtor's "right, title and interest" in a certain decree, which had been executed by the Court, in part by putting him in constructive possession of a portion of a taluk on account of its being under attachment by the Collector, was sold, it was held that the purchaser acquired only the unexecuted portion of the original decree, inasmuch as, at the partial execution of the decree, what possession, was possible under the circumstances had been granted by the Court. GIRISHCHUNDER CHUCKERBUTTY v. IBANESWARI DEBIA & GRISHCHUNDER CHUCKERBUTTY v. BISESWARI DEBIA, **6 C. 243, P.C.=3 Shome L.R. 240=4 Sar. 170=3 Suther. 776=7 C.L.R. 420 =4 Ind. Jur. 470.**

(38)—*Sale in execution of decree—Notice of claims of previous purchasers—Previous purchasers dispossessed by heirs of original owner—Suit for possession and mesne profits.*—Where the rights and interests of a judgment-debtor are sold in execution of a decree with notice of claims of previous purchasers of a portion thereof, and such previous purchasers are afterwards dispossessed by the heirs of the original owner, the purchasers in execution may sue such heirs

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————g.—PURCHASERS, RIGHT OF—*ctd.*

for return of the property with mesne profits. DEONARAIN SINGH v. TOKHUN SING, **5 W. R. 30.**

(39)—*Malikee right—Sale in execution—No pledge or mortgage—Right of purchaser to get possession.*—Where a malikee right, which is sold in execution of a decree, has not been pledged or mortgaged, the purchaser is entitled to get possession, in spite of a deed of assignment executed by the previous owner directing the ryot to make certain annual payments to a creditor of his for interest due under a bond. MEER GOWHAR ALI v. HURPAL BHUGAT, **22 W.R. 445**. [*F.*, 3 C. 720.]

(40)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 264—*Court sale—Possession by purchaser—Date of delivery.*—Under Act VIII of 1859, s. 264, the possession by an auction-purchaser ran from the date of the publication of sale certificate and proclamation by beat of drum, and not from the date of the actual possession by him. ASUDOOLLAH v. SHAIK AKBAR ALI, **7 W.R. 60**. [*Cons.*, 24 W.R. 418]

(41)—*Execution sale— Symbolical possession—Manual possession—Ejectment—Cause of action.*—Where a purchaser of the rights of a judgment-debtor at an execution-sale, on attempting to take manual possession (although he had obtained symbolical possession previously), was ejected by a third party, the cause of action for the purchaser was held to accrue from the ouster. BOYDANATH MOOKERJEE v. SREESHTEEDHUR CHUCKERBUTTY, **17 W.R. 464.**

(42)—*Execution-sale—Rights and interests of judgment-debtor sold—Suit for possession—Boundary—Procedure.*—In a suit for possession by a purchaser at Court auction of the rights and interests of a judgment-debtor in a share of an estate, where the sale-certificate sets forth the title passed by the sale and the boundaries of the estate, but the plaintiff does not prove the boundary, *held* that the Judge must inquire whether the boundaries, as stated in the sale-certificate, included any land other than the estate in question, and must decide accordingly. RAJ BULLUB MITTER v. BHEEM DEASHEE, **17 W.R. 344.**

(43)—*Sale proclamation and certificate—Boundaries in—General description of—Title of purchaser—Validity of.*—A mere general description of boundaries in the sale proclamation, or in the sale certificate, does not of itself confer on the purchaser such a conclusive title as can be rebutted by no proof to the contrary. BALUK DOSS v. NIMAYE CHUNDER SIRCAR, **17 W.R. 511.**

(44)—*Sales in execution—Bond debts—First purchaser placed in possession—Enforcement of rights by second purchaser.*—Where the holders of money-decrees upon bonds purchased the same property of the judgment-debtor and the

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————g.—PURCHASERS, RIGHT OF—*ctd.*

first purchaser was placed in possession, the second purchaser cannot have his right under his bond, decree and purchase adjudicated, except by a separate action. BHUGWAN DOSS v. SHAIKH NUBEE BUKSH, **7 W.R. 30.**

(45)—*Execution of decree — Purchasers—Mortgagees in possession.*—Plaintiff, a purchaser in execution of a decree, was opposed by the defendants claiming as mortgagees in possession after foreclosure, and under a decree passed thereon more than 12 years prior to the plaintiff's suit. The real question for decision was whether defendants held *bona fide* possession for a time sufficient to bar plaintiff under the law of limitation. *Held* that it was necessary to go, not only into the relative position of the judgment-debtor to the purchaser, his alleged spiritual guide, or the registry of the deed, but to trace step by step the conduct and possession and acts of ownership and appropriation of the profits during the possession by the defendants. GOUR CHUNDER THAKOOR v. KISSAN KOOMAR SOMAJPATTY. **1 W.R. 257.**

(46)—*Sale of decree for possession of land—Decision by Court against legality of sale, whether extinguishes decree—Rights of vendor and vendee.*—Where a party has obtained a decree for possession of land, the mere allegation of the judgment-debtor that he is not in possession is not sufficient to nullify that decree and render it infructuous. The Court has authority to put the decree-holder in possession of the property decreed, and, if there be any opposition on the part of any third party in possession, the Court will hear and decide the claim of such party under the provisions of s. 229 of Act VIII of 1859. In the absence of any such opposition, possession will have to be given. In the present case the defendants were not interested, except in regard to costs and mesne profits from a certain date, which the decree-holder having agreed to give up, they were not in a position to raise any objection to possession being given her. Where, on a decree having been sold, the Court decides that no legal sale had taken place as no consideration had passed, such decision cannot obliterate the decree. The vendee's rights might be extinguished, but the rights of the vendor could not be, there being no reason why she should not be allowed to revert to her former position as decree-holder. RADHA BULLUBH SINGH DEB v. BROMO KOOMAREE DEBEE, **4 W.R. Mis. 1.**

(47)—*Money decree—Personal decree for costs against A—Execution sale of property inherited by A's co-heir.*—A sale in execution of a decree for costs passed against A personally can lawfully pass property belonging to A; but it cannot have the effect of passing the property inherited by A's co-heir. MAHOMED EKBAL HOSSEIN v. RAM KISHEN DOSS, **20 W.R. 483.**

(48)—*Execution sale—Sale free of judgment-creditor's rights in property—Reservation of*

Sale—continued.

—5.—Sale in Execution of Decree—*contd.*

———*g.*—PURCHASERS, RIGHT OF—*ctd.*

rights.—When a judgment-debtor's property is sold at the instance of the judgment-creditor, the sale, whether it has been directed by the decree or not, must be a sale free of the judgment-creditor's rights in the property, unless, at any rate, these are reserved. DOOLEE CHUND v. MUSSAMUT OOMDA BEGUM, **24 W. R. 263.** [*F.*, 16 Ind. Cas. 365=16 C.L.J. 202 =17 C.W.N. 137=40 C. 173; *R.*, 10 C. 609, 16 Ind. Cas. 355.]

(49)—*Execution — Sale — Confirmation — Rights of purchasers at Court sales—Laches.*—The purchaser at a Court's sale ordinarily takes, subject to the prior right, contingent on confirmation, of a former purchaser, though such former purchase be confirmed subsequently to his own. Whether the case might not be different if the delay in the confirmation of the former purchase were accompanied by great laches on the part of the first purchaser, or by other special circumstances? KONAPA BIN MAHADAPA v. JANARDAN SUKDEY, **11 B.H.C. 193.** [*Diss.*, 22 A. 168=20 A. W. N. 31; *R.*, 17 B. 375.]

(50)—*Purchaser at sheriff's sale—Agreement as to possession between him and execution-creditor—Sale subsequently set aside—Suit for recovery of purchase-money.*—Where a purchaser of property at a sheriff's sale entered into an agreement with the execution-creditor that, in the event of his being dispossessed, owing to the illegality of the sale within a year, the latter should reinstate him and, on the death of the purchaser soon thereafter, the property escheated to Government for certain reasons and was subsequently (more than a year from the date of the agreement) returned to the original owners, on a declaration of the illegality of the sheriff's sale, it was *held*, in a suit by the purchaser's executors against the execution-creditor for recovery of the purchase-money, as the consideration has totally failed, that the agreement operated as an accord and satisfaction of all rights of the purchaser to the return of the money or to the advantages. It was also *held*, that no breach of the Government has occurred and, even if it had been broken, the suit was barred having been brought more than three years after the supposed breach. DORAB ALI KHAN v. ABDOOL AZEEZ, **6 C. 356.**

(51)—*Execution of decree—Claim to property by objector disallowed—Attachment of property — Objector's purchase of same property in execution of his own decree—Right of first decree-holder.*—The original decree-holder from whom R, the respondent purchased the decree, had attached certain property of his judgment-debtor in execution of his decree of 1860. N, the appellant, having objected to the attachment, the decree-holder who was referred to a civil suit, under s. 246 of Act VIII of 1859, obtained a decree in 1866, for the sale of the property in satisfaction of the former judgment-debt. The appellant (N) having sued the original judgment-debtor for the return of certain alleged consideration-money, obtained a decree, and brought the very same property of which the sale had been decreed against him in 1866, in execution of that decree. *Held* on the application for execution by the respondent that the appellant could only purchase the property subject to the decree for sale, and that the transactions subsequent to that decree of 1866, had no effect to shake it off. NIRUNJUN RAI v. RUJJOO RAI, **5 N.W.P. 166.** (4 N.W.P. 5, *F.*)

Sale—continued.

—5.—Sale in Execution of Decree—*contd.*

———*g.*—PURCHASERS, RIGHT OF—*ctd.*

(52)—*Decree—Execution—Priority—Decree-holder.*—A decree ordering certain property in suit to be sold in satisfaction of a certain prior decree, gives in equity and law a right of sale preferential to that of the holder of a later decree, notwithstanding such later decree-holder may have first attached the property in execution. SOORAJ BUKSH v. RAM JEEAWUN, **4 N.W.P. 5.** [*R.*, 5 N.W.P. 166.]

(53)—*Execution sale*—Bona fide *and benami purchase—Priority.*—A *bona fide* purchase of property sold in execution of a decree prevails over another (though prior in point of time) made *benami* for the judgment-debtor. JUGOBUNDHOO SEIN v. BHUGWAN CHUNDER DOSS, **17 W.R. 15.**

(54)—*Money decree—Execution sale—Priority of title—Purchaser's rights.*—In a suit by a purchaser at a sale held in execution of a money-decree, brought against the defendants who claimed alleging a prior title, the latter proved that the *shikmee* patta which they held from plaintiff's mortgagor had been executed four years before the date of purchase by the plaintiff and was duly registered, and they also established the *bona fides* of the transaction. *Held* that the suit should be dismissed, plaintiff not having adduced sufficient evidence of a rebutting character. RAM SOONDER SHAHA v. J. P. DE LANNEY, **17 W.R. 25.**

(55)—*Sale in execution—Purcahser's liability for acts of judgment-debtor*—The purchaser of an estate sold in execution of a decree is not bound by all the acts of the judgment-debtor. He can sue to obtain possession of the estate purchased by him, if he can make out that the debtor made a mere collusive transfer of it into another person's name, and the defendant cannot prove that it was *bona fide* transaction. Such collusive acts of the judgment-debtor do not bind the purchaser. DEWAN ROY v. CHARLES RIDDELL, **9 W.R. 521.**

(56)—*Sale in execution of decree—Re-sales—Ground for setting aside sale—Writ of* fieri facias.—A sale by the sheriff to a *bona fide* purchaser for valuable consideration will not be set aside on the ground that the judgment-creditor had communicated with the sheriff

Sale—continued.

——5.—**Sale in Execution of Decree**—*contd.*

————*g.*—PURCHASERS, RIGHT OF—*ctd.*

and desired him to stay the sale. The purchaser need not trace back his title beyond the *fi. fa.* KAMINEE DOSSEE v. GOURMONEY DOSSEE, **1 Ind. Jur. N.S. 359.**

(57)—*Purchasers from judgment-debtor, not parties to suit so as to be competent to appeal—Decree-holder, competency of, to release portion of property attached.*—In answer to the preliminary objection taken in this case that the petitioners could not be heard in appeal, because they were not parties to the suit, petitioners contended that, as purchasers of the property of the judgment-debtor, they stood in his shoes and were therefore in a position to appeal to the Court. The High Court, however, was of opinion that they were admittedly not parties to the suit, and the mere fact of their having purchased under an execution-sale could not give them a right to appeal regarding the same. If the petitioners had purchased by private sale, they could certainly not have been considered parties to the suit, and the mere fact that the purchase happened to be in execution could not alter their position. A decree-holder is not prohibited, at the time of sale, from releasing a portion of the property advertised, should he have grounds for doing so, and it is not sufficient for an objector to raise hypothetical cases of probable injury but to show that there has been positive injury by some irregularity in the sale proceedings BEET BHUNJUN SING v. JOWHUR DOSS, **4 W.R. Mis. 17.**

(58)—*Sale of specific share of judgment-debtor—Further acquisition of property—Auction-purchaser—Right of.*—Where there was an attachment and sale of a specific share of a judgment-debtor by which the whole debt was satisfied, *held* that the auction- purchaser was not entitled to claim any addition to his share which had become enlarged previous to the sale but not known to all parties. MUSSUMAT AZADEE v. MUSSUMAT AJMERE KOONWER, **1 Agra 282.**

(59)—*Purchase of judgment-debtor's rights—Suit for more than debtor's share.*—If a purchaser, in execution of the rights and interests of a judgment-debtor, claims more than the share of the person whose rights and interests he has purchased, his case must not be dismissed altogether, but he ought to be given a decree to the extent of the share of the judgment-debtor whose rights he has purchased. RADHA BINODE DUTT v. KOOTABODE MUNDUL, **15 W. R. 363.**

(60)—*Execution of decree—Wrongful sale of moveables—Remedy of real owner—Suit to recover from auction-purchaser—Civ. Pro. Code, Act X of 1877, s. 297, sale becoming absolute under, meaning of.*—When moveable property belonging to one person has been attached and sold in execution of a decree against another, the former is entitled to sue the auction-purchaser

Sale—continued.

——5.—**Sale in Execution of Decree**—*contd.*

————*g.*—PURCHASERS, RIGHT OF—*ctd.*

for the restoration of the specific moveable or for its value. The fact that the real owner may have a remedy by a suit for damages against the execution-creditor, for causing the property to be attached and sold, is no reason why he should be debarred from bringing a suit to recover the property itself from the auction-purchaser. Though s. 297 of Act X of 1877 provides that on payment of the purchase-money, a sale of moveable property in execution of decree becomes *absolute*, this must be taken only to mean a sale of property which the Court has jurisdiction to sell; and in no case is the sale absolute in the sense that it cannot be set aside by regular suit. MANGAL SEIN v. DABI DAS; MEHR CHAND v. DABI DAS. **82 P.R. 1878.**

(61)—*Execution of decree—Wrongful sale of property—Subsequent destruction—Liability of decree-holder—Costs.*—Where, in execution of a decree, a certain house belonging to a third person was attached and sold as the property belonging to the judgment-debtor, and the house was subsequently destroyed, *held* that the decree-holder was not liable, except where the decree-holder and the purchaser joined in demolishing the house and making away with the materials. A instituted a suit against P and D. The first Court exonerated P and decreed the claim against D. A did not prefer an appeal but D appealed making A and P respondents to the appeal, which was dismissed. D thereupon filed a special appeal to the High Court against A and P. *Held* that, inasmuch as A was satisfied with the decree of the first Court by not appealing from it and could not as co-respondent, object to the judgment as against the other respondent P, the decision of the first Court was final, and, as against P, the case was at an end before the special appeal was filed, and that, therefore, P was entitled to his costs of special appeal from D (the special appellant). NILMONNE DUTT v. THAKOOR DOSS ROY. **1 W.R. 94.**

(62)—*Former owners of lands, debts of, not constituting a lien on property sold—Non-liability for debts in hands of purchasers.*—In this case the plaintiffs-appellants claimed a lien on an indigo factory for the *wasilat* of the lands unjustly appropriated by the former owners of the factory and alleged that the new owners, the purchasers, were therefore liable. The High Court, however, *held* that, in the absence of either an attachment prior to sale not taken off, or of proof of acceptance by the new owners of the liability, there was no lien, and no liability of the new owners (who had bought the property not in the custody of the law, with no special acceptance of special liabilities). MOONSHEE LUTAFAT HOSSEIN v. MR. R. H. YOUNG, **2 W.R. 271.**

(63)—*Evidence—Judgment not inter partes, relevancy of.*—In a suit for confirmation of

Sale—continued.

—5.—Sale in Execution of Decree—*contd.*

———*g.*—PURCHASERS, RIGHT OF—*ctd.*

plaintiff's title as representing a decree-holder and for sale of certain property in execution of the decree, the defendant pleaded that he was a purchaser of the property for valuable consideration from the original judgment-debtor. It was found that, in a previous litigation between the defendant and a third party, the purchase set up by the defendant was *held* to be spurious, null and void. *Held* that, though the decision in the previous case was not binding or conclusive against the defendant in the present case, it was sufficient to give the plaintiff a good *prima facie* case to start with, which, by the rule of pleading, it was for the defendant to rebut ABDOOL KUREEM v. SUFFUR ALI, **11 W.R. 118.**

(64)—*Auction-purchaser—Right to question fraudulent alienation by judgment-debtor.*—An auction-purchaser can question the fraudulent acts and alienations of the old proprietor, *i.e.*, the judgment-debtor, in fraud of the decree. SHEIKH BAICHOO v. MR. W. HOWARD, **3 Agra 15**. *See also* DIWAN ROY v. RIDDELL, **9 W.R. 521.**

(65)—*Execution of decree—Sale—Bonds and securities for loan, claims under.*—Property that is purchased in execution of a decree is not subject to any lien in favour of a person claiming under a bond and deposit of a *hibbanamah* pledged as a security for a loan. SYED WOOZEER ALLEUL HOSSENNEE CHOWDHRY v. MUSSUMUT LUCKEE BEEBEE, **1 W.R. 143.**

(66)—*Decree against ghatwals — Suit for* mahetaran *lands purchased at sale in execution—Position of Government as intervenor in suit.*—This was a suit for possession of certain *mahetaran* lands on the allegation that the plaintiff purchased them in execution of a decree against the ghatwal defendants in the suit and that he was formerly put into possession of the same but was subsequently illegally ejected by the ghatwals. The government had not been arrayed as defendants, but sought to intervene, attempting to question the legality of the sale though no action had been brought by them nor any objection preferred in execution stage. If there had been any collusion between the zemindar and the ghatwal defendants, the Government can bring a suit if so advised; but as an intervenor in the suit and in special appeal they can have no right to ask the Court to determine the question of the legality of the sale or of the existence of any collusion between the plaintiff and the zemindar. THE GOVERNMENT v. KHETOO DUTT, **6 W.R. 169.**

(67)—Mooktearnamah *authorising execution of deed of sale—Omission to verify during life of executant, right of purchaser to recover purchase-money not affected by.*—Plaintiff had obtained a decree under a contract of purchase against one S B and, according to the case

Sale—continued.

—5.—Sale in Execution of Decree—*contd.*

———*g.*—PURCHASERS, RIGHT OF—*ctd.*

of the appellant, it had been agreed between him and the said S B, that he should not execute this decree, but purchase from her a certain estate in consideration of the decree and for a further consideration of Rs. 500 in cash. A *mooktearnamah* had been executed by S B on behalf of a third party authorizing him to sign her name to the bill of sale. Before this *mooktearnamah* could be verified and the agent become competent to sign the deed of sale the principal died. And, notwithstanding her death, the plaintiff took a conveyance of sale from the agent of the dead principal. Plaintiff paid to the agent the cash Rs. 500 and took and held possession of the estate for some years when he was ousted by the heirs of S B and the other defendants who claimed to have purchased her estate. The plaintiff now sued for recovery of possession. He sued the heirs of the agent, also the heirs of S B, and all other parties whom he said he found now in possession of the property sold to him, and over which he thought he had a lien, for the money paid by him, as well as for the amount of his decree not executed by him according to his contract of purchase, and which decree he could not now execute owing to limitation affecting his rights. *Held* that the sale to the plaintiff under the deed executed by the agent was valid so far as regards the right of the purchaser to recover the purchase-money. The lower appellate Court had wrongly added that the heirs of S B were not bound by any action of her agent done by him after her death. But the High Court was of opinion that if the money had reached the heirs as part of the contract of purchase to which they agreed and they had accepted it as such, there is no reason why they should not be held liable for it when the property had been taken away from the plaintiff. ISSUR CHUNDER CHOWDHRY v. SHAIKH AMEEROODDEEN AHMED, **6 W.R. 174.**

(68)—*Civ. Pro. Code*, 1882, *s.* 316—*Application for sale certificate by auction-purchaser—Stamp duty.*—As s. 316 of the Civ. Pro. Code, 1882, does not require even a written application from an auction-purchaser for a certificate of sale, such application need not bear any stamp. HIRA AMBAIDAS v. TECKCHAND AMBAIDAS, **13 B. 670.**

See ESTOPPEL—ESTOPPEL BY CONDUCT, 6 W.R. 163.

See MORTGAGE — REDEMPTION, 2 W.R. 267.

See MORTGAGE—SALE OF MORTGAGED PROPERTY, 1 B.L.R. A.C. 152=10 W.R. 151.

See VENDOR AND PURCHASER—LIEN, 3 B.L.R.A.C. 407=12 W.R. 303.

———*h.*—RE-SALES.

(1)—*Civ. Pro. Code, s.* 251—*Officer conducting sale.*—The provisions of s. 251, Civ. Pro. Code, gives the officer conducting the sale of moveable

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*h.*—RE-SALES—*continued.*

property, a discretion to allow the purchase-money to be paid at a reasonable time after the sale has been made. SHAH FAREED ALUM v. SHEO CHARUN RAM, **4 N.W.P. 37.**

(2)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 254—*Sale in execution—Time for payment of purchase-money— Exclusion of day of sale—Act* XXIII *of* 1861, *s.* 35—*Appeal—Appellate Court exceeding jurisdiction—High Court—Right to interfere.* — In computing the fifteen days allowed for payment of the balance of the purchase-money under Act VIII of 1859, the day of sale was excluded. Where an appellate Court exceeded its jurisdiction in hearing an appeal from an order of the first Court setting aside a sale in execution, on the ground of the non-payment of purchase-money within the proper time, it was competent to the High Court to exercise its power under s. 35, Act XXIII of 1861, to set aside the order of the first Court, if there was sufficient ground for the exercise of such power. AMANEE BEGUM v. KOORBAN ALI, **3 Agra 204.**

(3)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 254—*Court sale—Default by purchaser to pay purchase-money—Re-sale—Order making defaulter liable to pay difference—Appeal—Forfeiture of deposit.*—Where property sold in execution of a decree had to be re-sold for the default of purchaser to pay the purchase-money, an order by the Court directing the defaulter to pay the difference between his purchase and the second sale was appealable. [*F.*, 25 C. 99=2 C.W.N. 408; *Appl.*, 1 A. 181, 16 C. 535.] Where a decree holder purchased the property of the judgment-debtor in Court sale, but failed to pay the sale amount, he did not forfeit thereby any of his rights under the decree, but only the deposit amount paid by him [*Diss.*, 2 B. 562; *D.*, 21 W.R. 149; *R.*, 8 B. 368.] Where owing to the default of the decree-holder purchaser to pay the purchase-money, the property had to be re-sold, the judgment-debtor was entitled to credit for the full amount bid for his property at the time of the first sale. JOOBRAJ SINGH v. GOUR BUKSH LAL, **7 W.R. 110.**

(4)—*Civ. Pro. Code*, 1859, *s.* 254—*Defaulting purchaser—Sale proceeds less than price bid—Interest on difference.*—If the proceeds of a sale which is eventually consummated be less than the price bid by a defaulting purchaser, nothing beyond the actual difference can be levied and interest on the difference cannot be allowed. SOORJ BUKSH SING v. SREE-KISHEN DOSS, **9 W.R. 500.** [*R.*, 1 A. 181, F.B.]

(5)—*Act* VIII *of* 1859, *s.* 254—*Order holding defaulting purchaser liable for difference on re-sale—Appeal.*—The respondent bid for certain property put up to sale in execution of the decree held by the appellant, and it was knocked down to him. The next day, the property was sold in execution of a decree held by another party who had a previous lien on the estate, and, consequently, the respondent refused to pay the purchase-money; and, under the provisions of s. 254, the property was re-sold for a sum less than that bid by the respondent, and it was to recover that difference that the present application was made. The High Court remarked that the grounds on which the lower Court had released the respondent from the claim were altogether untenable and held that the respondent, notwithstanding the subsequent sale on the following day, was bound to make good his purchase. He had purchased something, though perhaps less than what he expected, and, if he chose to bid, he was bound to complete his purchase. It was contended in this case that no appeal lay to the High Court as the parties were not in the position of parties to the suit, but it was held that, looking at the wording of the latter end of s. 254, the parties under consideration may fairly be taken to come within the meaning of the terms "parties" in s. 11, Act XXIII of 1861. BABOO SOORAJ BUKSH SINGH v. SREE KISHEN DOSS, **6 W.R. Mis. 126.** [*F.*, 25 C. 99=2 C.W.N. 408; *Appr.*, 16 C. 535; *R.*, 9 W.R. 500. 16 W.R. 14.]

(6)—*Execution sale—Default by purchaser—Re-sale—Liability of first auction-purchaser—Civ. Pro. Code, Act* VIII *of* 1859, *ss.* 253, 254.—Where, in execution of a decree, a re-sale of the judgment-debtor's property was made, not on the date of the first sale, but on a subsequent date, *held* that the provisions of s. 253 of Act VIII of 1859 were applicable. The first auction-purchaser is liable to make good the difference between his bid and the amount which was bid for the property at the re-sale, only when he made default in paying the balance of purchase-money under s. 254, but not when default is made in depositing the 25 *per centum* of the sale-proceeds as required by s. 253. AJOODYA PERSHAD v. GOPAL DUTT MISSER. **17 W.R. 271.** [*R.*, 7 C. 337.]

(7)—*Act* VIII *of* 1859, *ss.* 253, 254—*Execution sale—Defaulting purchaser—Order for re-sale—Liability to pay difference in price*—A purchaser at a sale in execution of a decree defaulted to pay the amount required to be deposited under s. 253, and an order was passed for re-sale of it. Before, however, the re-sale took place, another decree-holder who had also attached this property in execution of his decree, applied for the sale of it and sold it at a lower price than on the first occasion. *Held* that there was no re-sale of the property as contemplated in ss. 253 and 254 of the Code, though one was ordered. The first purchaser was therefore not liable to make good the difference which was not a difference at a re-sale of the property, as no re-sale had, as a matter of fact or law, taken place. BISOKHA MOYEE CHOWDHRAIN v. SONATUM DOSS, **16 W.R. 14.** [*F.*, 16 C. 535.]

Sale –continued.

—5 —**Sale in Execution of Decree**—*contd.*

———*h.*—RE-SALES—*continued.*

(8)—*Auction sale under Civ. Pro. Code — Bid for another — Bidder not to be compelled to become purchaser against his will — Re-sale—Difference in price—Liability—Defaulting purchaser—Notice to pay difference in price.* —In an auction sale held under the Civ. Pro. Code, if for any good reason the auctioneer does not accept as purchaser the person named by the highest bidder as his principal, he cannot make the bidder himself purchaser against his will ; he must simply declare that no sale had been effected and re-open the bidding. Where it appears from the sale sheet that H held himself out as agent only for M and that M was accepted as purchaser on his bid and the Judge conducting the sale wrote down H's statement that he had effected the purchase in the interest of M, merely in order that, by so doing, he might prevent disputes under s. 260 of Act VIII of 1859, *held* when it became necessary to have a second sale and to call upon the purchaser at the first sale to make good the consequent difference of price under the terms of s. 254 of the Act, that M was the apparent first purchaser and therefore the person to whom recourse should first be had, and that he ought to be called upon to show cause why an order for payment of this difference should not be made upon him. Process of execution could not in any case rightly issue against the defaulting purchaser for the difference of price which is leviable from him under the terms of s. 254, Civ. Pro. Code, until an order for payment of that difference has been made upon him, and no such order could rightly be made upon him, without affording him an opportunity of showing cause against it. HUREE RAM v. HUR PERSHAD SINGH, **20 W.R. 80.**

(9) *Act* VIII *of* 1859, *s.* 254—*Execution sale—Bidding as agent — Principal — Liability.*—A person purchasing property at an execution sale in the character of an agent cannot be made liable as a principal. If the agent has no authority from the principal to make the purchase, he may be made liable on the ground, either that he falsely represented himself as having authority or that, by purchasing in this way, he undertook that he had authority. But a proceeding upon the contract under s. 254 of Act VIII of 1859, such as this, must be taken against the party who was the principal in the contract. BABOO HUREE RAM v. HUR PERSHAD SINGH, **20 W.R. 397.** [*Cons*, 16 C. 535; *R.*, 1 A. 181.]

(10)—*Execution of decree—Auction sale—Purchaser's default to deposit—Re-sale—Damages—Rights of decree-holder — Appeal.* — The non-deposit by a purchaser at a sale in execution of a decree of a portion of the consideration on the first day of the sale and the remainder within the time allowed by law, led to the re-sale of the property. *Held*, that the original decree-holder had all the rights of a decree-holder to enforce his claim for damages against

Sale—continued.

——5.—**Sale in Execution of Decree**—*contd.*

———*h.*—RE-SALES—*concluded.*

the defaulting purchaser who was liable for the same. An appeal lies to the High Court from the order of the lower Court absolving the purchaser from the liabilities attached to the purchase made by him. SREE NARAIN MITTER v. MAHARAJAH MAHTAB CHAND BAHADOOR, **3 W.R. 3.** [*F.*, 16 C. 535, 25 C. 99=2 C.W.N. 408; *R.*, 16 W.R. 14.]

(11)—*Sale in execution of decree — Re-sale by Collector—Suit to set aside sale.*—Where the plaintiff purchased the right, title and interest of his judgment-debtor in a certain *jumma* sold in execution of a Small Cause Court decree, and subsequently the same land was sold by the same creditor in execution of another decree obtained in the Collector's Court, and the defendant purchased, *held*, in a suit to set aside the second sale, that when a tenure has been sold in execution of a decree of a Civil Court, the Collector's Court has no power to put it up again as the property of the former tenant. SAMIRADDI KHALIFA v. HARISCHANDRA *alias* HARI MOHAN KURMOKAR, **3 B.L.R.A.C. 49=13 W.R. 451, Note.** [*F.*, 13 W.R. 449.]

(12)—*Execution of decree—Sale by Collector completed—Higher price offered—Sale if can be set aside and re-sale ordered.*—Where in execution of a decree for sale of attached properties by the Collector, the property was sold by auction and the decree holder purchased it, and had his purchase completed by paying the full amount of the purchase money, the Collector has no power to set aside the sale and to order a re-sale merely because a higher price had been subsequently offered by a third person. BAIAMTHI v. MADHAV MANOR, **15 B. 694.** [*R.*, 19 B. 216, 23 B. 531.]

———i.—RIGHT OF PURCHASER ON SETTING ASIDE SALE.

(1)—*Sale in execution of decree—Setting aside sale—Right to compensation for improvements on ejectment—Act* XI *of* 1855, *s.* 2.—A purchaser at a Sheriff's sale was not entitled to compensation under Act XI of 1855, s. 2, for improvements to the land during his occupation if he had relied solely on the bill of sale. BHOYRUBNATH KHETTRY v. DOYALCHUNDER LALA, **Bourke O.C. 159.**

(2)—*Sale in execution of decree—Setting aside sale—Rights of purchasers*—Bona fide *purchaser—Inquiry as to title—Act* XI *of* 1855.—A person did not become a *bona fide* purchaser within the meaning of Act XI of 1855, unless he had made all reasonable enquiries as to the title. Enquires from neighbours were not sufficient. When therefore a purchaser who had brought property on no further information than he could obtain from neighbours was rejected by one who showed a better title,—*Held* that he was not entitled to compesation under Act XI of 1855. GOUR GOPAL DUTT v. BISSONATH GHOSE, **Cor. 41.**

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————i.—RIGHT OF PURCHASER ON SETTING ASIDE SALE—*continued.*

(3)—*Civ. Pro. Code, (Act V of 1859), s. 258—Sale of immoveable property—Setting aside of—Rights of purchaser.*—Where a sale of immoveable property held in execution of a decree is set aside, the auction-purchaser is entitled under s. 258, Civ. Pro. Code (Act VIII of 1899) to recover back his purchase money. If the Court setting aside the sale omits to make such order, the auction-purchaser can sue to recover the money from the person who has received it. GREESH CHUNDER POTTAR v. LOOKHOODA MOYEE DEBEE, **1 W.R. 55.** [*Diss.*, 10 W.R. 365; *Disappr*, 12 W.R. 8, F B.; *Doubted*, 6 B.H.C. 258.]

(3-*a*)—*Execution-sale—Saleable interest—Refund of purchase-money.*—A purchaser of property at an auction sale in execution of a decree can, after the sale has been set aside in a suit brought by a third party against the auction-purchaser and the judgment-debtor, recover from the judgment-creditor by summary process, the money which he has paid for the property on the ground that the judgment-debtor had no saleable interest in the property. NIHAL CHAND v. JIWAN SINGH, **157 P.R. 1884.**

(4)—*Suit for refund of purchase-money—Execution sale set aside—Property not saleable in execution—Right of suit.*—A suit could lie by the auction-purchaser both against the judgment-debtor and the decree-holder for refund of the purchase-money with interest if the auction-sale was set aside on the ground that the property was not saleable in execution. Although the decree cancelling the sale was not accompanied by an order for the refund of the purchase-money, the auction-purchaser would not be debarred from prosecuting her claim in a separate suit, in spite of the fact that she was a party to the suit which terminated in that decree. MUSST. DOOLHIN HUR NATH KOONWEREE v. BAIJOO OOJHA. **2 Agra 50.** [*F.*, 8 N.W.P. 67 ; *D.*, 2 A. 780.]

(5)—*Execution purchaser—Suit for possession—Rival purchaser—Account—Redemption.*—In a suit for possession of certain property purchased at court-auction in execution of a mortgage-decree, the plaintiff consented to take a decree for on account with power to the defendant—who claimed to have purchased the same property at an earlier execution sale to redeem the property on payment of what was due, within a fixed time. *Held* that the proper decree in the case was for an account with a power to the defendant to redeem, the plaintiff foreclosing in default. JAMES MACKILLICAN v. KALEE DOSS ROY, **25 W.R. 436.**

(6)—*Sale in execution of decree — Setting aside sale—Rights of purchasers—Subsequent reversal of decree on appeal.*—The plaintiff purchased certain property at a sale under an execution upon a decree and paid the purchase-money. The purchase-money was applied

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————i.—RIGHT OF PURCHASER ON SETTING ASIDE SALE—*continued.*

partly in satisfying the decree-holder and partly in satisfying other persons admitted by the decree to participate. The decree was afterwards reversed upon appeal, and the execution debtor reinstated in his rights. *Held* that the plaintiff was not entitled to recover the purchase-money from the execution debtor. CHOOLUN SINGH v. ROY MOHUN-LALL MITTER. **Marsh. 183.** ROY MOHUN-LALL MITTER v. CHOOLUN SINGH, **1 Hay 438.**

(7)—*Civ. Pro. Code* (XIV *of* 1882), *ss*, 310-*A*, 315—*Refund of purchase-money on setting aside of sale, extent of the right of the purchaser to.*—On a sale being set aside by a Court under s. 310-A, the person who has paid in the purchase-money is entitled, under s. 315, to recover the same by way of execution from the person who has actually received it. The fact that, on attachment in execution of certain decrees, such purchase-money had been handed over to another Court, so that the latter Court was the medium through which the money reached the hands of the party proceeded against, cannot affect the rights or liabilities of the parties under s 315. VIRASAMI CHETTI v. LILADHARA VYASS, **21 M. 398=8 M.L.J. 110.**

(8)—*Civ. Pro. Code*, 1859, *s.* 258—*Sale set aside—Right to recover purchase-money.*—In the case of a sale set aside not under the provisions of the Civ. Pro. Code, the purchaser ejected from the property put into his possession under the sale could not claim to get the purchase-money returned by the decree-holder, on whose part there was no warranty as to any interest possessed by the judgment-debtor in the property. KRISHNAPPA *valad* SANTU v. PANCHAPA *valad* GURPADAPA, **6 B.H.C. A.C. 258.** (4 B.H.C.A.C. 114, *Com. on.*) [*F.*, 9 B H C. 92 ; *Com. on.*, 2 B. 258 ; *R.*, 1 A. 568, F.B.]

(9)—*Civ. Pro. Code, ss.* 256-258—*Execution—Sale in execution of decree—Property wrongfully sold—Refund of purchase-money by execution creditor.*—Notwithstanding what is said in 5 B.H.C.O.C. 83, 92, 96 as to the propriety of making the execution creditor a party to a suit brought by the owner against the purchaser of property at a judicial sale, and as to the scope of s. 258 of the Civ. Pro. Code, it must now be considered as settled that, except where the sale has been set aside for irregularity under s. 257, the purchaser would not be entitled to a refund of his purchase-money, although it might turn out that the judgment-debtor had no right, title or interest in the property, and consequently that the purchaser had not taken anything by his purchase. Review of cases which decide that a person whose property has been wrongfully seized and sold, or seized alone, has a remedy against the execution creditor who put the Court and its

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*i.*—RIGHT OF PURCHASER ON SETTING ASIDE SALE—*continued.*

process in motion to effect such seizure or sale. KALU *bin* VISAJAI v. DAMODAR GOVIND, **9 B.H.C. 92.** [*R.*, 2 B. 258; *Cons.*, 11 B.H.C. 46.]

(10)—*Execution — Sale — Decree satisfied — Judgment-debtor having no saleable interest—Fresh execution.*—A decree-holder caused certain property to be sold by auction in execution of his decree, alleging it to be the property of his judgment-debtor, purchased it himself and was put in possession. He set off the amount of the purchase-money against the sum due under the decree. The remainder was paid in cash by the judgment-debtor and the decree was thus fully executed. Subsequently, the wife of the judgment-debtor brought a suit for the same property alleging it was hers, and not the judgment debtor's. It was found that there was no fraud on the part of the judgment-debtor, and she recovered possession. Thereupon the decree-holder sought for fresh execution of his decree to the extent of the money which had been paid for the property. *Held* that no fresh execution of the decree could issue. If the auction-purchaser had been a stranger, he would not have been entitled to recover his purchase-money, and the decree-holder is not in a better position than any other auction-purchaser, a stranger. SHEIKH MAHOMED BASIRULLA v. SHEIKH ABDULLA, **4 B L.R. App. 35=15 W.R. 196, Note.** [*App.* 15 W.R. 195; *R.*, 9 B.H.C. 92, 1 A. 568, F.B.; *D.*, 2 B. 258, 12 C.L.R. 331.]

(11)—*Execution of decree — Purchase of minor's share—Minor setting aside decree—Purchase-money — Liability to refund.*—In execution of a decree, the plaintiff purchased the rights and interests of a person and his minor brother in certain property. Subsequently, on the minor attaining majority, he set aside the decree as far as it concerned his share of the property. Then the plaintiff brought the present suit to get a refund of a proportionate share of the purchase-money and impleaded both the decree holder and the other judgment-debtor as parties. *Held* that the plaintiff was entitled to get a refund as claimed from both the decree-holder and the other judgment debtor, as the auction-purchaser (plaintiff) suffered from the common wrong-doing of both of them. BABOO NEELKUNTH SAHEE v. ASMUN MATHO, **3 N.W.P. 67.** [*D.*, 2 A. 780, 2 A. 828.]

(12)—*Act* VIII *of* 1859, *s.* 258—*Setting aside sale—Refund of purchase-money.*—S. 258 provides for the refund of the purchase-money when a sale of immoveable property has been set aside under circumstances which, under the provisions of the Procedure Code, authorize such a proceeding; but there is no authority of law for setting aside a sale on the ground that the party, whose right, title and interest were sold, had

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*i.*—RIGHT OF PURCHASER ON SETTING ASIDE SALE—*continued.*

no interest at all, or had a less interest than was supposed. RAJIB LOCHAN v. BIMALAMANI DASI, **2 B.L.R.A.C. 82=10 W. R. 365.** [*F.*, 2 A. 780; *Expl.*, 3 B.L.R. A.C. 301; *R.*, 1 A. 568, F. B.; *D.*, 2 A. 107.]

(13)—*Execution sale of moveable poperty—Warranty as to title—Remedy of execution-creditor if title defective—Sheriff's liability.*—Certain shares of the judgment-debtor in a company having been attached and sold as his property under the Civ. Pro. Code, Act VIII of 1859, the sale-warrant and proclamation containing assertions that he was the owner of the shares, whereas it turned out that he had no interest at all therein, *held* that the purchaser was entitled in a separate suit to have the sale set aside and to a return of the purchase-money paid by him. But the Sheriff's liability to the purchaser in such a case ceased as soon as he had paid over the prceeds of the sale to the execution-creditor, and the remedy of the purchaser thereafter could be only against the execution-creditor. FRAMJI BESENJI DUSTR v. HORMASJI PESTONJI FRAMJI, **2 B. 258.** (5 B.H.C.O.C. 83, *Com. on*; 4 B.L.R. App. 35, *D.*) [*D.*, 10 B. 214, 11 M. 269.]

(14)—*Reg.* VII *of* 1825—*Act* VIII *of* 1859, *ss.* 257, 258—*Execution sale—Sale not set aside for irregularity—Judgment-debtor having no interest in land sold—Right to recover purchase-money—Auction purchaser when entitled to refund of purchase money—Sale—Vendor and purchaser—Purchaser evicted by title paramount and conveyance set aside—Distinction—Right to purchase-money.*—Where an auction-sale in execution of a decree was made under Reg. VII of 1825 and not under Act VIII of 1859, and the sale was not set aside for irregularity, but it was simply declared in a regular suit instituted by a third party that the judgment-debtor had no right or interest in the property sold and that the sale passed nothing, *held* that a suit by the auction-purchaser against the decree-holder or the judgment-debtor to recover the purchase-money would not lie. (6 W.R. 147, *R.*) [*F.*, 5 B.L.R. App. 91, 16 W.R. 128, 2 B. 258, 5 L.B.R. 58. F.B.=3 Ind. Cas. 672; *Appl.*, 23 W.R. 305, P.C.=15 B.L.R. 208=2 I.A. 131; *R.*, 26 P.R. 1884; *D.*, 18 W.R. 276, 19 W.R. 351, 1 A. 568, F.B., 2 A. 780, 2 A. 107; *D.*, 5 A. 577, F.B., 10 C.L.J. 558=13 C. W. N. 1080=2 Ind. Cas. 557.] An auction-purchaser can only recover the purchase-money as provided by s 258, when the sale is set aside under s. 257, Act VIII of 1859, for any irregularity in publishing or conducting the sale. (1 W.R. 55, *R.*) [*F.*, 2 A. 780; *R.*, 2 A. 107; *D.*, 5 A. 557, 13 C.W.N. 1080=2 Ind. Cas. 579; *R.*, 9 B.H.C. 92.] In an ordinary case between vendor and purchaser, if the conveyance has been actually executed by all the necessary parties, and the purchaser is evicted by a title to which the

***Sale*—continued.**

——5.—Sale in Execution of Decree—*contd.*

————i.—RIGHT OF PURCHASER ON SETTING ASIDE SALE—*continued.*

covenants do not extend, he cannot recover the purchase money either at law or in equity ("Sugden on Vendors and Purchasers," p. 441, *R.*). There is a great distinction between the case of a purchaser evicted by title paramount, and that of the conveyance by the vendors being set aside. In the one case, the owner of the land recovers notwithstanding the conveyance, because it was a conveyance of his land by a person who had no right to convey it; in the other case, where a sale has been set aside, the purchaser usually has a right to recover back his purchase-money, because it would be inequitable that the vendors should retain the purchase-money when there are grounds for setting aside the sale by which the contract is put an end to. But a Court of Equity does not set aside a conveyance, simply because the conveying party had no title to the property. There must be something more, such as fraud or the like, to induce the Court to infer in that manner. A purchaser at a sale in execution knows that all that he purchases is the right and title of the judgment-debtor. He knows that no one guarantees to him that the judgment-debtor has a good title and he purchases the property with his eyes open, and regulates the price which he bids for the land with reference to the circumstances under which he is purchasing and the risk he runs. SOWDAMINI CHOWDRAIN v. KRISHNA KISHORE PODDAR, **4 B.L R. F.B. 11=12 W.R. F.B. 8.**

(15)—*Refund of purchase-money — Suit — Purchaser—Act* VIII *of* 1859, *ss.* 258, 269.—The rights and interests of the judgment-debtor having been sold in execution, the auction-purchaser, in proceeding to take possession, was obstructed by one D. On this he filed a complaint under s. 369, Civ. Pro. Code, before the Civil Court, which found that as D had been in possession for a long time, he could not properly be ejected. The auction-purchaser then sued to recover his purchase-money. *Held* that plaintiff's proper remedy was to bring a suit against D to establish the title of the judgment-debtor in the property; and that, not choosing to take advantage of that remedy, his suit must fail. BISSESWAR PANDAY v. BHAGWAN DAS, **3 B.L R.A.C. 301=12 W.R. 176.** (2 B. L.R. A.C. 82, 6 W.R. 147, *D.*)

(16)—*Ss.* 313 *and* 315, *Civ. Pro. Code.*—Under s. 313, Civ. Pro. Code, the purchaser may resist and so prevent the confirmation of of sale, while under s. 315, Civ. Pro. Code, he may apply after the confirmation of sale for the refund of the purchase-money on the ground that nothing passed by the sale: SIVARAMA v. RAMA, **8 M. 99.** [*F.*, 9 M. 437.]

(17)—***Sale in execution of decree—Sale set aside—Suit by purchaser for return of purchase-money—Civ. Pro. Code, ss. 313, 315—"No saleable interest," meaning of.—By the Full Bench.***

***Sale*—continued.**

——5.—Sale in Execution of Decree—*contd.*

————i.—RIGHT OF PURCHASER ON SETTING ASIDE SALE—*continued.*

—An auction-purchaser in execution of a decree can maintain a suit against the decree-holder for the recovery of his purchase-money when it turns out that the judgment-debtor had no saleable interest in the property sold, and he is not limited to the special procedure in the execution department mentioned in s. 315, Civ. Pro. Code. [*F.*, 13 A. 383, 22 B. 783, 5 C.W.N. 240, 23 A. 355, 7 C.W.N. 105; *Cons.*, 11 M. 269; *R.*, 12 C.P.L.R. 49, 8 M.L.J. 194.] *Held per Straight, Oldfield* and *Tyrrell, JJ.* The words "no saleable interest" in s. 315, Civ. Pro. Code, mean "nothing to sell." Whether an auction-purchaser buys when the judgment-debtor has an interest that is not saleable or when he has no interest at all, he is equally entitled to claim back his purchase-money. MUNNA SINGH v. GAJADHAR SINGH, **5 A. 577, F.B.=A.W.N. 1883, 130.**

(18)—*Civ. Pro. Code*, 1859—*Application by dispossessed auction-purchaser under s.* 315 *of the Civ. Pro. Code*, 1877, *for refund of purchase-money.*—Where immoveable property was sold in execution of a decree under the Civ. Pro. Code, 1859, which did not allow an application by an auction-purchaser for refund of purchase-money, and the auction-purchaser was dispossessed of the same on the ground that the judgment-debtor had no saleable interest in it, an application by him for such refund was held maintainable under s. 315 of the Civ. Pro. Code, (1877) which had then come into force. *In the matter of the petition of* MULO, **2 A. 299.** [*Diss.*, 2 A. 780.]

(19)—*Civ. Pro. Code, s.* 315—*Refund of purchase-money.*—Where it is found that the judgment-debtor had no saleable interest in the property put up for sale, the purchaser is entitled to a refund of the money paid to the decree-holder even though the purchaser largely contributed to the loss he sustained. KUNHI MOIDIN v. YARAL MOIDIN, **8 M. 101.** [*R.*, 13 A. 383.]

(20)—*Execution sale—Setting aside sale—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 312, 313—*Right of purchaser to refund of money from Sheriff.*—Under s. 315 of the Civ. Pro. Code (Act XIV of 1882), when a sale is set aside under ss. 312 or 313, the purchaser shall be entitled to receive back his purchase-money from any person to whom the purchase-money has been paid; and consequently, a purchaser was held to be entitled as against the Sheriff, to a refund of money which the latter had merely received as his proper commission on the sale which was subsequently set aside. MT. PREM VANTI v. MOKAND LAL, **183 P.R. 1883.** [*Appr.*, 45 P.R. 1886; *Appl.*, 68 P.R. 1885.]

(21)—*Civ. Pro. Code, s.* 315—*Execution sale—No saleable interest—Remedy of purchaser.*—

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

——— *i.*—RIGHT OF PURCHASER ON SETTING ASIDE SALE—*continued.*

A purchaser at an auction-sale of property subsequently found to belong to a third party, in a suit to which the decree-holder was also a party, is entitled to recover back the purchase-money with or without interest as the Court may direct under s. 315, Civ. Pro. Code., on the ground that the judgment-debtor had no saleable interest in what purported to be sold. BENODE BEHARI NUNDI v. MOHESH CHUNDER GHOSE, **12 C.L.R. 331.**

(22)—*Civ. Pro. Code, ss.* 313, 315, 586—*Suit to recover purchase-money—Auction-purchase—Not of Small Cause nature—Order not final.*—An auction-purchaser applied under s. 313, Civ. Pro.Code, to set aside the sale and to refund the deposited amount, *viz.*, Rs. 75, to him: but the application was rejected. The sale was completed but was set aside on a suit by a third party. Now the auction-purchaser sued to get his purchase-money and interest. The Munsif gave a decree, but the Judge reversed it on the ground that the Munsif's order on the application under s. 313 was final, as it was not appealed against and as this suit was barred. *Held* that orders under this section are not final, and that a suit was maintainable. PACHYAPPAN v. NARAYANA, **11 M. 269.** [*F.*, 12 C.P.L.R. 49. 5 C.W.N. 240; *R.*, 16 M. 361, 19 M. 315; *D.*, 12 M. 454.]

(23)—*Civ. Pro. Code*, 1882, *ss.* 295 (=*s.* 73), 315 (=*O.* XXI, *r.* 93. *new Code*)—*Suit by auction-purchaser against decree-holders receiving distributed assets.*—Where the proceeds realised by sale in execution have been rateably distributed under s. 295, the auction-purchaser, desirous to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold, is not restricted to an application under s. 315, but may institute a regular suit against the persons that have received such rateable distribution. KISHUN LAL v. MUHAMMAD SAFDAR ALI KHAN, **13 A. 383=A.W.N. 1891, 138,** (5 A. 577 *F.*) [*F.*, 5 C.W.N. 240; *R.*, 12 C.P.L.R. 49, 23 A. 355.]

(24)—*Civ. Pro. Code*, 1882, *s.* 315—*Failure of saleable interest in judgment-debtor.*—The words in s. 315 of the Civ. Pro. Code, "when it is found that the judgment-debtor had no saleable interest in the property," must be taken to mean "when it is so found in some proceeding by which the judgment-creditor is bound." To compel the judgment-creditor to refund the purchase money of property brought to sale in execution, merely because, in some proceedings between other parties, a Court has decided that the judgment-debtor had no saleable interest in the property, would be contrary to law and justice. NILAKANTA v. IMAM SAHIB, **16 M. 361=3 M.L J. 364.** [*R.*, 24 B. 591.]

(25)—*Execution sale—No saleable interest of judgment-debtor in property—Fraud—Civ. Pro. Code, ss.* 313, 315, 316—*Rights of purchaser.*—

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

———*i.*—RIGHT OF PURCHASER OF SETTING ASIDE SALE—*continued.*

Where a Court sale in execution of a decree is not vitiated by fraud, the only extent to which the purchaser can claim relief is that indicated by s. 315, Civ. Pro. Code. The effect of ss. 313, 315, 316, Civ. Pro. Code, is that the right, title, and interest of the judgment-debtor passes to the purchaser at a Court sale subject, however, to the condition that the purchaser may recover back his purchase money when he finds that the judgment-debtor had no saleable interest at all. The implied warranty of title in respect of sales by private contract cannot be extended to Court sales except so far as such extension is justified by the processual law in India, *i.e.*, s. 315, Civ. Pro. Code. SUNDARA GOPALAN v. VENKATAVARADA AYYANGAR, **17 M. 228=3 M.L J. 293.** (5 I.A. 116, *F.*) [*F.*, 28 C. 235, 5 L.B.R. 58; *R.*, 21 B. 424, 23 A. 355; *D.*, 12 C.P.L.R, 49; *Not F.*, 13 C.W.N. 1080=10 C. L.J. 558.]

(26)—*Sale in execution of decree—Judgment-debtor found to have no interest in property sold—Purchase-money returned to auction-purchaser—No notice given to decree-holder—Practice.*—In execution of a decree which he obtained against B, A sold property belonging to B which was purchased by C who obtained possession through Court. D sued B and C for establishing his title to property contending that the property belonged to him, got a decree and obtained possession in execution thereof. C thereupon applied to the Court under s. 315, Civ. Pro. Code, for a refund of the purchase-money, which application was resisted by the original decree-holder A, who contended that he was not liable to refund the purchase-money, since he was no party to the suit brought by D, with the result that he had no opportunity of showing that the property in dispute was rightly sold under his decree. Nevertheless, the Court ordered A to re-pay the purchase-money to C. *Held* in revision, reversing the order of the lower Court, that A could not be ordered to refund the purchase-money to C. S. 315, Civ. Pro. Code, 1882, providing for the return of the purchase-money, not only when the sale is set aside under s. 312 or s 313, but also whenever it is found that the judgment-debtor had no saleable interest, does not say how the finding is to be arrived at, but the conclusion from the language of s. 313 as well as from general principles, is that it must be a finding in some proceedings to which the judgment-creditor was a party or, at any rate, of which he had notice. In this case, there was no finding before the lower Court on which it could base its order for the refund of the purchase-money. VITHOBA v. ESAT, **18 B. 594.**

(27)—*Sale in execution of decree—Sale set aside—Suit by auction-purchaser to recover purchase-money—Civ. Pro. Code*, 1859, *ss.* 256, 257, 258—*Civ. Pro. Code*, 1877, *ss.* 312 *and* 315—*Warranty of title.*—Where a sale in execution of

Sale—continued.

——5.—**Sale in Execution of Decree**—*contd.*

————i.—RIGHT OF PURCHASER ON SETTING ASIDE SALE—*continued.*

a decree is set aside, not on the ground of want of jurisdiction or other illegality or irregularity affecting the sale, but at the instance of a third party who has succeeded in establishing his title to it, and there is no question of fraud on the part of the decree-holder, the auction-purchaser cannot sue the decree-holder for recovery of purchase-money. (2 B.L.R.A.C. 83=10 W. R. 365, 4 B.L.R. F. B. 11=12 W. R. F.B. 8, *F.*; 1 A. 568, N.W.P. 1871, p. 67, N.W.P. 1867, p. 50, *D.*) The provision of s. 315, Civ. Pro. Code, 1877, having no retrospective effect, cannot apply to a sale which has taken place before the Act came into operation. In the case of such a sale, therefore, the auction-purchaser cannot apply under that section for the refund of purchase-money. (2 A. 229, *Diss.*) Under s. 315, Civ. Pro. Code, the proper remedy for the auction-purchaser is by an application in the execution department and not by separate suit. (*Per Straight, J.*) No warranty of title is ordinarily given by the judgment-creditor in judicial sales *held* under the Civ. Pro. Code. HIRA LAL v. KARIM-UN-NISSA, **2 A. 780**.

(28)—*Purchaser at Sheriff's sale—Suit for purchase-money.*— Where a purchaser at a Sheriff's sale, under a writ of *fieri facias*, is put in possession, and is in receipt of the rents and profits for some time, but is afterwards ejected, the sale being held to be null and void, he (the purchaser) has no right to sue the decree-holder for recovery of the purchase-money. (11 B.L.R. 121, *Explained by Phear, J.*) DORAB ALLY KHAN v. KHAJAH MOHEE-OO-DDEEN, **1 C. 55 =24 W.R. 372.**

(29)—*Sale in execution of decree—Right of auction-purchaser to recover purchase-money on sale being set aside—Fraud on the part of decree-holder—Fraud on the part of auction-purchaser—Minor—Claim for costs of suit.*—In execution of a personal decree for money, a decree-holder fraudulently brought to sale the property of a minor. The minor brought a suit to set aside the sale and recovered possession of the property from the auction purchaser. The latter sued the decree-holder for recovery of the purchase-money with interest, and the costs incurred by him in defending the suit brought by the minor. It was found that the auction-purchaser was neither a party to, nor aware of, the fraud on the part of the decree-holder; but it was also found that he was aware that he was purchasing the property of a minor, and that he did not ascertain whether the sale was warranted by the terms of the decree. *Held* by a majority of the Full Bench, that this knowledge and this omission on his part did not disentitle him to recover the purchase-money from the decree-holder. (N.W.P. 1874, 168, *D.*) *Held* also that he could not recover the costs incurred in defending the suit bought by the

Sale—continued.

——5.—**Sale in Execution of Decree**—*contd.*

————i.—RIGHT OF PURCHASER ON SETTING ASIDE SALE—*continued.*

minor, as he ought not to have defended it, at any rate without obtaining a guarantee from the decree-holder for the costs to be incurred. *Per Stuart, C. J.*, that under the circumstances, the auction-purchaser was guilty of fraud, at the least, of negligence in purchasing with notice that the property belonged to a minor, and in failing to ascertain whether the terms of the decree warranted its sale, and that therefore he could not recover. MUKUNDI LAL v. KAUNSILA, **1 A. 568, F.B.** [*D.*, 2 A. 780.]

(30)—*Sale in execution of decree—Village where property situate transferred to other jurisdiction—Sale null and void.*—When a decree is passed by a Court, and in execution thereof certain property is sold by the same Court, but the village wherein the property sold is situate is transferred in the interval between the decree and sale from that Court's jurisdiction to that of some other Court, the sale is a mere nullity and confers no title on the purchaser, who is nevertheless entitled to recover the amount of the purchase-money paid by him from the judgment debtors. After the valid transfer of the jurisdiction to the other Court, the power of the first Court to issue process of execution for the attachment and sale of the property ceased, and the only power which that Court then had, as respects execution against such property, was that provided for by ss. 284 and 286, Civ. Pro. Code, relating to the execution of decrees against property out of the jurisdiction of the Court passing the decree. NARAYANASAWMY NAICK v. SARAVANA MUDALY, **6 M.H.C. 58.**

(31)—*Civ. Pro. Code (Act VIII of 1859), s. 256—Setting aside of sale under—Right of vendee—Equities.*—The immediate effect of setting aside a sale under s. 256, Act VIII of 1859 is that the immoveable property (the subject of the sale) reverts to its former owner, and the purchaser becomes entitled to receive back his purchase-money, with or without interest, in such manner as it may appear proper to the Court to direct in each instance. Where the sale is set aside after the purchaser had taken possession, laid out money and received rents and profits, he should, in equity, get back the money laid out by him for the benefit of the estate in addition to his purchase-money and interest thereon, and should also account to the judgment-debtor for the profits received by him. At the same time, it would depend upon the circumstances under which the purchaser took possession and the nature of his outlay whether he ought, in equity, to be allowed to claim reimbursement of the money expended by him. Accordingly, it was held that, where a *bona fide* purchaser took possession of the property and laid out money thereon from time to time, because he thought

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*i.*—RIGHT OF PURCHASER ON SETTING ASIDE SALE—*concluded.*

that, otherwise, from its peculiar nature, it would become worse than valueless, he was entitled to have it made a condition precedent of setting aside the sale, that he should be repaid so much of the outlay as he could show was beneficial to the estate. *Held*, further that he should account for the rents and profits which had come to his hands during the time he had been in possession. E. C. MORGAN v. MOULVIE ABDOOL HYE, **23 W.R. 393.**

(32)—*Execution of decree—Sale under Civ. Pro. Code*, 1859—*Sale set aside in appeal under Civ. Pro. Code*, 1877—*Suit by purchaser for interest on purchase-money and for expenses of sale—Law to be applied.* — Property having been sold in execution of a decree while the Civ. Pro. Code, 1859, was in force, the judgment-debtor, whose application to set aside the sale was rejected, appealed against such order after the Code of 1877 had come into force. The sale having been set aside in this appeal, the purchaser sued the decree-holder for interest on the purchase-money and for the expenses of the sale, neither of which was allowed or paid at the time the purchase-money was refunded to him. *Held* by the Full Bench that the provisions of the Code of 1877, and not of that of 1859 were applicable to the suit. *Held* by the Division Bench that the suit was not maintainable under the Civ. Pro. Code, 1877, the matter of the suit being one to be determined in execution. RAGHUBAR DAYAL v. THE BANK OF UPPER INDIA, LIMITED, **5 A. 364, F B. = A.W.N. 1883, 51.**

See PARTIES TO SUIT—GENERAL, 5 B.H. C.O.C. 83.

————*j.*—RIVAL DECREE-HOLDERS.

(1) *Execution by several judgment-creditors against several judgment-debtors—Attachment of same property — Practice — Procedure.*—A held a decree against B and C held another decree against D. B and D who were relations had both some rights in the house in suit. A brought the rights of B in the house to sale and E purchased them and obtained possession. C subsequently wished to attach the house as belonging to D; but he was referred to a regular suit to set aside the first sale. *Held* that this was an improper order. The Court in execution of his decree should have put up to sale the rights and interests of D for what they were worth and should have left the two purchases to bring to a decision the question who was the owner of the house and to what extent. LALU MAL v. RAM CHAND, **60 P.R. 1875.**

————*k.*—SETTING ASIDE SALE.

(1)—*Civ. Pro. Code, Act* XIV *of* 1882, *s.* 310-*A—Deposit—Poundage—Application to set aside sale.*—When the judgment-debtor has deposited the amounts specified in cls. (*a*) and (*b*) of s. 310-A of the Civ. Pro. Code, he is entitled to have the sale set aside, notwithstanding the fact that some amount on account of poundage was recoverable from him under the head of costs provided for in the last clause of the section. The remedy of the purchaser is to apply to the Court for recovering what is due to him unders ss. 310-A and 315. MUTHU AYYAR v. RAMASAMI SASTRIGAL, **20 M. 158.** [*R.*, 23 B. 450.]

(2)—*Auction sale—Suit to set aside.*—A suit to set aside an auction-sale in execution of a decree is maintainable. RAM PRASAD v. NAFAILI KUARI, **A.W.N. 1882, 5.**

(3)—*Civ. Pro. Code, s.* 311—*Suit to set aside Court sale.*—When the mortgagor of certain property which has been brought to sale in execution of a decree obtained thereon, sues to set aside the sale on the ground of fraud practised by the purchaser, the pleader of the mortgagee in purchasing the property himself in an underhand manner, the circumstance, that fraud was not alleged against the purchaser in a petition brought for the same purpose under s. 311, Civ. Pro. Code, would not vitiate the suit. SUBBARAYUDU v. KOTAYYA, **15 M. 389.** [*R.*, 23 A. 478.]

(4)—*Civ. Pro. Code, s.* 311—*Execution sale—Person competent to set aside sale.*—A person who claimed to be the owner of the property (sold in execution of a decree) as purchaser under a private sale is not competent to object under s. 311, Civ. Pro. Code, and set aside the execution sale. BHAWANI DAS v. TULSI RAM, **A.W.N. 1883, 7.** (3 A.W.N. 7, *F.*)

(5)—*Civ. Pro. Code, s.* 311—*Execution sale—Persons competent to set aside sale.*—Under s. 311, Civ. Pro. Code, the persons who can prefer objections are the decree-holder and any person whose immoveable property has been sold. A stranger is not entitled to come in under that section to set aside a sale. AHMADUDDIN KHAN v. SHEORAJ SINGH, **A.W.N. 1883, 7.**

(6)—*Execution sale—Suit against auction-purchaser for possession by setting aside sale—Civ. Pro. Code*, 1877, *s.* 244.—Where the property is purchased at an execution sale held in pursuance of an order under s. 244 of the Civ. Pro. Code, by a person not a party to the suit, and that order is subsequently set aside, *held*, the order directing the sale had the force of a decree, and that the judgment-debtor could not sue the auction-purchaser for recovery of the property by setting aside the sale. MURARI SINGH v. PRAYAG SINGH, **11 C. 362.** (10 W. R. 154, *F.*) [*Cited*, 1 L. B. R. 22.]

(7)—*Execution sale after uncertified payment—Suit to set aside sale—Cause of action.*—Where a judgment-debtor, jointly liable with others under a decree, was released from all

***Sale*—continued.**

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

liability thereunder in consideration of a small payment, which, however, was not certified to the Court, and the immoveable property of such debtor was subsequently brought to sale and purchased by the decree-holder himself in execution of the same decree, *held*, a suit to set aside such sale and recover the property would lie against the decree-holder. ISHAN CHUNDER BANDOPADHYA v. INDRO NARAIN GOSSAMI, **9 C. 788=12 C.L.R. 390.** [*F.*, 10 C. 354 ; *Cons.*, 21 C. 437 ; *Diss.*, 20 A. 254 = A.W.N. 1898, 37 ; *R.*, 11 B 6, F.B., 15 C. 187, 15 C. 179, 17 C. 769, F.B., 8 C.W.N. 395=31 C. 480.]

(8)—*Plea that decree is not binding--Question of* "bona fide."—The question of whether the purchase was made *bona fide* and for value does not arise in a case in which a sale in execution of decree is sought to be set aside on the ground that the decree does not in terms make answerable parties whose interests in the property are sold. KOMBI v. LAKHMI, **5 M. 201.** [*R.*, 10 M. 79, 8 M. 484, F.B., 20 M. 129, F.B.]

(9)—*Sale in execution of decree—Transfer of interest by purchaser—Sale subsequently set aside—Effect.*—When a sale in execution of a decree is set aside, no such rights and interests are left to the purchaser as can be sold on his behalf. SYUD MAHOMED AFZUL v. KANHYA LAL, **5 W.R. 42.**

(10)—*Ss.* 295, 310-*A*, *Civ. Pro. Code*, 1882 (=*s.* 73 *and O.* XXI, *r.* 89, *present Code*)—*Rateable distribution—Application for setting aside sale by deposit of debt due to decree-holder at whose instance the property is sold.*—The effect of s. 310-A is to put the owner of the property practically in the same position in which he would have been, if he had paid the amount due under the decree before the sale took place. When property has been sold in execution of a decree and there are other decree-holders, who, prior to the sale, have applied under s. 295, Civ. Pro. Code, 1882, for rateable distribution, the person whose property has been sold is competent to have the sale set aside under s. 310-A by depositing only the amount of the decree for the satisfaction of which the sale was proclaimed and took place. HARI SUNDARI DASYA v. SHASHI BALA DASYA, **1 C.W.N. 195.** [*F.*, 30 C. 262=7 C.W.N. 341.]

(11)—*Execution of decree—Sale of immoveable property, reversal of, by competent Court—Right of purchaser to recover purchase-money—Act* VIII *of* 1859, *s.* 258.—When a sale of immoveable property in execution, has been set aside by a competent Court for sufficient reasons, the right of the purchaser to recover back his purchase-money under s. 258 of the Civ. Pro. Code of 1859 is absolute. It was, however, contended that, in this case, the plaintiff could not recover because he himself had caused the

***Sale*—continued.**

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

property to be put up for sale. This contention was *held* by the High Court to be untenable, because it was not even suggested that the plaintiff was guilty of any fraud or misrepresentation that could deprive him of a right which he could otherwise assert ; nor did he in any way guarantee the validity of the sale under the decree. BROJENDUR ROY CHOWDHRY v. JUGURNATH ROY, **6 W.R. 147.** [*R.*, 12 W.R.F.B. 8, 6 B.H.C. 258, 19 W.R. 16.]

(12)—*S.* 310-*A. Civ. Pro. Code.* (1882, 1884)—*Deposit provided for in s.* 310-*A not paid within* 30 *days—Court's power to set aside sale.*—Where a judgment-debtor does not, within 30 days from the date of sale deposit in Court a sum equal to 5 per cent. of the purchase-money, and the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder, but has deposited in Court within the prescribed period a sum calculated by some officer of the Court as the sum to be deposited in respect of such 5 per cent and the amount specified in such proclamation of the sale, the Court cannot pass an order setting aside the sale under s. 310-A, Civ. Pro. Code, there being nothing to show that there was any mistake of the Court by which the judgment-debtor was induced to deposit an insufficient amount. (25 C. 609, *D.*) The mistake of an officer of the Court in calculating the sum to be deposited cannot avail the judgment-debtor, unless he can shew that the mistake was made by an officer whose duty and within whose province it was to give the information. CHUNDI CHARAN MANDAL v. BANKE BEHARAY LAL MANDAL, **26 C. 449, F.B. = 3 C.W.N. 283** [*F.*, 6 C.W.N. 57; *R.*, 13 C.W.N. 591, 30 M. 507=17 M.L.J. 291=2 M.L.T. 347 ; *Expl.*, 29 C. 626 ; *D.*, 11 C.W.N. 116, 5 C.L.J. 204.]

(13)—*Act* VIII *of* 1859, *ss.* 256 *and* 259—*Act* XXIII *of* 1861, *ss.* 11 *and* 35—*Auction sale—Order cancelling sale—Suit to set aside sale—Appeal.*—The finality and the validity of an order under ss. 226 and 259 of Act VIII of 1859 depends on its compliance with the terms of those sections. Where, therefore, an auction sale of landed property was set aside, under s. 257, on the sole objection of the judgment-debtor that the price realized was low, there being no allegation or proof of material irregularity in publishing or conducting the sale, in other words, no objection permissible by s. 256 having been made by the judgment-debtor, *held*, that the Court had failed to do the duty imposed on it by law of confirming the sale, and exceeded its jurisdiction by cancelling the sale. Under the above circumstances, a suit will lie by the auction purchaser to cancel the order of the Court cancelling the sale. SUKHAI v. DARYAI, **1 A. 374.** (All. H. C's. Decision in S.A. No. 1436 of 1876, unreported, *F.*) [*Appr.*, 3 A. 206, F.B.; *R.*, 3 C.W.N. 99.]

Sale—continued.

—5.—Sale in Execution of Decree—*contd.*

———*k.*—SETTING ASIDE SALE—*contd.*

(14)—*Civ. Pro. Code*, 1882, *s.* 310-*A*—*Sale in execution of mortgage decree—Appeal from order setting aside sale.*—S. 310-A of the Code applies to a sale in execution of a mortgage decree, and the judgment-debtor could apply to have the sale set aside on payment of the sum mentioned therein. An order setting aside the sale is not appealable. CHINNAMMAL v. ATHINATHA IYENGAR, **10 M.L.J. 228.** [*Not F*, 30 M. 507=17 M.L.J. 291=2 M.L.T. 347.]

(15)—*Sale in execution—Decree setting aside sale—Subsequent order allowing sale to stand—No suit to set aside order—Validity of sale.*—Where an order was passed allowing to stand a sale in execution, which had been set aside by a decree, and the order was not contested by a regular suit, the sale was good and valid, as the order became the final judicial proceeding in the matter. MUNNOO LAL v. CHOONEE SAHOO, **7 W.R. 116.**

(16)—*Sale under decree in execution of a decree, setting aside of.*—A Court has no power to set aside a sale unless the judgment-debtor has strictly complied with the provisions of s. 310-A of the Civ. Pro. Code, 1882. TRIMBAK v. RAMCHANDRA, **1 Bom. L.R. 215 = 23 B. 723.**

(17)—*S.* 244, *Act* XIV *of* 1882 (*Civ. Pro. Code*)—*Execution sale—Suit to set it aside—Parties to the suit—Fraud.*—All objections to execution-sales should be disposed of as cheaply and as speedily as possible. The Courts in India have not placed any narrow construction on the language of s. 244 of the Civ. Pro. Code. When questions are raised between the parties to a decree relating to its execution, discharge, or satisfaction, the fact that the purchaser at an execution-sale, who is no party to the suit, is interested and concerned in the result has never been held a bar to the application of the section, limiting the disposal of these matters to the Court executing the decree. Certain property having been sold by the Court in execution of a decree, the judgment-debtor impeached the sale in a suit on the ground that it had been brought about by fraud andcollusion on the part of the decree-holder and the Court-purchaser, in that the decree-holder had brought the property to sale in breach of his agreement with the judgment-debtor and that the purchaser had purchased with notice of the agreement: the ground on which the sale was attacked was, substantially, that the judgment-debtor had brought the property to sale without any right to sell it. *Held*, that that was a question which could have been determined by the order of the Court, which executed the decree, and that it could not be tried in a separate suit. PROSANNO KUMAR SANYAL v. KALI DAS SANYAL, **19 C. 683= 19 I.A. 166, P.C = 6 Sar. 209.** [*F.*, 1 C.W.N. 656, 24 A. 209=22 A.W.N. 18, 23 M. 55, 25 B. 418, 6 C.W.N. 283, 26 A. 447=24 A.W.N. 61 =1 A.L.J. 65, 31 C. 480=8 C.W.N. 395, 9 C.W.N. 134, 11 Bom. L.R. 699, 12 C.W.N. 485; *Expl. and F.*, 26 A. 447=24 A.W.N. 61=1 A. L.J. 65; *Rel. on*, 3 C.W.N. 6, 7 C.W.N. 591; *R.*, 21 C. 437, 21 C. 940, F.B., 18 A. 163=16 A.W.N. 18, 32 M. 429, 18 M. 439, 22 B. 463, F.B., 24 C. 62, F.B., 19 M.L.J. 401, 24 C. 473, 24 C. 707, 25 C. 175, 20 M. 487=8 M.L.J. 7, 23 B. 237, 20 A. 254=18 A.W.N. 37, 12 C.P. L.R. 73, 12 C.P.L.R. 82, 13 C.P.L.R. 177, 22 A. 86=19 A.W.N. 184, 22 A. 103=19 A.W.N. 205, 1 Bom. L.R. 74, 26 C. 324, 26 C. 539, 4 C.W.N. 538, 6 C.W.N. 279, 25 B. 631, 23 A. 478, 24 A. 239=22 A.W.N. 49, 36 C. 130, 25 M. 529, 6 Bom. L.R. 697, 17 C.P.L.R. 60, 31 C. 737, 7 O.C. 199, 8 O.C. 370, 6 A.L.J. 71; F.B., 27 A. 702=2 A.L.J. 469=A.W.N. 1905, 162, U.B.R. 1905, 4th Quarter, Civil Procedure, 36, 9 Bom. L.R. 15=31 B. 207, 5 L.B.R. 65, 30 M. 507=17 M.L.J. 291=2 M.L.T. 347, 12 O.C. 175, 5 C.L.J. 328, 5 C.L.J. 34-N., 5 C.L J. 491=11 C.W.N. 593=34 C. 642=2 M.L.T. 207, F.B., 9 Bom. L.R. 462, 30 A. 72=5 A.L. J. 20=A.W.N. 1908, 12; *D.*, 31 A. 82=5 M.L. T. 185, 22 A. 450.]

Sale—continued.

—5.—Sale in Execution of Decree—*contd.*

———*k.*—SETTING ASIDE SALE—*contd.*

(18)—*Execution sale—Material irregularity in publishing and conducting sale—Setting aside of illegal order passed by Judge on appeal.*—The Court of first instance refused to set aside an execution sale from which the judgment-debtor alleged that he had sustained substantial injury on the ground of material irregularities in publishing and conducting the sale; the District Judge on appeal set aside the sale on the ground that the officer conducting the sale should have received the amount of the judgment debt which the judgment-debtor offered to pay after the sale but before its confirmation. *Held*, that the District Judge's order must be set aside and the sale confirmed, as there is no law authorising the officer conducting the sale to stop it because the judgment-debtor offered to pay the debt to the decree-holder. *Held*, further, that the Court executing the decree is bound to confirm the sale unless the judgment-debtor seeking to set it aside shows that he has sustained substantial injury by reason of some material irregularity in publishing or conducting the sale. R. V. KOSHTI v. NARAYAN DHULAPPA, **3 B. H. C. A. C. 110.**

(19)—*Civ. Pro. Code*, 1877, *s.* 311—*Sale in execution—Irregularity in conducting sale—Occupancy holding—Sale to stranger—N.W.P. Rent Act*, XVIII *of* 1873, *s.* 9.—Where an occupancy holding put up for sale in execution of a decree was purchased by a person other than the zemindar or a co-sharer in such holding, *held*, that, although the auction-purchaser's title might be challengeable by the zemindar or co-sharer in the holding, it was impossible to hold that the officer conducting the sale was

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

guilty of an irregularity in accepting the bid. It was no part of that officer's duty to ascertain, before accepting the auction-purchaser's bid, whether he was a co-sharer in the holding or a zemindar or not. Nor could it be contended that the sale should not have been held at all because the provisions of s. 9 of the Act XVIII of 1873 might operate to prevent the acquisition of a good title by other purchasers than co-sharers in the right sold. KUNDAN v. GULAB, **A.W.N. 1881, 40.** HUR NARAIN v. RAM DAT, **A.W.N. 1881, 60.**

(20)—*Civ. Pro. Code*, 1877, *s.* 312—*Suit to set aside sale—Irregularity in conduct of sale—Limitation Act*, s. 18, *arts.* 12, 95.—A suit to set aside a sale, on the ground of irregularities in publishing or conducting the sale, was precluded by the provisions of s. 312, Act X of 1877. Such a suit should be brought within a year after the confirmation of the sale, the article applicable being art. 12 and not art. 95, as the plaint did not contain any allegation of fraud. RAM SARUP v. RAGHUNANDAN, **A.W.N. 1881, 38.**

(21)—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 311—*Application to set aside sale—Irregularity in publishing and conducting sale—Substantial injury.*—S. 291 of the Civ. Pro. Code empowers the officer conducting a sale to adjourn it for seven days without a fresh proclamation and for a longer period after a fresh proclamation. Omission to issue a fresh proclamation is only an irregularity. (18 C. 496, *F.*) The allegation of the judgment-debtor that the prices were inadequate was found to be based on vague statements, and as no substantial injury was proved the application to set aside the sale was dismissed. PANDIT JOWALA DAT PARSHAD v. RAM DAS, **96 P.L.R. 1902.** (21 C. 66, P.C., 24 C. 291, R.)

(22)—*Execution of decree—Suit for possession by cancellation of sale duly confirmed—Irregular attachment—Defects in publishing and conducting sale—Civ. Pro. Code, ss.* 311 *and* 312 *—Effect of want of notice under s.* 232 (*a*), *Civ. Pro. Code.*—This was a suit by the judgment-debtor against the auction-purchaser to recover possession of a house sold in execution of decree, on the ground of certain irregularities in publishing and conducting the sale, and for the reason that the person executing the decree was an assignee of the original decree-holder, and the notice required by proviso (*a*) of s. 232, Civ. Pro. Code, was not served on the plaintiff. *Held*, that the want of notice under s. 232 (*a*), Civ. Pro. Code, could not vitiate attachment of property effected on the application of the assignee of the decree, as the judgment-debtor was all along cognizant that it was the assignee who was executing the decree. *Held*, further, that the defects in the proclamation of sale and in publishing and conducting the auction were matters which should have formed

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTIEG ASIDE SALE—*contd.*

the subject of an application under s. 311, Civ. Pro. Code, failing which and after confirmation of the sale, they could not be gone into at all, and s. 312 forbids a fresh suit in respect of such defects. *Held* also, that every Court has inherent power to correct defects of its procedure in order to remedy injustice, if the application is made to it in proper time. It was found that there were no substantial defects in the attachment which rendered the sale a nullity. HARNAM SINGH v. HAMIRA MAL, **P.L.R. 1900, p. 157.**

(23)—*Application to set aside sale—Act* XIV *of* 1882, *s.* 311 (*Code of Civil Procedure*)—*Material irregularity in publishing and conducting the sale—Substantial injury must be proved to have occurred by reason of material irregularity.*—In a petition under s. 311, Civ. Pro. Code, by one of the two judgment-debtors (the other having died) asking the Court to set aside the sale on the grounds:—(1) that sanction of the Commissioner or Deputy Commissioner had not been obtained as required by s. 20, Act XVIII of 1876; (2) that the legal representatives of the deceased judgment-debtor had not been brought on the record under s. 234 of the Code of Civil Procedure; (3) that an order absolute for sale had not been obtained under s. 89 of the Transfer of Property Act:—*Held*, that these grounds did not constitute any material irregularity in publishing and conducting the sale within the meaning of s. 311, Civ. Pro. Code. *Held*, further, that it was essential for the judgment-debtor not only to prove substantial injury and irregularity in publishing and conducting the sale, but to prove that the substantial injury occurred by reason of such irregularity. S.P. KAIN v. KASHMIRI BANK, LIMITED, FYZABAD, **1 O.C. 155.** [*R.*, 6 O.C. 61, 8 O.C. 409.]

(24)—*Execution sale, suit to set aside—Separate suit—Maintainability—Execution sale, effect of, before confirmation—Second sale after prior un-confirmed sale.*—Where, after an ineffectual attempt in all the Courts to set aside an execution sale on the ground of irregularity, it was sought, by a separate suit, to set it aside, on account of a prior execution sale of the same property having been set asde, (which took place long after the confirmation of the second sale), *held*, the separate suit would lie, as it was not one to set it aside on the ground of fraud or anything connected with the sale itself, and as no execution proceedings were pending in which it was possible for the plaintiff to raise the question under s. 244 of the Civ. Pro. Code. (11 C. 376, *Diss.*) There is more than a contract for sale in the interval between an execution sale and its confirmation; there is an inchoate transfer of title, which only requires to be perfected by confirmation. Not that, pending confirmation there is merely a contract for sale, but a sale does actually take place, which must be

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

set aside if not made absolute. So that, where a second execution sale takes place after a prior sale, which, though not confirmed, has not been set aside, there would be nothing left to pass by the second sale. PRANGOUR MOSOOMDAR v. HIMANTA KUMARI DEBYA, **12 C. 597.** (16 M.I.A. 529=10 B.L.R. 214, *Cited.*) [*Appr.*, 17 B. 375; *R.*, 15 C. 546, 2 C.W.N. 589.]

(25)—*Execution sale—Objections to sale—Validity of objections—Duty of Court.*—A Court executing a decree is bound to try the validity of the judgment-debtor's objections to the sale of attached property. GUNESH LALL TEWAREE v. RANEE BINDOO BASHINEE, **24 W.R. 85.**

(26)—*Act* VIII *of* 1859, *s.* 256—*Petition—Issue—Judicial proceeding—Procedure.*—The issue which arises in a proceeding when a petition preferred under s. 256, Act VIII of 1859 is a judicial proceeding and ought to be carried out with regularity. Upon the petition being filed, the Judge ought to fix a day for the hearing of the matter of the petition and give reasonable notice thereof to all parties. BROJO MOHUN THAKOOR v. SHAH AMEENOODDEEN, **20 W.R. 424.**

(27)—*Execution sale—Confirmation—Application to set aside sale—Limitation.*—An application to set aside a sale can be received even after thirty days, but before the confirmation of sale, the discretion in the matter lying with the Judge. POULSON v. DUNN, **18 W.R. 11.** [*F.*, 18 W.R. 333.]

(28)—*Mokurruree title—Sale of tenure in execution—Zemindar in possession—Claim by zemindar — Notice — Limitation.* — Where, in execution of a decree against a person alleging a mokurruree title to certain property, the tenure is advertised for sale, and the zemindar in possession prefers a claim and notice thereof is given at the time of sale, the zemindar need not institute a suit for setting aside the sale, and limitation will not run against him in favour of the purchaser who has not obtained possession. RAJAH MOKOOND NARAIN DEO v. KHETTUR MOHUN DHAMUT KOORMEE, **19 W.R. 298.**

(29)—*Confirmation of sale—Application for reversal of sale after* 30 *days from its date, not admissible—Act* VIII *of* 1859, *s.* 256.—This application for the reversal of the sale was made several days after the sale had been confirmed, and after the period of 30 days from the date of the sale had expired. The High Court *held* that the debtor was not entitled to be heard under s. 256, Act VIII of 1859. ISHAN CHUNDER DUTT v. MOTHOORANATH DOSS, **6 W.R. Mis. 122.**

(30)—*Reg.* VII *of* 1825—*Sale—Irregularity—Suit to set aside—Limitation—Act* VIII *of* 1859, *ss.* 257, 387—*Applicability.*—Ss. 257 and 387 of Act VIII of 1859 cannot be applied to a case

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

instituted before Acts VIII and XIV of 1859 came into operation for setting aside a sale made irregularly under Reg. VII of 1825. The plaintiff has 12 years within which he might sue. Sales held under Reg. VII of 1825 cannot be vitiated simply because there were certain irregularities in the sale. But they may be vitiated if it is proved that the irregularities have caused injury to the party suing. MUSST. BHOOBUN v. SHEIKH OOZUTOOL HUQ, **3 W.R. 70.**

(31)—*Sale in execution of decree—Suit to set aside sale—Limitation Act* XIV *of* 1859, *s.* 1, *cls.* 3, 12.—Plaintiff purchased some immoveable property at an execution sale. The same property was again purchased by the defendant at another execution sale. In a suit brought by the plaintiff against the defendant to recover the property, *held*, that the suit was virtually a suit to set aside the last sale, and that it should have been brought within one year from the date of that sale; and that cl. 3 and not cl. 12 of s. 1 of Act XIV of 1859, applied to the case. KRISHNAJI U. JOSHI v. MUKUND CHIMANSHET, **2 B.H.C. 19.** [*Diss.*, 5 B.H.C. 139, 22 W.R. 84, 8 B.H.C. 219.]

(32)—*Sale in execution, suit to set aside—Parties bound by sale—Limitation Act, sch.* II, *art.* 12 (*a*)—*Civ. Pro. Code, s.* 312.—A sale in execution of a decree can only deal with and pass the right, title and interest of the judgment-debtor; and it cannot pass the right, title and interest of others than the judgment-debtor. S. 312, Civ. Pro. Code, states that the Court confirming the sale confirms it as regards parties to the suit and the purchaser. Art. 12 (*a*) of the Limitation Act is not applicable to a case, in which the plaintiff was not a party to or bound by the sale, which is sought to be set aside. HAJEE GOYA KAKA v. ZACCHEUS, **4 L.B.R. 40.** (11 B. 119, 11 B. 130, 20 M. 118, *F.*)

(33)—*Execution sale confirmed—Setting aside sale by summary order, validity of—Application to set aside sale after confirmation—Limitation Act*, 1877, *art.* 165.—The Court has no power, by an order on a summary application in execution proceedings, to set aside an execution sale after its confirmation, and to direct that the judgment-debtor be restored to possession. *Quære*: Whether the judgment-debtor has the right to raise the question in a substantive suit. [*R.*, 10 C. 220.] An application to set aside an execution sale two years from the date thereof, and one and a half years from its confirmation, is barred under art. 165 of the Limitation Act. MAHOMED HOSSEIN v. KOKIL SINGH, **7 C. 91=9 C.L.R. 53.**

(34)—*Act* VIII *of* 1859, *ss.* 256, 257—*Execution—Sale—Time for objection—Objection after confirmation of sale—Jurisdiction.*—The period of thirty days mentioned in s. 256, Act VIII of 1859, is the measure of the right of the parties

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

to come in and object to the sale. But the jurisdiction of the Judge to receive such an application is not limited to that period; and there is nothing in s. 257 of the Act to lead to the inference that the Judge has no jurisdiction to receive such an application at any time before the sale in confirmed. UMRITO LALL BOSE, PETITIONER, **18 W.R. 11, Note.** [*F.*, 18 W.R. 333.]

(35)—*Execution sale—Want of jurisdiction—Burden of proof.*—An execution sale of a village cannot be set aside on the ground that the Court which sold it had no local jurisdiction, unless it is clearly found that in fact and in law, the village belongs to another jurisdiction. Where this objection is taken, not before the sale, but at the very latest possible moment, it is for the objectors to prove indisputably the absence of jurisdiction. MOONSHEE MAHOMED RUSHEED KHAN v. KOMUL MONEE DABIA, **21 W.R. 443.**

(36)—*Sale, application to set aside—Application to set aside sale under s. 310-A, after application under s. 311, Civ. Pro. Code, abandoned—Sale of immoveable property in execution of decree—Civ. Pro. Code, ss. 310-A and 311—Jurisdiction to set aside sale.*—On February 27th the judgment-debtors applied to the Munsif under s. 311, Civ. Pro. Code, to set aside a sale of immoveable property on certain grounds. On March 15th they withdrew the application and it was accordingly dismissed. On the same day they made an application under s. 310-A, Civ. Pro. Code, and deposited the sum required by that section. The Munsif set aside the sale. *Held*, that the Munsif had no jurisdiction to set aside the sale. The words "if a person applies" in the proviso to s. 310-A must be taken in their literal and primary meaning and that the judgment-debtor's second application was barred by that proviso. MATADIN v. SHEORAJ SINGH, **5 O.C. 137.** [*Appr.*, 10 O.C. 141.]

(37)—*Execution of decree—Decree passed without jurisdiction—Sale in execution—Sale before advertised date—Illegality.*—A obtained a decree against B and C. B was not carrying on business, nor was he a resident within the jurisdiction of the Court which passed it. B died and her executor appealed on that ground, and the appellate Court reversed the decree, so far as it was against her. The decree had been, before reversal, transferred to another Court for execution and B's property was attached and brought to sale. B's executor then applied both to the Court which passed the decree, and also to the Court to which it was sent for execution for a stay of sale. The former Court passed an order staying the sale provided security was given by B's executor. Before that order could be communicated to the latter Court, the property of B, had been sold 15 days earlier than that fixed in the sale

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

proclamation and purchased by D. When D was attempting to take possession he was informed by a letter from B's executor that he was purchasing under a decree passed without jurisdiction. B's executor then sued to have the sale set aside, and claimed also mesne profits. *Held* (1) that if the sale had not taken place earlier than the date fixed in the sale proclamation, B's executor would have brought a substantial objection to the sale, and this irregularity in the sale caused substantial injury to the plaintiff and the sale must therefore be set aside; (2) that the plaintiff was also entitled to mesne profits from the date on which he gave notice to the purchaser, subject of course to the payment of compensation for improvements effected by him *bona fide*. W. HAMILTON v. J. W. PATTERSON, **8 P.R. 1868.**

(38)—*Setting aside of execution sale—Jurisdiction.*—When a sale has taken place under a decree, a Judge has no right, upon the application of a third person who is not a party to the suit, and in no way connected with the original proceedings, to set aside the sale. HARA DHONE SHAMUNTO v. GOLUCK CHUNDER SHAMUNTO, **25 W.R. 79.**

(39)—*Limitation—Execution sale—Confirmation—Application to set aside—Discretion of Court.*—An application to set aside an execution sale may be entertained, although not made within 30 days of the sale; but then, if not made within that time, it is not a matter of right in the party who raises the objection to the confirmation of the sale. It is in the discretion of the Court whether he will be allowed to make the application; but he must show a sufficient reason in the judgment of the Court for not coming within the 30 days. RAJ COOMAR SINGH v. LALLJEE SAHOO, **18 W.R. 333.** (18 W.R. 11, *F.*)

(40)—*Act* VIII *of* 1859, *s.* 256—"*Applicant*"—*Meaning--Attaching-creditor—Appeal to High Court — Amount.*—The term "applicant" in s. 256, Act VIII of 1859, includes any person who has sustained substantial injury by reason of a material irregularity in publishing or conducting the sale. Although the applicant here was a creditor for a sum less than Rs. 5,000, as the sale took place in a suit for a sum over Rs. 5,000 an appeal lay to the High Court. KRISHNARAV VENKATESH v. VASUDEV ANANT, **11 B.H.C. 15** [*Appl.*, 8 C. 367 = 10 C.L.R. 441; *Appr.*, 15 C. 488, F.B.; *R.*, 20 C. 418, 29 C. 548.]

(41)—*Act* VIII *of* 1859, *s.* 256, *application to set aside sale under, whether maintainable by purchaser subsequent to mortgage.* — The decree-holder in this case was mortgagee of two properties M and P. She applied for an order for the sale of the two properties, P to be sold first and M next. After proclamations were issued and the properties allotted for sale in the said order, the lower Court, according to the judgment-debtor's request to that effect

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

caused property M to be first sold. The present applicant, claiming as a purchaser of property M, under a sale subsequent to the mortgage, came to the Court claiming under s. 256 to set aside the sale on the ground of irregularity. On the question which arose as to whether the applicant could come in under s. 256, it was held that he could not come in under that section; and, on that ground and also, because of the absence of any irregularity in the sale, the High Court refused to interfere with the order of the lower Court. *Per Seton—Karr, J., dissentiente*:—The words of s. 257 of Act VIII of 1859, *viz.*, "application may be made to the Court" are very general and the application is not to be regarded as one restricted to "parties to the suit." The words of the section are so wide and comprehensive as to embrace every one affected by a sale of immoveable property. On the above ground, the applicant in the present case having clearly sustained injury by an unnecessary deviation from the proper and prescribed order of things, was entitled to the relief sought by him. JOGE NARAIN SINGH v. BHUGBANO, **2 W.R. Mis. 13.** [*Appr.*, 15 C. 488, F.B.; *R.*, 11 B.H.C. 15, 20 C. 418.]

(42)—*Civ. Pro. Code* (XIV *of* 1882), *ss.* 311, 314 (=*O.* XXI, *rr.* 90, 92, *new Code*)—*Decree-holders entitled to rateable distribution, right of, to apply to set aside Court-sale.*—Decree-holders entitled to rateable distribution have the right to apply under s. 311 of the Civ. Pro. Code to set aside a Court-sale on the ground of material irregularity. Where the proclamation of sale was not only not issued in the form prescribed by the High Court but also failed to contain the required particulars as to the extent of the property to be sold and the revenue or rent assessed on the land, it was *held* that there have been material irregularities in the publication of the sale causing substantial injury and precluding the confirmation of the sale. ATHAPPA CHETTI v. RAMAKRISHNA NAYAKAN, **21 M. 51.**

(43)—*Purchase from judgment-debtor prior to attachment—Purchaser's objection to sale—S.* 311, *Civ. Pro. Coae* (1882)—*Setting aside sale for irregularity—Substantial injury.*—A person who claimed to be a purchaser from the judgment-debtor prior to an attachment cannot come in under s. 311 and object to the sale of the property of the judgment-debtor. (14 C. 240, *Overruled.*) [*F.*, 20 C. 418, 23 B. 450; *Compared*, 21 M. 416; *Cons.*, 5 C.W.N. 821=29 C. 1, F.B.; *Diss.*, 12 A. 440=11 A.W.N. 103 F.B.; *Disc.*, 29 C.548; *D.*, 12 A. 440=11 A.W.N. 103, F.B., 22 C. 802; *R.*, 16 M. 476, 19 M. 167, 4 C.W.N. 542, 7 C.W.N. 243.] A person who applies to set aside a sale for irregularity must prove substantial injury arising therefrom. ASMUT-UN-NISSA BEGUM v. ASHRUFF ALI, **15 C. 488, F.B.** (2 W.R. Mis. 13, 11 B.H.C. 15, *Appr.*)

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

(44)—*Sale by sheriff under writ of* fieri facias *—Warranty—Eviction of purchaser—Purchaser's remedy.*—The sheriff is authorised, by a writ of *fi-fa*, to seize the property of the execution-debtor, which lies within his territorial jurisdiction and to pass the debtor's title to it without warranting that title to be good. If, however, the sheriff acts *ultra vires*, by seizing and selling property without his jurisdiction, he cannot invoke the protection of the law given to him when acting within jurisdiction, and is no better than an ordinary person, who sells what he had no title to sell. The sheriff's responsibility, in respect of sales in India, must be governed by the law relating to the sale of chattels rather than to that of real estate, and moveable and immoveable property are alike capable of being seized under a writ of *fieri facias*. [*R.*, 21 B. 425.] When the sale conducted by the sheriff becomes inoperative and ineffectual, because of his having acted beyond his jurisdiction, the purchaser may have a case for relief as against the judgment-creditor, who has received the purchase-money, if the sheriff should have acted under his authority and by his express directions. DERAB ALLY KHAN v. KHAZAH MOHEEOODDEEN, **3 C. 806 3=Suth. 519=5 I.A. 116=2 C L.R. 529=3 Sar. 818.** [*F.*, 17 M. 228; *R.*, 2 A. 780, 5 A. 577, F.B., 1 C.P.L.R. 26, 1 C.P.L.R. 178, 23 A. 355.]

(45)—*Ss.* 244 (*c*), 310-*A*, 311, *Civ. Pro. Code*, 1882—*Order under s.* 310-*A—Appeal—Right of applicant under s.* 310-*A, to impugn sale.*—An order under s. 310-A, Civ. Pro. Code, 1882, passed on application by a decree-holder, who is also purchaser, is one under s. 244 (*c*) and an appeal lies from it. (1 C.W.N. 703, *R.*) [*R.*, 5 O.C. 377, 25 M. 244, F.B., 29 A. 275=4 A. L.J. 135=A.W.N. 1907, 64, 30 M. 507=17 M. L.J. 291=2 M.L.T. 347, 7 C.L.J. 282, 5 L. B.R. 85.] An applicant under s. 310-A is not entitled to impugn a sale on the ground of irregularity in publishing and conducting it. PHUL CHAND RAM v. NARSINGH PERSHAD MISSER, **28 C. 73.** [*D.*, 13 C.W.N. 591.]

(46)—*S.* 311, *Civ. Pro. Code*, 1882—*Sale by person claiming to be the real owner—Objection—Person claiming to be beneficial owner entitled to object to the execution-sale.*—On a sale of immoveable property in execution of a decree against the ostensible owner as his property, a person claiming to be the beneficial owner can come in and object to the sale under s. 311, Civ. Pro. Code—*Per Petheram, C.J., and Ghose, JJ.* (*Beverley, J., contra*). Per *Ghose, J.*—The language of s. 311 in the Civ. Pro. Code of 1882 is exactly the same as in the Code of 1877. The remedy under s. 311 of the Code is not confined to the decree-holder and the judgment-debtor; and when any third party comes in upon the ground that his interest in the property has been affected by the sale, the Court cannot help determining whether he

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

has such an interest in the property. The beneficial owner is bound by any decree that may be passed *against the benamidar*. (10 C. 697 and 3 A. 812, *Appr.*) Per *Petheram, C.J., and Beverley, J.* (*Ghose J., contra*)—*Held* that the matter in this case is concluded by the decision in 15 C. 485, F.B. ABDUL GANI v. DUNNE, **20 C. 418.** [*F.*, 19 M. 167; *Appr.*, 23 B. 450; *D.*, 8 C.L J. 305.]

(47)—*Ss.* 295, 311, *Act* XIV *of* 1882, *Civ. Pro. Code—Person not entitled to come in under s.* 295, *Civ. Pro. Code, not included in the term "decree-holder" in s.* 311.—A person, who is not entitled to come in under s. 295, Civ. Pro. Code, and share in the rateable distribution of the sale proceeds, is not included within the words "decree-holder" in s. 311. He is not entitled to apply to set aside the sale under s. 311. CHATTRAPAT SINGH v. JADUKUL PROSAD MUKERJEE, **20 C. 673.** (12 C. 294, 10 M. 57, *R.*) [*R.*, 29 C. 548; *D.*, 4 C.W. N. 542.]

(48)—*S.* 310-*A, Civ. Pro. Code—Mortgage decree under s.* 88, *Transfer of Property Act—Application under s.* 310 *A. rejected—Judgment-debtors other than applicants, application under s.* 311 *by.*—When a mortgage decree is passed under s. 88, Transfer of Property Act, the judgment-debtor has the right to apply to set aside a sale under s. 310-A, Civ. Pro. Code. [*Overruled*, 25 C. 703, F.B.; *R.*, 1 O.C. 193, 25 B. 104.] An appeal against an order rejecting an application under s. 310 A is not barred by reason of an application under s. 311 having been made, by the judgment-debtors other than those who made the application under s. 310-A, immediately after the rejection of the latter application but before the appeal. ASHRUF ALI CHOWDHRY v. NET LAL SAHU, **23 C. 582.**

(49)—*Civ. Pro. Code*, 1882, *s.* 310-*A* (=*O.* XXI, *r.* 89, *present Code*)—*Deposit by benamidar good deposit.*—A benamidar of a person whose immoveable property is sold has a right to apply to have the sale set aside under s. 310-A, Civ. Pro. Code, 1882. BASI PODDAR v. RAM KRISHNA PODDAR, **1 C.W.N. 135.** [*F.*, 8 C. L.J. 305; *Appl.*, 29 C. 1, F.B. = 5 C.W.N. 821.]

(50)—*Sale in execution—Purchase* benami *for decree-holder without leave to bid—Suit not maintainable by judgment-debtor to set aside sale—Civ. Pro. Code, ss.* 242, 294.—On a suit to set aside a Court-sale of the plaintiff's property in execution of a decree obtained against him on the grounds that the sale proceedings had been secretly brought about without his knowledge, and that the certified purchasers under the sale were mere *benamidars* for the decree-holders who had not obtained the necessary permission to purchase, it was *held* that such a suit was not maintainable and that the plaintiff had mistaken his remedy since, instead

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

of instituting a regular suit, the plaintiff ought to have made an application in the execution proceedings under s. 244 and the last clause of s. 294 of the Civ. Pro. Code. DURGA KUNWAR v. BALWANT SINGH, **23 A. 478 = A. W.N. 1901, 175.** (5 M. 217, 16 M. 287, 11 B. 588, 22 B. 271, 15 M. 389. 10 C. 757, 17 C. 769, 19 C. 783, 26 C. 324, *R.*)

(51)—*Application to set aside sale under s.* 173, *Act VIII of* 1885—*S.* 244, *Civ Pro. Code*, 1882—*Auction-purchaser a* benamidar—*Second appeal.*—An auction-purchaser being a *benamidar* for the judgment-debtor, an application to set aside a sale under s. 173, Bengal Tenancy Act and s. 311, Act XIV of 1882, is cognisable under s. 244, Civ. Pro. Code, and a second appeal lies to the High Court from an order made on the application. CHAND MONEE DASYA v. SAMTO MONEE DASYA, **24 C. 707 = 1 C.W.N. 534.** (19 C. 683, *F.*) [*R.*, 4 C.W.N. 538, 12 O.C. 175.]

(52)—*S.* 310, *Civ. Pro. Code*, 1882 (=*O.* XXI, *r.* 89, *present Code*)—*Purchaser from judgment debtor after auction-sale—Application to set aside sale.*—A purchaser at a private sale from the judgment-debtor after sale in execution, has no *locus standi* to make an application under s. 310-A, Civ. Pro. Code, 1882 HAZARI RAM v. BADAI RAM, **1 C.W.N. 279** [*Diss.*, 30 M. 214 = 17 M.L.J. 127, 30 M. 507 = 17 M.L.J. 291 = 2 M.L.T. 347.]

(53)—*Civ. Pro. Code, s.* 311—*Application to set aside sale — Powers of Court—Grounds limited to those set forth in section.*—On an application under s. 311 of the Civ. Pro. Code, the Court can have no jurisdiction to set aside the sale except on the ground of material irregularities in the conducting or publishing of the sale and of injury sustained by the judgment-debtor in consequence. There is nothing in s. 311 which allows a Court to go into any question over and above these grounds. Having come into the Court upon such allegations, it is not open to the applicant when he has failed to make them out, to pray in aid some further ground which he considers would entitle him to the relief asked for; nor can the Court allow such ground of its own motion. Where the Court finds that the irregularities complained of have not been established, it must pass an order confirming the sale. HARBANS LAL v. KUNDAN LAL, **21 A. 140 = A.W.N. 1898, 212.** (20 I.A. 176, 18 A. 141, *R.*) [*R.*, 132 P.R. 1906 = 11 P.L.R. 1907; *D.*, 9 O.C. 289.]

(54)—*Civ. Pro. Code, s.* 311—*Application to set aside sale under—Right of mortgagee with decree for foreclosure—S.* 86, *Transfer of Property Act.*—A decree under s 86. Transfer of Property Act, virtually has the effect of declaring the mortgagee's right to the property, subject to the liability to "transfer" it to the mortgagor on payment of the sum found due

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

within a certain date. If payment is not made on or before the date fixed, the mortgagor is "absolutely debarred of all right"—not to the property, but—"to redeem the property." Therefore, either the mortgagor or the mortgagee, under such circumstances, would be entitled to apply to the Court under s. 311 of the Code, if he had reason to believe that the property had been irregularly or collusively sold. RAKHAL CHUNDER BOSE v. DWARKA NATH MISSER, **13 C. 346.** [*F.*, 23 B. 450; *Cons.*, 5 C.W.N. 821, F.B.=29 C. 1; *D.*, 5 C. W.N. 63; *R.*, 15 C. 488, F.B., 21 M. 416, 23 B. 181.

(55)—*Execution of decree—Suit to set aside sale*—Bona fide *purchaser.—Bona fide* purchasers for valuable consideration, and without notice of a sale in execution of a decree, are not in every case protected from having the sale set aside under the present or former law. It must be decided in each case in accordance with the principles of justice, equity and good conscience, whether the sale ought to be set aside or not. ABDUL HAYE v. NAWAB RAJ, **B.L.R. Sup. Vol. 911=9 W.R. 196.** [*F.*, 20 W.R. 120, 7 A. 450=A.W.N. 1885, 65; *Appr.*, 17 C. 414; *Commented on*, 26 B. 543=4 Bom. L.R. 249; *R.*, 13 C.W.N. 710.]

(56)—*Sale in execution—Objections by judgment-debtor—Procedure—Duty of Court.*—In this case, the High Court observed that the first Court should have made an investigation into the circumstances attending the sale which was objected to by the judgment-debtors and ought not to have relied on the mere report of the nazir. The Court of first instance had failed to arrive at any express findings in reference to the specific objections made by the judgment-debtors against the sale proceedings in question, and the High Court ruled that it was imperative on the lower appellate Court to have taken up each objection separately and to have determined it specifically recording the reasons for the finding arrived at in respect of it. SOOKH RAJ SINGH v. MOOFTEE TUFAZZOOL HOSSEIN, **2 N.W.P. 142.**

(57)—*Act* VIII *of* 1859, *s.* 226—*Application to set aside sale in execution—Irregularity resulting in substantial injury.*—In this application under s. 256 of Act VIII of 1859, the Principal Sudder Ameen, instead of coming to a distinct finding as to the existence of irregularity in publishing the sale, had turned his attention to ascertain whether any substantial injury had accrued to the debtor. The High Court *held* that it is only if substantial injury be caused by reason of irregularity that the applicant can claim to have the sale set aside and that, therefore, the Principal Sudder Ameen should have first determined whether there had been any irregularity and whether the provisions of s. 249 had or had not been complied with; and, till an irregularity

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

be shown to have taken place, any further enquiry would be unnecessary. MUSSAMUT PARBUTTY v. GIRDHAREE LALL, **6 W. R., Mis. 125.**

(58)—*Sale in execution—Objection by judgment-debtor—Material irregularity—Civ. Pro. Code, ss.* 256, 257.—Where a sale has once taken place, objection to its being made absolute can be taken and disposed of only under s. 256 and s. 257 of Act VIII of 1859. In the present case, no material irregularity had been shown to exist, and as, under the said sections, applications to set aside sales could be made only on the ground of material irregularity in publishing or conducting the sale, it was held that any remedy that the appellant may have could not be under any of those sections. NIL KOMUL CHUCKERBUTTY v. SHAMA SOONDUREE, **6 W.R. Mis. Rul. 46.**

(59)—*Decree, extent to which enforceable against representative—Objection by representative not an irregularity under s.* 256 *of Act* X *of* 1859.—Where a decree has to be enforced against the representative of a deceased person, such representative could be held liable only to the extent of the property that he might have inherited from the deceased. Where the representative takes the objection that he has inherited nothing, such objection though valid, could be of no avail unless it had been taken before the sale in execution of the decree had taken place, because such an objection is not one of those irregularities which would entitle the representatives, under s. 256, to ask the Court to set aside the sale. The High Court therefore came to the conclusion that the objection, in the present case, however valid, was not an irregularity contemplated in s. 256 of Act VIII of 1859; that consequently the sale that had taken place before such objection was raised could not be legally set aside and must be confirmed; and that the only course open to the representative to set it aside was by suit in the Civil Court. CHOWDHRY SHAIKH WAHED ALI v. MUSST. JUMAYE, **6 W.R. Mis., 116.** [*Appr.*, 2 B.L.R., F.B., 73.]

(60)—*Sale in execution—Omission to attach, effect of, when no material injury proved.*—A sale in execution of a decree for immoveable property cannot be set aside by reason of an omission (entire or partial) to attach the property, if the judgment-debtor does not show that he has sustained any material injury in consequence of the omission to attach. *Quære.*—Whether the sale can be set aside on proof of material injury? JOWHUROOZ ZUMMA KHAN v. BANEE MADHUB NUNDUN, **11 W. R. 226.**

(61)—*Striking of execution case off file, effect of, on previous attachment—Act* VIII *of* 1859, *s.* 201—*'Attachment and sale,' meaning of—Sale in execution, previous attachment essential for validity of—Act* VIII *of* 1859, *s.* 249, *omission in sale proclamation of particulars required*

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

——*k.*—SETTING ASIDE SALE—*contd.*

by, effect of—Sale of promissory notes in custody of Collector—Production of notes in Court, not essential—Civ Pro. Code, Act VIII *of* 1859 *s.* 270—*Attachment subsisting at time of sale—Right of parties—Priority according to date of attachment.*—It was contended in this case that the mere striking off of a case in execution does not necessarily cause the attachment previously taken out to become null and void; but that, on the case being restored to the file, the case is revived with all its incidents, including the attachment, and without fresh process; but, it was held that, according to the decisions on a case in execution being struck off the file, the attachment necessarily falls in. The attachment previously taken out by the defendant in this case had ceased on his execution case having been struck off the file, and he was remitted to his former position of a simple judgment-creditor; and had to begin *de novo* and to re-attach the properties before a sale at his instance took place. In s. 201 of Act VIII of 1859, the words "attachment and sale" must be taken together and not distributively, and consequently it cannot be said that moveable property which has not been attached and consequently, cannot be to be "*in custodia legis*," can be sold. So, no sale in execution of a decree can take place either of moveable or immoveable property without previous attachment, and a sale had without previous attachment irregular and illegal. Under s. 249 of the Civ. Pro. Code in all cases of intended sale by public auction, whether of moveable or immoveable property in execution of a decree, any particulars which the Court may think necessary ought to be specified in the sale proclamation. In the present case, no particulars were given, and the High Court observed that, though the lower Court would have exercised a wise discretion, if all particulars, such as the numbers, the value, the year of the loan, the amount of interest due and the rate of interest, etc., had been given yet, the omission of such particulars, which it was in the discretion of the Court to give or to withhold, did not cause any such injury to the plaintiffs as could enable them to sustain an action under s. 252 of Act VIII of 1859. It was objected also that the Government promissory notes belonging to the judgment-debtor which were under attachment in this case ought to have been produced in Court. But the High Court held that it was not essential that they should be brought into the Court of the officer conducting the sale; they were to all intents and purposes "*in custodia legis.*" The notes were in the custody of the Collector. Intending purchasers were not prevented from inspecting those notes, and obtaining any information as to their value which they might require. Under s. 270 of the Civ. Pro. Code, Act VIII of 1859, the judgment-creditor whose attachment subsists at the time of sale is entitled, according to priority of date of attachment, to be satisfied first; and where the attachment by one party made under cl. 1 of s. 5, Reg. II of 1806, has been subsisting up to the date of sale, and an attachment by another party which, though prior in date, had subsequently fallen through and become void by his execution case having been struck off the file, the party whose attachment was pending at the time of the sale would be entitled to the entire sale proceeds of the attached property. BABOO LUCHMEEPUT v. BABOO LEKRAJ ROY, **8 W.R. 415.** [*R.*, 12 W.R. 142, 18 C. 188.]

(62)—*Execution of decree—Sale in execution—"Material irregularity"—"Substantial injury—Civ. Pro. Code, s.* 311.—Where it was found by the lower appellate Court that a sale in execution of a decree notified to take place at noon, had, as a matter of fact, not been held till sunset, and that in consequence few persons had attended the sale and the price realised by the property sold was much below its proper value; *held* that these facts disclosed such "material irregularity" and "substantial injury" within the meaning of s. 311 of the Civ. Pro. Code, as were sufficient to warrant the setting aside of the sale. ALI BAKSH v. SAHIB DIN, **A.W.N. 1891, 156.**

(63)—*Application to set aside a sale—Act* XIV *of* 1882, *s.* 311 (*Code of Civil Procedure*)—*Material irregularity, Order of sale not proclaimed by beat of drum—Inadequacy of price.*—On an application by judgment-debtor to set aside a sale under s. 311, Code of Civil Procedure, on the ground that the order of sale was not proclaimed by beat of drum in consequence of which the property was sold for an inadequate price. *Held*, that the judgment-debtor should have proved by evidence that the alleged inadequacy of price resulted from the alleged irregularity in proclaiming the sale, and no such evidence having been given, the alleged irregularity was not a material irregularity within the meaning of s. 311, Civ. Pro. Code. MUSAMMAT SUKHRAJ KUAR v. SHEO PARSHAD, **1 O.C. 186.** [*R.*, 6 O.C. 61.]

(64)—*Execution of decree—Civ. Pro. Code, ss.* 311 *and* 312—*Application to set aside a sale in execution—Non-joinder of auction-purchaser.*—Where a judgment-debtor applied under s. 311 of the Civ. Pro. Code, to set aside a sale, but omitted, until after the expiration of thirty days from the date of the sale, to join the auction-purchaser as a party—*held* that, the joinder of the auction-purchaser being essential, the application to set aside the sale was barred by limitation. KARAMAT KHAN v. MIR ALI AHMED, **A.W.N. 1891, 121.** [*Appr.*, 15 A. 407.]

(65)—*Warrant of attachment not signed by Judge but by Munsarim—Irregularity—Invalidity of sale—Civ. Pro. Code*, 1859, *s.* 222.—Where a sale of property in execution of a decree, after attachment made under a warrant signed not by the Judge but by the Munsarim of

***Sale*—continued.**

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

the Court, was set aside in favour of a subsequent purchaser and in the suit of the first purchaser against the subsequent purchaser and others for a declaration of his right to have the sale confirmed in his favour, the High Court, on appeal, *held*, with reference to the terms of s. 222 of the Civ. Pro. Code, 1859, that the sale to the plaintiff was rightly set aside, an appeal by the plaintiff to the Judicial Committee was dismissed with costs. RAM DAYAL v. MAHTAB SINGH, **7 A. 506, P.C.** (*On appeal from*, 3 A. 701.)

(66)—*Civ. Pro. Code*, 1882, *ss.* 244 (=*s.* 47), 258 (=*O.*XXI, *r.* 2, *new Code*)—*Sale in execution of decree—Suit to set aside sale on ground of adjustment of decree out of Court—Adjustment not certified—Suit not maintainable.*—S. 258, Civ. Pro. Code, cannot be taken as overriding the clear provisions of s. 244. A separate suit to set aside a sale held in execution of a decree on the ground that the decree had been adjusted out of Court, but not certified in the manner provided by s. 258, Civ. Pro. Code, is barred under s. 244. (3 A. 538, 13 A. 339, *D.*; 9 C. 788. 14 C. 376, *Not F.*; 19 C. 683, 21 C. 437, 15 M. 302, *R.*) The negligence of the judgment-debtor to take steps to have the adjustment certified to the Court under s. 258, Civ. Pro. Code, cannot give the Court a jurisdiction which is clearly barred by the provisions of s. 244. It may be that he may have some other relief against the decree-holder, for instance, by a suit for damages, but he cannot maintain a suit which would have the effect of nullifying a decree regularly obtained in a suit between him and the decree-holder. JAIKARAN BHARTI v RAGHUNATH SINGH, **20 A. 254=A.W.N. 1898, 37.** [*R.*, 13 C.P.L.R. 177, 31 C. 480=8 C.W.N. 395; *D.*, 17 C.P.L. R. 60.]

(67)—*Sale in execution of a mortgage-decree — Judgment-debtor's death before sale — Grounds not vitiating sale—S.* 311, *Civ. Pro. Code*, 1882 —The omission to bring in the representative of a deceased judgment-debtor, on the record does not vitiate the sale, such omission amounting to an irregularity only. (12 A. 440, 19 B. 276, *R.*; 15 M. 399, *Not F.*; 7 C.L.R. 85, *D.*) The absence of a guardian *ad litem* for a minor judgment-debtor stands upon the same footing. The description of an adult judgment-debtor as a minor does not in any way affect the validity of the sale proceeding. NET LALL SAHOO v. SHEIKH KAREEM BUX, **23 C 686.** (21 C. 866, *R*) [*R.*, 3 O.C. 142, 7 O.C. 234, 11 O.C. 159, 30 A. 192=5 A.L.J. 253=A.W.N. 1903, 77.]

(68)—*Sale duly confirmed, validity of—Attachment by a Court without jurisdiction, effect of—Irregularity in the attachment.*—*Held*, that a sale ordered by a Court having jurisdiction and duly confirmed by it is not invalidated by proof that the original attachment was made by a Court not having jurisdiction. The absence of regularly perfected attachment amounts at most to an irregularity, which does not affect the validity of the sale after it has been duly confirmed. ADIL KHAN v. MIRZA MOHAMMAD SADIK ALI KHAN, **13 O.C. 43=5 Ind. Cas. 798.**

(69)—*Civ. Pro. Code*, 1882, *s.* 311—*Execution sale—Disparaging remarks by by-standers—No irregularity.*—Acts done by bidders or by by-standers at a public sale without the knowledge of the Court, or private understandings between intending bidders, cannot amount to an irregularity in conducting the sale such as will render it liable to be set aside under s.311. GUNGA NARAIN GUPTA v. ANNUNDA MOYEE BURROOANEE, **12 C.L.R. 404.** [*F.*, 17 C. 152.]

(70)—*Execution sale—Auction-purchaser intimidating intending purchasers.*— Where a decree-holder applied for avoiding a sale in execution of a decree on the ground that the auction-purchaser had dissuaded or prevented persons from bidding for the property at the sale, *held*, on the facts, that there was no valid ground for setting aside the sale. LALMAN v. RAPU LAL, **A.W.N. 1882, 138.** (A.W.N. 1881, 106, A.W.N. 1882, 39, 7 C. 346, *D.*)

(71)—*Execution against estate of deceased judgment-debtor—Real heir, not made party—Irregularity—Civ. Pro. Code*, 1882, *s.* 311—*Sale setting aside of—Limitation Act*, 1877, *sch.* II, *art.* 12 (*a*)—*Sale without notice to legal representative—Nullity or voidable—Auction-purchaser, liability of—Enquiry into defect or legality of sale—Relief prayed for, inconsistent with previous sale—Necessity for setting aside sale—Suit for setting aside sale and for consequential reliefs—Suit for redemption—Mortgagee purchasing property at auction-sale held under third party's decree—Sale, irregular, effect of—Limitation.*—Where a decree had been made against the judgment-debtor and after his death, application for execution was made against his estate and against a person as heir, who was in fact not the heir, and without notice to the proper heirs the property was sold, *held* that such a sale can only be set aside in the regular way by proceedings under s. 311, Civ. Pro. Code, or by a suit within a year from the date of the confirmation of the sale as provided under art. 12 (*a*), sch. II of the Limitation Act of 1877. (9 B. 86, *D.*) [*Expl. and R.*, 30 C.142=7 C.W.N. 305; *Expl.*, 6 C.L.J. 670; *R.*, 7 C.W.N. 591, 32 C. 193, P.C.=9 C.W.N. 225 =2 A.L.J. 190=32 I.A. 1, 25 A. 214=A.W.N. 1903, 21.] The fact that the Court proceeded with the execution upon notice to a person not the legal representative is an error of judgment, and does not amount to an adjudication without jurisdiction so as to render the sale a nullity. A sale cannot be treated as a nullity

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

merely because it is irregular or illegal. [*F.*, 27 M. 504, 1 S.L.R. 98, U.B.R. 1907, 2nd Qr. Civ.Pro.Code, 311; *R.*, 25 A. 214, F.B.=23 A.W.N. 21, 26 A. 152, 25 A. 347=1903 A.W.N. 361, 26 A. 57, A.W.N. 1904, 110=26 A. 522, 2 C.L.J. 241=9 C.W.N. 1046, F.B., 2 C.L.J. 259=9 C.W.N. 1065=33 C. 352, F.B., 6 C.L.J. 547=12 C.W.N. 590, 11 C.W.N. 1011=6 C.L.J 320=35 C. 61, F.B., 5 C.L.J. 696 F.B.=11 C.W.N. 756=34 C. 811=2 M.L.T. 371; *Expl. & D.*, 2 C.L.J. 394=9 C.W.N. 956; *D.*, 32 C. 296, P.C.=32 I.A. 23=1 C.L.J. 584=9 C.W.N. 201=7 Bom. L.R. 1=2 A.L.J. 71, 5 C.L.J. 686, 5 C.L.J. 385=34 C. 241.] A purchaser at an execution sale, who is a stranger to the suit, is not bound to enquire into its accuracy or to judge of its legality, and is justified in believing that the Court has done all that which the law requires. [*Rel. on*, 5 Bom. L.R. 799=28 B. 125.] A party seeking relief inconsistent with a previous sale must pray to set it aside. [*F.*, 24 A. 467; *R.*, 8 C.W.N. 876.] The one year's limitation prescribed by art. 12 (*a*) of the Act of 1877, is not confined only to suits, which seek no relief other than a declaration that a sale ought to be set aside, but applies also to suits where other relief is sought which can only be granted on annulment of the sale. (13 I.A. 84, *Appl.*; 14 B. 279, *Disappr.*) [*R.*, 5 C.L.J. 696, F.B.=11 C.W.N. 756=34 C. 811=2 M.L.T. 371, 12 M.L.J. 390; *Expl. & D.*, 1 A.L.J. 53; *Expl.*, 38 P.R. 1907=13 P.L.R. 1908; *R.*, 29 C. 36.] Where a mortgagee purchases the mortgaged property at an execution sale held under a money decree of a third person and the sale is liable to be set aside for some irregularity, a suit for redemption of the mortgage is not maintainable before getting the sale cancelled by a suit or proceeding to which the original decree-holder is a party. MALKARJUN *bin* SHIDRAMAPPA PASARE v. NARHARI *bin* SHIVAPPA, **5 C.W.N. 10=2 Bom. L.R. 927=27 I.A. 216=25 B. 337, P.C.=10 M.L.J. 368=7 Sar. 739.** [*Expl. & D.*, 23 A.W.N. 61, 24 A.W.N. 35=1 A.L.J. 53=26 A. 346; *F.*, 31 C. 111=7 C.W.N. 688; *R.*, 30 C. 433, 30 C. 990=7 C.W.N. 864, 32 M. 72=5 M.L.T. 99; *Cited*, 23 P.R. 1902.]

(72)—*Civ. Pro. Code, s.* 313—*Application to set aside sale—Incumbrance in excess of market value.*—An application was made under s. 313 to set aside a Court-sale on the ground that there was a mortgage on the property in excess of its market value. *Held*, that there was no ground for setting aside the sale under s. 313 The fact that the property was fully incumbered was not sufficient to sustain a plea that the person whose property it was had no saleable interest in it under s. 313. There was always the equity of redemption remaining. What the section contemplated was that either the judgment-debtor had no interest at all, or that the interest was not one he could sell. The fact that the property might fetch little or nothing, if sold, did not affect the question. SANT LAL v. RAMJI DAS, **9 A. 167=A.W.N. 1887, 6.** (8 C.L.R. 468, *D.*; 9 C. 506, *R.*) [*R.*, 5 L.B.R. 58.]

(73)—*Execution of decree—Attachment of property in execution of decrees of several Courts—Sale by Court of lower grade, invalidity of—Civ. Pro. Code, s.* 295.—Where immoveable property is attached in execution of the decrees of a District Judge and a District Munsiff subordinate to him, the latter has no jurisdiction to order its sale, and a sale held by him would be invalid and liable to be set aside. AGHORE NATH v. SHAMA SUNDARI, **5 A. 615=A.W.N. 1883 167.** (4 A. 359, *F.*) [*Not F.*, 19 C. 651; *Appr.*, 18 A. 348; *R.*, 22 B. 88, 13 C.P.L.R. 145.]

(74)—*Civ. Pro. Code*, 1882, *s.* 411 (=*O.* XXXIII, *r.* 10, *new Code*) — *Invalidity of sale to recover Court-fees not really due—Suit for possession by prior mortgagee—No suit necessary to set aside sale.*—A sale held for Court-fees wrongly believed to be due to the Crown, while they were not actually so due, is invalid, as the order for such sale is *ultra vires*. In such a case, where a prior usufructuary mortgagee of the property sold brought a suit for recovery of possession, *held* that he was entitled to his claim, even though he did not ask as a relief in the suit that the sale should be set aside. BALWANT RAO v. MUHAMMAD HUSAIN, **15 A. 324=A.W.N. 1883 140.** (12 C. 307, *R.*) [*F.*, 16 A. 5; *R.*, 19 A. 308, 163 P.L.R. 1901, 26 A. 346=A.W.N. 1904, 35=1 A.L.J. 53.]

(75)—*Application to set aside—Civ. Pro. Code*, 1882, *ss.* 244, 311—*Agreement to pay on certain date—Forfeiture—Court of Equity, when to interfere—Contract, essence of—Intention.*—Where an agreement secured is simply one for the payment of money, relief is afforded against forfeiture on the ground that such condition and forfeiture are intended merely as a security for the payment of money. It cannot be affirmed as a general rule that equity will relieve against forfeitures in all cases where compensation can be made. If forfeiture is occasioned by accident, fraud, surprise or ignorance, a Court of Equity will interfere and relieve against forfeiture so caused, but a Court of Equity will refuse to aid a defaulter, if the forfeiture is wilful or is the result of gross negligence. Whether the time of performance fixed by an agreement is of the essence of the contract or not, depends upon the intention of the parties. It must be ascertained whether, in fact, the performance of the contract by one party was meant to depend upon the other party's promise being fulfilled by the day named therefor, or whether a day was named merely in order to secure performance within a reasonable time. If the former is found to have been the intention, no relief can be claimed against forfeiture; if the latter is found to have been the intention, equity will not refuse relief, if the promise required to be performed was performed

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

within a reasonable time. When the parties agreed that, if the judgment-debtors pay a certain sum to the decree-holder within one month, the execution sale shall be set aside: *held*, that the intention of the parties was that performance within the prescribed time was essential. Even if performance within the time had been merely material and not essential, no relief could be granted, unless the delay which occasioned the default was satisfactorily explained and accounted for. Such an agreement is a valid and enforceable agreement. HARAKH SINGH v. SAHEB SINGH, **6 C.L.J. 176.** (29 C. 577, *R.*) [*D.*, 9 C.L.J. 251=36 C. 422=2 Ind. Cas 338.]

(76)—*Debt due on mortgage transaction—Attachment of property—Sale for instalments subsequently due by the same debtor—Second attachment, if necessary.*—Where property which had been already under attachment at the instance of a creditor to enforce part of a debt accrued due in a mortgage transaction at an earlier period, was sold in execution of his decree for instalments subsequently due by the same debtor, *held* that a second order of attachment would be an empty formality and was not necessary to validate the sale. DOSIBAI v. ISHWARDAS JAGJIVANDAS, **15 B. 222, P.C.=18 I.A. 22=6 Sar. 10.**

(77)—*Act* VIII *of* 1859, *s.* 285—*Attachment of immoveables by Court other than that passing decree—Invalidity of sale subsequently following.*—The attachment of the immoveable property in this case was held to vitiate the sale that followed upon it, because it had been effected by a Court other than that by which the decree was passed and *that* before the decree had been sent to it for execution. It has been held that a sale of immoveable property in execution of a decree which property is situated beyond the jurisdiction of the Court making the decree, will not be good unless it has been made in strict observance of the procedure prescribed by s. 285 of Act VIII of 1859, and, in accordance with such rulings the attachment in this case was to be deemed to be insufficient to support the subsequent sale. SHURUTOOLLAH MERDHA v. GOOROO CHURN DASS, **8 W.R. 310.** [*F.*, 9 W.R. 388.]

(78)—*Process of attachment and sale—Distinction between moveable and immoveable property—Simultaneous issue of attachment and sale of immoveable property, mere irregularity not vitiating sale.*—Ss. 235 and 239 of Act VIII of 1859 prescribe the mode in which attachment of real property is to be made; and reading these sections with s. 250, which prescribes that, in the case of moveables, process of attachment and sale may be issued successively or simultaneously, it should be taken that, in regard to landed property, the process of attachment and sale is intended to be successive; yet, if the attachments have been made *bona fide*, and the

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

sale proclamation duly issued with sufficient interval as of 30 days, as required by s. 249, the mere irregularity of the proclamation having issued simultaneously instead of successively, would not be a sufficient ground for cancelling the sale, as no material injury could accrue to the debtor thereby. HUROO SOONDUREE DEBIA v. BROJO GOBIND SHAHA, **4 W.R. Mis. 11.**

(79)—*Act* VIII *of* 1859, *ss.* 235, 259, 285—*Execution of decree in different district—Copy of decree not forwarded—Illegal sale—Objections by third parties.*—Where in execution of a decree against a judgment-debtor's estate in a different district, a prohibitory order under s. 235, Act VIII of 1859, was passed, and no application was made under the provisions of s. 285 and no certificate was forwarded to the Court by which the decree-holder wished the decree to be executed, and subsequently, without further procedure under s. 285 and the sections following it, and without further attachment, the property is sold and a certificate under the provisions of s. 259 is not granted to the purchaser, the sale is illegal, and there is no valid transfer of right, title and interest in the property. S. 256 of Act VIII of 1859 refers to objections by judgment-debtors who must prove, to the satisfaction of the Court, that they have sustained substantial injury by reason of irregularities, before a sale can be set aside. That section does not apply to third parties who have purchased at a sale regularly conducted, and after all the formalities prescribed by the law had been observed by them. LUCHMEEPUT SINGH DOOGUR v. MUKTAKASHEE DEBIA, **9 W.R. 388.** [*Reversed*, 10 B.L R. 214, P.C.=17 W.R. 289=14 M.I.A. 529; *Diss.*, 11 B.H.C. 15; *R.*, 20 C. 418.]

(80)—*Objection to sale proceedings—Allegation of irregularity of notification of sale and attachment—Proof of non-service essential—Misconduct of decree-holder not sufficient ground for setting aside sale.*—Before a sale is confirmed, any party raising objection to the regularity of the sale should be permitted to adduce proof of non-service or insufficient service, and, if the evidence should be considered to be credible, the Court should further enquire whether any material injury was caused to the debtor thereby. The misconduct of the decree-holder, even if true, may be a good cause of action, but cannot be a ground for setting aside the sale, which can only be done summarily if irregularity in the sale proceedings resulting in material injury to the debtor be proved. RETHBUNJUN SINGH v. MITTURJEET SINGH, **4 W.R. Mis. 9.**

(81)—*Execution of decree—Irregularity—Sale—Suit by judgment-debtor to set aside sale—Civ. Pro. Code*, 1859, *s.* 257.—An irregularity in execution proceedings, which did not

***Sale*—continued.**

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

prejudice the judgment-debtor, does not vitiate a sale. Where execution was taken out on an earlier decree in appeal (which was afterwards reversed) and continued even after a final appellate decree was passed, *held*, the irregularity was one which did not prejudice the judgment-debtor. *Held* that a suit by the judgment-debtor to set aside a sale under the above circumstances, on the ground of nullity, was not maintainable with reference to Act VIII of 1859, s. 257. GHAZI v. KADIR BAKSH, **1 A. 212, F.B.**

(82)—*Execution of decree—Sale in execution—Confirmation of sale—Objection that property is not liable to attachment—Civ. Pro. Code, ss.* 278, 311, 312.—An objection that a sale of property in execution of a decree should not be confirmed, but should be set aside, on the ground, that the property was not liable to attachment as the objector was not a party to the decree, is one that cannot be entertained under s. 311, Civ. Pro. Code, especially when raised for the first time in appeal. Such an objection ought to be raised at the time of attachment. HUB LAL v. KANHIA LAL, **7 A. 365=A.W.N. 1885, 52.** [*R.*, 19 B. 276.]

(83)—*Judgment-debtor's property — Lien.*—A decree-holder is not precluded from taking any of his judgment-debtor's property in execution of his decree merely because he had a lien on particular properties. RAJA LALJEE v. SADIT HOSSEIN, **4 N.W.P. 99.**

(84)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 252—*Sale of decree—Subsequent attachment and sale of that decree—Objection by purchaser disallowed—Sale not mere irregularity.*—A sale in execution of a decree transfers to the purchaser nothing more than the rights and interests of the judgment-debtor at the time of the attachment and sale, and s. 252 of the Code (Act VIII of 1859) does not prohibit the enquiry into the extent of those rights or declare the owner of property attached in execution of a decree passed against a third party, incompetent to assert his claim by suit. The sale of moveable property belonging to a third party in execution of decree is not a mere irregularity within the meaning of s. 252 of the Civ. Pro. Code, and the owner of property so sold is entitled to sue for its restoration or for damages. SHAM SUNDER DAS v. RAHEEM BUKSH, **6 N.W.P. 252.**

(85)—*Execution sale—Sale of property not belonging to judgment-debtor—Suit for restoration—Irregularity—Act* VIII *of* 1859, *ss.* 251, 252.—The sale of moveable property belonging to one man, under an execution of a decree against another, is not a mere irregularity within the meaning of s. 252, Act VIII of 1859. As the sale is only of the rights and interests of the debtor, when the sale becomes absolute, it transfers only such rights and interests, and the

***Sale*—continued.**

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

owner is entitled to sue either for the restoration of the property specifically, or for damages. Where the owner asks either, for the property or for damages, it is in the option of the Court to award him either, according to its own view of the justice of the case. MOHANUND HOLDAR v. AKIAL MEHALDAR, **9 W.R. 118.** [*F.*, 14 W.R. 120, 6 N.W.P. 252; *Cons.*, 9 B.H.C. 92; *R.*, 5 L.B.R. 58, F.B.=3 Ind. Cas. 672.]

(86)—*Execution case — Transfer of, from Subordinate Judge's Court to District Court—Jurisdiction—Civ. Pro. Code, Act* VIII *of* 1859, *s.* 6—*Sale of property in portions—Discretion of executing Court—Sale of portion of judgment debtor's property sufficient to satisfy decree—Whole property sold—Irregularity—Substantial injury.*—S. 6, Act VIII of 1859, does not authorize the District Court to remove to itself or to transfer to any other Court proceedings in a suit which have been already commenced and entertained in any Court subordinate to itself. It was held that the District Judge had no jurisdiction to call up an execution case from the file of a Court subordinate to his own Court. [*Appl.*, 15 C. 177; *R.*, 23 M. 314=10 M.L.J. 51=32 C. 875=9 C.W.N. 705.] It is within the discretion of an executing Court to direct the sale of the judgment-debtor's property in portions, even though it had been attached or proclaimed as an entirety. It is damage to a person to have his whole property sold against his will to satisfy the claims of a creditor when the sale of a smaller portion would be sufficient for the purpose. So, where in execution of a decree, the whole of the judgment-debtor's property was ordered to be sold instead of a portion which would be sufficient to satisfy the decretal debt, *held* that the irregularity was one causing substantial injury to the judgment-debtor. MOULVIE ABDOOL HYE v. MACRAE, **23 W.R. 1.**

(87)—*Execution of decree—Decree for sale of mortgaged-property and for costs—Execution for whole amount of decree against other property of judgment-debtor—Suit to set aside sale—Civ. Pro. Code, ss.* 311 *and* 312.—In execution of a decree for the sale of mortgaged-property and for costs, other property of the judgment-debtor was attached and sold. On the objection of the judgment-debtor, it was eventually decided by the High Court that such property was not liable to attachment and sale under the decree. In the meanwhile, however, the property had been sold and the sale confirmed. In a suit by the judgment-debtor, against the purchaser, to set aside the sale on the ground that the property was not saleable under the decree; *held* (*a*) that the decree as to costs was a personal one, and could be executed against the person and other property of the judgment-debtor; (*b*) that the attachment and sale were valid as they were made in respect of the

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

costs as well as of the principal and interest decreed. (*Per Oldfield, J., Mahmood, J., doubting*). *Held, also per Mahmood, J.* (*c*) that such a suit would lie, and was not open to any preliminary objection (B.L.R. Sup. Vol. 911, *F.*); (*d*) that the decision of the High Court, that the property was not saleable in execution of the decree, being one between the judgment-debtor and the decree-holder, and having been subsequent, not only to the sale, but to the confirmation of it, cannot be used against the purchaser, especially as it did not decide anything as to the nature of the decree as to costs; (*e*) that as the attachment was in respect of the whole amount of the decree, and not for costs only, and as there were no separate proceedings in regard to the personal decree against the judgment-debtor, it was doubtful if the attachment, the notification of sale, and the sale itself, were valid; but that, in any case, as these objections were objections cognizable under s. 312 of the Civ. Pro. Code, to the confirmation of sale, a suit to set aside the sale on such grounds alone, is prohibited by the last part of s. 312. RAGHUBAR DAYAL v. ILAHI BAKHSH, **7 A. 450 = A.W.N. 1885, 65.** [*F.*, 10 A. 127.]

(88)— *Decree for possession— Execution—Demarcation by Ameen— Objection—Regular suit.*—In execution of a decree for possession of lands, the Court executing the decree deputed an Ameen to demarcate the lands decreed, and make over possession of the same to the plaintiff. The Ameen accordingly did so, and a year after that the defendant objected that in execution of the decree lands in excess of the quantity actually decreed have been made over to the plaintiff, and that he was ignorant of the demarcation made by the Ameen. *Held*, that a separate suit would not lie to rectify an error caused by an executing Court, and that the defendant must in execution proceedings be given an opportunity to substantiate his objections, and to show that the Ameen's proceedings were held in his absence, and without notice to him. THE COLLECTOR OF MONGHYR v. BHOBANI PERSHAD, **25 W.R. 183.**

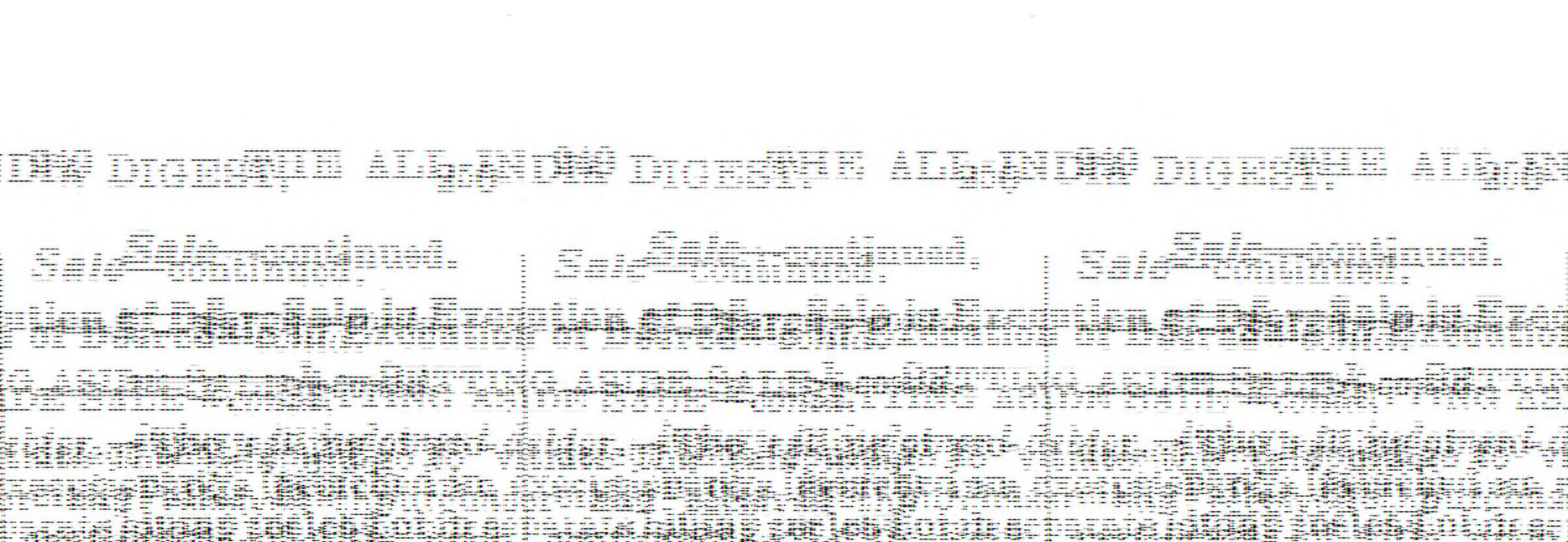
(89)—*Sale in execution—Suit by judgment-debtor to set aside—Burden on judgment-debtor of proving irregularity—Omission to give notice, whether vitiates sale.*—Plaintiff, the present respondent, sued to set aside the sale of certain land at which defendant-appellant had purchased it. Plaintiff obtained a decree in both the lower Courts. On second appeal it was urged that the plaintiff, who alleged that there had been an irregularity, was bound to prove it, whereas the Principal Sudder Ameen had thrown the *onus* on the defendant, and that supposing an irregularity proved, it was not of a nature to cause any loss or damage to the judgment-debtor, and could not therefore justify a reversal of the sale. Both points were decided by the High Court in favour of the appellants. Where it is alleged that the necessary notices have not been affixed previous to the sale, the *onus* of proving the default in affixing the notices lies upon the judgment-debtor, and not upon the auction-purchaser. Also though under certain circumstances, the non-issue of a notice may be an irregularity, still it is not one that can go to vitiate a *sale*. MUSST. NUFUSA v. SYUD MAHOMED AKBAR GAZEE, **2 W.R. 74.**

(90)—*Striking off an execution petition.*—After the striking off of an execution case, the omission to re-issue the necessary processes required by law, is not a material irregularity. BISHEN DYAL SINGH v. SREEMUTTY KHUDEEMUN, **W.R. 1864, 359.**

(91)—*Sale—Adjournment of properly notified sale—Civ. Pro. Code*, 1859, *s.* 256—*Notice of sale after decree-holder's death—Irregularity—Legality of sale.*— An adjournment may be made of a properly notified sale with the consent of the parties. A sale could not be set aside under s. 256, Act VIII of 1859, on the ground that the notice of sale was issued at a time when the original decree-holder was dead and before any person had come in to get himself registered as decree-holder, unless it was clearly proved that the judgment-debtor sustained injury by reason of the irregularity. GOBIND CHUNDER AOOCH v. BAMUN DOSS MOOKERJEE, **22 W.R. 481.**

(92)—*Execution sale—Notice of sale—Uncertainty — Adjournment of sale — Discretion of auctioneer—Notice of higher bid to auctioneer—Reading notice o fliens on estates sold—Practice.*—The inam village of Chandanpuri was sold, by order of Court, in execution of a decree, by public auction. The notice of sale stated that the sale would begin at either place Maligam or Chandanpuri, but would be completed at Maligam. *Held* that the notification was not likely to cause any injury to the judgment-debtors and that the uncertainty in the notice of sale was not such an irregularity as to entitle them to have the sale set aside. There is no rule which compels an auctioneer to close the auction on the first day. It must be left to his judgment to do so when he thinks fit, and much in such cases will depend upon the nature of the property and the circumstances of the sale. There is no obligation on the part of an auctioneer to adjourn the same simply because a person sent him notice to say that he was ready to make a higher bid. The mere fact of Karkuns reading aloud notices of liens on property about to be sold by auction is not such a material irregularity as to reduce the value of the property and thereby vitiate the sale. GOVIND HARI VALEKAR v. BANK OF INDIA; BANK OF INDIA v. RAGO NARAYAN, **4 B.H.C. A.C. 164.**

(93)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 256—*Sale of property—Irregularity—Substantial*



Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

———*k.*—SETTING ASIDE SALE—*contd.*

not be sold on that day or for several days after, and it would be unreasonable to expect them to wait so long even if they then understood that the sale was postponed. This would be an irregularity which would vitiate the sale of the property had it in fact, been sold at an undervalue for want of bidders. BYKUNT NATH SANDYAL v. JUGGUT MOHUN SHAHA, **24 W.R. 240.**

(99) —*Execution sale—Jurisdiction—Setting aside of—Irregularity—Notice.*—Where an execution sale of an estate in the towjee of Nuddea was confirmed, fifteen mouzahs of which were in the 24 Pergunnahs, the question as to how far those mouzahs were conveyed to, or a valid title to them was created in favour of, the purchaser, was held to be one which must be raised between him and the judgment-debtor in a place other than the High Court, and that the High Court should not set aside the sale upon this ground in exercise of their powers of superintendence. It is not because an estate has been sold at auction for less than its market value that the judgment-debtor is entitled to have the sale set aside, and the property put up for sale again. He must show that such inadequate price has been directly and presumably the result of the irregularity in the sale of which he complains. Where the Sudder Kutchery of the Zemindar was beyond the District Court's jurisdiction, *held* that the publication of the notice of sale at one of the inferior Cutcheries was legal and sufficient. HUBEEBOOL HOSSEIN v. MR. W.O. ALLENDER, MANAGER ON BEHALF OF THE LAND MORTGAGE BANK, **14 W.R. 44.**

(100)—*Court-sale—Fraud*—Benami *purchase—Notice.*—Where immoveable property of considerable value was sold for Rs. 11 in execution of a decree for Rs. 17-11-0, and purchased by a relative of the decree-holder *benami* for him and without notice of sale to the judgment-debtor: *Held*, that all these circumstances taken together amounted to a fraudulent dealing with the property, and the sale was consequently set aside on the judgment-debtor paying the decree amount. Where the judgment-debtor does not reside on the land attached, but lives in a different district, the affixing of the notice of attachment in a not very conspicuous part of the land is not sufficient to satisfy the requirements of justice. GOBIND CHUNDER MOOKERJEE v. RAM MOHUN CHATTERJEE, **23 W.R. 364.**

(101)—*Beng. Reg.* XLV *of* 1793, *s.* 12—*Irregularity in failure to comply with requirements of section—Beng. Reg.* VII *of* 1825, *s.* 5—*Objection to irregularity when to be raised.*—A suit was brought in 1852 to set aside an execution-sale made in 1841, on the ground of irregularity in not complying with the provisions of Ben. Reg. XLV of 1793, s. 12, for the due publication of the sale. A summary suit,

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

———*k.*—SETTING ASIDE SALE—*contd.*

under Ben. Reg. VII of 1825, s. 5, had been brought shortly after the date of the sale by the judgment-debtor, to set it aside, on the ground of inadequacy of the purchase-money, which suit was dismissed. There was no allegation in that suit of any irregularity in the publication of sale. It appeared, from the evidence in the suit of 1852, that the notice of sale was affixed at the dwelling-house of the judgment-debtor, the place where his rents were paid but which was not part of the estate sold. It was not pleaded, in the suit of 1852, that there was a town or village, where the notification could be fixed as required by s. 12, Ben. Reg. XLV of 1793. The *Sudder Dewanni* Court held that there had been an irregularity in the publication of the notice of sale, as it was not made within the ambit of the estate sold, and set the sale aside on that ground. Upon appeal, *held* by the Judicial Committee, reversing such decree, first, that, as it did not appear that there was any town or village within the *pergunnah* at which notification required by the provisions of Ben. Reg. XLV of 1793, s. 12, could be affixed, there had been no irregularity in posting the notice at the house of the judgment-debtor, so as to vitiate the sale; and, secondly, that, even if there had been an informality in that respect, it ought to have been objected to in the summary suit brought in 1841, and could not be opened eleven years afterwards. LAMB v. BEJOY KISHEN DASS, **8 M.I.A. 427=1 Sar. 803.**

(102)—*Execution sale, setting aside of—Irregularity and injury, necessary connection between—Civ. Pro. Code*, 1882, *s.* 311.—In the absence of evidence to connect an injury with an irregularity (under s. 311 of the Civ. Pro. Code), the one must, to justify the setting aside of an execution sale, at least flow reasonably and naturally from the other and be attributable to it alone. TRIPURA SUNDARI v. DURGA CHURN PAL, **11 C. 74.** [*R.*, 11 C. 658, 11 A. 333=9 A.W.N. 115.]

(103)—*Setting aside sale in execution of decree—Material irregularities—No substantial injury.*—Where there were proved to have been material irregularities in an execution-sale, an application to set aside the sale was refused, as it appeared that the applicant had been present at the sale and purchased the property himself and that no substantial injury had resulted from the irregularities. BANDY ALI v. MADHUB CHUNDER NAG, **8 C. 932.** [*R.*, 5 M.L.J. 70, 11 A. 333=9 A.W.N. 115.]

(104)—*Civ. Pro. Code*, 1877, *ss.* 290, 311—*Proclamation published less than* 30 *days before sale—Material irregularity—Sale, setting aside.*—Publication of a sale proclamation less than 30 days before the date of sale is a material irregularity, on account of which the sale may be set aside, provided that substantial damage

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

has been occasioned by reason of that irregularity. ABDUL NOSSIA v. DOOLAL DAS, **11 C.L.R. 303.** (7 C. 39=8 C.L.R. 369, *F.*)

(105)—*Execution of decree—Sale within thirty days of fixing up proclamation—Material irregularity—Civ. Pro. Code*, ss. 290, 311.—The infringement of the rule in s. 290 of the Civ. Pro. Code, is an illegality vitiating a sale in execution of a decree, and is something more than a material irregularity in publishing and conducting a sale, to which s. 311 refers. BAKHSHI NAND KISHORE v. MALAK CHAND, **7 A. 289=A.W.N. 1885, 42.** [*Not F.*, 14 M. 227, *F.*, 14 C. 1, 9; A. 511; *Cons.*, 5 M.L.J. 70; *R.*, 10 A. 506, 11 A. 333, 12 A. 440, F.B., 12 A. 510, F.B., 21 A. 196, P.C. U.B.R. 1907, 2nd Qr., C.P.C. p. 9=14 Bur. L.R. 96; *D.*, 18 C. 496.]

(106)—*Civ. Pro. Code*, 1882, *ss.* 290, 311 (= *O.* XXI, *rr.* 68, 90)—*Execution of decree—Sale of immoveable property within* 30 *days of proclamation—Not merely irregular but also illegal—Substantial injury need not be proved.—Per Edge, C.J.*—The sale of immoveable property in execution of a decree, which takes place before the expiry of thirty days, without the consent of the judgment-debtor, is an illegality and amounts to more than an irregularity in the conduct of the sale, and there is no necessity for the judgment-debtor to prove substantial injury for setting aside the sale as void. *Per Brodhurst, J. contra.* GANGA PRASAD v. JAG LAL RAI, **11 A. 333=A.W.N. 1889, 115.** (10 I.A. 25, 7 C. 34, 7 C. 466, 11 C. 74, 7 C. 730, 8 C. 932, A.W.N. 1885, 304, 9 A. 511, 7 A. 289, *R.*) [*Not F.*, 14 M. 227, 21 A. 311=19 A.W.N. 84; *R.*, 12 A. 96, 12 A. 440, F.B.=10 A.W.N. 103, 12 A. 510, F.B., 5 C.L.J. 687, 5 M.L.J. 70, 18 A. 37, 21 A. 140, 29 A. 196, P.C.; *D.*, 18 C. 422.]

(107)—*Execution sale—Material irregularity—Inadequacy of price—Misleading of bidders.*—Where there is an allegation that a material irregularity in the conduct of a sale in execution of a decree took place, by reason of the said sale having been held two hours earlier than that announced in the notice, and that in consequence, the judgment-debtor was seriously prejudiced as his property was sold for an inadequate price; it is the bounden duty of the Court to take evidence upon that point, and after considering the whole case, to determine whether, in fact, bidders had been prevented from attending and, consequently, an irregularity of a material kind had occurred; and, if it were established upon that evidence, that the irregular departure from the terms of the notice had misled purchasers, and also that the price was inadequate, the Court ought to set aside the sale. KHODEJA BIBEE v. RAM NARAIN DAN, **12 W.R. 511.**

(108)—*Act* VIII *of* 1859, *s.* 256—*Change in sale-programme—Irregularity.*—Three estates

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

which had been advertised to be sold in a certain order in execution of a decree were sold out of that order as per lot bundee without the consent of the judgment-debtor. *Held* that the change in the sale-programme under the circumstances without notice to intending parties and without the express consent of the judgment-debtor was a substantial irregularity in the conduct of the sale under s. 256 of the Civ. Pro. Code, and that the sale in consequence be set aside. POKHRAJ SINGH v. GOSSAIN MUNRAJ POOREE, **12 W.R. 281.**

(109)—*Execution sale—Sale not held on day originally fixed—Notice—Irregularity—Injury to judgment-debtor.*—Where the property of a judgment-debtor is sold in execution of a decree against him without further notice on a date subsequent to that originally fixed therefor, and especially when the decree-holder is the purchaser for a very inadequate price, *held* that the judgment-debtor was entitled to prove that he had suffered substantial injury by such sale. KISHEN PROSUNNO MOJOOMDAR v. NURDUMA DOSSEE, **17 W.R. 339.**

(110)—*Execution sale—Proclamation, time fixed in—Postponement—Reasons—Substantial injury.*—It is the duty of the Courts to hold execution sales, which have been advertised, on the day fixed therefor by the proclamation, as far as possible, and not to postpone them except for good reasons. In cases of postponement, due notice should be given to all parties concerned. A postponement of sale in execution of a decree from the 25th to the 26th could not be complained of by a judgment-debtor, unless he can prove that he has suffered substantially thereby. SREEMUTTY ASMUTOONISSA BIBEE v. SREEMUTTY KHUDEMOONISSA BIBEE, **17 W.R. 278.**

(111)—*Civ. Pro. Code (Act* VIII *of* 1859), *s.* 243 — *Auction-sale — Postponement — Competency of Court.*—The property of a judgment-debtor was put up for sale by public auction. The bid of the decree-holder was the highest. The lower Court postponed the sale on account of the representation of the judgment-debtor who hoped to obtain a larger price by private sale than was offered at auction. *Held* that the lower Court's proceedings were irregular and objectionable and that it was not justified in postponing the sale, as there was no reasonable ground to believe that the amount of the judgment-debt would thus have been raised. BABOO LUCHMEE NARAIN v. BABOO BHYROO PERSHAD, **1 Agra Mis. App. 11.**

(112)—*Execution sale — Postponement — Inadequacy of price—Irregularity.*—Where an execution-sale was conducted, as far as possible, on the day fixed and was then openly and publicly put off to the next day, when, there being no higher bid, it was concluded at the prices bid on the first day, and the inadequacy of price (objected to by the judgment-debtor) was

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

due to several claims against the right and title of the judgment-debtor, to the property sold under the decree, *held* that there had been no irregularity in the conduct of the sale which could prejudice the judgment-debtor, and that, even if there were any, the judgment-debtor was benefited by it. NUDDEA KISHORE DOSS v. BUNGSHEE MOHUN DOSS, **17 W.R. 210.**

(113)—*Sale of land in execution of decree—Postponement of sale, Collector's application for—Jurisdiction of Zillah Judge—Cases pending in lower Court.*—A Zillah Judge had no jurisdiction to order a Subordinate Judge, in a case pending before him, to postpone the sale. Where an application by a Collector (made to a Subordinate Judge through a Zillah Judge) for postponement of sale did not contain reasons required under s. 244, Civ. Pro. Code, and did not represent that satisfaction of the decree might be made within a reasonable period by a temporary alienation of the land ordered to be sold, postponement of sale should not be granted. JAISHEE RAM v. MUSSAMUT BIJAI KOOER, **5 N.W.P. 177.**

(114)—*Execution-sale, setting aside, equitable grounds for.*—Where an execution-sale took place, notwithstanding a consent, by the decree-holder, to a petition by the judgment-debtor for postponement, which, however, was, by mistake, presented to and filed in a wrong Court, *held*, the judgment-debtor was entitled to a decree, in a suit brought to have the sale set aside, no title having passed thereby. GANGA PERSHAD SAHU v. GOPAL SINGH, **11 C. 136, P.C.=11 I A. 234=4 Sar. 572.** [*R.*, 17 C. 769, F.B., 13 C.W.N. 710.]

(115)—*Act* VIII *of* 1859, *s.* 257—*Order postponing sale—Sale taking place before communication of order—Irregularity.*—A sale which took place before the order postponing it reached the officer conducting it, can be set aside on the ground of irregularity, and the order setting it aside is final under s. 257, Act VIII of 1859. MAIJHA SINGH v. JHOW LAL, **6 N.W.P. 354.** [*D.*, 1 C.W.N. 226.]

(116)—*Order postponing sale—Notification—Irregularity.*—When the High Court had passed an order postponing a sale and such order arrived at the Collector's office a day after the sale, *held* that the notification of the sale was irregular as the order postponing it invalidated the notification of sale. NONIDH SINGH v. MUSSUMAT SOUGHT KOOER, **4 N.W.P. 135.** [*Appr.*, 6 N.W.P. 354; *R.*, 3 A. 424; *Cons.*, 1 C.W.N. 226.]

(117)—*Sale in execution of decree—Civ. Pro. Code*, 1877, *ss.* 311 *and* 312—*Review of order.*—Where, owing to an order for postponement of an execution-sale not being communicated in time to the officer conducting it, such sale is effected, and is also confirmed by the Court, such Court does not act improperly or *ultra vires* in reviewing the order of confirmation and setting aside the sale as illegal. For, the order for sale having been withdrawn, the sale was made without authority. MIAN JAN v. MAN SINGH, **2 A. 686.** [*D.*, 1 C.W.N. 226.]

(118)—*Civ. Pro. Code*, 1882, *s.* 311 (=*O.* XXI, *r.* 90, *new Code*)—*Execution of decree—Postponement of sale—Order not reaching the conducting officer—Sale illegal and void and not merely irregular—Proof of substantial loss unnecessary.*—The effect of an order postponing the sale in execution of a decree, is to deprive the conducting officer of all legal authority to hold it on the date previously fixed; and his not being aware of the order is not material. Such defect in the sale amounts to more than an irregularity in the conduct of the sale, and there is no necessity to prove substantial injury to the judgment-debtor for setting aside the sale as void. SANT LAL v. UMRAO-UN-NISSA, **12 A. 96=A.W.N. 1889, 201.** (3 A. 701, 4 A. 382, 11 A. 333, *R.*) [*F.*, 9 O.C. 289; *R.*, 5 M.L.J. 70; *D.*, 21 A. 140.]

(119)—*Act* VIII *of* 1859, *s.* 243—*Sale by Collector—Potsponement — Fresh proclamation.*—A sale of land paying revenue to Government need not be held by the Collector under s. 248, Act VIII of 1859, unless the Government shall so direct. A proclamation of thirty days is necessary when the property is first advertised for sale, not when the sale is postponed for the convenience of the debtor, and s. 255 relates to re-sale and not to a postponed sale. BUDREE NATH BHUTT v. RAJAH CHUNDER SEKHUR MAN SINGH, **1 W.R. Mis. 3.**

(120)—*Execution—Issue of sale proclamation—Postponement of sale—Irregularity.*—Where, after the issue of sale proclamation in execution of a decree, the judgment-debtor obtained a postponement of the sale for one month from the date fixed for sale, agreeing not to object to the validity of the sale, if it should eventually be held on the postponed date, on the ground of non-issue of fresh sale proclamation *held* that the judgment-debtor was bound by his undertaking. NOORUL HOSSEIN v. MUSST. OMATOOL FATIMA, **25 W.R. 34.** [*Rel. on*, 2 C.L.J. 584; *R.*, 6 C.L.J. 62=11 C. W. N. 848; *D.*, 14 C.L.J. 346=11 Ind. Cas. 438.]

(121)—*Postponement of sale in execution—Necessity of fresh proclamation and notice.*—Where a sale in execution has to be postponed, a fresh proclamation and fresh notice would have to be issued. Want of notice is a very material irregularity, for it almost necessarily injures the sale. Further, in the present case, the price actually realized was such as to lead to the impression that substantial injury had been caused. SHOSHEE MOOKHEE BURMONYA v. DWARKANATH BISWAS, **6 W.R. Mis. 84.** [*D.*, 22 W.R. 481, 23 W.R. 256, 25 W.R. 34.]

(122)—*Indefinite postponement of date of sale in execution—Necessity of fresh proclamation*

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

giving notice of time and place of sale—Act VIII *of* 1859, *s.* 249—*Service of notice proof of by other documentary evidence—Receipts of chowkidhar and reports of Nazir not sufficient evidence of service.*—Where a sale fixed for a certain day is, for some reason, postponed indefinitely, it is needful, in compliance with the spirit, if not, with the wording of the law contained in s. 249, Act VIII of 1859, and for the information of intending purchasers, to issue a fresh proclamation fixing the time and place of the sale. Unless this be done, material injury might ensue to the judgment-debtor. The old proclamation becomes inoperative where the time fixed for the sale has passed by, unless the sale has been postponed by order from date to date or to some other particular date, and consequently, in cases of indefinite postponement of sale, the law requires the issue of a proclamation fixing the fresh date for the taking place of the sale. [*Appr.*, 17 W.R. 339; *R.*, 13 W.R. 209, 25 W R. 328; 3 C. 542=1 C. L.R. 349; 7 C. 34=8 C.L.R. 369; *D.*, 22 W.R. 481, 23 W.R. 256, 25 W.R. 34.] In this case, the High Court expressed disapproval of the practice in the lower appellate Courts, which, instead of requiring legal evidence to prove service of notices of appeal and the like, frequently take the returns of the Nazir and the receipts of Chowkeedarees without obliging the Nazir and the Chowkeedars to pledge themselves on oath or affirmation to the facts certified by them. In the case of a proclamation, the Court should not place implicit reliance on the Nazir's return or the Chowkeedar's receipt, but the fact of the proclamation having been made, should, when disputed, be proved on oath or affirmation like any other fact. OKHOY CHUNDER DUTT v. ERSKINE AND CO., **3 W.R. Mis. 11.** [*F.*, 10 W.R. 3; *R.*, 9 W.R. 530, 11 B.H.C. 46, 7 C. 34=8 C.L.R. 369.]

(123) — *Execution sale — Postponement — Notice—Irregularity.*—An execution sale was duly notified to take place on the 8th. But, owing to some cause, an order for the postponement of the sale to the 9th was made in open Court on that day. *Held* that that was a sufficient notification of the sale being held on the 9th; the operation of the notice was, in fact, continued and it was good for sale on the 9th. The persons who came to bid at the sale on the 8th would have had the means of knowing that the sale was postponed. ROY GOWREE NATH SAHOY v. SHAH FUKEER CHAND, **18 W.R. 347.** [*D.*, 5 C. 259.]

(124)—*Sale, postponement of, without fresh proclamation or notification, illegal as contravening, s.* 249 *of Act* VIII *of* 1859—*Presumption of injury to owner.*—Where a sale had been fixed for the 20th of November but was delayed until the 22nd without any order of postponement or any fresh proclamation of the day of sale, a *prima facie* case of injury to the owner

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

of the property must be taken to have been made out as bidders, who would have been present on the 20th, might not have been so on the 22nd. The lower Court should have therefore allowed the appellants to prove the injury sustained by them and should have fairly tried the issue whether they had sustained substantial injury by the irregularity of the officer, who had certainly acted in contravention of the provisions of s. 249 in having postponed the sale without fresh proclamation of the fact and date of the sale. SANWUL SINGH v. MAKHUN PANDEY, **2 N.W.P. 143.**

(125)—*Execution pending appeal — Sale — Stay of execution—Proclamation—Irregularity.*—Pending an appeal by one of the judgment-debtors against a mortgage decree, the decree was executed and the property was advertised for sale. Subsequently, the appellant obtained an order for stay of the execution so far as he was concerned. The sale, however, took place without any fresh proclamation. *Held*, that the sale was irregular and must be set aside. The lower Court ought to have issued a fresh proclamation and to have made inquiries as to the exact share held by the judgment-debtor who did not appeal against the decree, so as to enter it in the proclamation. MOHINY MOHUN DASS CHOWDHRY v. BHOOBUNJOY SHAH, **6 C.L.R. 237.**

(126)—*Court-sale — Irregularity — Postponement of sale.*—Where a sale in execution of a decree did not take place on the day fixed in the notice of sale proclamation, and the decree-holder himself purchased the property for a very low price in consequence of the indefinite postponement. *Held* that the sale ought to be set aside, as the judgment-debtor had been substantially injured by the irregularity in the procedure of the Court. JHOOMUCK CHOWDHRY v. RAJAH RADHA PERSHAD SINGH, **25 W.R. 328.**

(127)—*S.* 291, *Civ. Pro. Code—Execution sale—Application to set aside sale.*—Whereas the doing of a thing which is prohibited by law is an illegality which renders the thing done null and void, the omission to do something which is prescribed, may be only an irregularity. The omission to issue a fresh proclamation of sale, under s. 291, Civ. Pro. Code, amounted only to an irregularity and no substantial injury would be caused thereby. Such an omission did not vitiate a sale held in execution of a decree. BAGUL CHUNDER MOOKERJEE v. RAMESHUR MUNDUL, **18 C. 496.** (12 A. 510, 11 C. 653, *F.*) [*F.*, 96 P.L.R. 1902.]

(128)—*Execution-sale—Adjournment—Fresh proclamation—Civ. Pro. Code, Act* VIII *of* 1859, *s.* 249.—Where, at the instance of a judgment-debtor, an execution sale is adjourned to the following month, the judgment-debtor consenting not to raise any objection to any irregularities affecting the sale, and the sale

Sale—continued.

—5.—**Sale in Execution of Decree**—*contd.*

———*k.*—SETTING ASIDE SALE—*contd.*

took place as agreed upon, and an *istahar* is also proclaimed in a public place, *held* that it was not open to the judgment-debtor to object to the sale on the ground of a fresh proclamation not having been issued, such proclamation not having been contemplated by him at the time of his application for postponement. TEKAIT HET NARAIN SINGH v. GOSSAIN LUCHMEE NARAIN POOREE, **23 W. R. 256.**

(129)—*Sale in execution on holiday, illegality of—Holidays other than fixed holidays.*—A sale of property in execution is illegal when made on a holiday, and if, as in the present case, the Court was closed by order of the High Court on the date of the sale of the property, that day must, for the purpose, be considered as much a holiday as any other fixed holiday and the sale would be liable to be set aside. HARO JEMADAR v. JADUB CHUNDER HOLDAR, **3 W. R. Mis. 24.**

(130)—*Sale in execution on a holiday—Civ. Pro. Code*, 1877, *s.* 311.—The sale of immoveble property by an Amin of the Court on a close holiday, is not illegal, nor is it an irregularity or illegality in publishing or conducting the sale, such as would vitiate it. BISRAM MAHTON v. SAHIB-UN-NISSA, **3 A. 333.** [*F.*, 2 A.W.N. 169; *R.*, 9 A. 366.]

(131)—*Execution sale—Purchase by decree-holder without permission—Effect.*—The fact that the decree-holder bid and purchased at an execution without the leave of the Court does not *ipso facto* invalidate the sale. *In the Matter of* VEERAPAH CHETTY AND AGA SYUD ABDUL HOSSEIN, **6 B. L. R. App. 37=14 W. R. 405.**

(132)—*Execution sale—Decree-holder bidding without Court's permission—Substantial injury, necessity for.*—Under the terms of the third paragraph of ss. 294 of the Civ. Pro. Code, it is discretionary with the Court of execution to set aside an execution sale, wherein the decree-holder has purchased without the previous permission of the Court. Though such a matter is an irregularity in the conduct of the sale, the Courts will, before interfering with such a sale, consider whether any substantial injury has resulted to the judgment-debtor by reason of it. MATHURA DAS v. NATHUNI LALL MAHTA, **11 C. 731.** [*R.*, 21 C. 554; *Appl.*, 32 M. 242=5 M.L.T. 248.]

(133)—*Auction sale—Leave to bid—Decree-holder joint in family with manager defendant—Decree holder permitted to bid, duty of—Setting aside, ground for.*—A decree-holder, joint in family with the manager of an infant defendant, cannot be allowed to purchase the defendant's property sold in execution of the decree, as such a purchaser would be for the benefit of the family of which the manager is one of the members; and it would, in fact, amount to a purchase by an agent of his principal's property.

Sale—continued.

—5.—**Sale in Execution of Decree**—*contd.*

———*k.*—SETTING ASIDE SALE—*contd.*

When liberty is given to a decree-holder to bid at the sale of the judgment-debtor's property, he is bound to exercise the most scrupulous fairness in purchasing that property; and if he or his agent dissuades others from purchasing at the sale, that of itself is a sufficient ground why the purchase should be set aside. WOOPENDRO NATH SIRCAR v. BROJENDRO NATH MUNDUL, **7 C. 346=9 C.L.R. 263.** [*Commented on*, 23 M. 227, P.C.; *D.*, 17 C. 152, 36 C. 226=13 C.W.N. 18=9 C.L.J. 244=4 M.L.T. 421.]

(134)—*Civ. Pro. Code, s.* 311—*Setting aside sale on ground of material irregularity—Non-disclosure amounting to fraud.*—When, in execution of a mortgage-decree, the decree-holder obtains leave to bid and purchases the mortgaged property, his omission to disclose to the Court an agreement by which he promises to convey the property to a third person on certain terms, provided the latter dissuaded others from bidding at the sale, amounts to a fraud on the Court entitling the judgment-debtor, especially when he is a minor, to say that in point of law no leave to bid was granted, and that the withholding of information is no less a ground for cancelling a sale than actual misrepresentation on the part of the applicant who becomes the purchaser, and that therefore, the sale must be set aside. JAYINILABDIN ROWTHAN v. VIJAYA RAGHUNADHA AYYARAPPA MAIKAN GOPALAR, **19 M. 315.** [*F.*, 36 C. 226=13 C.W.N. 18=4 M.L.T. 421=9 C.L.J. 244; *R.*, 8 C.W.N. 910=31 C. 715; 1 C.L.J. 85]

(135)—*Deposit of purchase-money.*—In cases of sales in execution of a decree, when the sale of any lot is completed, the purchaser should then and there be required to make the deposit prescribed by s. 253 Act VIII of 1859 and, failing to do so, the lot should at once be put up to sale at the risk of the first purchaser; and the decree-holder, if the party to whom the lot is knocked down is equally bound to make the prescribed deposit as any other auction-purchaser. CHULKOO DUTT JHA v. RAJA LEELANUND SINGH, **W.R. 1864, Mis. 30.**

(136)—*Execution of decree—Sale—Purchase by decree-holder—Set-off.*—Where the decree-holder is himself the purchaser at a sale in execution of his decree, there is no reason why he should not, instead of paying the purchase-money in cash, give receipts for the amount due to him under his decree. KHELLAT CHUNDER GHOSE v. KESHUB CHUNDER PAUL CHOWDHRY, **16 W.R. 46.**

(137)—*Act* VIII *of* 1859, *s.* 254—*Sale in execution—Payment of purchase-money, order passed by Court regarding, no appeal lies from—Default under s.* 254, *not an irregularity under s.* 256.—On this special appeal, it was urged that no appeal could lie from an order passed by the

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

set aside at the instance of the judgment-debtor. KHODEJA BIBEE v. MOONSHEE JOHAD ROHEEM, **14 W.R. 320.**

(144)—*Civ. Pro. Code*, 1882, *ss.* 287, 311—*Misstatements as to value—Material irregularity.*—Misstatement of the value of the property calculated to mislead possible bidders, made by a Court in a sale proclamation following the affidavit of the decree-holder, constituted such a "material irregularity in publishing and conducting" the sale as to bring the case within the special remedy provided by s. 311. SAADATMAND KHAN v. PHUL KUAR, **20 A. 412, P.C. = 25 I.A. 146 = 2 C.W.N. 550 = 7 Sar. 380.** [*F.*, 23 M. 568; 6 C.W.N. 836, 30 C. 1; *R.*, 6 C.W.N. 48, 8 C.W.N. 257, 6 O.C. 61, 32 C. 542 = 9 C.W.N. 487, 132 P.R. 1906 = 11 P.L R. 1907; *D.*, 26 C. 324, 31 C. 922 = 8 C.W.N. 264, 1 Ind. Cas. 246.]

(145)—*Auction sale—Application by judgment-debtor to set aside sale—Sale considerably below proper value—Paucity of bidders.*—The mere fact that an auction sale was made at a price considerably below the value of the property nor that but few persons attended the sale as bidders, are not proofs of such irregularity as could set it aside, if there had been no irregularity in advertising the sale, or in conducting it. RAGHOONATH SINGH v. TOODAY SINGH, **5 N.W.P. 19.**

(146)—*Execution-sale—Postponement at request of judgment-debtor—Fresh proclamation if necessary—Inadequacy of price—Sale if affected—Objections to—Disallowance of order confirming sale—Duty of Court—Civ. Pro. Code*, 1859, *ss.* 256 257, 259—*Objections to sale overruled—Reversal of sale on the same objections—Validity.*—Where a sale in execution of a decree is postponed for short periods at the request of the judgment-debtor in order to enable him to raise the money due under the decree, and on the distinct understanding that the attachment and proclamation were to subsist and not to be renewed, *held* that no fresh proclamation is necessary. Inadequacy of price cannot affect the regularity of sale-proceedings. Where objections to an execution sale on the ground of material irregularity in publishing or conducting it are disallowed, it is the duty of the executing Court to pass orders confirming the sale which has become absolute and to grant a certificate to the purchaser under s. 259, Act VIII of 1859. It is not competent to a Court to reverse an execution sale on the same objections which had been once overruled, and which were not material and did not substantially injure the judgment-debtor. *In the matter of* BABOO HURDEO NARAIN SAHOO v. GIRDHAREE SINGH, **19 W.R. 227.**

(147)—*Execution sale—Setting aside of sale—Material irregularity—Inadequacy of price.*—Mere inadequacy of price, unless it be

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

shown that substantial injury has been occasioned to the judgment-debtor by material irregularity in publishing or conducting the sale, would not alone be a sufficient ground for reversal of a Court-sale. NOORAL HOSSEIN v. RAM COOMAR SAHEE, **25 W.R. 326.**

(148)—*Civ. Pro. Code, Act* XIV *of* 1882, *ss.* 311, 291—*Material irregularity—Substantial loss—Inference—Adjournment of sale—Procedure.*—The omission to have a sale tom-tomed is a material irregularity. Where a material irregularity in the conduct of a sale is proved and it is also proved that the price realized is much below the true value, it may be ordinarily inferred that the low price was a consequence of the irregularity, even if the manner in which the irregularity caused the low price be not strictly proved. [*R.*, 22 M. 440 = 6 O.C. 61, 9 Bom. L.R. 651, P.C. = 11 C.W.N. 739 = 6 C.L.J. 11, U.B.R. 1907, 2nd Qr., C.P.C. p. 9, 9 M.L.J. 190, 31 C. 815 = 8 C.W.N. 686; *Appr.*, 6 C.W.N. 48.] Adjournments of sales should be to a specified day and hour. The exact provisions of the Code should be followed in these matters. VENKATASUBBARAYA CHETTI v. ZAMINDAR OF KARVETINAGAR, **20 M. 159.** [*Appr.*, 6 C.W.N. 48, 31 C. 815 = 8 C.W.N. 686.]

(149)—*Execution — Sale proclamation — Description of property—Fraud—Illegality.*—Six tenures with separate recorded jammas were lumped together and described as one tenure and sold in execution of a decree as one lot. By this fraud, the plaintiff and his co-sharers was precluded from buying in one or more of the six tenures. There was an omission to describe the properties to be sold in the sale-proclamation. In consequence of this, the defendant was the only bidder and he purchased the property for an inadequate price. *Held* that the sale was fraudulent and illegal and so must be set aside. SREEKUNT DOSS v. RAMJEEBUN ROY, **18 W.R. 342.**

(150)—*Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 108 *and* 244.—*Execution-sale—Sale and decree impeached on ground of fraud.*—Whether the decree sought to be set aside was obtained by fraud or not is a question of fact, which it will be for the lower appellate Court to decide. If it finds that the decree was fraudulently obtained, the suit would lie to set aside the decree. But if it does not find that the decree is tainted by fraud, then the suit will not be maintainable. So, a suit is maintainable for setting aside, not only an execution-sale, but also the decree itself in execution of which such sale was held on the ground of the decree and the sale being both fraudulent, although no endeavour has been made to get the decree set aside and suit revived under s. 108. ABDUL MAZUMDAR v. MUHAMMAD GAZI CHOWDHRI, **21 C. 605.** (17 C. 769, 19 C. 341, *D.*; 5 W.R.

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————d.—SETTING ASIDE SALE—*contd.*

Act X, 20, 10 C. 357, *R.*) [*F.*, 5 C. W.N. 559; *Appr.*, 24 C. 546, 27 C. 197; *R.*, 12 C.P.L.R. 82, 5 C.L.J. 328; *D.*, 29 A 418=A. W.N. 1907, 112=4 A.L.J. 392.[

(151)—*Setting aside execution sale for fraud —Question relating to execution.*—The question of setting aside an execution sale on the ground of fraud is one relating to the execution of the decree, and no separate suit lies where it is between the parties to the suit in which the decree was passed. SARODA CHURN CHUCKERBUTTY v. MAHOMED ISUF MEAH, **11 C. 376**. (5 M. 217. *F.*) [*Appr.*, 17 C. 769, F.B.; *D.*, 12 C. 597, 15 C. 179, 16 C. 794.]

(152)—*Sale in execution—Suit to set aside sale as fraudulent.*—In a suit to set aside a sale in execution of a decree, the only question that was raised being whether or not certain persons had *bona fide* conveyed certain shares in the estate purchased by the decree-holder previous to the passing of the decree in his favour, *held* that the lower appellate Court was not competent to go into the question whether the title or interest of any share-holders in the estate in dispute was adverse to the title or interest of the decree-holder. CHUNDEE CHURN ROY v. RAM COOMAR DUTT, **7 W.R. 413.**

(153)—*Setting aside of — Fraud — Misrepresentation—Withholding of material information — Purchase — Sanction of Court.* — A purchase which has received the sanction of the Court will not be set aside upon slight grounds, but if the approval of the Court is obtained by misrepresentation, or by withholding of material information through the absence of which the information furnished is misleading, the Court will treat such misrepresentation or such withholding as fraud and act accordingly. ATMARAM v. BALKRISHNA, **7 Bom. L.R. 653=29 B. 515.**

(154)—*Application to set aside an execution-sale—Fraud of decree-holder—Auction-purchaser, stranger to suit.*—A judgment-debtor is entitled, by an application under s. 244, Civ. Pro. Code, to have an execution sale of his property set aside if he alleges and proves fraud on the part of the decree-holder, though no fraud is alleged or proved against the auction purchaser who is a stranger to the suit. KHIRODE SUNDARI DEBI v. GNANENDRA NATH PAL CHAUDHURY, **6 C.W.N. 283.** (19 C. 683, 2 C.W.N. 691, 4 C.W.N. 541, 3 C.W. N. 403, *F.*)

(155)—*Fraud—Sale—Decree—Setting aside decree—Minor—Personal decree—Frame of suit —Form of decree—Party to suit—Execution of decree—Part-payment.*—A suit was brought by B against A "for self and as guardian of C, a minor," for a certain debt. In that suit, a part-payment of the debt by A to B on account of C was suppressed, a personal decree was given

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————d.—SETTING ASIDE SALE—*contd.*

against the minor, and, in execution of that decree, certain property belonging to the minor was sold. *Held* in a subsequent suit by the minor, that the latter was entitled to have the decree and the subsequent sale set aside, as against a purchaser with notice, on the ground of fraud. The fact of a suit being brought against A, "for self and as guardian of C, a minor" is not conclusive evidence that C is not so far a party to the suit as to be bound by the decree. GRISH CHUNDER MOOKERJEE v. MULLER, **3 C.L.R. 17.** (11 B.L.R. 171, 12 B.L.R. App. 2 *Cited*) [*F.*, 11 C. 509; *R.*, 6 C.L.J. 448; *D.*, 11 C. 402.]

(156)—*Sale in execution—Sale alleged fraudulent and collusive* — *Onus of proof.*—Where a sale held in execution is alleged to be fraudulent colorable and collusive, the *onus* of proof lies on the person who alleges it. TATUR KHAWAS v. LOKE NATH, **15 W.R. 131.**

(157)—*Suit to set aside decree and sale and for recovery of property sold—Jurisdiction—Fraud—Civ. Pro. Code*, 1882, *s.* 244 (=*s.* 47, *present Code*)—*Evidence Act*, *s.* 44—*Suit, for merely setting aside decree of another Court.*—A suit to set aside a decree and the sale in execution thereof and to recover the property sold is maintainable, notwithstanding the provisions of s. 244, Civ. Pro. Code, and should be brought in the Court in the jurisdiction of which the property is situate, although the decree sought to be set aside was passed by a Court in a different district. (22 W.R. 213, *R.*; 21 C. 605, 24 C. 546, 3 C.W.N. 670, *F.*) It may not be competent to the Court to set aside the decree passed by another Court as fraudulent, but it is competent to the Court to investigate the question as to the character and validity of the decree for the purpose of giving relief to the plaintiff in respect of the land which he lost by reason of the sale. KEDAR NATH MOOKERJEE v. PROSONNA KUMAR CHATTERJEE, **5 C.W. N. 559**. [*R.*, 11 C.W.N. 579; *D.*, 4 A.L.J. 392 =29 A. 418=A.W.N. 1907, 112.]

(158)—*Sale—Application for setting aside—Fraud—Second appeal, whether competent—Change in law—Civ. Pro. Code*, (*Act* XIV *of* 1882), *s.* 244—*Civ. Pro. Code* (*Act* V *of* 1908), *ss.* 2, 47, 104, *sub-s.* (2), 154, *O.* XXI, *rr.* 90, 92—*Application for setting aside sale on ground of fraud placed on same footing with those made on ground of irregularity, as regards appeal.*—In December, 1908, an application for setting aside a sale was made by the judgment-debtor on the ground of material irregularity and fraud. The first Court granted the application and set aside the sale in August, 1909. On appeal, the lower appellate Court allowed the appeal and rejected the application. The judgment-debtor then preferred a second appeal and contended that, as the application was made under the Code of 1882, it fell under s. 244 of the Code and a second appeal was competent. *Held*, that, the order of the first Court having been made when the Code of 1908 had come

Sale—continued.

——5.—**Sale in Execution of Decree**—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

into operation, the order should be treated as one made under O XXI, r. 92, sub-r. (1) ; that the application must have been treated by the first Court as one under r. 90 which has effected a material alteration in the law and had placed cases in which a sale was impeached on the ground of fraud on the same footing as cases in which the sale was impeached on the ground of material irregularity ; and that under s. 104, sub-s. (2), a second appeal was incompetent. BHADRESWAR GOLOI v. BISHNU CHARAN SEN, **8 Ind. Cas. 3.**

(159 & 160)—*Market value—Private sale—Execution sale.*—The market value of a property is not the value which ought to be taken as the standard at an auction sale in execution of a decree. In a private sale, the purchaser gets a title and the title deeds. In an execution sale, he ordinarily gets neither, but only the right, title and interest, whatever that might be, of the judgment-debtor at the time of sale. MEAH KHAN v. NARAIN CHUNDER CHOWDHRY, **18 W.R. 197.**

(161)—*Sale in execution, application to set aside—Act* VIII *of* 1859, *s.* 56—Onus *on applicant of proving substantial injury.*—On objection by the judgment-debtor in this case taken regarding the proclamation of sale, it was held that the judgment-creditor should produce or, the Court itself take evidence as to whether the proclamation of sale had actually issued or not. In the absence of such proclamation, even where material irregularity has thereby ensued, still, under s. 256 of the Civ. Pro. Code, the applicant would be bound to prove that she had sustained substantial injury owing to the irregularity. JOY TARA DOSSEE MAHOMED HOSSEIN, **2 W.R. Mis. 1.**

(162)—*Execution—Allegation of irregularities in attachment and sale—Question of substantial injury essential.*—Where there have been admitted irregularities in the attachment and proclamation, before a sale, it is the duty of the Judge to go fully into the case and determine whether the debtor has sustained any substantial injury from the irregularities in the sale-proceedings. A debtor may be seriously injured if the attachment or proclamation be not duly made, for bidders will not be in attendance. NILMONEE SHAHA v. RAM CHURN DEB, **6 W.R. Mis. 45.**

(163)—*Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 256—*Sale in execution—Application to set aside—Material irregularity—Proof of substantial injury.*—A sale in execution of a decree shall not be set aside under s. 256, Civ. Pro. Code, on the ground of any material irregularity in conducting or publishing it, unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity. Mere proof of material irregularity, without proof of substantial injury, is not enough. ABOOL MAHOMED v. SHIB DOORAREE TEWAREE, **11 W.R. 114.**

Sale—continued.

——5.—**Sale in Execution of Decree**—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

(164)—*Material irregularity—Silence of judgment-debtor.*—The silence of a judgment-debtor on a previous occasion is no bar to his being heard when he alleges material irregularity within the 30 days allowed by law for that purpose. SYUD NUJMOODDEEN AHMED v. ABDOOL AZEEZ, **15 W.R. 95.**

(165)—*Sale—Irregularity — Substantial injury—Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 256. —Any irregularity in the conduct of a sale under s. 256 of Act VIII of 1859, cannot vitiate the same unless substantial injury is shown to have been caused to the party seeking to have the sale set aside by reason of such irregularity. CHUNDER SEKHUR DEB v. JUDUB CHUNDER SETT, **19 W.R. 78.**

(166)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 256—*Irregularity in conduct of sale—Application to set aside sale—Necessity to prove diminution in price.*—Where a judgment-debtor applied under s. 256, Act VIII of 1859, to set aside a sale on the ground of certain irregularities in the conduct of the sale, he must show that the irregularities caused diminution in the price for which the property was sold, and, in the absence of such proof, the Court would not set aside the sale. SHEO PROKASH MISSER v. HURDAI NARAIN, **22 W.R. 550.** [*F.*, 24 W.R. 227.]

(167)—*Civ. Pro. Code, s.* 311—*Application to set aside sale—Facts to be proved.*—An applicant in an application under s. 311 of the Civ. Pro. Code, seeking to set aside a sale in execution, is not only bound to show that there had been material irregularity in publishing or conducting the sale and that a price below the market value has been realised, but he is also bound to go on by means of direct evidence to connect the one with the other, that is, the loss with the irregularity. JAGAN NATH v. MUKUND PRASAD, **18 A. 37 = A.W.N. 1895, 154.** (20 I.A. 176, *R.*) [*Diss.*, 6 O.C. 61 ; *R.*, 24 C. 291, 1 O.C. 186, 31 C. 815 = 8 C.W.N. 686.]

(168)—*Expenses of execution sale—Liability—When sale is set aside.*—Where an execution sale was set aside on the ground of the irregularity on the part of the Amin or other officers of Court, *held* that the judgment-debtor was not chargeable with the expenses of the sale so set aside. W. HULSE v. LUCHMAN DASS, **1 Agra Mis. App. 1.**

(169)—*Execution proceedings—Application to set aside—Jurisdiction—Fraud.*—After the property of a judgment-debtor had been seized and sold in execution of a decree, and the execution proceedings are at an end, the Court executing the decree has no right to re-open and set aside the proceedings at the instance of a third person, not a party to the suit, on the ground that the execution was fraudulent and not warranted by the decree. The question can only be determined in a regular suit. *In the matter of* ROY LUTCHMEEPUT SINGH v. ADOYTO CHURN MULLICK, **24 W.R. 452.** [*D.*, 22 B. 267.]

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

——*k.*—SETTING ASIDE SALE—*contd.*

(170)—*Sale in execution—Sale of mortgaged property without order absolute—No objection to sale by judgment-debtor who had knowledge thereof—No damage—Right of judgment-debtor to apply to set aside sale.*—In execution of a mortgage decree, the mortgaged properties were advertised for sale. The judgment-debtor who had notice of the intended sale applied for adjournment thereof, but did not object to its taking place. After the properties were sold, he applied for the sale being set aside on the ground that there was no order absolute for sale before the order for sale was passed. *Held* that as, in the circumstances of the case, there was no allegation that the judgment-debtor had suffered any damage by reason of the defect, the sale could not be set aside. RAYILU PATTAR v. NARAYANA PATTAR, **10 M L.J. 205.**

(171)—*Civ. Pro. Code*, 1882, *s*, 310-*A* (= *O.* XXI, *r.* 89, *present Code*)—"*Date of sale,*" *meaning of — Confirmation of sale—Setting aside sale.*—The words "date of sale" in s. 310-A, Civ. Pro. Code, mean the actual date of sale when the property is put up for sale and knocked down to the highest bidder; the "date of sale" does not mean the date when the sale is confirmed or when an order setting it aside is reversed by the Appellate Court. CHOWDRY KESA SAHAY SINGH v. GIANI ROY, **6 C.W.N. 776.** (23 I.A. 45, 3 C.W.N. 283=26 C. 349, *R.*)

(172)—*Civ. Pro. Code*, 1882, *ss.* 311, 312, 313—*Order for sale after notice to judgment-debtor—Sale in contravention of s. 99 of Transfer of Property Act—Right of judgment-debtor to have sale set aside.*—Where, in execution of a simple money decree obtained by a mortgagee, the mortgaged property is ordered to be sold after notice to the judgment-debtor, the latter cannot apply to have the sale in pursuance of the order set aside on the ground that it was in contravention of s. 99 of the Transfer of Property Act inasmuch as he is bound by the order for sale. THALERI PATHUMMA v. THANDORA MAMMIAD, **10 M.L.J. 110.** [*Diss.*, 30 A. 146=A.W.N. 1908, 49=5 A.L.J. 121; *R.*, 2 P.R. 1907=157 P.L.R. 1906, 35 C. 61=6 C.L.J. 320 =11 C.W.N. 1011.]

(173)—*S.* 246, *Act* VIII *of* 1859—*Possession.*—When land is attached for sale in execution of a decree, the point of possession is the one which determines its liability to sale or not under s. 246, Act VIII of 1859. But, in a suit brought to set aside a sale made under that section, it is not the mere possession, but the actual right and title, which determines whether the sale ought or ought not to stand. WOOMA CHURN CHOWDHRY v. KURRALEE CHURN CHOWDHRY, **W.R. 1864, 163.**

(174)—*Attachment of property by two creditors—Delay of first creditor in bringing property to sale—Sale by second attaching creditor, first creditor not competent to set aside.*—The plaintiff attached certain property in execution, but he having delayed to bring it up to sale, another criditor attached it and proceeded to sale. In this suit brought by the plaintiff, the first attaching creditor, against the purchaser at the sale of the property brought on by the second attaching creditor, it was *held* that the first creditor who merely attached the property but delayed to bring it to sale could not prevent any other creditor, from proceeding in execution, and that, therefore, the sale to the defendant was perfectly regular and valid. Plaintiff could only claim the benefit of s. 270, that is, the right to be first paid out of the proceeds, and his attempt to set aside the sale to the defendant was wholly unwarranted. MOHUNT NAUNK BUKSH v. KOONWUR ROY, **2 W.R. 62.** [*Appr.*, 12 C. 317.]

(175)—*Execution-sale.*—Where a judgment-debtor's liability under a decree for Rs. 7,122, which bore interest until realization, eventually grew into a debt of Rs. 31,000, and his estate was sold upon execution of the said decree, and he pleaded that the sale should be set aside because the judgment-creditor had held out to him hopes that he would be allowed time to pay the debt: *held* that sufficient ground was not disclosed for setting aside the sale. MUSSAMUT SONA KOOER v. SHEO SOHOY PANDEY, **26 W.R. 106.**

(176)—*Execution of decree—Sale of "ancestral" land by Civil Court—Civ. Pro. Code*, 1877, *ss.* 311, 320—*Local Government Rules under s.* 320—*Invalidity of sale.*—Once it is established, that land belonging to a judgment-debtor is "ancestral land," within the meaning of the Local Government Rules under s. 320 of the Civ. Pro. Code, the Civil Court has no jurisdiction to order its sale, and its sale by such Court is invalid and liable to be set aside. SUKHDEO RAI v. SHEO GHULAM, **4 A. 382=A.W.N. 1882, 77.** [*Not F.*, 28 A. 273=3 A.L.J. 140=A.W.N. 1906, 3; *F.*, 2 A.L.J. 448=A.W.N. 1905, 183; *Expl.*, 18 A. 141; *R.*, 12 A. 96.]

(177)—*Decree reversed on appeal*—Bona fide *purchase by strangers to decree—Purchase by decree-holders.*—In a suit brought by a judgment-debtor to set aside sales of his property in execution of a decree against him in force at the time of the sales, but afterwards revereed on appeal, *held* that they could be set aside only as against the decree-holders who had purchased, but not as against *bona fide* purchasers who were not parties to the decree. ZAIN-UL-ABDIN KHAN v. MUHAMMAD ASGHAR ALI KHAN, **10 A. 166, P.C.=15 I.A. 12=5 Sar. 129.** [*F.*, 17 A.W.N. 28, 26 C. 734, 27 C. 810; *R.*, 49 P.R. 1894, 1 L.B.R. 22, 22 A. 168, F.B., 23 A. 60, 24 A. 467, 27 M. 98, 27 M. 504, 31 C. 499, 29 B. 435,

Sale—continued.

——**5.—Sale in Execution of Decree**—*contd.*

————*k.*—SETTING ASIDE SALE—*contd.*

=7 Bom. L.R. 585, F.B., 30 M. 295=17 M.L. J. 165=2 M.L.T. 186, 13 C.W.N. 710; *D.*, 2 A.L.J. 358=A.W.N. 1905, 153.]

(178)—*Execution-sale—Setting aside—"Saleable interest"—Civ. Pro. Code, s.* 313.—The fact that property sold in execution of a decree is subject to a mortgage, upon which a decree has been got, which fact is not disclosed prior to the sale proclamation, is not enough to set aside the sale on the ground of want of "saleable interest" under s. 313 of the Civ. Pro. Code. PROTAP CHUNDER CHUCKERBUTTY v. PANIOTY, **9 C. 506=12 C.L.R. 488.** [*F.*, 10 C. 368; *R.*, 9 A. 167=7 A.W.N. 6, 5 L.B.R 58.]

(179)—*Decree against insolvent—Sale of property vested in Official Assignee—Setting aside sale—Civ. Pro. Code, s.* 313.—Where property vested in the Official Assignee is attached and sold in execution of a decree against an insolvent, the purchaser is entitled to have the sale set aside, in spite of the acquiescence of the Official Assignee in the sale and his willingness to receive the sale-proceeds. DINOBUNDHOO PAL v. SHOSHEE MOHUN PAL, **9 C. 217.**

(180)—*Mortgage decree—Civ Pro. Code,* 1882, *ss.* 298, 311(=*O.* XXI, *rr.* 78, 90, *present Code*)—*Sale of mortgage decree—Setting aside of sale.*—When a decree held by the judgment-debtor upon a mortgage of immoveable property is sold in execution of a decree, an application under s. 311, Civ. Pro. Code, is incompetent, while s. 298, Civ. Pro. Code, prohibits the setting aside of a sale of moveable property on the ground of irregularity. BAIJ NATH LOHEA v. BINOYENDRA NATH PALIT, **6 C.W.N. 5.**

(181)—*Sale of holding—Application to set aside sale on ground that holding was not transferable—Limitation—Want of judgment-debtor's knowledge of the order for sale—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 244.—When a judgment-debtor seeks to set aside a sale on the ground that the holding sold was not transferable, the application is one made under s. 244, Civ. Pro. Code, 1882, and may be presented within three years from the date of sale. Before the judgment-debtor can ask for reversal of the sale, it has to be proved that he was not aware of the order for sale because if he was aware of the order, he ought to have prevented the sale by an objection taken at the proper time. SADEK SARDAR v. KALI PRASANNA SAHA, **7 Ind. Cas. 48** (26 C. 727, 3 C.W.N. 586, *F.*)

(182)—*Execution of decree—Auction-purchaser—Suit to set aside sale in execution of decree—Civ. Pro. Code, ss.* 313, 316.—One S L. in a suit upon a mortgage obtained a decree for sale of two houses. K.L objected that one half of one of the said houses was his and should not be made liable to sale in the suit of S.L. That

Sale—continued.

——**5.—Sale in Execution of Decree**—*contd.*

————*k.*—SETTING ASIDE SALE—*concld.*

objection was granted, but nevertheless the decree was prepared as for the sale of the two houses without any exception. Under this decree the two houses were sold, and were purchased by C.R. who duly obtained a certificate of sale. Subsequently K.L. having obtained amendment of the decree under which the sale had taken place, brought a suit against S.L., the decree-holder, and C.R. the auction-purchaser, to recover one-half of one of the houses sold. *Held* that the title of the auction-purchaser was good, and that the suit would not lie. KUNDAN LAL v. CHET RAM, **A.W.N. 1896, 36.** (12 B. 589, *R.*)

(183)—*Ex-proprietary tenant—Occupancy right—Sale in execution after passing of Act* XII *of* 1881—*Validity—N.W.P. Act,* XVIII. *of* 1873, *s.* 9—*N.W.P. Act* XII *of* 1881, *ss.* 2, 9.—The right of the appellant as ex-proprietary tenant of certain land was attached in execution of a decree, on the 22nd February, 1881, before Act XII of 1881 came into force, but the sale of such right took place after that Act came into force. *Held*, that the sale must be set aside. SHITAB KHAN v. AJUDHIA PRASAD, **A.W.N. 1882, 117.** (A.W.N. 1882, 41, *F.*)

Application for setting aside a sale made by an unregistered transferee of a holding from judgment-debtor in a suit for rent—*See* BEN. ACT VIII OF 1885, s. 173 (sub-s. 3), 9 C.W.N. 134.

See APPEAL—MISCELLANEOUS. 5 W.R. Act X, Rul. 89.

Reversal of decree—*Ex parte* decree—Reversal of sale—*See* APPELLATE COURT—DUTY OF APPELLATE COURT, 6 C.L.J. 92.

See CIV. PRO. CODE, 1908, s. 73, O. XXI, rr. 90, 92, 29, C. 548

Sale by Collector—Application to set aside sale—Jurisdiction—*See* COLLECTOR, 9 A. 43.

Setting aside sale—Civ. Pro. Code, s. 310-A.—Sale subsequent to Civ. Pro. Code. Amendment Act V of 1894—Right of judgment-debtor to have sale set aside—*See* EXECUTION OF DECREE—EFFECT OF CHANGE OF LAW PENDING EXECUTION, 18 M. 477.

See LETTERS PATENT, HIGH COURT, 1865—CALCUTTA, ss. 15, 36, 4 B.L.R. A.C. 181=13 W.R. 209.

See LIMITATION ACT, 1908, art. 14, 24 A. 467=A.W.N. 1902, 116.

Fraudulent sale in execution of decree—Application to set aside—Separate suit not maintainable—*See* LIMITATION ACT, 1908, art. 166, 9 B. 468.

See REVIEW—REVIEW WHEN LIES, 6 W.R. Mis, 127.

***Sale*—continued.**

——5.—Sale in Execution of Decree—*contd.*

————*l.*—STAY OF SALE.

(1) *Sale in execution of mortgage-decree—Stay of sale pending administration suit—Stay of execution sale—Appeal—Civ. Pro. Code*, 244 (c).—An order staying the sale of mortgaged property in execution of a decree upon a mortgage bond executed by the father of the judgment debtors, on the ground of the pendency of an administration suit regarding the properties of such father, ought not to be made by the Court, in the absence of reasonable grounds for debarring a secured creditor to enforce his security pending the administration-suit. An order as the one stated above which stays the execution of a decree for an indefinite time, and prevents a secured creditor from availing himself of the benefit of his security, is a question relating to the execution of the decree and is appealable as coming under cl. (c), s. 244, of the Civ. Pro. Code. KRISTOMOHINY DOSSEE v. BAMA CHURN NAG CHOWDHRY, 7 C. 733=9 C.L.R. 344. (11 B.H.C. 151, *R.*) [*F.*, 7 A. 73=4 A.W.N. 226, 13 C. 111; *R.*, 12 C. 624.]

(2)—*Civ. Pro. Code*, ss. 291, 244—*Sale in execution, stoppage of, on payment by transferee of property — Question relating to execution, maintainability of separate suit by transferee.*—Where a judgment-debtor had sold the property covered by the hypothecation decree against him, and the purchaser assigned it over to some third person, such person would be entitled to come in and protect the property from being sold away in execution, by tendering the whole amount due, under s. 291 of the Civ. Pro. Code. The only right of the decree-holder is to have the debt and costs paid up, and on payment of such money into Court by a third person on behalf of the debtor, it is competent to the Court to accept the money and stop the sale. Where, even after the offer of the money by the assignee in such a case as the above, the sale had taken place, such money not having been accepted by the Court, the assignee could maintain a separate suit to set aside the sale, and s. 244 of the Civ. Pro. Code would not apply to the case so as to bar such a suit. BEHARI LAL v. GANPAT RAI, 10 A. 1=A.W.N. 1887, 238.

(3)—*Civ. Pro. Code*, ss. 276, 305.—The object of s. 305, Civ. Pro. Code, is to prevent the sale of property attached in execution of decree, if the whole decree can be satisfied within a reasonable time by private alienation, and at the same time to protect the lien the decree-holder has obtained under s. 276. Therefore a mortgage of attached property for a sum less than the decree amount, though it may be *bona fide* and binding as between the mortgagor (judgment-debtor) and the mortgagee, cannot be valid against the decree-holder, nor can it affect the lien acquired by him under s. 276. GURUSAMI v. VENKATASAMI, 14 M. 277=1 M.L.J. 220.

***Sale*—continued.**

——5.—Sale in Execution of Decree—*contd.*

————*l.*—STAY OF SALE—*concluded.*

(4)—*Sale in execution of decree—Refusal of application for sale of house—Injury to judgment-debtor.*—Where a judgment-debtor is not an agriculturist, and there is no valid ground on record that, at an auction-sale, his house, attached in execution of decree against him, will not fetch its full value, the Commissioner cannot refuse the application for sale without giving valid reasons for the refusal. RATAN CHAND v. KHUSHI RAM, **10 P.R. 1876.** [*Diss.*, 123 P.R. 1876, F.B.]

————*m.*—WRONGFUL AND INVALID SALES.

(1)—*Execution — Attachment and sale of moveable property—Decree-holder's liability.*—A decree-holder who has caused the sale of moveable property not belonging to his judgment-debtor, though he has done so in perfect good faith, is liable to make good the value of that property to the rightful owner. KANAI PRASAD BOSE v. HIRACHAND MANU, **5 B.L.R. App., 71=14 W.R. 120.** (3 B.L.R. A.C. 413, 9 W.R. 118, 5 B.L.R. App. 73 (Note)=11 W.R. 528, *D.*) [*R.*, 9 B.H.C. 92, 11 B.H.C. 46; *D.*, 13 O.C. 357.]

(2)—*Sale in execution—Order directing sale set aside subsequently—Validity of sale.*—An auction sale, which was made under the authority of an order which at the time of sale was not in force, but was superseded by a subsequent order postponing the sale, was null and void. FOUJDAR KHAN v. BANIEE DOOBEY, **3 Agra 398.**

(3)—*Execution of decree—Sale before advertised time—Validity.*—The Civ. Pro. Code, authorizes a sale, which is to be conducted at a time and place properly notified, and a sale otherwise conducted is not a sale at all within the meaning of the Code. The time to be notified for a sale of property in execution of a decree must be the time of the *commencement* of the sale, in order that all intending purchasers may be enabled to be present during the whole of the proceedings, to see how the biddings go, and that all who are interested in the property sold may see that there is a fair competition and a good sale. Where, therefore, property advertised to be sold at 11 A.M. was sold at 7 A.M. there was something more than a mere irregularity in conducting the sale, and the whole proceedings were invalid. CHEDAMI LAL v. AMIR BEG, **7 A. 676=A.W.N. 1885, 178.** [*R.*, 96 P.L.R. 1902, U.B.R. 1907, 2nd Qr., Civ.Pro.Code, p. 9=14 Bur. L.R. 96.]

(4)—*Satisfied decree, nullity of sale ordered by Court in execution of.*—Where a decree that is being executed by a Court has been, in fact, satisfied by payment before any order passed in execution thereof, the Court can have no jurisdiction to order a sale of property in such proceedings. Where, therefore, through inadvertence or otherwise, the Court orders sale of any

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

———*m.*—WRONGFUL AND INVALID SALES—*continued.*

property in execution of the decree, notwithstanding such previous discharge of it, the sale under such order would be null and void as *ultra vires*. CHUNNI v. LALA RAM, **16 A. 5**= **A.W.N. 1893, 141.**

(4-*a*)—*O.* 21, *rr.* 54, 66, 66 (4), 67, 68, 70, 90 (=*ss.* 274, 287, 289, 290, 311, *Civ. Pro. Code*, 1882)—*Non-compliance with requirement of s.* 290, *Civ. Pro. Code, a material irregularity—Execution-sale — Substantial injury should be proved for nullifying execution-sale.*—The non-compliance with the provisions of s. 290, Civ. Pro. Code, that, before sale of immoveable property in execution, there should be an interval of 30 days, between proclamation and sale, is a material irregularity under s. 311. But its effect is not to make the sale a nullity in the absence of proof of substantial injury caused to the judgment-debtor thereby. S. 311 clearly contemplates direct evidence on the subject. TASADDUK RASULT KHAN v. AHMAD HUSAIN, **21 C. 66, P.C.=20 I.A. 176.** (9 C 656, 12 M. 19, *R.*) [*F.*, 18 A. 37=A.W.N. 1895, 154; *Expl.*, 24 C. 291; *R.*, 18 A. 141=A.W.N. 1896, 9, 21 A. 140=A.W.N. 1898, 212, 21 A. 311 =A.W.N. 1899, 84, 96 P.L.R. 1902, 6 O.C. 61, 31 C. 385, 8 C.W.N. 686=31 C. 815, 32 C. 509=9 C.W.N. 348=1 C.L.J. 91, 32 C. 542=9 C.W.N. 487, 33 C. 68= 9 C.W.N. 1046 =2 C.L.J. 241, 28 A. 193=2 A.L.J. 640=A.W. N. 1905, 241, 29 A. 196, P.C.=2 M.L.T. 47=9 Bom. L.R. 83=17 M.L.J. 112=5 C L.J. 138 =11 C.W.N. 393, 9 O.C. 289, U.B.R. 1907, 2nd Qr. Civil Procedure, p. 9=14 Bur. L.R. 96, 5 C.L.J. 696=11 C.W.N. 756, 6 C.L J. 320=11 C.W.N. 1011=35 C. 61, F.B.; *Rel. on*, 6 C.L.J. 163.]

(5)—*Sale in execution — Validity of sale held in contravention of order of Court.*—Where a sale is held in contravention of an order of Court, which it is competent to make, the sale is invalid. Subsequent to the passing of a decree for sale, a defendant put in a petition asking that a certain, item of the property described in the decree might be sold after the other items, on the ground that that item had been mortgaged to him and was in his possession. An order was made by the Court with the decree-holder's consent in the terms of the petition. After this order, the decree-holder assigned the decree and the assignee brought the very item to sale. *Held* that, as the sale was in contravention of the order of the Court, it was invalid and liable to be set aside. SUBBARAYA AIYAR v. SRINIVASA RAGHAVAIYANGAR, **10 M.L.J. 211.**

(6)—*S.* 545, *Civ. Pro. Code*, 1882 (=*O.* XLI, *r.* 5, *present Code*)—*Order for stay of execution passed by appellate Court—Sale held before communication of such order, nature of.*—An order of an appellate Court under s. 545, Civ. Pro. Code, 1882, to stay execution of a decree against which an appeal is pending, is in the nature of a prohibitory order, and, as such, would only take effect when communicated. If property is sold before such an order is communicated to the Court holding the sale, such sale is not void and cannot be treated as a nullity. BESSESSWARI CHOWDHURANY v. HORRO SUNDAR MOZUMDAR, **1 C.W.N. 226.** (4 N.W.P. 398, 6 N.W.P. 354, 2 A. 686, *D.*) [*F.*, 6 M.L.T. 159; *Expl. and D.*, 33 C. 927= 3 C.L J. 67.]

(7)—*Execution sale—Possessory suit by shareholders—Limitation.*—It is not because the purchaser at a sale in execution of the rights and interests of X does a wrong, and unlawfully takes possession of the shares of the partners of X that the latter are bound to sue to set aside the sale. But they must bring a suit to recover their shares which the defendants took unlawful possession of alleging that they had purchased X's rights and interests. They are not tied down to sue to establish their rights as part owners of the land within the time allowed by law for institution of actions to set aside sales made in execution. BEBEE ATHUROONISSA v. RUGHOONATH BANERJEE, **W.R. 1864, 322.**

(8)—*Sale of property of third person—Suit for recovery of possession—Reversal of sale not necessary.*—Because at a sale in execution the right and interest of the judgment-debtor alone is sold, if the property belonged to the plaintiff and not to the judgment-debtor, it would not be necessary for the plaintiff to reverse the sale before he could recover possession. Where it is not necessary so to reverse the sale before recovering possession, the plaintiff will not be precluded from recovering possession by means of his suit merely because he had asked therein for the reversal of the sale. GUNGANARAIN BEHUTTA v. THE COLLECTOR OF MIDNAPUR, **6 W.R. 47.**

(9)—*Civ. Pro. Code*, 1859, *s.* 246—*Execution sale—Moveable property.*—Where the right, title and interest of a debtor in certain moveable property claimed by B as part-owner under s. 246, Act VIII of 1859, is sold in execution, the judgment-creditor is not liable. The purchaser becomes entitled to an undivided share to be used as such, and is not liable to the owner of the other undivided share merely for using it. TAMIZUDDIN MULLA v. NYANUTULLA SIRKAR, **5 B.L.R. App. 73, Note=11 W.R. 528.** [*R.*, 9 B.H.C. 92; *D.*, 5 B.L.R. App. 71=14 W.R. 120, 11 B.H.C. 46, 3 B. 74.]

(10)—*Execution of—Death of judgment-debtor after attachment but before sale—Legal representative of judgment-debtor not made party in sale proceedings—Effect of omission, on validity of sale—Civ. Pro. Code*, 1882, *ss.* 311, 316 (=*O.* 21, *r.* 90, *and O.* 21, *r.* 94, *new Code*).—T obtained a decree against S, during S's life-time a warrant for sale of certain land

Sale—continued.

——5.—**Sale in Execution of Decree**—*contd.*

————*m.*—WRONGFUL AND INVALID SALES—*continued.*

was issued and the proclamation published for the sale of the land which had been previously mortgaged to K. S died on the 27th September, 1877, the sale took place on the 3rd October, 1877, without any notice being given to D, who was the heir and legal representative of S, or her name being placed on the record. T became the purchaser. D came to know of the sale some days after it took place. In 1883, T sold the land to A, who redeemed the mortgage from K and took possession. In 1891, D, as heir and legal representative of S, filed this suit to redeem the land. She made K and A parties to the suit. Her contention was that the sale was absolutely void by reason of the plaintiff not having been brought on the record of the execution proceedings immediately on her father's death. *Held* that the plaintiff was not entitled to redeem. *Per Jardine, J.*:—As no "substantial injury" was alleged to have resulted by reason of the plaintiff not having been brought on the record of the execution proceedings immediately on the death of the judgment-debtor and before the sale took place, the purchaser acquired a valid title under s. 316, Civ. Pro. Code. *Per Ranade, J.*:—The omission to join the name of the representative of the deceased judgment-debtor as a party to the record was a material irregularity, and a serious defect in the title of the purchase. But this irregularity did not vitiate the sale under the special circumstances of the present case, as the plaintiff did not apply under s. 311, Civ. Pro. Code, to have the sale set aside although she came to know of the sale within the period allowed by law for applications to set the sale aside; as there was no fraud or *mala fides* on the part of the judgment-creditor; as the sale had not resulted in any substantial injury to the plaintiff, and as the auction-purchaser and his assignee had been in adverse possession for more than twelve years. ABA v. DHONDUBAI, **19 B. 276.** [*Appr.*, 21 B. 424; *R.*, 19 M. 219, 23 C. 686.]

(11)—*Execution sale—Sale held on holiday—Death of decree-holder before sale.*—There is nothing unlawful in holding a sale of a house or other property on a civil holiday. (3 A. 333, *F.*) The death of the decree-holder a day before the sale was also not a circumstance which by itself operated to render the sale void. AMIRULLAH v. KHALILULRAHMAN, **A.W.N. 1882, 169.**

(12)—*Act* XXIII *of* 1861, *s.* 11—*Act* VIII *of* 1859, *ss.* 256, 257, *not applicable to suit based on fraud vitiating sale.—Held* that s. 11, Act XXIII of 1861, and ss. 256 and 257 of Act VIII of 1859, could not apply to the present suit in which fraud was imputed vitiating the sale *in toto*. The question for decision did not arise between the parties to the suit in which the decree was passed, and relating to the execution of that decree; for, it was contended that the decree that had been executed was not the decree which was passed between the parties, but a decree which had been modified by a subsequent decretal order. S 11, therefore, could not apply. Neither did ss. 256 and 257 of Act VIII, which refer to material irregularities in conducting the sale, apply; for, in the present case, it was averred that the sale was brought about by the fraud of the defendant. The issue of fraud or no fraud having therefore to be necessarily tried, the Principal Sudder Ameen was right in having remanded the case to the Court of first instance for that purpose. UMBIKA CHURN CHUCKERBUTTY v. DWARKANATH GHOSE, **8 W.R. 506.** [*Appr.*, 15 C. 179; *R.*, 2 M. 264, 17 C. 769, F.B.]

(13)—*Civ. Pro. Code, Act* VIII *of* 1859, *ss.* 256, 257 — *Court sale — Application to set aside sale—Fraud of conducting officer—Limitation.*—Where an application was made to set aside a Court sale on the ground that the sale was vitiated by the fraud and collusion of the officer conducting the sale and the decree-holder, the provisions of ss. 256 and 257, Act VIII of 1859, did not apply, and the application was not barred by limitation, because it was made more than thirty days after the date of sale. VIRSINGAPPA *Bin* BASLINGAPPA v. SADASHIVAPPA APPA GOLKHANDI, **7 B.H.C.A.C. 74.**

(14)—*Suit to set aside decree on ground of fraud Execution of decree—Sale in execution—Title of* bona fide *purchaser at auction sale.—Held*, that the title of a *bona fide* purchaser at a sale in execution who was no party to the decree is not invalidated by the setting aside of the decree which was valid at the time of the sale. JETHAO MAL v. DURGA PRASAD, **A.W.N. 1899, 180.** (10 A. 166, 1 B.L.R. 84, 7 W.R. 312, 12 W.R. 49 and 24 W.R. 260, *R.*)

(15)—*Execution sale—Fraud—Irregularity—Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 256—*Remedy of judgment-debtor.*—Where the facts connected with an execution sale do not establish fraud, but only amount to an irregularity, prejudicing the judgment-debtor, the remedy of the latter is to apply to the Court, in proper time, under s. 256, Act VIII of 1859, to set aside the sale held in execution of the decree. If such application is made and dismissed, the judgment-debtor cannot bring a regular suit for establishing the same thing. GOBIND SINGH v. MOHUNT MUNNO RAM DOSS, **19 W.R. 414.**

(16)—*Act* VIII *of* 1859, *ss.* 256, 257—*Application to set aside sale in execution—Subsequent suit to set aside sale on the ground of fraud, maintainability of.*—S. 257, Act VIII of 1859, refers to irregularities in publishing or conducting a sale only, and a person who has failed in his application under ss. 256 and 257, is not thereby precluded from bringing a separate suit

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

———*m.*—WRONGFUL AND INVALID SALES—*continued.*

to set aside the sale on the ground of fraud *dehors* the irregularities complained of. NUND LALL DOSS v. DELAWUR ALI, **11 W.R. 244.** [*Appl.*, 15 C. 179 ; *R.*, 17 C. 769, F.B.]

(17)—*Execution sale—Setting aside of—Fraud—Conditions.*—In a suit to set aside an execution sale on the ground of fraud, it is not enough for the Court to find that the mode of making attachment and proclamation was according to law. But the Court must consider whether, looking to all the surrounding circumstances of the case, the alleged fraud is proved or not. CHOONEE SAHOO v. MUNOO LALL, **14 W.R. 325.**

(18)—*Gift in fraud of creditors—Creditors bringing property to sale—Rights of purchaser at sale—Suit by donee to set aside sale on ground of fraud—Rescission.* - A transaction cannot generally be rescinded unless the party seeking it is able to rescind it *in toto*, except where the transaction is severable. A debtor, being in pecuniary difficulties, made a gift of all his property in favour of his wife and his minor sons in 1875. X, a creditor of his, who subsequently obtained a decree against him, sold part of the said property in execution, which was purchased by Y for an inadequate price by means of false representations. An application made by the debtor in 1879 to set aside the sale on the ground of fraud was rejected. In 1884 the minor sons (being represented by their next friend), instituted the present suit to set aside the sale, against Y (the purchaser), alleging that the sale was void by reason of the defendant's fraud and claiming the property as theirs under the gift of 1875. *Held* (1) that the gift under which the plaintiffs claimed having been made by the debtor, when in pecuniary difficulties, was void against his creditor X, who had a right to sell the property in execution of his decree, that the defendant, as purchaser at the sale acquired a valid title, and that the plaintiffs could not take anything under the deed of gift ; (2) that the plaintiffs could not set aside the sale on the ground of the defendant's fraud. The gift of 1875 made the sons (plaintiffs) and the wife of the debtor tenants-in-common and the plaintiffs were only owners of their respective shares, and consequently could not claim to rescind the sale *in toto*. Nor could the wife join in rescinding the sale as she must have known of the fraud in 1879, when her husband endeavoured to set aside the sale on that ground. HORMUSJI v. COWASJI, **13 B. 297.** [*F.*, 17 C.P.L.R. 24.]

(19)—*Sale in-execution—Purchaser rights.*—If a sale takes place in execution of a decree in force and valid at the time of the sale, the property in the thing sold passes to the purchaser. *Per Norman, J.*:—If the decree or judgment be afterwards reversed, the reversal does not affect the validity of the sale or the title of the purchaser. CHUNDER KANT SURMAH TALOOKDAR v. BISSESSUR SURMAH CHUCKERBUTTY, **7 W.R. 312.** [*F.*, 8 W.R. 300, 10 W.R. 154=1 B.L.R.A.C. 56, 1 B.L.R.A.C. 84, 12 W.R. 508, 6 N.W.P. 291 ; *R.*, 8 B.H.C. A. C. 37.]

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

———*m.*—WRONGFUL AND INVALID SALES—*continued.*

(20)—*Sale in execution of decree*—Bona fide *purchaser.*—A sale to a *bona fide* purchaser for a valuable consideration in execution of a decree outstanding and in force at the time of the sale is a good and valid one. FYAZOODDEEN BHOOYA v. SHUMSUNNISSA BEEBEE, **12 W.R. 508.** (7 W.R 312, 10 W.R. 154, *F.*)

(21)—*Execution of decree—Sale*—Bona fide *purchaser—Decree reversed on appeal—Right of purchaser.*—A sale under a decree to a *bona fide* purchaser after confirmation is valid notwithstanding the reversal of that decree upon appeal. BEHAREE LALL v. RAJA RAM, **6 N.W.P. 291.**

(22)—*Setting aside of portion of decree relating to liability for costs—Sale in execution for costs not cancelled.*—This was a suit brought by the plaintiff to have a sale of his property set aside. The sale had taken place in execution of a decree for costs at the suit of Government. That part of the decree which made the plaintiff answerable for costs having been afterwards set aside, it was now contended that the sale ought to fall. The High Court, however, following the decision in 7 W.R. 312, refused to uphold the contention of the plaintiff and dismissed his appeal. PEAREE MONEE DOSSEE v. THE COLLECTOR OF BEERBHOOM, **8 W.R. 300.** [*R.*, 6 B.L.R. App. 90, 2 C.L.R. 223, F.B.]

(23)—*Sale in execution of decree—Invalid sales—Remedy of parties aggrieved—Suit for reversal of sale.*—When a property is sold in execution of a decree which had been in force at the time of sale, but which was eventually set aside on appeal, the remedy of the party aggrieved is by a suit for the reversal of the sale, and not by a suit for the recovery of damages for the loss sustained. ANNUNDO CHUNDER BANERJEE v. SHUBHUL CHUNDER DEBEA, **2 Hay 624.**

(24)—*Sale under decree subsequently reversed—Dispossession—Right to recover lands with mesne profits.*—On the reversal of a decree in execution of which a sale of land takes place, the sale itself made while that decree was under appeal falls to the ground, and the party dispossessed under such decree is entitled to recover the land with mesne profits. SHEIKH BHOOLLOO v. RAM NARAIN MOOKERJEE, **W.R. 1864, 129.**

(25)—*Execution sale—Purchase by decree-holder—Suit by judgment-debtor for possession—Equities.*—Where the defendants (decree-holders) purchased certain property at a sale

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————m.—WRONGFUL AND INVALID SALES—*continued.*

held in execution of a decree against the plaintiff, and the latter brought a suit to recover a share of such property, *held* that the plaintiff could not recover unless he offered to pay the defendants the debt which he owed them and which formed part of the consideration of their purchase. BABOO GOWREE BOYJO NATH PERSHAD v. JODHA SINGH, **19 W.R. 416.** [*R.*, 27 M. 98 ; *D.*, 27 C. 810, 5 C.L.J. 328.]

(26)—Ex parte *decree—Minor defendants not properly represented—Sale of ancestral property—Presumption — Mortgage on behalf of minor—Auction-purchaser — Purchase after notice of invalidity of transaction.*—Where mortgage bonds in respect of ancestral property were executed on behalf of a minor and advances of money were made without making such enquiries as ought to have been made as to the necessity for the loan and in fact no one thought of the interests of the minor at all, and the minor's name was joined in the transaction merely because he was a member of the family, and the minor was not properly represented in the suit on those bonds in which an *ex parte* decree was obtained, *held* that the bonds were invalid against the minor, and a decree so obtained could not be presumed to be valid as against the minor. An auction-purchaser who purchases ancestral property after receiving distinct notice that the mother of the plaintiffs, minors, challenged the validity of the entire proceedings, cannot protect himself by relying on an *ex parte* decree and execution sale. JUNGEE LALL v. SHAM LALL MISSER, **20 W.R. 120.** [*R.*, 19 M. 219; *D.*, 20 W.R. 123.]

(27)—*Auction-purchaser—Validity of decree contested— Purchase without notice—Validity of sale.*—An auction-purchaser at a sale in execution of an *ex parte* decree, to whom notice of contest as to the validity of the decree is not communicated before the property is sold, is entitled to retain the purchase. RAM JEWUN LALL v. SHAM LALL MISSER, **20 W.R. 123.** (20 W.R. 120, *D.*)

(28)—*Decree — Satisfaction — Purchase by one of several judgment-debtors — Execution — Sale in execution of satisfied decree—Rights of purchaser—Notice.*—As between the judgment-debtor and the decree-holder, the purchase of a decree by one of several judgment-debtors operates as a satisfaction of the decree; therefore, after such satisfaction, the decree cannot legally be executed. Where a judgment-debtor, having satisfied the decree, fails to cause satisfaction to be entered up, or neglects reasonable precautions, and omits to take proper means of giving to purchasers at the sale notice of the satisfaction of decree, a person purchasing property in execution of the decree, appearing on the face of it to be good without notice of any infirmity in the right of the person causing the decree to be executed, will not

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————m.—WRONGFUL AND INVALID SALES—*continued.*

be affected by any rights or equities of the judgment-debtor against a decree-holder causing the decree to be executed, of which he has no notice. DIGAMBUREE DEBIA v. ESHAN CHUNDER SEIN, **15 W.R. 372.**

(29)—*Civ. Pro. Code, s. 313—Stat. 11 and 12, Vict., cap. 21, s. 7—Insolvent judgment-debtor—Vesting order—Execution sale—Saleable interest.*—In execution of a decree, certain property of the judgment debtor was attached and sold. But, prior to the date of the decree, the judgment-debtor had been adjudged an insolvent and all his estate had vested in the Official Assignee under s. 7 of Stat. 11 and 12 Vict., Chap. 21. *Held* that the auction-purchaser was entitled to set aside the sale under s. 313, Civ. Pro. Code, on the ground that the insolvent had no saleable interest in the property sold even though the Official Assignee might have assented to such execution sale. DENOBUNDHOO PAL v. SHUSHI MOHUN PAL CHOWDHRY, **12 C.L.R. 60.**

(30)—*Stat. 11 and 12 Vic., Chap. XXI, s. 7—Vesting order—Effect—Civ. Pro. Code, 1877, s. 313—Saleable interest - Setting aside of sale—Ratification.*—The effect of an order adjudging the judgment-debtor an insolvent is to vest all his property in the Official Assignee, and, after the property thus vests in the Official Assignee, the judgment-debtor has no saleable interest in such property and the purchaser is entitled to apply under s. 313, Civ. Pro Code, to have the sale set aside, even though the Official Assignee may have ratified the sale. RAM SOONDUR DEY v. SHOSHI MOHUNPAL CHOWDHRY, **11 C.L.R. 389.** [*F.*, 31 M. 493 = 18 M.L.J. 487 = 4 M.L.T. 188.]

(31)—*Civ. Pro. Code, 1877, s. 313—Sale in execution—Application to set aside sale for want of saleable interest in judgment-debtor—Sale in execution of different decrees—Prior sale under latter attachment—Priority.*—Certain property was purchased at Court auction on 21-2-1880, in execution of a rent decree dated 20th May, 1879, the proclamation of sale not mentioning any incumbrance on the property. After paying the decree-holder the amount due to him under the decree, the balance remained in Court. But a decree was obtained on the 9th of October, 1879, on a mortgage executed by the judgment-debtor, and the same property was sold again in execution of the second decree on 11th March, 1880. The former purchaser applied for setting aside the sale to him and asked that his purchase money should be returned to him. *Held* that if, as a fact, the property sold was covered by the mortgage, there was, under the circumstances, no such saleable interest in the judgment-debtor at the time of the first sale, as would prevent the operation of s. 313, Civ Pro. Code, inasmuch as under the sale the purchaser would be unable to get the particular property purchased

Sale—continued.

——5.—**Sale in Execution of Decree**—*contd.*

———*m.*—WRONGFUL AND INVALID SALES—*continued.*

by him and that, therefore, the sale must be set aside. [*R.*, 5 A.577, 10 C. 368; *D.*, 9 C. 506, 9 C. 626; 9 A, 167=7 A.W.N. 6.] An earlier sale, though under a later attachment, is entitled to priority over a later sale under an earlier attachment. NAHARMUL MARWARI, v. SADUT ALI, **8 C.L.R. 468.** (6 C.L.R. 85, *F.*)

(32)—*Civ. Pro. Code* (*Act X of* 1877), *s.* 313—*Execution—Sale under attachment during subsistence of prior attachment—Priority.*—Certain properties belonging to the judgment-debtor were attached in execution of a decree and brought to sale. The sale was postponed pending a suit instituted by a claimant to the said property. After the suit was dismissed, the decree-holder applied for sale, and 16th December, 1878, was fixed for the sale. In the meanwhile another creditor of the judgment-debtor who had obtained a decree against him attached the same property and brought it to sale, and 15th November 1878, was fixed for the sale. The sale took place on that date. Again, on 16th December, the same property was sold under the first attachment. The auction-purchaser at the second sale applied under s. 313 of the Civ. Pro. Code, 1877, to set aside the sale to himself on the ground that the judgment-debtor had no saleable interest. *Held* that the sale must be set aside. CHUTKA PANDA v. GOBURDHONE DASS, **6 C.L.R. 85.** (9 W.R. 514, 9 W.R. 244, 2 W.R. Mis. 48, *doubted but F.*) [*Appr.*, 12 C. 317, 7 C. 410, 8 C.L.R. 468.]

(33)—*Concurrent decrees against same judgment-debtor — Execution — Attachment and sale of judgment-debtor's property by order of inferior Court—Attachment by order of superior Court—Realisation and distribution of assets—Civ. Pro. Code*, 1882, *ss.* 285, 295.—In execution of a decree which he obtained on 13-10-1891 against D, in a Second class Subordinate Court, S attached the judgment-debtor's property on 18-10-1891, obtained an order for sale on 7-7-1892 and had the proclamation of sale issued on 9-7-1892. T, another creditor, obtained a decree against D on 9-10-1891 in a First-class Subordinate Court, and in execution thereof attached the same property on 14-8-1892. But the property having been sold on 17-8-1892 (the day fixed for sale) by the Second-class Subordinate Judge under the decree of S, T applied to the latter for setting aside the sale, contending that the sale was invalid under s. 285, Civ. Pro. Code. *Held* that the sale was not invalid under s. 285, because the inferior Court had ordered the sale and issued the proclamation before the property was attached by order of the superior Court. The order for sale and proclamation was perfectly valid at the time when it was made by the inferior Court on 7th and 9th July rsspectively. PATEL NARANJI MORARJI

Sale—continued.

——5.—**Sale in Execution of Decree**—*contd.*

———*m.*—WRONGFUL AND INVALID SALES—*continued.*

v. HARIDAS NAVALRAM, **18 B. 458.** [*F.*, 19 B. 127; *Cons.*, 19 B. 539; *R.*, 18 A. 348, 22 B. 88, 25 C. 46, 13 C.P.L.R. 145.]

(34)—*Attachment and sale of property of third person by decree-holder—Liability to damages—Proof of* mala fides *unnecessary.*—Without proof of *mala fides*, a judgment-creditor is responsible in damages to any person whose property he wrongfully causes to be attached in execution of his decree. RAYNOR v. SUNGHEER SINGH, **5 N.W.P. 211.**

(35)—*Sale in execution of decree passed without jurisdiction.*—A sale in execution of a decree passed without jurisdiction is a nullity. JADU NATH KUNDU CHOWDHRY v. BRAJANATH KUNDHU. **6 B.L.R. App. 90.** (1 B.L.R. A.C. 56, 8 W.R. 300, *D.*)

(36)—*Mortgage—Bond and warrant of attorney to enter up judgment give as collateral security—Seizure of property under* fi-fa *in execution of judgment—Equity of redemption not sale able under* fi-fa—*Subsisting of right of redemption.*—Plaintiff sued to redeem a garden which was mortgaged by his father B in 1819 to the predecessor-in-title of the defendants. On the date of the mortgage, as a collateral security, gave a bond and a warrant of attorney to enter up judgment in the Supreme Court. Execution issued on this judgment; and, under a *fi-fa*, the property was seized and sold by the Sheriff and purchased by R brother of the original mortgagee. who got possession in 1821 under a bill of sale and continued ever since in possession. In 1865, the present suit was instituted to redeem upon the footing of the original mortgage. The plaintiff's case was that the relationship of mortgagor and mortgagee still subsisted between the appellants and the respondents (the representatives of R and his brother the original mortgagee) and that much more than the mortgage-debt had been realised from the usufruct. The Principal Sudder Ameen found that the relation of mortgagor and mortgagee between B and R, N ceased to exist from the date of the Sheriff's sale when the holders of the bond and warrant of attorney satisfied their debt and took possession of the garden and B received and appropriated the surplus proceeds of the sale. The question argued on special appeal was the same as that before the lower Court, *viz.*, did the relation of mortgagor and mortgagee still subsist, or had the title of the mortgagee been exchanged for any other title, and, if so, when and how. *Held* that the right of redemption had not been lost, but still subsisted. At the time of the Sheriff's sale in 1821, an equity of redemption could not be seized and sold under a *fi-fa*, and therefore, nothing passed under the Sheriff's sale to R.N. R.N. no doubt was put in possession; but as he had no right to possession save as mortgagee, he must be deemed to have obtained and to

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

———*m.*—WRONGFUL AND INVALID SALES—*continued.*

have remained in possession in that capacity. HURROPERSHAD GHOSAL v. HURRO MONEE DEBEE, **8 W.R. 210.**

(37)—*Sheriff, jurisdiction of, to issue* fieri facias.—*Held* that, after the High Court was established, or at all events after 1865, the writ of *fieri facias* could not run beyond the local limits of the High Court's original jurisdiction, and that the Sheriff could not under that writ take possession of or sell property in the Mofussil. Whilst a certain land in the Mofussil was in the possession of the Sheriff under a writ of *fieri facias* issued on a judgment of the High Court, the same land was sold by the Court of the twenty-four Pergunnahs under another decree transferred to it by the High Court. *Held* that the sale was a valid one and that the Sheriff's possession would not invalidate the sale. GRISH CHUNDER DAS v. BROJO JIBUN BOSE, **8 C. L R. 4.** (24 W. R. 366, *R.*)

(38)—*Act* VIII *of* 1859, *s.* 257—*Execution sale.*—A suit to recover property alleged to have been sold in execution by a Court which had no jurisdiction is not barred by Act VIII of 1859, s. 257. KANHAYE SINGH v. OOMADHUR BHUTT, **21 W.R. 291.**

(39)—*Decree becoming incapable of execution—Auction sale of property in execution of such decree—No title passes to purchaser.*—A suit to recover possession of and to establish the right to property purchased at an auction sale, in execution of a decree which, since the sale, had been declared incapable of execution, will not lie. PADARUTT LALL v. RUTTUN SINGH, **5 N.W.P. 242.** (13 W.R. 273, *F.*)

(40)—*Invalid decree—Sale in execution—Limitation—Act* XIV *of* 1859, *s.* 20.—A sale in execution of a decree is vitiated by the circumstance of the decree being at the time of sale invalid, *e.g.*, barred by limitation. GOLAM ASGAR v. LAKHIMANI DEBI, **5 B.L.R. 68=13 W.R. 278.** [*F.*, 5 N.W.P. 242; *Appr.*, 20 W.R. 5; *D.*, 20 W.R. 5.]

(41)—*Sale in execution of decree void—Suit for refund of purchase money.*—A sale in execution of a hypothecation decree was set aside at the suit of a private auction-purchaser, and the purchaser in execution of the mortgage decree, having been obliged to surrender the property brought the present suit to recover the purchase money from the decree-holder, alleging that the hypothecation-bond and the decree obtained thereon were of a collusive nature. The lower appellate Court found that the decree was the result of collusive proceedings between the mortgagor and the mortgagee. *Held*, on such finding, that the plaintiff was entitled to recover the money from the mortgagee (decree-holder) as money had and received to his use. KISHORI LAL v. GHANSHAM, **A.W.N. 1881, 125.**

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

———*m.*—WRONGFUL AND INVALID SALES—*concluded.*

(42)—*Sale in execution of decree—Setting aside sale—Rejection of highest bid—Abortive sale caused by act of judgment-debtor—Highest bidder declared not the purchaser—Validity of sale.*—Three attempts to sell land taken in execution under a decree had been rendered abortive by the acts of the judgment-debtor, and a delay of seven years occasioned, during which by his conduct he defeated the execution of the decree. When the property was put up for sale for the fourth time, the Collector rejected the two highest bids, on the ground that neither of the bidders could produce a mooktarnamah from the persons for whom respectively they professed to act as agents, nor produce the required deposit, and he declared the third highest bidder the purchaser of the land. *Held* that under the circumstances the conduct of the Collector was justifiable and the sale valid. RAJAH MOHESH NARAIN SING v. KISHRAMUND MISSAR, **Marsh 592=2 Ind. Jur. O.S. 1=5 W.R. P.C. 7=9 Moore's I.A. 324=1 Suther. 488=1 Sar. 862.**

(43)—*Execution sale—Bidding by decree-holder without permission of Court—Sale if valid.*—A bidding at an execution-sale by the decree-holder without permission from the Court, does not *ipso facto* invalidate the sale. VEERAPPA CHETTY, *Petitioner*, **14 W.R. 405.**

See CIV. PRO. CODE, 1908, s. 47, 10 B.H.C. 297.

———*n.*—MISCELLANEOUS.

(1)—*Application to sell immoveable property in execution setting aside deed of gift—Avoidance of deed of gift in suit by third party—Removal of obstruction to decree-holder to bring property to sale for debts under his decree.*—The defendant in the present suit had obtained a decree against one J, and made a summary application in execution to have a gift executed by J in favour of the plaintiff's donor cancelled. Subsequently a third party who had sued to set the deed of gift aside succeeded on the ground that it was not *bona fide*. The obstruction being thus removed, the decree-holder petitioned to have the property sold in execution of the decree against J and succeeded. The present suit was thereon instituted by the plaintiff who was in possession to stay the order for sale in execution. The lower appellate Court having dismissed the suit, plaintiff appealed. But the High Court dismissed the appeal holding that the decree in favour of the third party had removed the obstruction to the decree-holder in bringing the property to sale as that of his judgment-debtor J, and the title deed of the plaintiff having been declared not to be a *bona fide* one, defendant might at once sell the property for the debt due to him. SARAYE AKUN v. CHAMPA BIBEE, **2 W.R. 308.**

(2)—*Sale of decree—Subsequent execution by vendor—Purchase at auction-sale—Construction*

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*n.*—MISCELLANEOUS—*continued.*

1341 *of* 17*th June* 1842.— A decree-holder cannot first sell a decree, and then sue out execution upon it. Construction 1341 of 17th June 1842 no doubt makes it essential to the formal recognition by a Civil Court of the transfer of a decree that the transferrer should certify the fact to the Court ; and that until such fact be so certified, the originally recorded decree-holder alone can be regarded as the decree-holder who can properly execute the decree by sale or otherwise. But the construction was never intended to enable a person to commit a fraud by first selling a decree and then suing out execution upon it. SITARAM SAHAI v. MOHAN MANDAR, **B.L.R. Sup. Vol. 345=3 W.R. 90.** [*R.*, 7 W.R. 360.]

(3)—*Holder of money-decree, acquiescence of, in Court's order relating to sale—Duty to credit sale price to the decree.*—In this case a creditor who had obtained a money-decree acquiesced in an order in execution made by the Court that, out of four villages, the property of his judgment-debtor, the two last should only be sold if the price of the two first fell short of the amount of his decree. The first two villages did sell for more than enough to satisfy the decree, but the creditor, having applied part of the sale price to clear that account, placed the other part to the credit of some old debts due to him by the judgment-debtor. Under these circumstances, it was *held* that the judgment-creditor had no right to get the last two villages sold in satisfaction of what remained of his debt. It was therefore not competent to the creditor to subsequently maintain a suit to have his lien declared upon the two other villages which, under the orders of the Court passed in his presence and with his acquiescence, could be liable only when the condition occurred that the decree was not satisfied by the sale of the two villages ordered to be first sold. MOONSHEE KALLY PERSHAD v. LALLAH BEHARY LAL, **4 W.R. 67.** [*R.*, 8 W.R. 379.]

(4)—*Decree for possession of land — Immoveable property—Order setting aside sale of decree, not to be interfered with by appellate Court.*—A decree for possession of land is a document convertible at the pleasure of the holder into land. Such a decree, therefore, is not of the nature of a 'moveable ;' it is the title-deed of an estate and, like all other similar muniments of title, is real or immoveable property. Consequently, the order of the first Court setting aside a sale under such a decree being final, it is not competent to the appellate Court to interfere with such order. MOBKOONISSA v. DEWAN ALI MISTREE, **4 W.R. Mis., 22.**

(5)—*Sale in execution—Intervention by claimants—Admission by intervenors of partial interest of judgment-debtor—Court whether bound to enquire into claim—Civ. Pro. Code, s. 246, scope of.*—S. 246 of the Civ. Pro. Code, was

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*n.*—MISCELLANEOUS—*continued.*

enacted for the purpose of avoiding the inconvenience and hardship which might accrue to third parties in consequence of the sale of any property as the property of the judgment debtor, when the latter has got no possession in it, either actual or constructive. From the nature of the enquiry prescribed by the section and that of the order to be passed upon the result of such enquiry, this construction of the law appears to be perfectly correct. The validity or otherwise of the title set up by the claimant is not to be investigated directly. The question for adjudication of such a case is whether the judgment-debtor is in possession of the property attached for sale, actually or constructively ; and for the purpose of determining it, the claimant is to be placed in the category of a defendant. Where, therefore, the person who comes forward with the claim admits the debtor's possession of some share or interest, he thereby admits the very fact which it is the object of enquiry under the section to ascertain, and consequently it is then unnecessary for the Court to proceed to enquire into the claim. MISREE BEGUM v. PUNNOO SINGH, **8 W.R. 362.**

(6)—*Sale of estate in execution—Application by judgment-debtor for realization of debt from proceeds of another estate.*—The Court will not prevent a decree-holder from enforcing his decree by sale of an estate, in which the judgment-debtor has a saleable interest, merely on the ground that the estate is entangled and that it would be more convenient to the judgment-debtor if the judgment-creditor should wait and receive his debt from the proceeds of another estate which is under attachment. NUJEEMOODDEEN AHMED v. ABDOOL AZEEZ, **11 W.R. 342.**

(7)—*Holder of two decrees—Attachment in satisfaction of first decree—Subsequent application for attachment for second decree—Fraud.*—A decree-holder who, after having obtained two decrees against the same person, has attached certain property in execution of one decree, has a right to carry out the sale of that property, if, in the notification of sale, intending purchasers have been made aware of the fact that he likewise claims the same property in satisfaction of his second decree. BOLAKEE LALL v. KHURUCKDHAREE SINGH, **12 W R. 79.**

(8)—*Execution of decree—Prohibitory order—Act* VIII *of* 1859, *ss.* 236, 243—*Purchase of property by judgment-creditor — Practice of English Courts.*—Where, in execution of a decree, the defendant caused a decree of the plaintiff, awarding him Rs. 925 to be attached under s. 236, Act VIII of 1859, caused the prohibitory order to be fixed in a conspicuous part of the Court-house and copies thereof to be delivered to the judgment-debtors, and subsequently purchased the decree at Court-sale for Rs. 20, *held*, on special appeal by the plaintiff,

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*n.*—MISCELLANEOUS—*continued.*

that the prohibitory order, having been in accordance with the terms of s. 236, Act VIII of 1859, was legal and regular. The Court executing the defendant's decree ought not to have sold the plaintiff's decree, but should have under s. 243 appointed a manager to enforce the plaintiff's decree. A decree-holder must not be allowed to bid and purchase at a sale in execution of his decree without an order of Court previously obtained upon notice to the judgment-debtor. Practice of English Courts in execution of decree considered. BANDHU ROY v. HANUMAN SINGH, 3 B.L.R. A.C. 320 =14 W.R. 406, Note.

(9)—*Sale in execution—Purchase in good faith—Inquiry into vendor's title.*—Buying in good faith at a sale in execution does not make it immaterial to inquire into the vendor's title. TATUR KHAWAS v. LOKE NATH, 15 W.R. 131.

(10)—*Execution of decree—Postponement of sales at judgment-debtor's request—No fresh notification—Validity of sale.*—Where an execution sale was adjourned at the judgment-debtor's request and with his express consent that no fresh notification was necessary, the sale that took place on the adjourned date cannot be questioned by him on the ground of material irregularity in not publishing the notification. BAMA SOONDUREE CHOWDHRAIN v. SARODA SOONDUREE DOSSEE, 18 W. R. 511.

(11)—*Execution—Act* VIII *of* 1859, *s.* 270—*Decree of subordinate Court.*—Where a decree was passed by the Subordinate Judge, and in execution of that decree a sale of certain property was held and conducted by the nazir of the District Judge, *held* that, in reference to the sale, the District Judge had no jurisdiction to pass any order respecting the re-sale of the property. NOBA KISHORE DASS v. PROTAP CHUNDER BANERJEE, 1 C.L.R. 534.

(12)—*Title of purchaser at auction-sale, when commences—Liability to pay Government revenue.*—The title of a purchaser to an execution-sale dates from the date of the actual sale though the confirmation of the sale takes place at a later date. [*F.*, 6 C. 389=7 C.L.R. 456, 11 C. 341; *R.*, 17 B. 375, 17 M. 89, 7 C.L.J. 1.] Such purchaser is liable to pay the Government revenue on the property purchased accruing due between the date of sale and the confirmation thereof. BHYRUB CHUNDER BUNDOPADHYA v. SOUDAMINI DABEE, 2 C. 141, F.B. [*F.*, 6 C. 389=7 C.L.R. 456.]

(13)—*Execution sale, Postponement of—Want of notice of postponement of sale.*—In all cases, in which an execution-sale may be postponed to another day, it is necessary that the formalities required by law should be gone through afresh, unless the parties waive them. So, where the prescribed notice of the postponement of an execution sale was not given, it might be presumed that there had been an absence of

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*n.*—MISCELLANEOUS—*continued.*

bidders, from which alone substantial injury must probably have arisen to the judgment-debtor. GOOPEE NATH DOBEY v. ROY LUCHMEEPUT SINGH BAHADUR, 3 C. 542=1 C.L.R. 349. (3 W.R. Mis. 11, *F.*) [*R.*, 7 C. 466, 7 C. 730, 3 C. 544=2 C.L.R. 260.]

(14)—*Proclamation of execution sale—Material irregularity.*—The omission to issue a fresh proclamation of execution sale on a release of a portion of the property from attachment is a material irregularity; and the proclamation should be published thirty days before sale. SHIB PROKASH SINGH v. SARDAR DOYAL SINGH, 3 C. 544=2 C.L.R. 260. [*R.*, 18 A. 37.] *See, also,* **GOOPEE NATH DOBEY v. ROY LUCHMEEPUT SINGH BAHADUR, 3 C. 542=1 C.L.R. 349.**

(15)—*Dispossession of person in possession of property by auction-purchaser—Remedy under the Civ. Pro. Code of* 1877—*Limitation Act* (XV *of* 1877), *sch.* II, *art.* 165.—Under the Civ. Pro. Code of 1877, there was no provision corresponding to that in s. 269 of the repealed Code of 1859, enabling the Court, executing a decree, to enquire into a complaint by a party having no connection with the judgment-debtor, on the ground of dispossession in the delivery of possession to the execution purchaser; his remedy in such a case was only by regular suit. HARASATOOLLAH v. BROJONATH GHOSE, 3 C. 729=1 C.L.R. 317.

(16)—*Lapse of time between proclamation and actual sale of property.*—On an adjournment (not *de die in diem*) of a Court sale, after several previous postponements, by the Court itself on its own motion, the rule that thirty days should elapse between the proclamation and the sale must, in the absence of waiver by the debtor, be strictly complied with, though such last adjournment might be to the debtor's benefit. HARBUNS SAHAI v. BHAIRO PERSHAD SINGH, 5 C. 259=4 C.L.R. 23. (18 W.R. 347, *D.*)

(17)—*Execution sale—Material irregularity in proclamation of sale—Substantial injury—Presumption.*—Substantial injury cannot be presumed from the fact of a material irregularity in the proclamation of an execution-sale, though, on proof of both the injury and the irregularity, the Court will presume the injury to be due to the irregularity. BONOMALI MOZUMDAR v. WOOMESH CHUNDER BUNDOPADHYA, 7 C. 730=9 C.L.R. 341. [*R.*, 11 A. 333=A.W.N. 1889, 115, 5 M.L.J. 70.]

(18)—*Execution sale of immoveable property—Confirmation of sale and certificate—Evidence.*—The order affirming a sale of immoveable property in execution would be sufficient to pass a title to the purchaser, and the sale certificate that might afterwards be obtained by him would be merely evidence that the property

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*n.*—MISCELLANEOUS—*continued.*

so passed. TARA PRASAD MYTEE v. NUND KISHORE GIRI, **9 C. 842=12 C.L.R. 448.** (7 C. 199, *F.*) [*Cited.*, 9 P.R. 1903=36 P.L.R. 1903; *R.*, 11 M. 296, 7 C.L.J. 384; *D.*, 10 C. 252.]

(19)—*Sale in execution of decree—Previous attachments of property, effect of.*—When a property is sold in execution of a decree, it cannot be sold again at the instance of a decree-holder, who had attached before the attachment effected by the decree-holder, under whose decree it is actually sold. Consequently, on the happening of a judicial sale, all previous attachments effected upon the property sold fall to the ground. KASHY NATH ROY CHOWDHRY v. SURBANAND SHAHA, **12 C. 317.** [*R.*, 22 B. 88, 6 C.W.N. 57, 6 C.L.J. 130=34 C. 836; *Compared*, 16 B. 91.]

(20)—*Sale by inferior Court in ignorance of pending attachment by superior Court, validity of—Civ. Pro. Code*, 1882, *ss.* 285, 295.—Where an execution sale has been held by an inferior Court at the instance of the decree-holder (the Court itself, the decree-holder and the auction-purchaser being without any information of any objection to the exercise of a jurisdiction which that Court would ordinarily be competent to exercise), and that sale has been confirmed without any objection raised, a title so obtained would be a valid one, notwithstanding the pendency of an attachment of the same property in execution of a decree of a superior Court. Such a superior Court, when the property is attempted to be brought to sale in pursuance of its own attachment, would be acting with discretion by refusing to re-sell the property and by sending for the assets realised by the inferior Court, for rateable distribution in such superior Court. BYKANT NATH SHAHA v. RAJENDRO NARAIN RAI, **12 C. 333.** (7 C. 410, 3 A. 356, 4 A. 359, 7 M. 47, *R.*) [*F.*, 19 C. 651, 21 C. 200; *Cons.*, 13 C.P.L.R. 145; *R.*, 16 B. 91, 18 B. 458, 18 A. 348, 22 B. 88, 25 C. 46, 9 M.L.J. 1=22 M. 295, 6 C.L.J. 130=34 C. 836.]

(21)—*Execution sale under decree since reversed — Separate suit to recover purchase money—Party to execution proceedings—Civ. Pro. Code*, *s.* 244.—Where the defendant, in execution of his decree for costs, purchased the plaintiff's house himself and, after deducting the decretal amount from the purchase money, refunded the balance to the plaintiff, and, upon the suit being decreed on appeal, the plaintiff got back possession of his house unconditionally, *held*, a separate suit by the defendant for the recovery of the balance of the purchase-money received by the plaintiff, as money received to his use, the consideration having failed, would lie, notwithstanding s. 244 of the Civ. Pro. Code, as the defendant was not a party to the execution proceedings in his character of

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*n.*—MISCELLANEOUS—*continued.*

auction-purchaser. HIRA LAL CHATTERJI v. GOURMONI DEBI, **13 C. 326.** [*D.*, 18 M. 13; *R.*, 13 B. 34, 16 C. 33, 15 B. 290, 24 A. 519 =22 A.W.N. 144, 113 P.L.R. 1904=45 P. R. 1904.]

(22)—*Execution of decree—Omission to cause attachment—Validity of sale of mortgaged property not affected.*—The omission to cause an attachment to be made in execution of a decree for the realisation of a mortgage-debt, would not affect the validity of a sale held in execution of such decree. TINCOURI DEBYA v. SHIB CHANDRAPAL CHOWDHURY, **21 C. 639.** (18 C. 188, *F.*).

(23)—*Execution of decree—Successive sales—Auction-purchaser's negligence.*—In a suit for possession by a decree-holder, who, on a sale in execution of a mortgage decree being set aside, purchased and took possession of the property in a second sale during the pendency, in the High Court, of an appeal, against the order setting aside the first sale, to which the decree-holder was made no party, and which confirmed the first sale, the failure of the auction-purchaser to apply to the High Court for a stay of execution by the decree-holder would itself be sufficient to show that in justice the property should be allotted to the decree-holder, who throughout neglected nothing, and only acted in accordance with his right. GONESH PERSHAD v. FAZUL EMAM KHAN, **23 C. 857.**

(24)—*Sale in execution of an* ex parte *mortgage decree—Purchase by third party—Confirmation while* ex parte *decree is in force—Decree set aside and subsequently re-affirmed.* — A mortgagor is not entitled to redeem, when the property mortgaged has been purchased by a third party at a sale in execution of an *ex parte mortgage-decree* and confirmed while the same was in force, notwithstanding the fact of the decree being set aside and subsequently re-affirmed after trial. MUKHODA DASSI v. GOPAL CHUNDER DUTTA, **26 C. 734.** (14 C. 18, P.C., 10 A. 166, P.C., 10 W.R. 154, *R.*) [*R.*, 22 A. 377, 23 A. 25, 13 C.W.N. 710]

(25)—*Sale in execution of decree—Purchaser accepting conditions of sale—Abstract of title incorrect—Purchaser's right to set aside sale—Application for refund of purchase-money.*—A purchaser of property—put up for sale by the Registrar, in execution of a mortgage-decree—, who accepted the conditions of sale, whereby he was required to furnish requisitions within ten days after the actual delivery of the abstract of title, though he failed to furnish his requisitions within the time allowed by the conditional sale is not precluded from applying to the Court for setting aside the sale on the ground that the abstract is incorrect and contained a most material misdescription of the document which has been made the root of title. The purchaser, under the circumstances, is entitled to have

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*n.*—MISCELLANEOUS—*continued.*

his purchase-money refunded. (*In re Banister*, (1879) L.R. 12 Ch. D. 131, 150, *M'Culloch* v. *Gregory* (1855), 1 Kay & J. 286, *Else* v. *Else* (1871), L.R. 13 Eq. 196, *R.*) AGHORE NATH MOOKERJEE v. ADMINISTRATOR-GENERAL OF BENGAL, **30 C. 468.** (5 C.W.N. 593, *R.*)

(26)—*Hindu Law—Widow's estate, what passes upon an execution—Sale of.*—The question whether, upon an execution-sale, the mere right, title and interest of a Hindu widow or the complete title to the estate passes to the purchaser, depends upon the nature of the right, title and interest sold and upon the terms of the decree in execution of which the sale was held. *Held* upon the evidence in this case, that only the right, title and interest of the widow passed. RAM LAL SHOOKOOL v. AKHOY CHARAN MITTER, **7 C.W.N. 619.**

(27)—*Execution sale—Application to set aside on the ground of fraud—Under-statement of value, if fraud—Limitation—Limitation Act* (IX *of* 1908), *s.* 18, *sch.* I, *art.* 166—*Sale before Act, new or old Act applicable—General Clauses Act* (X *of* 1897), *s.* 6.—*Per Coxe, J., Teunon, J.*, expressing no opinion)—An under-statement of value in the sale proclamation cannot by itself justify an inference of fraud on the part of the decree-holder. S. 18 of the Limitation Act does not apply to a case in which the fraud is antecedent to the accrual of the right. (36 C. 654, 17 B. 341, *R.*) *Held*, that s. 18 can apply only to such fraud as amounts to concealment and is intended to keep from the injured party the knowledge of the wrong or its remedy. The section therefore can have no application where the fraud alleged by a party applying to set aside an execution sale is under-statement of the value of the properties in the sale proclamation. The burden of proving fraud lies on the applicant. *Semble.*—An application to set aside on the ground of fraud, an execution sale held prior to the coming into operation of Act IX of 1908 will be governed by art. 166 of sch. I of that Act, if made after that Act came into operation. S. 6 of the General Clauses Act does not preserve the right the applicant had to apply within three years from the date of the sale. SRIMATI RAIKISHORI DASYA v. MUKUNDA LALL DUTT, **15 C.W.N. 965.**

(28)—*Sale of property—Subsequent attachment of property in execution of decree against vendors—Vendee putting in objection petition when property put up for sale and withdrawing petition—Subsequent suit by him against auction-purchaser and vendors, not barred.*—Where, after the purchase of certain property by a person, the property is attached in execution of a decree against the vendors, and, when the property is about to be sold, the vendee puts in an objection petition objecting to the sale, and then his vakil withdraws the petition with his consent, and then the property is sold in Court-auction, the withdrawal of the objection petition does not bar the vendee from suing his vendors and the auction-purchaser for recovering the land. KUMARASAMY REDDI v. PANNA SOONA MOOROOGAPPA CHETTY, **7 M.H.C. 359.**

(29)—*Decree—Execution—Irregular procedure—Sale invalid.*—Where the properties of a judgment-debtor were put up for sale and knocked down to a purchaser, and the Amin, considering that the deposit had not been duly made, re-sold the same properties on the following day; and where objection was taken to the second sale by the first auction-purchaser and the Judge ordered a third sale, cancelling the other two, without giving notice to the judgment-debtor, it was held that the last order for a third sale, was invalid and should be set aside. KUPPA v. RAMASAMI, **6 M. 197.**

(30)—*Court-sale—Purchaser*—Lis pendens—*Decree—Execution—Invalid sale—Possession given to purchaser—Remedy.*—A purchaser who buys at a Court-sale, while an appeal is pending, takes subject to whatever would be the ultimate result of the decision in the pending appeal, whether he knew of the *lis pendens* or not. Where certain properties were attached in execution of a decree, and the representatives of the judgment-debtor put in a claim to them in his own right, and, on its being rejected, appealed to the High Court against this order, and on the same day as the sale to a third person of those properties was confirmed by the lower Court, the High Court set aside the order rejecting the claim; though the order of the lower Court confirming the sale was made without jurisdiction, that Court had no power to restore possession to the claimant. SUBBAYA v. YELLAMMA, **9 M. 130.**

(31)—*Standing crop—Court-sale.*—The ordinary rule is that the right to the growing crop will pass by a sale of the land without express mention. RAMALINGA v. SAMIAPPA, **13 M. 15.** [*R.*, 15 C.P.L.R. 141.]

(32)—*Civ. Pro. Code, s.* 306—*Material irregularity—Sale in execution of decree.*—The commencement of a sale prior to the expiry of the thirtieth day, or any delay in making the deposit required by s. 306, or the adjournment of the sale from time to time without sufficient ground, is a mere irregularity. VENKATA v. SAMA, **14 M. 227.** [*F.*, 3 L.B.R. 225; *R.*, 132 P.R. 1906.]

(33)—*Court auction—Withdrawing from bid.*—A bidding at an auction is a mere offer which may be retracted before the hammer is down. In the absence of any law or rule to the contrary, this rule applies to Court auctions also. AGRA BANK v. HAMLIN, **14 M. 235.**

(34)—*Civ. Pro. Code, Act* XIV *of* 1882, *ss.* 268 *and* 274—*Attachment of mortgage-debt*

Sale—continued.

——5.—**Sale in Execution of Decree**—*contd.*

————*n.*—MISCELLANEOUS—*continued.*

under s. 268 *only—Not a material irregularity.*—In a suit against the mortgagor by a person who had purchased a mortgage-debt in Court sale in execution of a decree against the mortgagee, in the course of which execution the said debt had been attached, not under s. 274, Civ. Pro. Code, but under s. 268, it was *held* that he was entitled to a mortgage-decree, since the omission to attach under s. 274, though an irregularity, was not a material irregularity, and the mortgagor had not been prejudiced thereby. MUNIAPPA NAIK v. SUBRAMANIA AYYAN, **18 M. 437 = 5 M.L.J. 60.** [*R.*, 6 M.L.J. 1, 14 C.P.L.R. 5, 30 M. 255 = 17 M.L.J. 201 = 2 M.L.T. 167, 18 P.R. 1909.]

(35)—*Decree-holders purchasing at execution-sales—Purchase subject to final result of litigation—Object of rule.*—Though in the case of third parties purchasing at execution sales, the subsequent reversal or modification of the decree or order under which the sale took place does not affect their rights, it is otherwise in the case of decree-holders themselves purchasing, and in their case, the purchase is subject to the final result of the litigation between them and their judgment-debtors. The object of the rule, is so far as it relates to judgment-creditors, is apparently to prevent the interests of the judgment-debtors suffering by sales of their property before their liability is finally determined, and to avoid judgment-creditors profiting at the expense of their debtors by becoming purchasers in sales pending litigation by way of appeal. *Quære* :—Whether the decree-holder purchaser should be treated as if he held a charge upon what he purchased for what was ultimately found due to him. SYED NATHADU SAHIB v. NALLU MUDALY, **27 M. 98.** (19 W.R. 416, *R.*) [*R.*, 27 M. 504, 5 C.L.J. 328.]

(36)—*Civ. Pro. Code*, 1877, *s.* 311—*Postponement of sale in execution—Order communicated to officer after sale—Sale void.*—When an order has been made postponing a sale in execution of a decree, the sale, if it has been made before the order reached the hands of the officer conducting the sale, becomes void. TODI SINGH v. MITHU LAL, **A.W.N. 1881, 19.**

(37)—*Execution — Sale of property under money decree—Subsistence of mortgage-decree—Rights of purchasers.*—The purchaser of certain property in execution of a money decree cannot resist a sale of the same property in execution of a prior existing mortgage-decree. The fact that the mortgage-decree was treated as a money-decree at the time of his purchase and the decree was amended so as to be a mortgage decree, only after his purchase, cannot be a valid ground for his resistance. At the time of his purchase in execution of the money decree, the lien under the mortgage-bond, if not under the decree, was subsisting, and he could only take the property with the charge upon it. GUJAR KUAR v. BEHARI LAL, **A.W.N. 1883, 57.**

Sale—continued.

——5.—**Sale in Execution of Decree**—*contd.*

————*n.*—MISCELLANEOUS—*continued.*

(38)—*Successive sales in execution of decrees—Priority—Confirmation—Civ. Pro. Code*, 1882, *ss.* 11, 320.—Three persons obtained decrees against the same person, for the enforcement of hypothecation against the same property. The execution of these decrees was transferred to the Collector under s. 320, Civ. Pro. Code. The decree were, in order of date, those of M. S. and B respectively First, the property was sold in execution of S's decree and was purchased by S and D. After this, but on the same day, the same property was put up again for sale, in execution of B's decree and purchased by A. It was then put up a third time for sale in execution of M's decree and purchased by G. A subsequently allowed his earnest money to become forfeited. The Deputy Collector confirmed the last sale on the ground that M's decree being first in date, the lien held by him was entitled to priority over the other liens. The other purchasers objected to the confirmation of sale but their objections were disallowed. An appeal from this order was preferred to the Deputy Commissioner who set aside the order confirming the sale and confirmed the prior sale in favour of D and S. G then brought a suit in the Civil Court praying that the Commissioner's order might be set aside and that the sale in his favour might be confirmed. *Held* (1) that a suit of such a nature would lie in the Civil Court and (2) that the first purchasers at the sale held under the Collector's order were the only possible purchasers at the sale, that to confirm the sale to the plaintiff would be a manifest injustice, that the sale to the plaintiff could not be confirmed and that, therefore, the suit should be dismissed. GAURI SAHAI v. SEWA RAM, **A.W.N. 1887, 267.**

(39)—*Execution of decree—Sale in execution—Civ. Pro. Code, s.* 310-*A—Two deposits made in execution of the same decree lumped together—Withdrawal of part of lump sum—Presumption as to withdrawal.*—Where there were in Court two sums deposited in connection with the execution of a decree, one of which the decree-holder was entitled to draw out and the other he was not, and the two sums were lumped together in the Civil Deposit register as a single deposit under the head of "decree-money," it was held that a withdrawal by the decree-holder of a portion of the lump sum must be regarded as a withdrawal of that portion only which he was legally entitled to withdraw, and he could not be heard to say that he had withdrawn any portion of the deposit which he was not legally entitled to touch. GANGA SARAN SAHU v. KANDHAIYA KANDU, **A.W.N. 1899, 168.** (L.R. 13 Ch. D. at p. 727, *R.*)

(40)—*Sale of decree charging land—Sale of immoveable property—Procedure — Civ. Pro. Code*, 1859, *ss.* 235, 252.—The sale, in execution

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————n.—MISCELLANEOUS—*continued.*

proceedings, of a decree, charging lands for its satisfaction, held by the judgment-debtor, is a sale of an interest in immoveable property. [*D.*, 15 A. 134; *R.*, 9 M. 5, 10 M. 169.] Sales in execution proceedings, of decrees charging lands, are governed by the provisions of the Civ. Pro. Code, relating to sales of immoveable property. MUSAMMAT BHAWANI KOER v. GULAB RAI, **1 A. 348.** [*R.*, 10 M. 169.]

(41)—*Sale in execution of decree—Warranty of title.*—In execution-sales of rights and interests in immoveable property, the extent and nature of the interest of the judgment-debtor, as described in the revenue registers, are notified at the time of sale, but the descriptions so given are neither intended by the decree-holder or the officer conducting the sale, nor taken by the auction-purchasers, to convey any warranty of the correctness of the description of such interest or any warranty of the extent and nature of such interest. Where, therefore, in such a case, the sons of the judgment-debtor obtained a decree against the auction-purchaser for the recovery of their interests in the property sold, he could not, in the absence of fraud or misrepresentation on the part of the decree-holder, or anything to show that an express or implied warranty of title was given by him, maintain a suit against the decree-holder for the refund of the purchase-money proportionate to the interests in the property recovered from him. RAM NARAIN v. MAHTAB BIBI, **2 A. 828.** (N.W.P. 1871, p. 67, *D.*) [*Appr.*, 23 A. 60; *R.*, 23 A. 355.]

(42)—*Sale in execution of decrees of several Courts—Civ. Pro. Code*, 1877, *ss.* 285, 311, 312.—Where, in execution of two decrees between the same parties, one passed by a Subordinate Judge, and the other by a District Munsif, the same property was sold by a single sale and, on the application of the decree-holder in the former Court (who brought the amount due on the decree), and with the consent of the decree-holder and the auction-purchaser, the Subordinate Judge set aside the sale as a whole, which was subsequently confirmed by the District Munsif on the application of the decree-holder in his Court and the auction purchaser: *Held per Spankie, J.*—that s. 285 of the Civ. Pro. Code, did not give the Subordinate Judge any jurisdiction to deal with the sale in respect of the decree passed by the District Munsif; nor was there anything in that section to prevent the Munsif from confirming the sale in respect of the decree passed by him, by reason of the fact that a Court of a higher grade had set aside the sale. *Per Oldfield, J.*—It was doubtful whether the Munsif had jurisdiction to confirm the sale; but the Subordinate Judge must have intended to set aside the sale only in respect of the decree passed by him: and, his order setting aside the whole sale being illegal, and the Munsif's order having done substantial justice, there was no reason to interfere. CHUNNI LAL v. DEBI PRASAD, **3 A. 356.** [*Appl.*, 7 M. 47; *R.*, 12 C. 333.]

(43)—*Sale in execution of decree—Separate sales in execution of decrees—Civ. Pro. Code*, 1877, *s.* 295.—Where, two or more decrees held by several persons against the same judgment-debtor are under execution, and in execution of one of them by sale of his property, sufficient money is realized for the payment of all the decrees, it is not allowable to sell such property again or other property of the judgment-debtor in execution of other decrees. RATI RAM v. CHIRANJI LAL, **3 A. 579.**

(44)—*Sale in execution of decree—Death of decree-holder before sale—Effect on validity of sale—Civ. Pro. Code*, 1877, *ss.* 365, 366.—*Per Oldfield, J.* and *Straight, J.*—The death of a decree-holder before a sale takes place in execution of his decree, does not render such sale void and the confirmation of it improper. The provisions of ss. 365 and 366 of the Civ. Pro. Code do not apply to proceedings in execution of a decree where a sole judgment-creditor dies. *Per Spankie, J.*—Though his death does not render the sale invalid, the confirmation of it without bringing the representatives on the record under ss. 365 and 366 of the Civ. Pro. Code, is improper. *Per Pearson, J.*—As an application for execution abates after the death of the decree-holder if not prosecuted by his legal representatives, a sale under such circumstances is improper and invalid, and the order confirming it should be set aside. DULARI v. MOHAN SINGH, **3 A. 759 = A.W.N. 1881, 57.** [*F.*, 2 A.W.N. 169; *Appl.*, 6 A. 255; *R.*, 12 A. 440, F.B., 19 B. 276, 10 C.L.J. 396.]

(45)—*Execution of decree—Sale in execution set aside—Another sale in execution of another decree—Subsequent confirmation of first sale—Effect on second sale.*— A sale in execution having been set aside on the petition of the judgment-debtors, the same property was again sold in execution of another decree and purchased by another person. In a suit brought, afterwards, by the purchaser at the first sale against the judgment-debtor who colluded with him (the purchaser at the second sale not being made party to such suit), the first sale was confirmed. In a suit by the purchaser at the first sale against the purchaser at the second sale for possession, *held* that the title of the latter under the second sale was not affected by the decree confirming the first sale. BANKE LAL v. JAGATNARAIN, **22 A. 168 = A.W.N. 1900, 31.** (17 B. 375, 11 B.H.C. 193, 2 C.W.N. 589, 20 C. 25; *D.*, 15 I.A. 12, *R.*) [*R.*, 24 A. 467.]

(46)—*Act* VIII *of* 1859, *s.* 259—*Decree for sale of immoveable property—Certificate of sale—Attachment.*—A decree for the sale of mortgaged

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*n.*—MISCELLANEOUS—*continued.*

property was attached and sold in execution of a decree. *Held* that the certificate of sale ought to have been granted to the purchaser, for what he purchased was not a mere paper on which the decree was written, but the interest in immoveable property which was recoverable under that decree, and such interest must be regarded as immoveable property within the meaning of s. 259 of the Civ. Pro. Code, 1859. HARI GOVIND JOSHI v. RAMCHANDRA PANDURANG JOSHI, **9 B.H.C. 64.** [*R.*, 9 M. 5, 10 M. 169.]

(47)—*Stranger impeaching decree as obtained by fraud—Stay of sale possible only on suit by.*—It is not competent to the executing Court to refuse to sell property ordered to be sold by the decree on the mere ground that a stranger impeaches the decree as having been fraudulently obtained. Where the stranger wishes to stay the execution of the decree, the proper course for him is to file a suit and obtain an injunction for that purpose. PURSHOTTAM VITHAL v. PURSHOTTAM ISHWAR, **8 B. 532.**

(48)—*Purchaser in execution of decree—Nature of title of purchaser—Rival purchasers—Priority—Sale-certificate.*—The purchaser in execution of a decree buys the property subject to all the equities attaching to it as against the judgment-debtor. Where, therefore, the same property was purchased by two different persons in executions of two different decrees against the same judgment-debtor, and while the prior purchaser applied for and got a sale certificate in respect of his purchase only after the same was obtained by the later purchaser, *held* that the prior purchaser had obtained an equitable interest in the property although he had not obtained a sale certificate, and that the later purchaser, therefore, must be held to have purchased the property subject to such equitable interest; and that the prior purchaser, having subsequently completed his title by obtaining the sale-certificate, was entitled to recover possession from the later purchaser. YESHVANT BABURAV v. GOVIND SHANKAR, **10 B. 453.** [*Appl.*, 11 B. 588; *R.*, 17 B. 375, 7 C.L.J. 1.]

(49)—*Sale in execution of decree—Purchase of judgment-debtor's interest—Subsequent acts or omissions of judgment-debtor, not binding on purchaser.*—The attachment and sale in execution of the decree against the judgment-debtor, in this case, and the purchase of his interest thereon by the plaintiff's father, was prior to the attachment made by the defendant. On the defendant's subsequent attachment, the judgment-debtor preferred a claim to the attached property, which was dismissed, and he failed to bring a regular suit within a year to set aside the summary order against him. *Held* that the act of the judgment-debtor in having unsuccessfully intervened at the subsequent attachment, and his omission to bring a suit within a year, could not affect the rights of the

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*n.*—MISCELLANEOUS—*continued.*

plaintiff's father acquired on his purchase at the sale on the prior attachment. PAYAPA v. PADMAPA, **11 B. 45.**

(50)—*Purchaser of property at prior sale in execution of decree—Non-registration of certificate of sale—Purchaser at subsequent sale with registered certificate, rights of, as against previous purchaser.*—Plaintiff claimed as a purchaser, at an auction sale, of the property sued for, under a certificate of sale obtained by him in July 1880 and registered in the same month. The defendant who claimed as a previous purchaser in execution had obtained a certificate in 1875 and was put into possession by the Court, though the certificate was not registered. *Held, following* 10 B. 453, that the defendant had acquired, under Act VIII of 1859, a complete interest in the property, by the previous sale to him and confirmation of it, and, the plaintiff by his subsequent purchase took only subject to such interest. Though there was no direct evidence of the confirmation of the sale to the defendant, yet the grant of a second certificate to him and its registration was held to be sufficient proof of such confirmation. It was also urged that, as the defendant was the holder of the decree in execution of which the property was sold, he took nothing by the purchase, having regard to s. 294 of the Civ. Pro. Code, but it was *held* that such a purchase would not be void *ab initio* but only voidable "on the application of the judgment-debtor or other person interested in the sale" as provided for in the latter part of the section. CHINTAMANRAV NATU v. VITHABAI, **11 B. 588.** [*F.*, 23 A. 478=A.W.N. 1901, 175, 32 M. 242=5 M.L.T. 248; *R.*, 21 C. 554, 22 B. 271, 22 B. 624.]

(51)—*Decree against minor son of deceased debtor represented by guardian—Purchase of debtor's interest in execution—Right of purchaser to debtor's share in entirety including interest of heirs not parties to decree.*—After the death of K a Muhammadan woman, who was a co-sharer, with the defendants, in a certain *khotivatan*, a creditor of K sued on a bond executed by her and obtained a decree as against K deceased, represented by her minor son by his guardian. Plaintiff, as purchaser of K's share in the *vatan* at the sale in execution of the decree, sued the defendants, her co-sharers, to recover the profits of her share which had been collected by them. Defendants contended that the share of a daughter left by K had not passed to the plaintiff under his certificate of sale but it was held that, from the term of the certificate, the purchaser was justified in assuming that he had acquired the entirety of K's share in the *khoti* with a title unimpeachable by the daughter who was equally responsible for the debt. KHURSHET BIBI v. KESO VINAYEK, **12 B. 101.** [*F.*, 20 B. 338; *R.*, 24 B. 135=1 Bom. L.R. 627, 26 M. 734; *D.*, 2 S.L.R. 76, 12 O.C. 146=2 Ind. Cas. 922.]

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————n.—MISCELLANEOUS—*continued.*

(52)—*Execution of decree—Sale of moveable property—Place where sale must take place generally—Appeal — Parties to appeal.*—The Civ. Pro. Code intends that a sale of moveable property in execution of a decree should ordinarily be held at some place within the jurisdiction of the Court ordering the sale. Good and sufficient reasons ought to be shown for directing otherwise. Where a fair sale could be had within the jurisdiction of the Court which executes the decree, the mere fact that a higher price is likely to be bid by holding the sale at a place outside the jurisdiction of the Court, is no reason for deviating from the ordinary rule. The widow of a deceased judgment-debtor preferred an appeal against an order made against her (as representative of her deceased husband) in execution of the decree. One X applied to the Court to make him a party to the appeal, alleging that he was the adopted son of the deceased. The widow denied the adoption and opposed his application. *Held* that X may be made a co-appellant with the widow if the decree-holder consented as it would tend to his own security, irrespective of whether X was or was not the adopted son of the deceased judgment-debtor. LAKSHMIBAI v. SANTAPA REVAPA SHINTRE, **13 B. 22.**

(53)—*Execution of decree—Decrees of different Courts against same judgment-debtor—Judgment-debtor allowed by both Courts to raise amount by private sale—Confirmation of such sale by one Court—Subsequent application for confirmation to other Court—Practice—Procedure—Civ. Pro. Code*, 1882, s. 305 (*O.* 21, *r.* 83, *New Code*).—P obtained a decree against V in the Court of the Subordinate Judge at S. He applied for execution, but V, on 19th April, 1893, obtained permission under s. 305, Civ. Pro. Code, to raise the amount of the decree by private sale on or before the 6th June, 1893, the day fixed for the sale of the lands attached in execution. She obtained a certificate of leave under s. 305. Another decree was obtained against her in the Court of the Subordinate Judge at B by A who also attached the same in lands in execution. From the Court at B however, V also obtained a certificate under s. 305, Civ. Pro. Code, on 22nd April, 1893, authorizing private sale. On the strength of these two certificates, V sold the lands under attachment to the applicant C for Rs. 2,000 by deed dated 25th May 1893. On the 20th June, 1893, C produced the deed in the Court at B and applied for confirmation of the sale as required by s. 305, Civ. Pro. Code. He asked that the purchase money paid by him should be distributed as follows : *viz.*, Rs. 518-14-2 in satisfaction of the decree of the Court at B, Rs. 128-7-10 in satisfaction of the decree of the Court at S. and Rs. 1,352-10-3 for payment to V. The Court at B confirmed the sale, and ordered that the above sum of Rs. 128-7-10 should be paid into the Court at S. On 17th July, 1893, C applied to the Court

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————n.—MISCELLANEOUS—*continued.*

at S to confirm the sale, which had already been confirmed by the Court at B, and he brought into Court the said sum of Rs. 128-7-10. On 19th June, 1893, while the above proceedings were going on, a third decree-holder (the opponent) had applied to the Court at S for execution of his decree. He objected to the private sale being confirmed, contending that the whole money realized had not been produced in Court. The Court allowed the objection and rejected the application to confirm the sale. The applicant then applied to the High Court under its extraordinary jurisdiction. *Held* that the application to the Court at S for the confirmation of the sale under s. 305, Civ. Pro. Code, was superfluous and ought to have been rejected on the ground that, as the sale had already been confirmed by a competent Court, there remained nothing more to be done in regard to it. ANDANAPA v. BHIMRAO ANNAJI, **19 B. 539.** [*R.*, 11 C.L.J. 69 = 3 Ind. Cas. 105, 14 C.W.N. 396.]

(54)—*Decree satisfied out of Court, sale of property held in execution of—Rights of bona fide purchaser.*—Where a person, a stranger to the proceedings, purchases, property *bona fide* at an auction-sale held in execution of a decree, his sale cannot be set aside on the ground that the decree had been satisfied out of Court before the sale took place. Where the Court has had jurisdiction to proceed with the execution, the purchaser at a sale in such execution is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues. YELLAPPA v. RAMCHANDRA, **21 B. 463.** [*R.*, 37 C. 107 = 13 C.W.N. 710 = 11 C.L.J. 254.]

(55)—*Court sale of property not belonging to judgment-debtor—Suit for recovery of purchase-money—Cause of action—Limitation.*—A suit can be maintained under s. 315 of the Civ. Pro. Code, to recover from the defendants the purchase money which the plaintiff had paid at a Court sale for the purchase of property to which the judgment-debtor had no title. In this case, the District Judge had dismissed this suit on the ground that it was barred by limitation, taking the cause of action to arise on the date when it was found by the decree that the judgment-debtor had no saleable interest in the property ; but the High Court reversed his decree, being of opinion that the cause of action under the section does not accrue till the purchaser is deprived of the property sold to him. The double event must occur before he can sue :—(1) the property must be found not to have belonged to the judgment-debtor and (2) the purchaser must be deprived of it, and till the latter event occurs, the cause of action will not have completely accrued. GURSHIDAWA v. GANGAYA, **22 B. 783.** [*R.*, 3 A.L.J. 819 = A.W.N. 1906, 310, 12 Bom. L. R. 723, 14 O.C. 74.]

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*n.*—MISCELLANEOUS—*continued.*

(56)—*Decree —Execution —Court-sale—Suit by auction-purchaser for refund of purchase-money on failure of consideration—Maintainability of the suit—Civ. Pro. Code (Act V of 1908), s. 102—Suit whether cognizable by Small Causes Court—Second appeal.*—The plaintiff, an auction purchaser at a Court sale, on finding that the judgment-debtor had no saleable interest in the property sold, filed a suit to recover possession of the property, or, in the alternative, to obtain refund of the purchase-money on the footing of a total failure of consideration. The failure of consideration alleged was that the trust-deed, under which the judgment-debtor was stated to have an interest in the property sold, had not been stamped. It was objected that the suit would not lie: *Held*, that the right of the plaintiff to maintain the suit was made clear by the provisions of the Civ. Pro. Code in the manner indicated in (17 M. 228, *R.*) *Held*, also, that the trust-deed not having been duly stamped could not be admitted in evidence (s. 35 of the Stamp Act, 1899); and that it must, therefore, be taken to be non-existent. *Held*, further that the purchaser had been caused, however innocently, to make a mistake as to the substance of the thing which was the subject of the sale. He was led to believe that he was purchasing a right under a trust-deed, whereas, so far as it appeared from the facts proved, no trust-deed was in existence. There had, therefore, been an entire failure of consideration. Under the Civ. Pro. Code a warranty of some saleable interest, when the right, title and interest of a judgment-debtor is put up for sale, is implied, and the purchaser's right based thereon to a return under certain conditions of the purchase-money which has been received by the judgment-creditor is recognised. The liability of the judgment-creditor under the circumstances to refund the purchase-money which has been paid to him at a Court-sale being thus established, there can be no objection to treating the relations of the parties, namely, the judgment-creditor and the Court-sale purchaser, as relations in the nature of contract. On second appeal a preliminary objection was taken that, as the amount decreed in respect of purchase-money and interest in the first Court amounted to less than Rs. 500, no second appeal lay: *Held*, overruling the objection, that the claim was not only for money, but also for possession, and, therefore, the suit was not as framed cognizable by a Court of Small Causes. RUSTOMJI v. VINAYAK, **12 Bom. L.R. 723=7 Ind. Cas. 955.**

(57)—*Sale in execution of decree—Objection to sale by judgment-debtor — Proclamation of sale, objection by judgment-debtor to contents of, after sale—Witnesses, resummoning of—Judgment debtor, right of, to object to sale after it has taken place.*—A sale of immoveable property having taken place in execution of a decree, the

Sale—continued.

——5.—Sale in Execution of Decree—*contd.*

————*n.*—MISCELLANEOUS—*continued.*

judgment-debtor applied to the Court to set aside the sale on the following grounds:—*viz.*, that the amount of the incumbrance to which the property was liable was incorrectly stated in the proclamation of sale, that the proclamation of sale did not state the hour of sale and that it incorrectly stated the gross profits of the property. In support of his objections he summoned their witnesses one of whom was examined by the Court and the other two were absent. The Court made the following note "there are no more witnesses" and refused to adjourn the hearing of the case in order to re-summon and examine the remaining witnesses. In deciding the case the Court held with reference to Select Case No. 188 that the judgment-debtor could not be permitted, after the sale had taken place, to object to the contents of the proclamation of sale, as he must have known before the sale took place what the proclamation contained, and should therefore have objected to its contents before the sale. *Held*, that the Court was wrong in holding that the judgment-debtor could not be permitted to take objections to the sale founded on the contents of the sale proclamation, because he might have objected to them before the sale and did not do so. The Court misinterpreted Select Case No. 188 which followed the decision of the Privy Council (in 12 M. 19), and which did not lay down that a judgment-debtor cannot object to a sale which has taken place on the ground of alleged misdescription of the property in the sale proclamation, if he could have taken such objection before the sale. *Held* further, that, inasmuch as did not appear that the failure of the witnesses to attend was due to any want of diligence on the part of the judgment-debtor, the Court should not have refused to adjourn the hearing of the case, and that the judgment-debtor was entitled to have his witnesses examined. CHANDRIKA BAKSH SINGH v. BRIJ BIHARI LAL, **4 O.C. 379, B.**

(58) — *Entries in proclamation of sale as to encumbrance, how far binding on purchaser—Validity or otherwise of encumbrances wrongly entered therein — Liability of purchaser at an execution sale to pay off the encumbrances entered therein — Right of original owner to recover amount of encumbrance wrongly notified at the time of sale, but subsequently found to have been paid off—Purchaser at an execution sale for full value, liability of — Trust as to the amount of encumbrance wrongly entered.* —On July 4th, 1896, one *C* mortgaged village *G* to the defendants for Rs. 4,000 and on August 21st, 1896, *C* mortgaged the same village *G* and a share in another village *D* to the defendant for Rs. 6,000. In execution of a money-decree held by two other persons the village *G* was put up for sale in October 1900 and was purchased by the defendant for Rs. 14,633. In the proclamation of sale it was stated that the village was subject to an

Sale—continued.

—5.—Sale in Execution of Decree—*contd.*

——*n.*—MISCELLANEOUS—*continued.*

encumbrance of Rs. 10.000 under the two deeds of 1896, above-mentioned: As a matter of fact the mortgage of August 21st, 1896, had been paid off and only a sum of Rs. 5,543 was due on account of the mortgage of July 4th, 1896. After the sale the defendant was in due course put in possession of the property sold. In the present suit, the plaintiff, son of *C*, claimed redemption of the mortgage of July 4th, 1896, contending that the sale of the village *G* was not binding upon him inasmuch as at the time of sale the mortgage of August 1896 had been paid off and defendant having taken an advantage of this fact was a trustee of the village for him or at least of the benefit improperly obtained by him. The defendant contended that the sale was binding upon the plaintiff. It was proved that the mortgage of August 1896 has been paid off and that the village *G* was not worth more than Rs. 20,000. *Held*, that the defendant, having purchased the property for Rs. 14,633 with an encumbrance of Rs. 5,543, had paid almost the full value of the property, and had not therefore obtained by his purchase any benefit of which he should be considered a trustee for the plaintiff. *Held*, further, that a purchaser at an execution sale cannot avoid his purchase merely because charges not entered in the sale statement are found to be enforceable against the property, nor is such a purchaser bound to admit the existence or validity of charges, merely because they are entered in the sale statement. SETH JAI DAYAL v. THAKUR AMBAR SINGH, **10 O.C. 282.**

(59)—*Void sale—Suit for setting aside an execution sale—Limitation Act, sch. I, art.* 12—*Representative of judgment-debtor bound by execution proceedings only to the extent of assets received.*—Where a sale in execution is *null* and *void* for want of jurisdiction in the Court ordering it or for other causes, or where it does not affect a stranger's interest, *held* that art. 12, sch. I of the Limitation Act, does not apply to a suit to have such sale set aside or to a suit which has indirectly the effect of setting it aside. Where, in an execution proceeding on the death of the judgment-debtor, the name of K was substituted as his legal representative, *held* that K was bound by the proceedings held in execution only to the extent of the assets received by her as heir of the deceased, and not with respect to property acquired by K by purchase. CHAUHARJA BAKSH v. MUSST. KANIZ FATIMA BIBI, **13 O.C. 297.** (25 C. 179, *F.*; 11 B. 180, 20 M. 118, *R.*)

(60)—*Act* VIII *of* 1859, *s.* 205—*Property in Cantonment—Sale in execution—Sanction of Chief Court not necessary—"Land," meaning of—House in Cantonment.*—In case of hereditary or joint acquired property in land, the previous sanction of the Chief Court is necessary to bring it to sale in execution of a decree for

Sale—continued.

—5.—Sale in Execution of Decree—*contd.*

——*n.*—MISCELLANEOUS—*continued.*

money. But a house in a military cantonment does not fall under the definition of property in land contained in Government Notification No. 1225 of 24th September, 1866. "Land" is immoveable property for the time being subject to a settlement of land revenue. A house in a military cantonment is not such land, and the previous sanction of the Chief Court is not necessary for the sale of such property in execution of decree. MOOTSUDDEE MULL v. ABDOOLA KHAN, **26 P.R. 1870.**

(61)—*Sale in execution, judgment-debtor having no right in property sold—Decree-holder not bound to reimburse purchaser—Act* VIII *of* 1859—*Act* X *of* 1877, *s.* 315, *not retrospective.*—In this suit, plaintiff alleged that, at the sale held, at the instance of the defendant in May 1877, he bought a house for which he paid the purchase-money into Court, and, having since been ejected by the trueowner, he now demanded the price-money back from the defendant. *Held*, that, assuming that a suit will lie to enforce refund of the purchase-money payable under s. 315 of the new Civ. Pro. Code, the provision in the section was not retro-active so as to subject a decree-holder who brought the property to sale under Act VIII of 1859 to a liability towards the auction-purchaser to which he was not subject at the time of the sale. In May, 1877, when the plaintiff became auction-purchaser of property attached at the defendant's instance, the rule of law was that the auction-purchaser bought at his own risk, and, if he got nothing for his money the decree-holder who did no wrong in having taken the money out of Court, was not liable. DEBI PERSHAD v. MUHAMMAD IBRAHIM, **99 P.R. 1881.**

(62)—*Sale in execution—Execution application set aside on appeal—Its effect on auction-purchasers.*—An application for execution was made. Sale took place in pursuance of the same. After the sale was confirmed the application was set aside on appeal. This does not *ipso facto* annul the same. The purchase-money cannot be obtained by the auction-purchasers from the decree-holders as there is no privity between them. MUSSAMMAT MANSA DEVI v. RAHIM BAKSH, **49 P.R. 1894.**

(63)—*Execution proceedings instituted under Act* VIII *of* 1859—*Refund of part of purchase-money claimed by auction-purchaser in* 1877—*Law applicable, Act* VIII *of* 1859 *or Act* X *of* 1877—*Review.*—Where under execution proceedings instituted in August 1866, the judgment-debtor's house was brought to sale and purchased on 20th January 1877 by the auction-purchaser who subsequently applied for refund of part of the purchase-money on the ground that he was deprived of a share of the house purchased by him in auction, held that the proceedings relating to the refund application were governed by Act VIII of 1859 under the

Sale—continued.

——5.—Sale in Execution of Decree—*concld.*

————*n.*—MISCELLANEOUS—*concluded.*

provisions of which the purchaser at an auction sale in execution of a decree could not have recovered from the decree-holder summarily a portion of the purchase-money paid by him on the ground that the judgment-debtor had a less interest than the auction-purchaser supposed himself to have purchased. BULAKICHAND v. MOKUNDA MALL, **16 P.R. 1880.**

——6.—Sale of Goods.

(1)—*Sale of goods by description—Purchaser's right to reject—Transfer of ownership in the goods, question of—Contract for purchase of goods or part by description—Acceptance of part only—Remedy of seller.*—Under the law in India, a man is not bound, unless he has altered his position by some conduct of his own, to accept and to pay for goods which are not in accordance with the description of the goods he bargained for; and such right to reject the goods is quite independent of the question whether the property in the goods has passed to the buyer or not. [*R.*, 2 L.B.R. 91.] Where a contract was not an absolute contract for the purchase of five bales of goods, but for the purchase of "the goods or any part thereof that may be in a merchantable condition," and the purchaser took delivery of one bale and paid for it, but refused to take delivery of the remaining four bales as not being according to the contract, *held*, under the circumstances of the case, the transaction with regard to each bale must be a separate transaction, and that the property never passed to the purchaser except in the one bale delivered and taken. A suit, if one lay, would lie, not for the price of the four bales, but for damages for refusing to accept them, the measure of damages being the difference between the contract and the market price. MITCHELL REID AND CO. v. BULDEO DOSS KHETTRY, **15 C. 1.** [*R.*, 2 L.B.R. 91.]

(2)—*Sale of goods—Delivery at specified date—Rescission of contract after part delivery—Revocation of property is sold goods in vendor.*—Where, in a contract for the sale of ascertained goods, terms cash on delivery, to be given and taken in a specified time, the vendee took part delivery of the goods on payment of price, the vendor was held entitled to rescind the contract, time being of the essence of the contract, and to refuse delivery of the remaining goods on the vendee tendering the price therefor, after the expiration of an extension of time taken by him on certain conditions. [*R.*, U.B.R. 1905, 4th Qr., Contract, 55, 107, 10 Bom.L.R. 1113.] In a contract for the sale of ascertained goods even where the property in the goods had passed to the buyer, it would, on a proper rescission of the contract by the vendor, re-vest in him so as to enable him to refuse to deliver them. BULDEO DOSS v. HOWE, **6 C. 64=6 C.L.R. 582.** [*R.*, U.B.R. 1905, 4th Qr., Contract, 55, 107, 10 Bom. L.R. 1113.]

Sale—continued.

——6.—Sale of Goods—*continued.*

(3)—*Goods priced in sterling—Money paid in rupees, how far payment for goods—Sale of goods—Unpaid vendor—Stoppage in transit—Notice to agent—Bombay Act* VI *of* 1879, *ss.* 43, 62 — *Bye-laws of Port Trust Rule* 59.—The argument that money paid in rupees is not and cannot be payment for goods priced in sterling is untenable. Payment may be made in any medium which the parties mutually agree to give and accept. It is clear law that a wrongful delivery of goods by the carrier after notice to stop in transit does not defeat the right of the unpaid vendor (*Sett* v. *Cowley*, 7 Taunt. 169, *R.*) Notice to stop in transit given to the agent is equivalent to a notice to the master (*Kemp* v. *Falk*, 7 Ap. Cas. at p. 585, *R.*) According to Bombay Act VI of 1879, if goods are landed at a wharf of the Port Trust Board, the wharfingers are placed in the same position as the master and have to make delivery according to the exigencies of the bill of lading handed to them duly endorsed. As long as the goods are subject to a stop order for freight, the bill of lading has not discharged its office, and the goods are subject to incidents arising out of the original contract contained in the bill of lading. So long as they are subject to a lien for freight, the transit has not ended and the goods are not at home. When the ship-owner lands the goods under the statute, and his freight has been paid, his right of control and lien over the goods is gone, and thenceforth the goods are held by the statutable wharfingers for the consignee alone. Rule 59 of the Bye-laws of the Port Trust was not intended to have, and has not, any effect on the rights of consignees but is merely a departmental rule to prevent servants of the Board from delivering goods subject to the master's lien. LILLADHAR JAIRAM NARRANJI v. GEORGE WREFORD, **17 B. 62.**

(4)—*Consignment of goods by principal to factor for sale—Advances made by factor on consignment—Limit of price fixed by consignor—Fall of price of goods in market—Power of factor to sell goods below limit fixed by principal—Rights of factor*—Onus *of proof.*—Where a factor for sale who has made advances, claims the right to sell *invito domino*, the question is whether there was an agreement between the parties—either express or to be inferred from the general course of business or from the circumstances attending the particular consignment—that the factor should, under any and what circumstances, have the power to sell against the will of the owner of the goods, the *onus* of proving which lies on the factor who has made the advances.—*Per Sargent, C.J.* Where goods are consigned to a foreign merchant as security for an advance, *albeit* he may be a factor entrusted with the sale of goods on commission, and, by reason of the fall in the market or other causes, his security is declining in value, and becoming insufficient, such foreign merchant is invested with a power of

Sale—continued.

——6.—**Sale of Goods**—*continued.*

sale over the goods after due notice to his principal, although the latter may place a limit on their sale, and desire to hold them on, if he does not put his factor in funds to make up the deficit so caused.—*Per Farran, J.* JAFFERBHOY LUDHABHOY CHATTOO v. THOMAS D. CHARLESWORTH, **17 B. 520**. [*R.*, 20 M. 97.]

(5)—*Contract to supply goods—Sub-contract to make and deliver goods in batches to the contractor—Contract between contractor and sub-contractor whether entire or separate as to each batch—Inferior work not according to pattern—Reduction of Price.*—Plaintiff in this case claimed for the work which he had done for the defendant, who was himself under a contract with Government for the supply of doors and door frames with reference to the making of which there was a sub-contract between the plaintiff and the defendant. Some of the batches of doors supplied by defendant through plaintiff had been of inferior quality. But defendant had paid him the price of every batch except the last, the subject-matter of the present claim, the entire price of which was retained and withheld by the defendant because Government had rejected the door-work delivered over by the defendant as being of inferior quality, and the defendant had been put to expense in making good the deficient quality. It was contended on behalf of the defendant that his contract with the plaintiff was an entire one, that, as plaintiff knew that defendant was under a distinct contract with Government, the requirements of Government must furnish the measure of damages. *Held* that the separate delivery and settlement of price in respect of each batch severed the batch, and the contract under these circumstances cannot be considered an entire one. If the contract were general or entire, the cost to the defendant in putting the work into the state required by Government, or the Government deduction, could not afford the measure of the reduction to be made. By the defendant's own act (assuming the work to have been inferior to warranty or pattern) it was not in the present stage competent for the Court to arrive at any proper finding with regard to the reduction to be made. BERTOLA v. PEER BUKSH, **45 P.R. 1869.**

(6)—*Sale of goods—Beer—Implied warranty of fitness at time of supply—No warranty for any period after delivery—Challenge by buyer not to be delayed—Estoppel by acts of buyer.*—The plaintiffs sued for the price of a quantity of beer sold to the defendants. The beer was delivered to defendants early in February 1869 and the whole consignment reached them in or before the middle of March. The defendants advertised the beer they had purchased to be of superior quality, after thay had received it, and continued to do so till the date of this suit. A large quantity of beer was bottled off as the purchasers considered it sufficiently good for bottling. It was not until April that

Sale—continued.

——6.—**Sale of Goods**—*continued.*

the defendants, owing to a quarrel with the plaintiffs, refused payment on the ground that the beer was bad on arrival and not merchantable in that it was not fit for the purpose for which it was intended, *viz.*, to be kept for a reasonable time and re-sold. They contended that by law there is an implied warranty to that effect on the part of the plaintiffs. *Held*, that the plaintiffs were bound to supply wholesome and merchantable beer to the defendants, but they were not responsible for any deterioration that may have necessarily taken place between the date of despatch and the date of delivery, and that there is no implied warranty on the part of brewers that the beer supplied by them shall keep good for any period after delivery. When the brewer supplies beer of a fair and merchantable and wholesome quality, he has fulfilled the obligation imposed on him by law. *Held* also that the buyer was bound, in order to avail himself of a warranty, to challenge the quality of the article without unreasonable delay, for, if the challenge be unreasonably delayed, the legitimate inference is that the buyer was satisfied. If the buyer break bulk or make use of it, he is barred from raising any objection to it, and immediate inspection is more necessary when the article purchased may alter by keeping. *Held* also that, as the defendants, perfectly well aware of the perishable nature of the beer in question, accepted the beer consigned to them, puffed it up in a most glowing manner, sold a large quantity of it and never said a word about its bad quality until they quarrelled with the plaintiffs, they had by their own acts shown that they had no reasonable ground of refusal to pay. MITCHELL v. THE MURREE BREWERY CO., **5 P.R. 1870.**

Suit for goods sold and delivered—Unstamped acknowledgment—Evidence — Indian Stamp Act, I of 1879, s. 34—Limitation—*See* ACKNOWLEDGMENT, 18 B. 614.

See ACKNOWLEDGMENT, 5 B.L.R. 619.

Contract with Railway Company—Delivery at a station on another Railway Agency—*See* AGENCY, 3 M. 240.

By sample—Proof of inequality of sample—*See* BURDEN OF PROOF — MISCELLANEOUS, Bourke O.C. 276.

Place of suing—Contract with commission agent for sale of goods—*See* CIV. PRO. CODE, 1908, s. 20, 79 P.R. 1902.

Contract for—Speculation—Non-delivery — Rate of prices—Committee of experts—Custom —*See* CONTRACT—GENERAL, 8 C.W.N. 57, P.C.

Of—Parol evidence—Bought and sold notes —Fraud—*See* CONTRACT—GENERAL, 31 C. 614, P.C. = 31 I.A. 122 = 8 C.W.N. 489 = 6 Bom. L.R. 498 = 14 M.L.J. 196.

Sale—continued.

—— 6.—Sale of Goods—*concluded.*

For—Specific period for delivery—Breach of contract—Measure of damages—*See* CONTRACT—BREACH OF CONTRACT, 30 C. 477=7 C.W.N. 431.

Jurisdiction—Place of suing—Contract with commission agent for sale of goods—*See* CONTRACT—MISCELLANEOUS, 79 P.R. 1902.

See CONTRACT ACT, 1872, ss. 78, 81, 86 and 107, 4 C. 801.

By bailee—*See* CONTRACT ACT, 1872, s. 108, L.B.R. 1872—1892, 311.

Under false pretences—Contract of sale voidable at the instance of vendor—Cessation of vendor's title to the goods by his own acts—Purchase from vendee by third parties—Contract Act, s. 108, Excep. 3, applicability of—*See* CONTRACT ACT, 1872, s. 108, Excep. 3, 15 M.L.J. 375.

Endorsement of delivery orders of goods—Counter-signature by unpaid vendor's agent—Repudiation of transfer—*See* ESTOPPEL—ESTOPPEL BY CONDUCT, 5 C. 669=5 C.L.R. 533.

See EVIDENCE ACT, 1872, ss. 32, 92, 16 M. 238.

Place of suing—Contract with commission agent for sale of goods—*See* JURISDICTION OF CIVIL COURTS, 79 P.R. 1902.

Suit for price of goods—Damages claimed by way of set off—*See* LIMITATION ACT, 1908, art. 83, 7 A. 284=A.W.N. 1885, 40.

See STAMP ACT, 1879, sch. II, art. 2, 15 M. 150.

See STAMP ACT, 1879, sch. II, cl. 2 (*a*), 10 M. 27, F.B.

——7.—Miscellaneous.

(1)—*Possession—Necessity of, to complete a sale.*—Under the law current in Madras, possession is not necessary to complete a sale. VASUDEVA v. NARASAMMA, **5 M. 6.**

(2)—*Sale of Bank-shares—Purchase alleged to be induced by fraudulent concealment—Voidable nature of contract—Rescission of contract or confirmation by ratification—Purchaser once electing to affirm purchase, not competent to afterwards repudiate it.*—In this application under s. 119 of the Indian Companies Act, the applicant desired to have his name removed from the list of contributories of the Punjab Bank, in liquidation, in respect of certain shares purchased by him through A, the officiating Head Manager of the Bank, from the *de facto* directors. One of the grounds for the application was that the contract of purchase and sale in question was voidable at the option of the petitioner on the ground of misrepresentation and fraudulent concealment, on the part of A, of the true state of the Bank's affairs. A denied that there was any misrepresentation or concealment by which the petitioner was induced

Sale—continued.

——7.—Miscellaneous—*continued.*

to take shares, and averred that the petitioner well knew the embarrassed condition of the Bank and with full knowledge purchased the shares in question. The lower Courts found that there was no fraudulent concealment by which the purchaser's consent to take shares was induced, but that he purchased with knowledge sufficient to disentitle him to relief. The purchaser was bound to make cautious inquiry before he rushed into connection with an institution which, to his knowledge, had made losses amounting to one-third of its entire capital. The Chief Court *held* that, though it was unable to agree with the lower Courts in holding that the contract was *ab initio* valid, and never at any time voidable, the lower Courts were right in having proceeded on the ground that the contract had been affirmed and validated by the purchaser's subsequent conduct. It is the general rule of law that a person who has been induced to enter into a contract voidable on the ground of fraud may rescind the contract within a reasonable time after discovering the fraud. The contract continues valid till the party defrauded has determined his election by avoiding it, and, if a party once determines his election, it is determined for ever. In the present case, the legal fraud being the non-disclosure of the material facts known to the sellers at the time of the sale and purchase of the shares, if the facts so withheld had also come to the knowledge of the purchaser, and he did, after a reasonable time, by express words or acts, signify his determination to affirm the purchase, the contract would have ceased to be voidable and the property in the shares would have vested in him absolutely. It was found that the plaintiff, after becoming aware of the facts withheld from him, had voted at meetings of the shareholders and taken part in the direction and management of the Bank's affairs—acts for the performance of which the possession of a certain number of shares in the Bank was a necessary qualification. *Held* that the plaintiff had, by such conduct, signified his determination to affirm the purchase of the shares, and his claim to have his name removed from the list of contributories in respect of such shares was therefore rightly dismissed. COLONEL ARTHUR CORY v. THE OFFICIAL LIQUIDATOR, PUNJAB BANK, LD., **117 P.R. 1879.**

(3)—*Custom—Childless proprietor—Mehtams of Hoshiarpur—Power of alienation.*—Amongst Mehtams, a childless proprietor is not prohibited by custom from alienating his property by sale otherwise than for necessity, without the consent of his near collaterals. KAHAN SINGH v. DIT, **119 P.R. 1880.** [*R.*, 16 P.R. 1883, 107 P.R., F.B., 1887, 18 P.R. 1890; *D.* 115 P.R. 1891, 75 P.R. 1891, 117 P.R. 1893.]

Contract of sale—Want of assent—*See* CONTRACT—MISCELLANEOUS, 27 C. 403, P.C.=27 I.A. 30.

Sale—concluded.

——**7.—Miscellaneous**—*concluded.*

Muhammadan Law—, of minor's property made by guardian, when valid—Sanction of Government for such sale, effect of— *See* MAHOMEDAN LAW—GUARDIANSHIP, 6 B. 467.

Saleable Property.

(1)—*Expectancy, Sale of—Hindu Law—Power of guardian.*—Whether a mere expectancy can be the subject of a sale, and if so, of a sale by guardian acting or purporting to act on behalf of an infant. DOOLI CHAND v. BIRJ BHOOKUN LAL AWASTI. 6 C.L.R. 528, P.C. [*R.*, 8 C. 12, 8 C. 135, 10 C.P.L.R. 5.]

Sale-certificate.

See APPEAL—ORDERS, 26 C. 529=3 C.W. N. 374.

How far it confers title as between competing auction-purchasers—*See* AUCTION-PURCHASER, 3 Bom. L.R. 92.

Period for applying to obtain a—*See* CIV. PRO. CODE, 1908, s. 65, O. XXI, r. 94, 5 Ind. Cas. 263.

Is a title-deed in the hands of the purchaser —*See* CIV. PRO. CODE, 1908, O. XXI, r. 31, 2 Bom. L.R. 533.

Rule of construction of—*See* DECREE—DECREE, CONSTRUCTION OF, 6 Ind. Cas. 75.

If creates or proves title—*See* SALE—SALE IN EXECUTION OF DECREE — GENERAL, 9 C.L.J. 346=1 Ind. Cas. 64.

Sale-deed.

Sale-deed—Construction—Property specified by boundaries—Area specified — Mistake — Intention—*See* DEED—CONSTRUCTION OF DEEDS, A.W.N. 1883, 38.

Oral evidence to prove that a—, was intended to operate only as mortgage—*See* EVIDENCE —PAROL EVIDENCE, 25 C. 603, F.B.=2 C. W.N. 562.

Admissibility of evidence of oral agreement to reconvey — *See* EVIDENCE — PAROL EVIDENCE, 16 M. 80.

Execution of sale-deed—Contemporaneous oral agreement—Admissibility of proof—*See* EVIDENCE—PAROL EVIDENCE, 1 B. 333.

Suit for possession based on sale-deed—Necessary issues to be tried—*See* ISSUES—FRAMING ISSUES, 20 B. 753.

By gosha woman—Burden of proof—*See* PARDANASHIN WOMAN, 12 M. 380.

Loss of—Before registration— Subsequent sale to another with notice of first sale—Right of first purchaser—*See* RIGHT OF SUIT —SALE IN EXECUTION OF DECREE, 20 M. 250.

Sale Notification.

(1)—*Sale notification, object of—Statement of annual rent of tenure—Purchaser's liability.*— The object of a sale notification is to make known to intending purchasers, the rent for which they would be liable if they bought the property under sale. Where an application for execution of a rent-decree, the sale notification, and the sale certificate, stated a certain amount as the annual rent payable out of which a certain sum was kept in abeyance as *bhadran mahakup*, and the balance was stated as the net annual rent, *held* that the purchaser was liable only for the balance after the deduction stated in the sale-certificate. SHARIAT MONDUL v. SURJA KANT ACHARJA BAHADUR, **7 C.W N. 386.**

Sale-proceeds.

Surplus—With Government—Suit to recover residue of surplus sale-proceeds—Money due under statutory liability — *See* LIMITATION ACT, 1908, s. 10, arts. 62, 120, 20 C. 51, F.B.

Suit for surplus sale-proceeds in Collector's hands—*See* LIMITATION ACT, 1908, arts. 60, 62, 145, 18 C. 234.

Application for—*See* LIMITATION ACT, 1908, ART. 182, STEP-IN-AID OF EXECUTION, 6 A. 366=A.W.N. 1884, 118.

Sale-proceeds realized in execution against pauper plaintiff—Preferential right of Collector to amount of Court-fee—*See* PAUPER SUITS, 1 A, 596.

Sale in execution—Suit for refund of—Civ. Pro. Code, s. 295—Small Cause Court suit— *See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 7 A. 378=A.W.N. 1885, 63.

Sale-proclamation.

Under-statement in valuation in—Appeal. *See* APPEAL—GENERAL, 14 C.L J. 35.

Under-valuation of property in—Order dismissing application for stoppage of sale on the ground of appeal lies against—*See* CIV. PRO. CODE, 1908, s. 47, 23 M. 568=10 M.L.J. 314.

Application for amendment of—Appeal—*See* CIV. PRO. CODE, 1908, s. 47, O. XXI, rr. 66, 70, 6 Ind. Cas. 180.

Misrepresentation of value of property in—Decree-holder bidding through benamidar—Substantial injury—Fraud—Setting aside sale —*See* CIV. PRO. CODE, 1908, O. XXI, rr. 66, 70, 90, 6 Ind. Cas. 135.

Place for sale fixed in—Conducting the sale elsewhere whether a material irregularity—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 66, 70, 90, 132 P.R. 1906=11 P.L.R. 1907.

See CIV. PRO. CODE, 1908, O. XXI, rr. 66, 70, 90, 12 M. 19, P.C.=15 I.A. 171,

Omission to specify hour of sale in—Material irregularity—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 66, 90, 14 C.L.J. 541.

Sale-proclamation—*concluded.*

Fraud and misrepresentation in—Effect—Right of certified purchaser to set aside sale—Limitation—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 84 to 88, 90 to 94, ss. 65, 66, 8 M.L. T. 154.

Under-statement of value of property by decree-holder—Effect—*See* CIV. PRO. CODE, 1908, O. XXI, r. 90, 1 Ind. Cas. 246.

See SALE—SALE FOR ARREARS OF RENT—UNDER TENURES AND PORTIONS OF, SALE OF, 9 C. 641.

Execution—Sale of tenure—Misdescription in effect of—*See* SALE—SALE IN EXECUTION OF DECREE—GENERAL, 5 C. 389=4 C.L.R. 583.

Purchaser at execution sale for full value, liability of—Entries in proclamation of sale, how far binding on purchaser—*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 10 O.C. 252.

Sales, Bengal Land-revenue Act.

See BEN. ACT XII OF 1841.

See BEN. ACT XI OF 1859.

See BEN. ACT VII OF 1868.

Sales in Satisfaction of Decrees for Rent.

See ACT VIII OF 1835.

Sales of Land for Revenue Arrears.

See ACT I OF 1845.

Sale under Decree.

In execution of decree how far affected by *lis pendens*—*See* SALE—SALE IN EXECUTION OF DECREE—GENERAL, 1 Bom. L. R. 585=29 B. 435.

Sale under Mortgage.

See MORTGAGE—SALE OF MORTGAGED PROPERTY.

Sale for interest in arrears, by a mortgagee—*See* TRANSFER OF PROPERTY ACT, 1882, s. 69, 1 Bom. L. R. 273.

Applicability of s. 93 of the Transfer of Property Act—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 92, 93, 2 Bom. L.R. 633=25 B. 101.

Suit for, non-applicability of s. 93, Transfer of Property Act—*See* TRANSFER OF PROPERTY ACT, 1882, s. 93, 1 Bom. L. R. 821=24 B. 300.

Salsette.

(1)—*Hindu convert—Native Christian—Effect of conversion from Hinduism to Christianity—Christian inhabitants of Salsette, law applicable to—Testamentary rights—Hindu Law, applicability of — Succession — Inheritance—Coparcenary—Primogeniture — Family property, mortgage by manager binding on — Decree against manager alone on mortgage, effect of—Joint family—Ancestral property.*—The law of a conquered country continues until the Crown

Salsette—*continued.*

or the Legislature changes it. The island of Salsette was conquered from the Marathas by the British in 1774 and the law of succession for the Christian inhabitants of the island remained unaltered until the passing of the Indian Succession Act (X of 1865). Until that Act was passed, the law of *primogeniture* was not in force among the Christian inhabitants of Salsette. In the absence of a widow and daughter, the sons took the property of their father in equal shares. *Quære*, whether they did so under the Hindu law or the Portuguese law or by force of usage existing among them? One Antonio, a Christian inhabitant of Salsette, died in the year 1846 leaving considerable immoveable property and three sons, *viz.*, Pedro, Minguel and Enos. The family had been originally a Hindu family. In 1875, the eldest son, Pedro, mortgaged the family property in dispute to one D. The mortgage-deed was attested by Enos, who died in the year 1876. Minguel died in 1883, having made a will by which he left the property to Pedro's son, the present plaintiff. In that year (1883), the mortgagee filed a suit on the mortgage against Pedro alone and obtained a decree which he afterwards assigned to the defendant. In execution of the decree the defendant sold the property in dispute at a Court-sale and purchased it himself. The plaintiff (son of Pedro the mortgagor) now sued to redeem the property, and the questions arose (1) whether under the law applicable to the Christian inhabitants of Salsette the eldest brother Pedro had succeeded on the father's death to the whole of the family property, and (2) if not, then, to what extent the mortgage in question bound the property of the family. *Held*, (1) that the law of *primogeniture* did not prevail among the Christian inhabitants of Salsette prior to the passing of the Indian Succession Act (X of 1865), and that Pedro, although eldest son, had not succeeded to the whole of the family property. He and his brothers took equal shares in the property of their father; (2) that the mortgage by Pedro had been authorized by the family and was for family purposes and was binding on the family property. Although Pedro and his brothers could not be regarded as co-parceners under Hindu law, yet, having regard to the fact that the Christian inhabitants of Salsette were for the most part descendants of converts from Hinduism among whom Hindu usages prevailed to a large extent, the Court would not require the same direct proof of the authority of the manager of the family to mortgage the paternal estate under his management as it would be required in the case of an English manager under similar circumstances. The Court would treat it much in the same way as if the family were still a Hindu family; (3) that the plaintiff was not entitled to redeem. What was intended to be sold at the Court auction was the whole interest in the mortgaged property. The defendant purchased that interest subject to the right of the plaintiff to show that his interest derived from Minguel was not bound by the mortgage.

Salsette—*concluded.*

This he had failed to do. Minguel's share as well as Pedro's had passed by the sale; (4) a member of the Christian community of the island of Salsette is entitled to deal with his share in ancestral property by will. JALBHAI ARDESHIR SHET v. LOUIS MANOEL, **19 B. 680.** [*R.*, 23 B. 539, 16 C.P.L.R. 19, 31 C. 11, P.C., P.L.R. 1900, p. 251.]

Salt.

(1)—*Salsette—Beng. Reg.* X *of* 1819, *s.* 36—*Possession of salt—Arrangement by Government—The absence of a protective document makes salt contraband.*—But where the Government has made such an arrangement with a particular party as places him in possession of a large quantity of salt, the element and condition which give a salt officer the jurisdiction to seize salt in the absence of a protective document are wanting. KOOMARNARAIN ROY v. SUPERINTENDENT OF SALT CHOWKEY, JULLESSUR, **1 Hay 247.**

(2)—*Confiscation of salt—Removal of salt in excess of permit—Right of Government to confiscate entire salt--Damages—Interest—Unliquidated damages.*—Where a merchant removed from the Government salt works more salt than was covered by the permit granted to him, the Commissioner of Customs acting on behalf of Government was entitled to confiscate the entire salt and not merely the quantity in excess of that covered by the permit. Interest does not run on unliquidated damages. FRAMJI HORMASJI v. THE COMMISSIONER OF CUSTOMS, **7 B.H.C.A.C. 89.** [*R.*, 9 B.H.C. 7, 12 Bom. L.R. 831.]

This circular states how salt char-chittee forms are to be printed, &c. **Rev. Cir. No. 6, 21 W.R. Rev. Cir., 11.**

This circular modifies List of Pass Stations consequent on the removal of the Salt Pass Station from Sealdah to Chitpore. **Rev. Cir. No. 10, 22 W.R. Rev. Cir. 14.**

Illegal contract to sublet salt pans—Recovery of money paid under—*See* CONTRACT—ILLEGAL CONTRACTS, 11 Bom. L.R. 748=33 B. 636=3 Ind. Cas. 779.

Lands within zemindari used for—works and relinquished by Government—*See* BEN. REG. I OF 1824, 8 C. 95, P.C.

Salt Act.

See ACT XIVII OF 1877.

See ACT XII OF 1882.

See BOM. ACT VII OF 1873.

See BOM. ACT II OF 1890.

See MAD. ACT IV OF 1889.

Salt Duties, Bombay.

See BOM. ACT XVI OF 1844.

Salt Manual.

This circular makes an addition to Rule 29, page 71, of Salt Manual. **Rev. Cir. No. 9, 21 W.R. Rev. Cir. 9.**

This circular substitutes new Rule for Rule 32-A at page 8 of the Salt Manual. **Rev. Cir. No. 1, 22 W.R. Rev. Cir. 6.**

This circular adds another Rule to the Salt Manual. **Rev. Cir. No. 4, 22 W.R. Rev. Cir. 8.**

This circular amends Salt Manual consequent on the introduction into Backerguoge of the sub-char-chittee system. **Rev. Cir. No. 3, 22 W.R. Rev. Cir. 9.**

Salt-works.

Lands within zemindari used for salt *works* and relinquished by Government—*See* BEN. REG. I OF 1824, 8 C. 95, P.C.

Salvage.

(1)—*Right to salvage for services in land waters—Salvors' lien on goods saved until payment of salvage.*—Salvage is the compensation allowed to persons by whose assistance a ship or boat, or the cargo of a ship or the lives of the persons belonging to her, are saved from danger or loss, in case of shipwreck, derelict, capture, or the like. A claim to salvage is founded on a principle of equity which the Courts of British India are bound to recognize, and it accrues irrespectively of the circumstance that the rescue is from a danger incurred on inland waters, or of the circumstance that a portion of the services may be rendered from the shore. In order to support a claim for salvage, there must be usually skill, enterprise and risk on the part of the salvors, and peril with respect to the property saved. It has been held that where the owner of a ship discharges the claim of salvors, both in respect of the ship and cargo, he has a lien on cargo for the rateable portion of the salvage. So far as the salvors are concerned, it is difficult to understand on what principle a distinction could be taken between the liability of the owner of the cargo for the service rendered in saving the cargo, and the liability of the owner of the vessel for the services rendered in saving the vessel. The right of lien of the salvors on the property saved rests on the principle of equity that when persons have expended money or labour on goods, for which expenditure they have a right of suit against the owner, they are, in the absence of any special agreement to the contrary, entitled to retain the goods till their just claims are satisfied. Persons to whom (in these provinces) a right to salvage has accrued, are entitled to retain the property saved until a reasonable sum has been paid or tendered to them in satisfaction of their claim. Though the salvors are bound at the earliest moment clearly to inform the owner of the goods saved, of their claim, still they do not lose their lien by their omission to give immediate notice. If the owner has tendered the salvors a sum as salvage, and the latter refuse, and the sum tendered has, in the opinion of the Court, been a reasonable sum for the satisfaction of the claim,

Salvage—*continued.*

the owner would be entitled to damages for the detention subsequent to the tender. GILMORE v. ROSE, **6 N.W.P. 311.**

(2)—*Suit to recover value of wrecked property—Property given to actual salvors—Jurisdiction of Small Cause Court—Act* XXIII *of* 1861, *s.* 27—*Special appeal.*—Plaintiff, farmer of an estate from Government, stated that a boat containing a large quantity of rice having been wrecked at a certain spot, 400 maunds of the rice cargo recovered had been left by the owner on the river bank for the remuneration of the salvors. A portion of this rice having been left as huk-zemindary, the defendants as owners of the neighbouring jote, claiming to be entitled to the rice, had carried it away. In this suit for the recovery of the value of the rice so carried away, the first Court went into the question of the custom entitling the zemindar to property saved, and found it in the affirmative. The lower appellate Court, however, found that there was no such custom, and dismissed the suit. On special appeal by plaintiff, defendant took the preliminary objection that the special appeal was barred by s. 27 of Act XXIII of 1861. Plaintiff contended that the suit involved the trial of questions of right beyond the cognizance of Courts of Small causes. *Held* that the suit was simply a suit for the value of moveable property, the question of rights being only incidentally raised. The suit was therefore of a nature cognizable by a Court of Small Causes, and the value being less than Rs. 500, there could be no special appeal in the case. MR. THOMAS GRANT v. MODHOO SOODUN SINGH, **10 W.R. 79.**

(3)—*Derelict—Principle of salvage compensation.*—The fact that the subject of a salvage is a derelict does not carry with it a right to remuneration consisting of a half, a third or any specific proportion of the property salved. (*The Janet Court*, L.R. (1897) P.D. 59, *R.*) Salvage is not always a mere compensation for work and labour. The interests of commerce, the benefit and security of navigation, the lives of the seamen, render it proper to estimate a salvage reward upon a more enlarged and liberal scale. The ingredients of a salvage service are, first, enterprise in the salvors risking their own lives to save their fellow-creatures and to rescue the property of their fellow-creatures; secondly, the degree of danger and distress from which the property is rescued —whether it were in imminent peril or almost certainly lost; thirdly, the degree of labour and skill which the salvors incurred and displayed and the time occupied; and lastly the value. THE CLAN LINE STEAMERS v. THE BALCES, **27 M. 187.**

(4)—*Salvage — Services entitling vessel to salvage—Towage.*—Where a ship is in a condition of actual peril, and the services of a tug are sought for and directed to the purpose of releasing her from that condition, such services are salvage services. But where there is nothing in those services as regards risk or exertion or other conduct of the salvors to make them differ from ordinary towage services, their reward should be estimated as for towage with salvage liberality. *In the matter of the* ALABAMA, **2 Ind. Jur. N.S. 139.**

(5)—*Towage leading to rescue of vessel—Salvage compensation, rules of estimate and apportionment of.*—A towage service is where one vessel is employed merely to expedite the progress of another and where the towage leads to the rescue of a vessel in danger, it should be remunerated as salvage. Salvage compensation is not always to be calculated as a mere compensation for work and labour. The interests of commerce, the benefit and security of navigation and the lives of the seamen, render it proper to estimate a salvage-reward upon a highly enlarged and liberal scale. Nor is such reward to be estimated with reference to the value of the ship salved. With regard to the apportionment of the salvage amount, the rules have greatly changed since the introduction of steam-ships. The services rendered are (save in exceptional cases) held to be more due to the steam power than to any personal efforts and, consequently the owners, as compared to the captain and crew, are rewarded on a much higher scale than they were in the days of sailing ships. FRANCIS JOHN RAFFIN v. THE S. S. CHILKA, **7 B. 196**. [*R.*, 27 M. 187.]

(6)—*Value of salvage service—Principle of estimation.*—In estimating the value of salvage services, the Court is bound to weigh and consider the time, the labour, the skill and enterprise of the salvors, the risk incurred by them and the value of the property engaged in the salvage service on the one hand, and, on the other, the degree of danger from which the property is rescued and the value of that property. The great power possessed by steam boats of rendering services with rapidity entitles them to a higher rate of reward than other vessels. THE LADY JOCELYN, **2 M.H.C. 355.**

(7)—*Salvage—Goods put on flat during squall.*—A dinghee laden with gilders valued at Rs. 20,000 was being propelled across the river when, a squall coming on and the dinghee being in some danger, the gilders were taken on board a flat for safety and kept there till the squall subsided. *Held* that the owners of the flat had no claim for salvage, and that Rs. 150 was a fair remuneration for services rendered. URNA CHURN CHETTY v. GORDON, **1 Hyde 212.**

(8)—*Principles governing right to salvage remuneration—Accidental interruption, effect of—Salvage and towage, distinction between—Towage converted into salvage service, when—Forfeiture of salvage right—Principle of assessing award—Practice of Courts in awarding costs—Consolidation of claims.*—Any service rendered to a vessel in a state of peril or risk, or otherwise in distress, which contributes in some degree to its ultimate safety, entitles the person rendering the service to salvage award. The mere fact that the service was interrupted

Salvage—*continued.*

by accident or some like cause, if it has been productive of benefit to the owners, will not disentitle the salvors from their reward. It is not necessary that the distress should be actual or immediate, or that the danger should be imminent and absolute. It will be sufficient, if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which possibly expose her to destruction, if the services were not rendered. Where a ship is in a normal condition, and has received no injury, and nothing more is needed than expedition or acceleration of progress, that is towage; but salvage is service rendered to a ship in peril or risk or in distress, which contributes to the ultimate recovery of the same. So, in considering the question, whether the service was of the nature of salvage service, the risks of navigation, the difficulty under which it was performed, and the danger in performing it, have all to be taken into consideration. Mere towage service, or, as it is sometimes called, an ordinary towage service, may, in consequence of supervenient danger, be converted into salvage service. But the right to salvage may be wholly or partially forfeited by improper abandonment or by wilful misconduct or gross negligence on the part of the salvors. Not only the danger and difficulties to which the salvor was exposed, but also, the skill in the performance of the work, must be considered by a Court, while assessing the award. Extraordinary skill and labour may often be inferred from the shortness of service. The promovents have a right to separate costs, in a case in which two separate salvage claims are consolidated, and no order is made giving the conduct of both to one plaintiff. Following the practice of the Court, costs given on the ordinary scale provided for in the rules in accordance with the Civ. Pro. Code. *In the matter of* THE STEAMSHIP "THE DRACHENFELS," 27 C. 860.

(9)—*Action of salvage—Arrest of ship—Bail excessive—Increase of award in appeal.*—Where, in an action of salvage, a ship was arrested and the bail asked for was found to be excessive, *held*, that the impugnants should be paid by the promovents the costs of the excessive bail required from them. [*R.*, 24 B. 55, 1 Bom. L.R. 557.] The amount of salvage-award may be increased in appeal according to circumstances. *In the matter of* THE SHIP "CHAMPION," 17 C. 84. [*F.*, 27 C. 860.]

Services give rise to an equitable lien. Elements to be considered in assessing the amount of salvage—*See* ADMIRALTY, 1 Bom. L.R. 557=24 B. 55.

What constitutes, is a question of law—*See* ADMIRALTY, 1 Bom. L.R. 570.

Essential for salvage lien—*See* LIEN, 2 C. 58.

Lien—*See* MORTGAGE—GENERAL, 31 C. 667.

Salvage—*concluded.*

Application for consolidation of salvage claims—*See* PRACTICE AND PROCEDURE, 3 C.W.N. 67.

See PRACTICE AND PROCEDURE, 22 C. 511.

See PRIVY COUNCIL, PRACTICE OF—SPECIAL LEAVE TO APPEAL AND TO DEFEND APPEAL, 5 M.I.A. 137.

See SALT, 7 B.H.C. A.C. 89.

Samanodakas.

See HINDU LAW—INHERITANCE.

Hindu Law — Inheritance — Samanodakas, who are—Conflict between Samanodakas and bandhus or bhinna gotra sapindas—Priority—*See* HINDU LAW—INHERITANCE, 10 B. 372.

Sanad.

See GRANT—CONSTRUCTION.

(1)—*Hindu Law—Widow's estate—* Sanad, *construction of.*—In April 1861 the Chief Commissioner of Oudh granted a *sanad* in the following terms:—"It having been established after due inquiry that five persons specified herein held 48¾ acres in rent-free tenure under the former Government, the Chief Commissioner is pleased to maintain that tenure for the lives of the incumbents after whose death it will be resumed." C was the widow of one of the 5 grantees. *Held*, that the *sanad* simply established the *status quo ante* as contemplated by the law for the time being in force, and that C had only the estate of a Hindu widow under that document. NANDA v. BHAWANI SARAN, 3 O.C. 250.

(2)—*Male heirs—Construction.*—A *sanad* under which the Government agreed to continue a *vatan* to a family contained a clause which ran as follows:—"The said lands and cash allowances shall be continued without demand of service, and without increase of Land Tax over the above fixed amounts, and without objection or question on the part of Government as to the rights of any holders thereof, so long as any male heir to the *vatan*, lineal, collateral or adopted, within the limits of the *Vatandar* family, shall be in existence." *Held*, on a construction of the above clause that it does not limit the succession to male heirs only, because it merely relates to the continuance of inheritance in force in the family of the *vatandar*. GOVIND v. SITABAI, 2 Bom. L.R. 23.

(3)—*Construction of* Sanad—"*Heirs.*"—The word "heirs", used in the *Sanad*, was construed to mean heirs of the grantee according to the ordinary rules of inheritance of the Hindu law. VENKATA NARASIMHA APPA ROW v. NARAYYA APPA ROW, 6 C.L.R. 153, P.C.=2 M. 128=7 I.A. 38=4 Sar. 81. [*R.*, 11 M. 380; *On appeal*, 18 I.A. 45, P.C., 20 M. 256, P.C.; *D.*, 2 M. 290=8 I.A. 99, P.C., 24 M. 613=11 M.L.J. 29, 24 M. 562, 26 M. 339.]

Sanad—*continued.*

(4)—*Construction of* Sanad—'*Sontan,' meaning of—Male progeny*—"*Sreni Krame,*" *meaning of—Succession—Gift to A and children of her womb—Construction—Life interest.*—The word 'sontan' bears the wider and more general meaning of issue, and is not confined to male progeny only. [*R.*, 7 C.L J. 291.] The true meaning of the words 'Sreni Krame' in a *sunnad* as gathered from the context seems to be "in succession" in the sense of succession first of mother, and then of the children born of her womb. Where by its terms a *sunnad* determines with the life of a Hindu widow and the children born of her womb, the gift necessarily becomes the gift, not of an absolute estate, but of a life interest only. She can make no disposition of this property after her death and if she makes a testamentary disposition of it, the will becomes inoperative and will be of no legal effect. HURISH CHUNDER CHOWDHRY v. CHUNDER MONEE DEBIA, **24 W.R. 268.**

(5)—Sunnad, *construction of — Impartible zemindari—Partition—Succession by widow.*—The owner of an impartible zemindari which, though forming part of the family property, had, by ancient custom, been held and enjoyed by the eldest male member in the direct line, died leaving four sons and an infant grandson A by his eldest son who had predeceased him. During the minority of that grandson, the four surviving sons executed a *sunnad* which, after reciting certain arrangements made by their father, directed that "the zemindari should be held by A, the son of the eldest son. A and we four also shall take in equal shares the inam lands; until A attains his proper age, we all should jointly manage the affairs of the said zemindari. After A attains his proper age, the zemindari of the inam lands allotted to him should be delivered over to him, and each should confine himself to the share allotted to him." Certain jewellery was also divided in similar manner. A died leaving a son C, who died in 1865 without issue but leaving a widow. *Held* (reversing the decision of the High Court of Madras), that the *sunnad* amounted to an agreement by which the joint family was divided, and that on the death of C, his widow was entitled to the zemindari. VADREVU RANGANAYAKAMMA v. VADREVU BULLI RAMAIYA, **5 C.L.R. 439, P.C.** (5 I.A. 61, *Cited.*)

(6)—*Construction of* Sunnad—"*Mokurrary*", *meaning of.*—The word "Mokurrary," in a *sunnud*, does not necessarily import "perpetuity." THE GOVERNMENT OF BENGAL v. NAWAB JAFUR HOSSEIN KHAN, **5 M.I.A. 467=1 Sar. 472.**

(7)—*Construction of*—Mokarari, *grant of—Revision of rent, if in perpetuity—Set off*—Res judicata—*Civ. Pro. Code, s.* 13—*Non-realization of rent for many years, effect of—Landlord and tenant*—Batta, *agreement to pay, if and when legal.*—On the construction of the *sanad*, which recited that, by a previous grant, Rs. 72 had been fixed as the annual horse expenses of the lessee to be paid out of *mokarari* rent of Rs. 250, and as the lessee had with the consent of the donor taken a transfer of the *mokarari* interest, the sum of Rs. 72 was to be annually set off against the *mokarari* rent, and the remainder Rs. 178 was remitted for the kitchen expenses of the lessee and for feeding the poor and occasional visitors and which concluded with the following statement, *viz.*, "This *sanad* is, therefore, granted to Shah Pir Mahomed Saheb, as regards the remission of Rs. 250, being the amount of *mokarari* rent of *mouzah* Kaler, and according to the *sanad*, the Shah Saheb as well as his heirs shall get acquittances year after year from my *cutchery*." *Held*, that there was no maintenance grant in perpetuity to the lessee or donee and his descendants from generation to generation, nor was there even a maintenance grant to the donee and his heirs, but that there was a maintenance allowance granted to the donee and his heirs then living. (9 I.A. 33=8 C. 664, 14 I.A. 7=14 C. 296, 18 I.A. 22=15 B. 222, 28 I.A. 1=23 A. 194, 28 I.A. 152=28 C. 720, *D.*) *Per Stephen, J.*—Where in a previous litigation the question was whether the heirs of the grantee were entitled to claim the remission of rent and the same question, that is, as to a permanent remission of rent, is raised in a subsequent litigation by the transferees from the representatives of the original grantee, the decision in the former litigation does not amount to *res judicata.* A claim for *batta* being a claim in excess of rent is not enforceable at law. *Per Mookerjee, J.*—The Revenue Courts are Courts of limited jurisdiction, and notwithstanding the decision of the Collectorate Court a suit may be brought in the ordinary Civil Court, to establish the character of the land in suit, that is whether it is rent-free or rent-paying; in other words, the Revenue Court and the Civil Court are not Courts of concurrent or equal jurisdiction for the purposes of a suit to declare finally, whether the land is rent-free or liable to pay rent. A decision of the Revenue Court may be evidence, but it is by no means conclusive upon the issue whether the land is rent-free or rent-paying. (15 B.L.R. 238=24 W.R. 154, 7 B.L.R. 673=15 W.R. P.C. 30, 11 B.L.R. 434 =19 W.R. 322, 26 A. 468, 25 W.R. 189, *R.*) A maintenance grant is *prima facie* for the life of the grantee. (22 W.R. 225, 28 I.A. 1=23 A. 194, *R.*) But the presumption may be rebutted, either by the express provisions of the grant, or where the terms of the original grant are unknown, by long course of conduct of the parties concerned. (4 C.L.J. 399, *R.*) When the relation of landlord and tenant exists between two persons in respect of any property, the mere non-payment of rent, though for many years, is not sufficient to show that the relationship of landlord and tenant has ceased. (7 W.R. 400, 24 W.R. 386, 4 C. 314, 7 B. 40, 6 C.L.J. 72, B.L.R. F.B. 202, *R.*) *Batta* is not *abwab*, if it is merely an allowance for the exchange of *sicca* rupees into Company's rupees, the latter of which was

Advocate High Court
Jammu & Kashmir
Srinagar.

Sanad—*continued.*

introduced by Act XVII of 1835, and the former ceased to be a legal tender by Act XIII of 1836. If the rent claimed has been fixed before 1836, *batta* is *prima facie* not an *abwab*, but if it has been fixed subsequently, it is *prima facie* an *abwab*. RAMESHAR KOER *alias* DULPHIN SAHEBA v. GOBARDHAN LAL, **7 C.L.J. 202.** (6 C.L.J. 637, 6 C.L.J. 667, *R.*) [*R.*, 7 C.L.J. 251.]

(8)—*Construction of* Sanad—*Ownership in soil.*— Although *Sanadi* grants in *inam*, *saranjam*, etc., are *generally speaking*, more properly described as alienations of the royal share in the produce of the land, *i.e.*, of land revenue, than grants of land, yet it is not invariably correct in all cases. (4 B. H. C. 7 A.C.J., *D.*) If words are employed in a grant, which expressly, or by necessary implication, indicate that Government intends that, so far as it may have any ownership in the soil, that ownership shall pass to the grantee, neither Government, nor any person subsequently to the date of the grant deriving under Government, can be permitted to say that the ownership did not so pass, unless there are in the grant such detailed provisions as may show that such words are limited in their operation. Accordingly, a *sanad* by the State purporting to grant a village in *inam*, "including the waters, the trees, the quarries, the mines and the hidden treasures, but excluding *Hakdars* and *Inamdars*," could mean only a grant by the State of such proprietary right as it had in the soil of the village to the grantee; and the State cannot say that such words as above mean nothing but land revenue. (6 B.H.C. 191 A.C.J. and 11 M.I.A. 295=10 W.R. P.C. 13, *D.*) Also, the saving of the rights of *Hakdars* and *Inamdars*, does not prevent the property in soil, so far as it can be regarded as having been vested in Government, from passing to the grantee. RAVJI NARAYAN MANDLIK v. DADAJI BAPUJI DESAI, **1 B. 523.** (10 B.H.C. 471, *F.*) [*F.*, 6 Bom. L.R. 43=28 B. 276; *R.*, 3 B. 452, 6 B. 598, 12 B. 534, 12 M. 98, 16 B. 596, 5 Bom. L. R. 983, 28 A. 104=A.W. N. 1905, 206.]

(9)—*Construction of grants—English rule—Right to Soil — Timber — Forest rights — Prescription — Servitude.* — In construing a grant, the rule of English Law that "a grant, from the Crown is construed most strictly against the grantee and most beneficially for the Crown, so that nothing will pass to the grantee but by clear and express words," is the proper rule to be applied. Where the *sanad* ran as follows:—"the village of Manavali has been conferred on you as *inam*, to be enjoyed by you, your son, grandson, from generation to generation. The Government dues of the village, *viz.*, *koolbab koolkanoo* (*i.e.*, all taxes and assessments), present takes, and future takes, together with the house-tax, but exclusive of *haks* due to *hakdars*, shall continue to be debited from year to year, next succeeding. You are to enjoy the inam grant of

Sanad—*continued.*

the said village hereditarily without disturbanco." *Held*, that on the strict construction of this document and other documents in the case, the grantee did not obtain anything more than a right to Government revenue and had no right of property in the forest, and the grantee having such a right could not claim to have got a prescriptive right to dispose of all trees growing on such land. [*F.*, 10 B.H.C.R. 471, 1 B. 523; *R.*, 3 B. 340, 3 B. 452, 6 B. 598, 12 M. 98, 5 Bom. L.R. 983, 29 B. 480 =7 Bom. L.R. 497.] There can be no prescriptive right in the nature of a servitude so large as to preclude the ordinary uses of property by the owner of the land affected by the privilege, and to extinguish or destroy all the profits or produce ordinarily derivable from the soil. A claim to a prescriptive right to dispose of all the timber growing on another's land is absolutely inadmissible. Such a right could only be created by express grant. VAMAN JANARDHAN JOSHI v. THE COLLECTOR OF THANA AND CONSERVATOR OF FORESTS, **6 B.H.C. A.C. 191.**

(10)—Istimrari Sunnad, *effect of.*—The effect of the *Istimrari Sunnad* is to ascertain and limit the demand of the Government for revenue and to recognize and confirm, subject to this, the proprietary rights already in existence. CANNAMMAL AIYAR v. RUNGASAWMY SINGA PULLIAR, **8 M.H.C. 114.** (9 M.I.A. 539, *D.*)

(11)—*Decree-holders—Right to execute decree—Act* XXVII *of* 1860, *certificate under, if necessary.*—Persons who are decree-holders on the record are *prima facie* entitled to take proceedings in execution and draw the money standing to their credit under their decree, and it is not necessary for them to take out a certificate under Act XXVII of 1860, where there are no debts due to the estate of a deceased decree-holder. MANICK MOYEE CHOWDHRAIN v. POORNOO CHUNDER ROY, **17 W.R. 510.**

(12)—*Grant by a Zemindar of a portion of his estate in lieu of—Alienation.*—The *Zemindar* in possession, by a sunnad, conveyed to A, as the head of a branch of the grantor's family, an estate, part of the *Zamindary*, in lieu of maintenance, to which A was entitled, out of the *Zamindary*, "to hold and enjoy possession from generation to generation," subject to an allowance for maintenance to a certain class of the family described as "*Lowahokans* and *Motalokans*" (dependants and relations). *A*'s heir afterwards alienated a part of the estate for a valuable consideration. *Held*, first, in the absence of evidence of any class of persons answering the description of "*Lowahokans* and *Motalokans*" (which might have created a trust) that *A*, took an absolute estate in the lands assigned to him; and secondly, that the limitation in the *sunnad*, "from generation to generation" did not create such an estate as to operate as a bar to alienation by sale. RAJAH NURSING DEB v. ROY KOYLASNATH, **9 M. I.A. 55=1 Sar. 842.**

Sanad—*continued.*

(13)—*Suit for assessment—Grant of sunnads by judgment-debtor after attachment of property.* —In a suit to assess rent upon a tenure held by the defendant, the defendant pleaded that he held his lands under a sunnad which the plaintiff's mookhtear distinctly alleged, in his examination before the Court, to have been collusively granted by the former proprietor to his son (the defendant) in fraud of creditors after attachment of the property. The Court below altogether omitted to try the question whether or not the sunnad was given by the former proprietor in favour of his son, the defendant, after the attachment, and when he had no power to deal in such a manner with the property. *Held* that the Court below ought to have tried the above question. HURISH CHUNDER CHOWDHRY v. RAM CHUNDER CHOWDHRY, **1 W.R. 247.**

Grant by, if equivalent to settlement—*See* BEN. ACT VI OF 1870, s. 1, 15 C.W.N. 300=9 Ind. Cas. 688.

Issue of—Effect of—Quit-rent paid to Government by inamdar under such settlement—Suit for refund—*See* BOM. ACT VII OF 1863, s. 32, 17 B. 407.

See HINDU LAW—IMPARTIBLE ESTATE, 24 M. 562=11 M.L.J. 191.

Grant by—In 1802 of Zemindari without change of rule of succession by primogeniture—Madras Regulation XXV of 1802—*See* HINDU LAW—INHERITANCE, 13 M. 406, P.C=17 I.A. 134.

Sanadi-Milkyat-i-istemrari—Present partibility of a zemindari existing before 1759—Subsequent grants by Government—Absence of intention to grant it as impartible—*See* HINDU LAW—INHERITANCE, 14 M. 237, P.C. =18 I.A. 45.

Allowances to Hindu temple under—Applicability of Hindu Law in questions of limitation --Nibandha immoveable property—*See* HINDU LAW—RELIGIOUS ENDOWMENT, 6 B. 546, F.B.

See IMPARTIBLE ZEMINDARI, 3 M. 370.

Construction of Sunnad—*See* KHOTI TENURE, 12 B. 595.

Sanad granted to inamdars by Peshwa's Government—Right of grantees to soil of forest, timber and junglewood—*See* LAND TENURE —IN BOMBAY, 11 B. 688, Note=P.J. 1881, 276.

Sanad of a Vakil, supension of—*See* LEGAL PRACTITIONERS — PLEADER — REMOVAL, SUSPENSION, ETC., 1 Bom. L.R. 708=22 A. 49, P.C.=3 C.W.N. 736=26 I.A. 242=7 Sar. 556.

Zemindar's right to a tract of hill and forest, proof of—Construction of istemrari—of 1803 as to lands granted—*See* OWNERSHIP, 15 M. 101 =18 I. A. 149, P.C.=6 Sar. 74.

Granting hak--Re-grant of hak by endorsement on sanad—Endorsement, if requires registration—Admissibility of other evidence as to

Sanad—*concluded.*

alleged re-grant—Evidence Act, s. 92, Proviso 4 —*See* REGISTRATION ACT, 1908, s. 17, 14 B. 472.

Determination of assessment—Reference to Sunnads and Kabuleats—*See* MAD. REG. XXV OF 1802, s. 3, 12 M.L.J. 126.

See SERVICE TENURE, 14 B. 82.

On summary settlement, whether revocable by Government—*See* SETTLEMENT—MISCELLANEOUS, 4 B. 367.

Sanction.

See BEN. ACT XI OF 1859, s. 5, 5 B.L.R. 135=13 W.R. 381.

Suit by manager without—Of Court of Wards —Effect of sanction after appeal—*See* BEN. ACT IX OF 1879, s. 55, 16 C. 89.

Suit against Nawab of Surat—Sanction of Government not obtained before suit filed—Validity of suit—Meaning of expression "sue forth"—*See* BOM. ACT XVIII OF 1848, s. 1, 12 B. 496.

See MAD. ACT VIII OF 1865, s. 11, 9 M. 27.

Granted by Municipality for raising a building under Act XIII of 1884—Effect of present Act (XX of 1891) on such sanction—*See* PUN. ACT XX OF 1891, ss. 2, 92 (6), 9 P. R. 1905=14 P.L.R. 1905.

Compromise by guardian *ad litem* in suit against minor—Of Court necessary for—*See* COMPROMISE—GENERAL, 21 M. 91=8 M.L. J. 28.

Of compromise by Court on behalf of infant —*See* COMPROMISE—SETTING ASIDE COMPROMISE, 6 C. 687=8 C.L R. 169.

Suit by or against receiver—Of Court—*See* RECEIVER, 10 C. 1014.

Suit in *re* religious endowments—Costs—Of Advocate-General—*See* RELIGIOUS ENDOWMENT, 17 M. 406.

Sanction to prosecute.

(1)—*Sanction to prosecute—Principles which should guide a Court in sanctioning prosecution —Crim. Pro. Code*, 1882, *s.* 195—*Penal Code*, *ss.* 193, 463.—The object of the law in allowing sanction to prosecute is to restrain the exercise of private spite and to insist on there being prosecutions only when the interests of public justice render it necessary. It is not intended by the law to allow any person as of right to attack his civil adversary in a Criminal Court. Another reason for not granting sanction to prosecute in every case is that there may not be a number of prosecutions without convictions. It would be disastrous if there were a number of prosecutions ending not in conviction, but in acquittals. The result would be that, instead of putting down perjury, it would rather tend to encourage it. If the Court of first instance finds an instrument to be genuine and the Judge in appeal

Sanction to prosecute—*continued.*

happens to take a different view of the matter, it is not desirable to grant sanction to prosecute. RAM PROSAD ROY v. SOOBA ROY, **1 C.W.N. 400.**

(2)—*Perjury — False charge, making of—Sanction to prosecute refused by trying Magistrate—Duty of superior Court.*—Sanction to prosecute should only be given in a case in which, in the interests of justice, further criminal proceedings are necessary. The view of the Court, which originally passed the order, on which the proceedings for sanction are taken is most valuable and should not be lightly set aside. HIRA v. GOPI, **17 P.L.R. 1907.**

(3)—*Sanction to prosecute — Appeal pending against proceedings giving rise to application — Sanction if could be granted.*—Sanction should not be granted during the pendency of a regular appeal to the High Court from the decree and the proceedings out of which the application for sanction arises. Sanction should not be granted on a discrepancy between the statement made before the Court on oath and that recorded in the course of mutation proceedings without oath and to which the attention of the defendant was not drawn in the course of his examination. MAHANT KIRPALBAN v. MUSST. RAMDAI, **7 A.L.J. 647=7 Ind. Cas. 260.**

(4)—*Crim. Pro. Code* (*Act* V *of* 1898), *s.* 195—*Sanction to party to suit pending appeal to higher Court—Conviction doubtful — Stay of proceeding for sanction pending appeal—Proper procedure.*—In a suit for pre-emption, a sale-deed was produced on behalf of the defendants to show that part of the consideration consisted of certain promissory notes executed by the vendor. The promissory notes were found by the Subordinate Judge to be forgeries put forward with the object of increasing the pre-emption price, and the plaintiff's suit was decreed ; and on the application of the plaintiff, the Subordinate Judge granted sanction to prosecute the defendants and certain witnesses examined on their behalf. On appeal, the District Judge declined to revoke the sanction, although he was of opinion that the evidence, on which the Subordinate Judge relied as likely to secure a conviction, was unsatisfactory. On an application for stay of proceedings for sanction, pending an appeal preferred by the defendants in the High Court, against the decree of the Subordinate Judge, *held* that it was neither necessary nor desirable in this case, to grant sanction to one of the parties to pursue a doubtful criminal prosecution, pending the decision of the appeal which had been ordered to be expedited, and the hearing of which was probably being delayed by these proceedings. The proper procedure in a case of this kind is to await the conclusion of the litigation, and then to move the higher Court to take action, if necessary, in the ends of public justice. JADU LAL SAHU v. J. R. LOWIS, **11 C.W.N. 712=34 C. 858=6 C.L.J. 531=5 Cr.L.J. 480** (16 B. 729, 18 B. 581, 26 M. 190, B.L.R. Sup. Vol, 426, *R.*)

Sanction to prosecute—*continued.*

(5)—*Crim. Pro. Code* (*Act* X *of* 1882), *s.* 195—*Sanction—Criminal proceedings arising out of civil litigation—Pendency of civil suit—Stay.*—Criminal proceedings for perjury or forgery, arising out of a civil litigation, should not go on during the pendency of the civil litigation. *In re* SHRI NANA MAHARAJ, **16 B. 729.** [*R.*, 23 C. 610, 26 B. 785, 31 C. 858, 7 Bom. L. R. 84 ; *D.*, 6 C.L.J. 531=11 C.W.N.712.]

(6)—*Crim. Pro. Code* (*Act* V *of* 1898), *s.* 195—*Penal Code* (*Act* XLV *of* 1860), *s.* 191—*False evidence—Written statement filed in a suit—Denial of plaint allegations—Sanction to prosecute—Pleadings, construction of.*—Where the defendant in a suit stated, in his written statement, that he denied the plaint allegations, except such as were contained in a certain para therein, and sanction was asked for and granted for his prosecution under s. 191, Penal Code. *Held*, that, having regard to the whole of defendant's written statement, he only meant to say that he did not admit the plaint allegations and wanted plaintiff to prove them, and that sanction should not have been granted on the basis of such loose expressions of language. Pleadings in the *moffussil*, where no great exactitude of expression is found, should not be taken too literally. B. P. NARAYAN SASTRULU v. KANAKAMUNA, 3 **Ind. Cas. 723=6 M.L.T. 346=10 Cr.L.J. 364.**

(7)—*Crim. Pro. Code, Act* V *of* 1903, *s.* 195—*Penal Code* (*Act* XLV *of* 1860), *ss.* 183, 186—*Resisting public servant—Withdrawal of attachment—Court directing Court officer to re-deliver properties to defendant—Properties taken possession of by defendant—Civ. Pro Code* (*Act* V *of* 1908), *O.* 21, *r.* 55.—Certain properties of the defendant were attached in execution of a decree against him. The amount of the decree having been deposited in Court, the Court directed the properties to be released and directed the Amin to re deliver the properties to the defendant. The Amin reported that he could not effect delivery, as the defendant had already taken the properties from the bailees with whom they were deposited. The District Judge sanctioned the prosecution of the defendant under ss. 183 and 186, Penal Code. *Held*, that the order directing the properties to be entrusted to the petitioner was not authorised by any of the provisions of the Civ. Pro. Code, and that, the attachment having been withdrawn, there was no resistance by defendant to a public servant within the meaning of s. 183 or 186, Penal Code. *In re* ARAKKAL AHMAD ALI RAJAH AVERGAL OF CANNANORE, **4 Ind. Cas. 97=6 M L.T. 376.**

(8)—*S.* 195, *Crim. Pro. Code*, 1898—*Sanction to prosecute, when to be granted.*—Sanction to prosecute is not usually granted unless there is a very reasonable chance of a conviction following. A sanction to prosecute under s. 195 of the Code of Criminal Procedure ought to be granted with great circumspection and care. If granted it places in the hands of the person obtaining it a very powerful weapon which the unscrupulous might use for purposes

Sanction to prosecute—*continued.*

of oppression or black mail. KALI CHARAN LAL v. BASUDEO NARAIN, **12 C.W.N. 3=7 C.L.J. 301.**

(9)—*Sanction to prosecute for forgery of document filed in Court, when refused.*—Sanction to prosecute a person for forgery was refused on the ground that the genuineness of the document alleged to be forged might be questioned and determined in a Civil Court in another suit and also on the ground that sanction if granted, would be calculated to prejudice the judicial enquiry and decision in that suit. GURU CHARAN SHAHA v. GIRIJA SUNDARI DASSI, **29 C. 887=7 C.W.N. 112.**

(10)—*Sanction for prosecution—Enquiry by Court prior to granting sanction — Validity—ss. 195 and 476, Crim. Pro. Code.*—A Civil Court deciding a case without any evidence being gone into, may sanction the prosecution of any of the parties, after holding a preliminary enquiry as to the commission of any offence before it; sanction thus granted is not illegal. Where, in a Civil suit settled, without any evidence being gone into, by confession of judgment, the Court had grounds for supposing that an offence referred to in s. 195 of the Crim. Pro. Code, namely, an offence of false personation under s. 205 of the Penal Code, had been committed before it, *held*, that the Court, before granting a sanction to prosecute, would be competent to make a preliminary enquiry and travel outside the record, and thus satisfy itself whether a *prima facie* case had been made out for granting a sanction. SASHI KUMAR DEY (OF PAIKPARAH) v. SASHI KUMAR DEY (OF KHILPARAH), **19 C. 345.** (6 C. 440, 6 M. 29, *Diss.*) [*F.*, 20 M. 339=2 Weir 177=7 M.L.J. 311; *R.*, Rat. Un. Cr. Rul. 895=4 L. B.R. 234=14 Bur. L.R. 207=7 Cr. L.J. 495.]

(11)—*Sanction—Technical ground—Court's duty.*—When a Court is invited to sanction a prosecution, because an offence against public justice has been committed, the ends of justice should not be allowed to be defeated on technical grounds. At the same time, a sanction should not be lightly granted, merely because there is room for suspicion that an offence may have been committed; the Court is bound to satisfy itself that there is at least a *prima facie* case, and that, if sanction is granted, there is a reasonable prospect of a successful termination of the prosecution about to be instituted. MATHURA SAHU v. DAMRI RAM, **15 C.L.J. 337=14 Ind. Cas. 755=13 Cr. L.J. 291.**

(12)—*Crim. Pro. Code*, 1898, *s.* 195—*Sanction to prosecute—Whether any enquiry is necessary before sanction is given—Enquiry, nature of—'Produced,' meaning of, in cl.* (6).—In this case the plaintiff filed a suit on a pro-note, but withdrew it before summons was served on defendant. The defendant, alleging that it is a forged pro-note applied for sanction to prosecute him under ss. 463, 471 and 475, I.P. C. The District Judge granted sanction on appeal; *Held*:—*per Abdur Rahim, J.*—Before granting sanction to prosecute under s. 195,

Sanction to prosecute—*continued.*

Crim. Pro. Code, there must be some enquiry and the Court must be satisfied on evidence that there is at least a *prima facie* case for prosecution. If the suit had been properly tried and the pro-note found to be forged, there would be no need for a fresh enquiry. But when it was not so tried, sanction should not be granted without its being found, on proper enquiry held for the purpose, that there are sufficient grounds for holding it to be a forgery (35 C. 820, *R.*) *Per Spencer* (*contra*):—"Produced" in s. 195, clause 6 of the Crim. Pro. Code, should be read apart from the words "given in evidence" which follow. (22 C. 1004, 35 C. 820, *D.*) The section does not require any enquiry as a necessary antecedent to the grant of sanction. (20 C. 474, *R.*) Any enquiry under this section need not be a judicial enquiry. MUTHAVARUPU SESHIAH v. GATRAM RAMIAH. **1911, 2 M.W.N. 526.** (6 W.R. 41 Cr., *F*).

(13)—*Crim. Pro. Code* (*Act* V *of* 1898), *s.* 195—*Sanction to prosecute—Affidavit in support of the application for sanction—Cross-examination on the affidavit not permissible.*—Before granting a sanction under s. 195, Crim. Pro. Code, the Judge should be satisfied that there is a reasonable *prima facie* case fit to be tried. The giving of a sanction to prosecute does not involve any trial of the issue, nor necessarily forming of any definite opinion one way or the other upon the prisoner's guilt, but is restricted to removing a bar to this question being formally tried in another place. As a general rule, no cross-examination should be allowed on affidavits in support of an application for sanction to prosecute. SAFURABAI v. ABDULLABHAI READYMONEY, **11 Bom. L.R. 1164.**

(14)—*S.* 195 (4) *and* (6), *Crim. Pro. Code—Sanction to prosecute—Requisites of a valid sanction—Question of guilt to be gone into.*—Where sanction to prosecute a person given under s. 195 of the Code was couched in such general terms that it was impossible to say exactly what offences were imputed to him and in connection with what deeds he was charged with having committed them:—*Held*, that the sanction was illegal and ought to be set aside. Sanction to institute criminal proceeding should be in express terms and should strictly comply with the provisions of the law. It is not a sufficient compliance with the law, if the necessary elements have to be gathered from the Court's judgment by implication. No sanction should be granted unless the Court has made up its mind that the accused has committed the offences for which he is to be prosecuted. That question ought not to be left over for consideration at the trial. HABIBUR RAHMAN v. MUNSHI KHODABUX, **11 C.W.N. 195=5 C.L.J. 219=5 Cr. L.J. 29.**

(15) *Sanction to prosecute for perjury—Requisites of a valid sanction—Crim. Pro. Code, s.* 195.—In granting sanction for the prosecution of a person for perjury, the Court must specify in distinct terms the place where, and

Sanction to prosecute—*continued.*

the time when, the alleged false evidence was given, and in substance the assignments of perjury as also the sections of the Penal Code under which the proceedings are authorized. *In the matter of the petition of* HAR DIAL v. DURGA PRASAD, **6 A. 105=A.W.N. 1883, 227.** [*F.*, Rat. Un. Cr. C. 693; *R.*, 19 B. 362.]

(16)—*Necessity for application by some definite person* — *S.* 195, *Crim. Pro. Code.* — Sanction under s. 195 should be given only on an application made for it by some person who may desire to complain of the particular offence, and whose complaint could not be entertained without such sanction. DURGA DAS RUKHIT v. QUEEN-EMPRESS, **27 C. 820.** (18 A. 213, 20 C. 474, *Rel. on.*) [*R.*, 9 C.W.N. 277=32 C. 351; *Diss.*, 1 M. L. T. 47=3 Cr. L. J. 227=8 Bom. L.R. 32.]

(17) — *Sanction to prosecute — Crim. Pro. Code*, 1898, *ss.* 195, 476—*Sanction by a Court upon its own motion—Complaint.*— Under the provisions of s. 195, Crim. Pro. Code, a Court may either sanction the institution of criminal proceedings by a private individual or may itself prefer a complaint the procedure for preferring which is laid down in s. 476 of the Code; therefore, where, during the hearing of a civil case, the petitioner filed a certificate signed by a Civil Surgeon to prove his age, the Court, believing the certificate to have been tampered with, recorded a sanction under s. 195 of the Crim. Pro. Code on its own motion, as it suspected that either the offence of forgery s. 463 or that of using genuine a forged document s. 471, Penal Code, had been committed. *Held*, that the sanction was bad in law, as it had not been granted to a private prosecutor, nor had the procedure laid down in s. 476 been adopted. ATMA RAM v. THE EMPEROR, **23 P R. 1901 Cr.** (13 B. 109, *R.*) [*R.*, 44 P.R. 1905 Cr.=197 P.L.R. 1905=3 Cr. L.J. 128, 30 P.R. 1905 Cr.=105 P.L R. 1905.]

(18) — *Crim. Pro. Code* (*Act* X *of* 1882), *s.* 195—*Sanction to prosecute for making false affidavit—Application made through enmity by one not party to suit—Proper grounds for sanction.*—No Court should tolerate any application for sanction to prosecute made by persons who are not parties to the case. [*D.*, A.W.N. 1903, 209=5 A.L.J. 232 Note, 13 C.W.N. 1038.] Sanction to prosecute ought to be given by Judges only after careful consideration, and having in view the ends of justice, and not in order to assist the private ends of individuals. *In the matter of* CHUNDER KANT GHOSE, **3 C.W.N. 3.**

(19)—*Sanction to prosecute—Whether application in writing necessary—Inquiry—Sanction after great length of time—Crim. Pro. Code, s.* 195. — Sanction under s. 195, Crim. Pro. Code, should ordinarily be given only on an application made by some person, who may desire to complain of any of the particular

Sanction to prosecute—*continued.*

offences specified in the section, but whose complaint cannot be entertained without such sanction. (27 C. 820, 18 A. 213, 20 C. 474, 10 C.W.N. 222, 3 Cr. L.J. 112, 2 C.L J. 619, *R.*) It must be observed, however, that s. 195 does not expressly provide that an application must be made for the grant of sanction. The rule stated above may be justified to this extent that, before sanction is granted, the Court must be satisfied that there is some person who is willing to avail himself of it and carry on the prosecution. An application for sanction need not be made in writing, nor need it be made before an inquiry is held under s. 195. An application was made to a Munsif for sanction to prosecute under ss. 209, 210, 193 and 465, Penal Code; the Munsif refused the application on the ground that it was undesirable to grant sanction to a private prosecutor, and his order was upheld on appeal: *Held*, that, in the circumstances of the present case, it would be improper to grant sanction to the private prosecutor. RAGHUNANDAN PROSAD SINGH v. RAM NARAIN SINGH, **13 Ind. Cas. 97.**

(20)—*Crim. Pro. Code, ss.* 195, 476—*Sanction granting, revoking, or refusing to grant—Judicial proceeding—Competency of order under s.* 476 *while hearing appeal under s.* 195 (6)—*Sanction to stranger to suit.*—The grant of sanction to prosecute, the revocation of sanction already granted, and the refusal of an application to grant sanction, are all judicial acts. A District Judge, in an appeal under sub-s. (6) of s. 195 of the Crim. Pro. Code, affirmed the order of a Munsif and refused to grant sanction to a stranger to a suit, and at the same time made an order under s 476. *Held*, that it was perfectly open to the Judge to take proceedings under s. 476, inasmuch as the fact of the commission of an offence had been brought to his notice, in the course of a judicial proceeding under sub s. 6 of s. 195. (16 A. 80, *Diss.*; 10 M. 232, 20 M. 383, 23 M. 210, *F.*) *Held*, also, that the Judge acted properly in refusing to grant sanction to a stranger to the suit. BALA PASBAN KULDIP LAL v. GURWAR MISSER, **13 Ind. Cas. 111.**

(21)—*Power of Court to order prosecution under* s.476, *Crim. Pro. Code*, 1898—*Execution proceedings—Judicial proceedings.*—The powers conferred by s. 476, Crim. Pro. Code, can only be exercised if the offences, in respect of which a prosecution is ordered, have come to the cognizance of the Court in a judicial proceeding. Execution proceedings subsequent to the trial of a suit are not judicial proceedings. KANTO RAM DAS v. GOBARDHAN DAS, **35 C. 133.**

(22)—*Crim. Pro. Code* (*Act* V *of* 1898), *s.* 476 — *Opinion of officer ordering prosecution — Superior Court interfering.*—Where a Munsif having been directed by the District Judge sanctioned prosecution of a party under s. 476, Crim. Pro. Code, and it appeared that the case did not come before the Judge in the course of a judicial proceeding and that the offence was not committed before him, *held*, that the

Sanction to prosecute—*continued.*

order was without jurisdiction. RIAZUL HASAN v. KING-EMPEROR, **6 A. L. J. 924=4 Ind. Cas. 260=10 Cr. L. J. 525.**

(23) — *Crim. Pro. Code* (*Act* V *of* 1898), *ss.* 195, 476—*Revocation of sanction, if judicial proceeding*—I.P.C., (*Act* XLV *of* 1860), *s.*283.—A Subordinate Judge does not act judicially when he grants sanction to prosecute a man under s. 183, I.P.C., on the report of the Nazir of his Court against him for having resisted the Nazir in the execution of a decree, and the District Judge who revokes the sanction on an application made to him by the party is not holding, a judicial proceeding, and if he, after revoking the sanction sends the case under s.476, Crim Pro.Code to the District Magistrate for enquiry or trial, the order under s. 476 is consequently bad. JADU NATH MAHTA v. JAGADISH CHANDRA DEB, **7 C.W.N. 423.**

(24)—*Registrar—Registration of document when execution admitted—Necessity for sanction for prosecution for forgery.*—A Registrar in exercising his ordinary functions of registering a document the execution of which is not denied, is not a Court within the meaning of s. 195, Crim. Pro. Code, and his sanction is not necessary to prosecute the person presenting the document for forgery. MARUDAYA PILLAI v. PERUMAL PILLAI, **2 M.L.J. 286.**

(25)—*Departmental inquiry by Revenue officer—False evidence — Sanction, not necessary under s.* 195, *Crim. Pro. Code, for prosecution—Such officer not a Court, and inquiry not a judicial proceeding.*—Where the Collector of a District on receiving information that a subordinate revenue officer had been trying to obtain a tribe, examined him and certain others and ordered an enquiry to be made by the Assistant Collector under the Land Revenue Code, a certain person having given false evidence during such enquiry, no sanction was held to be necessary under s. 195, Crim. Pro. Code for his prosecution for perjury. The enquiry was merely a departmental enquiry and not a judicial proceeding, and the officers holding the enquiry was not a Court. *In re* CHOTALAL MATHURADAS, **22 B. 936.**

(26) — *Meaning of "Court" used in s.* 195 (1) (*b*), *Crim. Pro. Code*, 1898.—The term "Court" as used in s. 195, cl. 1 (1), (*b*) of the Code, is not confined to the Judge, who tried the case or the appeal, as the case may be, but also means and includes the successor in office of such Judge; a sanction for prosecution, granted under this section by such successor, is valid in law and is not defective for want of jurisdiction. *In the matter of* LALIT MOHAN PAL, **3 C.L.J. 176.** (33 C. 193, *F.*; 9 C.W.N. 850, *R.*)

(27)—*Offence committed before one Munsif—Prosecution ordered by another—Validity—Crim. Pro. Code*, 1898, *s.* 476.—An affidavit which was sworn to by the petitioner was filed before an Additional Munsif in a suit pending before him. That officer was transferred, and the suit was made over to the second Munsif; but the miscellaneous proceeding, in which the matter contained in the affidavit was the subject of enquiry, was continued by the first Munsif who ordered the petitioner to be prosecuted under s.476, Crim. Pro.Code. *Held*, that such an order can only be passed by the officer before whom the affidavit was filed, and that, as the affidavit in this case was filed before the Additional Munsiff, the first Munsif had no jurisdiction to make the order. KARTIK RAM BHAKAT v. EMPEROR, **35 C. 114.** (34 C. 551=11 C.W.N. 569, *F.*; 29 M. 341, *Not F.*)

(28)—*Crim. Pro. Code*, 1898, *s.*159, *cls.* 6 *and* 7—*Order of Munsif refusing sanction—Revocation by Subordinate Judge, if legal—Appeal to District Judge, transferred to Subordinate Judge—Civil Courts Act* (XII *of* 1887), *ss.*21, 22.—A Subordinate Judge cannot grant or revoke a sanction to prosecute refused or granted by a Munsif. RAM CHARN CHANDRA v. TARIPULLA SHEIKH, **16 C.W.N. 645=13 Cr. L. J. 191=13 Ind. Cas. 1007=39 C. 774.**

(29)—*S.* 195 (*b*) *and* (*c*), *Crim. Pro. Code*, 1898 — *Suit in Court of Small Causes — Reference to arbitrator—Fabrication of evidence and forgery and using forged document before such arbitrator—Prosecution—Sanction of Court.*—In a suit in the Court of Small Causes, the Court made a reference under the rules of the Court to an arbitrator. The accused, a party to the suit, was alleged to have fabricated evidence and to have committed forgery and to have used a forged document which was produced before the arbitrator. The accused was prosecuted in respect of those offences, without the sanction of the Court of Small Causes. *Held*, that a Magistrate could not take cognisance of the prosecution, without the sanction of the Court of Small Causes where the document alleged to be forged was filed with the award and formed part of the record of the suit. PUTTIAH v. VEERASAWMY, **17 M.L.J. 420.**

(30)—*Crim.Pro.Code* (*Act* V *of* 1898), *ss* 195, 195 (6), 439—*Sanction to prosecute—Procedure—Court if bound to take evidence—Revision of order of Civil Court refusing sanction — Civ. Pro. Code Act* V *of* (1908), *s.* 115, *High Court, Original Side — Revisionl jurisdiction over Presidency Small Cause Court—Practice—High Court Rules, Appellate Side, Rule* 1V(*a*).—There has been a well established practice of the High Court that application for revision of orders by the Calcutta Small Cause Court are heard by a single Judge on the Original Side of the High Court. (29 C. 498, 30 C. 588, 7 C.W.N. 547, 30 C. 986, 7 C.W.N. 843, *Disc.*) Rule IV (*a*) of the Appellate Side Rules confirms the practice, and under it jurisdiction for revision of orders by the Small Cause Court is vested in a single Judge on the Original Side. A Civil Court, in making an order under s. 195 of the Crim. Pro. Code, does not exercise criminal jurisdiction. The Criminal Revisional Bench of the High Court has therefore

Sanction to prosecute—*continued.*

no jurisdiction to interfere with such an order. (28 A. 554, 26 A. 249, 1 C.W.N. 400, 7 C.W.N. 112, 8 C.W.N. 73, 26 M. 98, *R.*) But the High Court can interfere with such order under s. 115 of the Civ Pro. Code. The jurisdiction of the High Court to interfere under s. 115, Civ. Pro. Code, is not ousted by s. 195, sub-s. (6) of the Crim. Pro. Code, inasmuch as an application under the latter is not an appeal but a substantive application. (26 A. 244, *R.*) In disposing of the application for sanction to prosecute for bringing a false suit under s. 195 of the Crim. Pro. Code, the Court has to decide whether the original suit was false, and whether, if it was false, sanction should be granted, and must make a full enquiry into the matter even if it involves trying the case *de novo*. So where there was no evidence in the records of the original case to prove that it was false, and Small Cause Court refused sanction on the ground that it was not bound to go beyond the record, the Court ordered the case to be sent back and tried according to law. SEW BOLLOCK SINGH v. RAMDHIN BANIA, **14 C. W. N. 806=6 Ind. Cas. 473=37 C. 714.**

(31)—*Crim. Pro. Code* (*Act* V *of* 1898), *ss.* 195, 476—*Sanction to prosecute and order for prosecution—Offence against public justice—Penal Code* (*Act* XLV *of* 1860), *s.* 209—*Offence committed before Small Cause Court—Sanction granted by such Court revoked by District Judge—High Court or District Judge, if may order prosecution under s.* 476—*High Court, if may grant sanction under s.* 195, *or set aside order revoking sanction—Powers of revision—Civ. Pro. Code* (*Act* V *of* 1908), *s.* 115—*Acting illegally in exercise of jurisdiction.*—When a Small Cause Court Judge granted sanction to the District Magistrate to prosecute the petitioner for an offence under s. 209, I.P.C., and the sanction was revoked by the District Judge on the ground that a sanction could not be granted to a third party, but the District Judge nevertheless ordered the prosecution of the petitioner under s. 476, Crim. Pro. Code, there being, in his opinion, a *prima facie* case against the petitioner: *Held*, that neither the District Judge nor the High Court had power to order the prosecution of the petitioner under s. 476, Crim Pro. Code (34 C. 551, F.B., *F.*) That the High Court was not, for the purpose of s. 195 of the Code, the Court to which the Small Cause Court was subordinate, and so could not grant sanction under cl. (*b*) of sub-s. (1) of s. 195. That the High Court had jurisdiction to set aside the order of revocation and to restore the original sanction, under s. 115 of the Civ. Pro. Code, the District Judge having acted illegally in the exercise of his jurisdiction in revoking the sanction which had been properly granted by the District Magistrate. *Quære*:—Whether the High Court had power under cl. (*b*) of sub-s. (1) of s. 195, to interfere with the order of the District Judge revoking the sanction. 10 C.W.N. 1026 is on this point in conflict with 5 C.L.J. 222 and has been dissented

Sanction to prosecute—*continued.*

from by a Full Bench of the Madras High Court in 30 M. 383. There is nothing in the statute law to limit the grant of sanction to a party to the proceeding in connection with which the offence aimed at was committed. Sanction to prosecute for an offence against public justice may best be granted to a public officer, for there can be no better recipient of such sanction. (3 C.W.N. 3, *D.*) The principles relating to the grant of sanctions to prosecute and the reasons for the safe-guards provided by ss. 195 and 476, indicated. "Offences against public justice ought to be pressed primarily in the interests of public justice and never as a means of satisfying a private grudge." RAM PROSHAD MALLA v. RAGHUBAR MALLA, **13 C.W.N. 1038=4 Ind. Cas. 6=10 Cr. L.J. 454 =37 C. 13.**

(32)—*Crim. Pro. Code* (*Act* V *of* 1898), *ss.* 195, 176—*Order under s.* 476 *infructuous—Order under s.* 195 *not illegal—Application under s.* 195 *presented by minor should be presented through next friend.*—After action has been taken under s. 476 of the Crim. Pro. Code, and an order has been made, which proved infructuous because not made in accordance with that section or because it is defective in form, there is no reason why an application properly made under s. 195 should not be entertained. The position would be different if the order under s. 476 was set aside on the merits. An application presented under s. 195 of the Crim. Pro. Code to a Civil Court, for sanction to prosecute a person, by a person who is an infant, ought to be presented on his behalf by a properly appointed next friend. The Court will not entertain an application which is not so presented. The objection goes to the root of the matter, and may be taken successfully in the appellate or the Revisional Court. RAJENDRA NATH DAS v. MUKTA RANI DASI, **6 Ind. Cas. 367.** (19 M. 127, 22 C. 270, *R.*)

(33)—*Crim. Pro. Code*, 1898, *s.* 195—*Sanction to prosecute—Appeal.*—*Held* that, when sanction to prosecute has been granted by a Court under the provisions of s. 195 of the Code of Criminal Procedure, only one appeal from such order will lie under that section. KANHI LAL v. CHHADAMMI LAL, **A.W.N. 1908, 290 =6 A.L.J. 1=31 A. 48=5 M.L.T. 755=9 Cr. L J. 63.** (28 A. 554, A.W.N. 1908, 102, 30 M. 382, *R.*)

(34)—*Appeals from orders granting, confirming, refusing or revoking sanction—Crim. Pro. Code, s.* 195, *cls.* 6 *and* 7.—The right of appeal conferred by s. 195 (6), Crim. Pro. Code, as read with sub-s. 7 of the same section, is not restricted to a right of appeal to the appellate Court, to which the Court of first instance is immediately subordinate. An appeal lies to the High Court, not only in cases where the Court of first instance refuses sanction, and sanction is granted by the Court to which that Court is immediately subordinate, but also in cases where the Court of first instance grants sanction and the sanction is

Sanction to prosecute—*continued.*

revoked by the Court to which that Court is immediately subordinate. (27 M. 223, *Appr.*) A revocation of a sanction is a refusal of the sanction, in the same way as an order confirming a grant of a sanction is a giving of the sanction, for the purposes of the section. MUTHUSAMI MUDALI v. VEERI CHETTI, **17 M.L.J. 266, F.B =30 M. 382=2 M.L.T. 239.** (5 C.L.J. 219, 222, 10 C.W.N. 1026, *R.*) [*F.*, 17 M.L J. 43 N; *R.*, 30 A. 243=A.W.N. 1908, 102=5 A.L.J. 247=3 M L.T. 377=7 Cr.L.J. 389, A.W.N. 1908, 290, 37 C. 13=13 C. W.N. 1038=10 C.L.J. 454=4 Ind. Cas. 6, 31 A. 48=6 A.L.J. 1.]

(35)—*Suit for arrears of rent under Act* XII *of* 1881—*Perjury—Application for sanction to prosecute—Power of District Judge to revoke sanction—Crim. Pro. Code*, s. 195.—In a suit for arrears of rent under s. 93, cl. (*a*) of Act XII of 1881, before an Assistant Collector, an application for sanction to prosecute for perjury was made and referred to the Collector who granted sanction. From the order of the Collector, the witness applied to the Sessions Judge to revoke the sanction. The Sessions Judge declined to interfere, being of opinion that the Collector was not subordinate to his Court in this matter within the meaning of s. 195, Crim. Pro. Code. An application to the Commissioner of the Division was similarly rejected. *Held* that the words in s. 195, Crim. Pro. Code, "the Court to which appeals from the former ordinarily lie" refer to the normal course of appeal applicable to civil cases, and as a very substantial part of the Collector's judicial work under the Rent Act is appealable only to the District Judge, the latter had power to interfere and revoke the sanction. HARI PRASAD v. DEBI DIHAL, **A.W.N. 1888, 234.**

(36)—*Sanction for prosecution—Power to grant sanction—Power of Civil Judge—Crim. Pro. Code*, 1861, ss. 170. 171—*Power of Judge to make order where application made to Sudder Ameen in whose Court offence occurred, refused.*—The Civil Judge made an order, under ss. 170, 171, Crim. Pro. Code, directing the Magistrate to investigate whether certain documents used before the Sudder Ameen were forged, and, if so, by whom. *Held* that he had jurisdiction to make the order, notwithstanding the Sudder Ameen had been applied to and had refused to make a similar order. RADHANAUTH BANERJEE v. KANGALEE MOLLAH, **Marsh 407=2 Hay 538.**

(37)—*Sanction to prosecute—Granted by Collector—Set aside by District Judge—Jurisdiction—Crim. Pro. Code* (V *of* 1898), *s.* 195 (7) (*c*).—Where a Collector granted sanction for prosecution for perjury in a case in which no appeal lay, and the District Judge revoked the sanction *held*, that, under cl. (*c*) of sub-s. (7) of s. 195, Crim. Pro. Code, the District Judge, as being the principal Court of original jurisdiction, had jurisdiction to revoke the sanction. WAZIR MUHAMAD v. HUB LAL, **6 A.L.J. 231 =31 A. 313=9 Cr. L J. 504=2 Ind. Cas. 182.**

Sanction to prosecute—*continued.*

(38)—*Sanction granted by Subordinate Judge in suit exceeding Rs.* 5,000 *in value—Crim. Pro. Code, s.* 195—*Appeal to District Judge.*—Where a Subordinate Judge has granted sanction under s. 195 of the Crim. Pro. Code, for prosecution for an offence referred to in the section, committed in the course of a civil suit before him for a sum in excess of Rs. 5,000, an appeal from the order granting sanction properly lies to the District Judge. The fact that the amount of the civil suit was such that an appeal therein was outside his jurisdiction cannot affect his competency to hear an appeal from the order granting sanction under s. 195 of the Crim. Pro. Code for a criminal prosecution. GANGA DEI v. SHER SINGH, **17 A. 51.**

(39)—*Appealability of order of single Judge of High Court interfering or declining to interfere in revision—Application for sanction to prosecute—Appeal—Appellate Court jurisdiction to direct lower Court to take fresh evidence—Crim. Pro. Code, s.* 195—*Revisability of proceedings under s.* 195, *Crim. Pro. Code, before Judges of Civil Courts—Civ. Pro. Code, ss.* 622, 647, 568 *and* 569.—An appeal lies against the decision of a single Judge of the High Court, whenever it amounts to a judgment; and an order of a single Judge interfering in revision is an appellate judgment. (22 M. 68, *R.*) The rejection by such a Judge of a revision-petition, on the ground that the objection therein taken to the jurisdiction of the lower Appellate Court to pass a certain order was unfounded, is also a judgment and is appealable. (23 M. 169, 27 M. 340, *Not F.*) When an application for sanction to prosecute comes before the District Judge on appeal from the District Munsif under s. 195, Crim. Pro. Code, the District Judge has no jurisdiction to direct the Munsif to take fresh evidence. The powers conferred by s. 195, Crim. Pro. Code, are of a very special nature and no inherent jurisdiction can be attributed to any Court, in the exercise of such powers, unless it is incident to their proper exercise and the jurisdiction to direct a District Munsif to take fresh evidence is not necessarily incident to the exercise of the appellate jurisdiction conferred by s. 195, Crim. Pro. Code. The effect of s. 647, Civ. Pro. Code, is not to make the provisions of the Civ. Pro. Code applicable to proceedings under s. 195, Crim. Pro. Code, which are of a criminal, rather than a civil nature. RAMA IYER v. VENKATACHALA PADAYACHI, **2 M.L.T. 84=17 M.L.J. 123=5 Cr. L.J. 288=30 M. 311.** (26 M. 139, 28 A. 554, *R.*)

(40)—*S.* 195, *Crim. Pro. Code—Sanction—Court of Village Munsif subordinate to District Judge—District Judge competent to grant sanction—Sanction to be granted on formal application—Village Courts Act* (III *of* 1892), *s.* 73.—No appeal lies from the decree of a Village Munsif under the Village Courts Act, although, under s. 73 of the Act, the District Judge may, under certain circumstances, review the decree of a Village Munsif. As no appeal lies from the decrees of a Village Munsif, that Court is,

Sanction to prosecute—*continued.*

under s. 195 (7) (*c*), Code of Criminal Procedure, deemed to be subordinate to the principal Court of original jurisdiction within the local limits of whose jurisdiction it is situate. The District Judge is, therefore, under s. 195 (1) (*b*), competent to grant sanction. Before sanction is granted, there must be a formal application by some person for sanction. Hence, where a District Judge moved by the Joint Magistrate to that effect granted sanction for the prosecution of certain persons in respect of the offence of false personation in the Court of a Village Munsif, but he did not name the person to whom he granted it, *held*, that the sanction ought to be revoked as there was no formal application for sanction, although the District Judge was competent to grant it. SUNDAR LAL v. KING-EMPEROR, **6 A.L.J. 796=6 M. L.T. 98=10 Cr. L.J. 437=3 Ind. Cas. 966.**

(41)—*Crim. Pro. Code*, 1882, *s.* 195—*Appeal—Revision.*—An order passed under s. 195, Crim. Pro. Code, 1882, granting or refusing sanction to prosecute is not open to appeal, but only to revision. ZAHUR AHMAD v. MUHAMMAD HASAN, **A.W.N. 1893, 147.**

(42)—*Crim. Pro. Code*, 1882, *ss.* 195, 404, 439—*Sanction to prosecute—Appeal—Revision.*—The proceeding under s. 195 of the Code of Criminal Procedure by which an order granting or refusing to grant sanction to prosecute may be set aside is a proceeding in revision and not one by way of appeal. MEHDI HASAN v. TOTA RAM, **A.W.N. 1892, 242=15 A. 61.**

(43)—*Crim. Pro. Code*, 1882, *s.* 195—"*Authority to which the authority giving or refusing (sanction) is subordinate.*"—For the purposes of granting, refusing or revoking sanction to prosecute under the provisions of s. 195, Crim. Pro. Code, 1882, the Collector and the Assistant Collector exercising jurisdiction under the North-Western Provinces Land Revenue Act (XIX of 1873) are not Subordinate either to the District Judge or to the High Court. *In the matter of the petition of* KADAM SINGH, **A.W.N. 1891, 82.**

(44)—*Crim. Pro. Code*, s. 195 (7), *cls.* (*a*), (*b*) *and* (*c*)—*Court to which appeals ordinarily lie—Original Court—Assistant Collector—Execution proceedings in arrears of rent case—Sanction to prosecute refused.*—In a suit for arrears of rent exceeding Rs. 100, a decree was passed in favour of the appellant. In course of execution proceedings, the respondent made certain statements which, according to the appellant, were false. The appellant applied for sanction to prosecute him under s. 195, cl. 7, Crim. Pro. Code. The sanction was refused by the Assistant Collector. The District Judge refused to entertain an appeal against the order on the ground that he had no jurisdiction. *Held*, that the object of sub-s. 7 of s. 195 is to indicate the Court to which a Court giving or refusing sanction to a prosecution should be deemed to be subordinate. The word "case" in cl. (*b*) means the actual proceedings in which

Sanction to prosecute—*continued.*

the offence is said to have been committed, and not the original case out of which these proceedings arose. The opening words of cl. (*c*) refer to particular cases in which no appeal lies, and not to Courts against none of whose decisions an appeal lies. The nature of the proceedings in which sanction is given or refused is to determine the principal Court of original jurisdiction and there is no justification for reading these words as if they were principal Court of original civil jurisdiction. The appeal, therefore, did not lie to the District Court, as the 'case,' here meant the execution proceedings and not the original suit. AJUDHIA PERSHAD v. RAM LAL, **9 A.L.J. 124=13 Ind. Cas. 284=13 Cr. L.J. 44=34 A. 197.**

(45)—*Crim. Pro. Code*, 1898, *s.* 195—*Sanction for prosecution granted by Presidency Small Cause Courts—Appeal—Whether lies to the original or the Appellate side of High Court—Statement that two persons were partners—Another statement that one of them stood surety to other—Whether contradictory.*—A Bench of the High Court sitting on the Appellate side has power to hear an appeal under s. 195, Crim. Pro. Code, from an order granting sanction passed by the Chief Judge of the Court of Small Causes. The power of the High Court to deal with a sanction granted by another Court, comes within the purview of its appellate and not original jurisdiction. (14 C.W.N. 806, *R.*) There is no necessary contradiction between the statements that two persons were partners and that one of them stood surety for the other's borrowings. JAMNA DOSS v. A. M. SABAPATHY CHETTY, **10 M.L.J. 278=1911, 2 M.W.N. 259=12 Ind. Cas. 521.**

(46)—*Crim. Pro. Code*, 1882, *ss.* 195, 476—*Sanction to prosecute*—"*Judicial proceeding*"—*Act* IV *of* 1882 (*Transfer of Property*), *s.* 83.—Where a mortgage-deed is deposited in Court in pursuance of the procedure provided by s. 83, Transfer of Property Act, such document is neither put in evidence before the Court, nor brought to the notice of the Court in the course of a judicial proceeding, so as to give the Court power to sanction, either under s. 195, or s. 476 of the Code of Criminal Procedure, the prosecution of a person suspected by the Court of having forged such deed. ADHAR SINGH v. ABLAKH SINGH, **A.W.N. 1895, 145.**

(47)—*Sanction to prosecute — Crim. Pro. Code*, 1882, *s.* 195—*Duty of superior Court in dealing with application to revoke sanction granted under s.* 195.—Where a person, for whose prosecution sanction has been granted under s. 195, Crim. Pro. Code, applies under the same section to a superior Court to have such sanction revoked, the superior Court in dealing with such application is exercising a judicial function and should exercise such function in a proper manner, *i.e.*, it should give its reasons for either confirming or revoking the sanction. On such an application as aforesaid in the Court of a Sessions Judge the order of the Judge was:—"I decline to interfere on

Sanction to prosecute—*continued.*

revision—Rejected." *Held* that this was not an order, which complied with the requirements of the law, and that it must be set aside. *In the matter of the petition of* ZAFARYAB ALI, **A.W.N. 1892, 60.** [*R.*, 21 B. 495.]

(48)—*Crim. Pro. Code*, 1882, *s.* 195—*Sanction to prosecute—Grounds for revocation of order refusing sanction.* — Before a superior Court grants sanction for a prosecution under s. 195, Code of Criminal Procedure, where such sanction has been refused by the Court before which the offence that sanction is sought for is alleged to have been committed, it is necessary for such Court to satisfy itself that there are good grounds for holding the Subordinate Court was in error in refusing to grant sanction. KISHAN LAL v. SHEO DIAL, **A.W.N. 1893, 104.**

(49)—*Sanction to prosecute—Suit referred to arbitration—Decree in accordance with award—Preliminary enquiry.*—Where, in a suit on a bond, the question, whether the bond was executed by the defendant, was referred to arbitration, and the arbitrator having found that the bond was a forgery, the suit was dismissed in accordance with his award, *held*, that as the Court had not itself determined the question of the forgery of the bond, it could grant sanction for the prosecution of the plaintiff for that offence, only after making a preliminary enquiry to satisfy itself that there were materials to justify a prosecution, and that it should place upon record its reasons for holding that criminal proceedings ought to be sanctioned. *In the matter of the petition of* PARSOTAM LAL v. BIJAI, **6 A. 101=A.W.N. 1883, 226.** [*R.*, 35 P.R. 1889]

(50)—*Application for sanction—Proceeding in suit—Belchamber's Rules and Orders—Rule 93—Civ. Pro. Code* (1882), *s.* 39 —An application for sanction to prosecute under s. 195 of the Crim. Pro. Code, though headed and made in the suit, is not a proceeding in the suit such as is contemplated either by an ordinary warrant to defend or the terms of Rule 93, (Belchambers' Rules and Orders) and s. 39 of the Code of Civil Procedure; and the defendant is entitled to appear through a new attorney without obtaining a discharge of his original warrant or retainer in the suit in favour of the original attorney. CASSIM MAMOOJEE v. GOPAL LALL SEAL, **3 C.W.N. 579.**

(51)—*Crim. Pro. Code* (*Act* V *of* 1898), *s.* 195 (6) — *Sanction to prosecute — Revision before Judge—Powers of Judge to make a remand.*—One of the parties to a suit applied for sanction to prosecute the plaintiff, on the ground that he had instituted a false claim. The Munsif dismissed the application on technical grounds. The applicant applied to the District Judge under s. 195, cl. 6, Crim. Pro. Code, in revision. The Judge remanded the case to the Munsif for trial of the application. *Held*, that, assuming the Court exercising its powers of revision to be a Civil Court, in such cases its powers were confined to powers conferred by s. 195, Crim. Pro. Code, and it had no jurisdiction to make the order of remand, BENI PRASAD v. SARJU PRASAD THAKURIA, **8 A.L.J. 429.**

Sanction to prosecute—*continued.*

(52)—*Defective, illegal—Court granting sanction, Duty of—High Court, power of interference with order of subordinate Courts granting sanction—Crim. Pro. Code, s.* 195, *sub-ss.* 4 *and* 6.—Under s. 195, sub-s. 6 of the Crim. Pro. Code, the High Court has the power to interfere with the order of a District Judge, affirming the sanction granted by a Munsif, and not revoking it. (10 C.W.N, 1026, *D.*) In granting sanction for the criminal prosecution of any person, the Judge, who grants such sanction, should comply strictly with the terms of the law. Where the sanction does not specify the place where, and the occasion on which, the offences were said to have been committed, as required by law, the sanction is defective and ought to be revoked, even if the facts may be gathered by implication. GIRIJA SANKAR ROY v. BINODE SHEIKH, **5 C.L.J. 222=5 Cr. L.J. 188.** [*R.*, 30 M. 382=17 M.L.J. 266=2 M.L.T. 239=6 Cr. L.J. 102, 37 C. 13=13 C.W.N. 1038=10 C.L.J. 454=4 Ind. Cas. 6.]

(53)—*Sanction to prosecute—Application to execute satisfied decree—Ss.* 195 *and* 439, *Crim. Pro. Code*, 1882—*S.* 210, *Penal Code.*—Where an application for execution of a decree for rent was dismissed on the ground that the decree had been satisfied and an order sanctioning the prosecution of the decree-holder for an offence under s. 210, Penal Code, was also made, the High Court revoked the sanction under s. 439, Crim. Pro. Code, on the ground that the decree had not been caused to be executed. SHAM CHARAN DAS v. KASI NAIK, **23 C. 971.** [*F.*, 88 P.L.R. 1902, 13 P.R. 1902, Cr.]

(54)—*Sanction to prosecute—High Court—Procedure to be observed.*—In an application for revocation of sanction granted by the lower Court, the High Court is competent to exercise the broad and general powers granted under s. 195 of the Code of Criminal Procedure, whether the application be regarded as one under s. 439 of the Code of Criminal Procedure or one under s. 622 of the Code of Civil Procedure of 1882. The High Court must satisfy itself that the case is one in which the sanction was not merely fitly accorded but accorded with due regard to the procedure which, in the interest of the accused person, ought to be observed. JOY NARAIN JANA v. UPENDRA NARAIN RAY, **13 C.L.J. 216=9 Ind. Cas. 706.**

(55)—*Crim. Pro. Code*, 1898, *s.* 439—*High Court's powers of revision—Sanction to prosecute—Sanction granted by a Civil Court.*—Where sanction to prosecute had been granted by a Subordinate Judge acting under s. 195 of the Code of Criminal Procedure, and the order of the Subordinate Judge had been upheld in revision by the District Judge, it was *held* that the High Court had jurisdiction to interfere in revision upon an application made to it under

Sanction to prosecute—*continued.*

s. 439 of the Code of Criminal Procedure. *Held*, also, that it is inexpedient and not in the interests of public justice that sanction to prosecute should be granted to a judgment-debtor against the person who holds a decree against him. MOTI RAM v. NIADAR MAL, **A.W.N. 1903, 170.**

(56)—*Crim. Pro. Code*, 1898, *ss.* 439, 195—*High Court's powers of revision — Sanction to prosecute—Sanction granted by Civil Court.*—Where sanction to prosecute had been granted under s. 195 (Crim. Pro. Code, 1898) by the Judge of a Court of Small Causes, and such order bad been upheld in revision by the District Judge, it was held that the High Court had no jurisdiction under s. 439 of the Code of Criminal Procedure to revise the orders of the District Judge and of the Judge of the Court of Small Causes. MUHAMMAD YAKUB v. MUHAMMAD TYAB, **A.W.N. 1903, 172.** (26 M. 139, *F.*) [*R.*, A.W.N. 1905, 85 ; *Appr.*, 28 A. 554, F.B.]

(57)—*Sanction for prosecution—False evidence—Nature of sanction—Crim. Pro. Code*, s. 195.—In a suit on a bond for recovery of money due thereunder, it was found by the Court of first instance that the bond had been adjusted, and at the end of its judgment it was observed with reference to the verification of the plaint and its decision, that the defendant had the Court's permission to prosecute the plaintiff for "false verification." The lower appellate Court affirmed the decision of the Court of first instance. The plaintiff some six months afterwards applied to the High Court for revision of the Munsif's order granting sanction for prosecution, contending *inter alia* that the sanction was bad, being too general in its terms and failing to specify the offence in respect of which prosecution was sanctioned. *Held* by the High Court, rejecting the petition, that if the petitioner wished to prefer objections against the order of the Munsif sanctioning his prosecution, he should, with reference to s. 195 of the Crim. Pro. Code, have taken his objections before the District Judge ; and also that the Munsif in passing the order objected to had sufficiently complied with the provisions of the law, and that there was no sufficient reason for the interference of the High Court. *In re the petition of* CHAJMAL DAS, **A.W.N. 1884, 57.**

(58)—*Crim. Pro. Code*, 1898, *ss.* 196, 297 (*a*), 489—*Powers of High Court to revoke sanction—Affidavit in support of application for attachment before judgment—Plaintiff in examination stating that affidavit was based upon hearsay—Penal Code, ss.* 193, 196, 199, 200—*Village Magistrate whether a Magistrate — General Clauses Act* (X *of* 1897).—Under sub-s. 6, s. 195, Crim. Pro. Code, a petition, by way of appeal, lies to the High Court in every case in which a Civil or Criminal Court subordinate to it, within the meaning of sub-s. (*a*), gives or refuses a sanction, whether in respect of an offence committed before it or in respect

Sanction to prosecute—*continued.*

of one committed before a Court subordinate of it, and in the latter case, whether it gives to sanction refused by the subordinate Court or revokes a sanction accorded by such Court. Under cls. (*b*) and (*c*) of sub-s. 1, the sanction may be accorded in the first instance by the Court to which the Court in which the offence was committed is subordinate, even though no application for sanction has been made to the latter Court. For the purposes of cls. (*b*) and (*c*), of sub-s. 1, a sanction accorded by the High Court would operate as a sanction accorded by Court subordinate to it, such as the District Court. An order passed by the Court of Appeal is, in law, the order which ought to have been passed by the subordinate Court, and will, therefore, have the same efficacy and operation as the order which ought to have been passed by the latter. S. 439 expressly provides, among other things, that the High Court, as a Court of Revision, may exercise the powers conferred on a Court of appeal by s. 195. In a case in which both the original Criminal Court and the Appeal Criminal Court refuse a sanction, the High Court, as a Court of Revision, may call for the record, and, if the refusal proceeds on an error of law, it may accord the sanction which ought to have been granted by the Appellate Court, and such sanction will be operative, for the purposes of cls. (*b*) and (*c*) of sub-s. 1 of s. 195. [*Appr.*, 17 M.L.J. 266=2 M.L.T. 239=6 Cr. L.J. 102=30 M. 382.] The plaintiff in a suit applied for an attachment before judgment and declared in the affidavit that the defendants, with a bad intention, were attempting to alienate the immoveable properties belonging to them. While he was examined *viva voce* in support of his petition, he stated that he only knew from hearsay that the defendants were intending to alienate the properties. The application being dismissed, the Subordinate Judge granted sanction only for an offence under s. 199, Penal Code, but refused sanction for the offences under ss. 193, 196, 200, Penal Code. The sanction was not based upon any statement made by the petitioner in his oral evidence, but upon the above-mentioned declaration made by him in his affidavit. On appeal by the defendant, the District Judge granted sanction under ss. 193, 196, 200, Penal Code. *Held*, that the District Judge, did not exercise a sound discretion in according sanction for the prosecution of the petitioner. Although, in his affidavit, he did not state that he based his statement upon hearsay, yet, the declaration in the affidavit was not inconsistent with his having based it upon hearsay. *Quære* :—Whether a village Magistrate in the Madras Presidency is or is not a Magistrate, within the meaning of s. 197 (*a*), Civ. Pro. Code, as that expression is defined in the General Clauses Act. PALANIAPPA CHETTI v. ANNAMALAI CHETTI, **27 M. 223=14 M.L.J. 25.**

(59)—*Crim. Pro. Code, Act* V *of* 1898, *ss.* 439, 195—*Sanction by Civil Court—Debtor*

Sanction to prosecute—*continued.*

and creditor--Principle.—An order granting or revoking a sanction under s. 195 of the Crim. Pro. Code, even though made by a Civil Court, can be revised under s. 439 of the Crim. Pro. Code by the High Court. (26 M. 139, *Diss.*) [*Overruled*, 28 A. 554, F.B.=3 A.L.J. 394=1 M.L.T. 219=A.W.N. 1906, 103=3 Cr. L.J. 400; *Diss.*, 4 L.B.R. 138.] It is not expedient that a sanction to prosecute should be given to a debtor to be used against his creditor. If any offence against public justice appears to have been really committed, the proper course would be to take proceedings under s. 476. NAZIR HASAN v. DOST MUHAMMAD, **26 A. 1=A.W.N. 1903, 171.**

(60)—*Sanction to prosecute—Notice when necessary previous to sanction.*—When a sanction is applied for, after the termination of the proceedings, in the course of which the offence is alleged to have been committed, the person against whom the sanction is applied for, ought to have notice and have an opportunity of being heard, and the proceedings ought not to be re-opened to his prejudice, without giving him such an opportunity. ABBILAKH SINGH v. KHUB LALL, **10 C. 1100.** [*Commented upon*, 10 M. 232=2 Weir 181, F.B.]

(61)—*Sanction to prosecute—Notice to accused—Crim. Pro. Code*, 1882, *s.* 195.—No notice is necessary to the person, against whom it is intended to proceed, before the Court, before which the alleged offence has been committed, can, under s. 195 of the Crim. Pro. Code, sanction a complaint being made to a Magistrate regarding one of the offences specified in that section. KRISHNANUND DAS v. HARI BERA, **12 C. 58.** [*F.*, 18 A. 358=16 A.W.N. 113; *Appr.*, 10 M. 232=2 Weir 181.]

(62)—*Crim. Pro. Code*, 1882, *s.* 195-(*a*)—*Penal Code, s.* 182—*Sanction to prosecute--Notice—Municipal Commissioner.*—The Chairman of a Municipal Board has power, apart from, and independently of, the rest of the Board, to grant sanction to prosecute for an offence under s. 182, Penal Code, committed in respect of the Secretary of the Board. In granting such sanction, it is not necessary for him, as a condition precedent, to issue notice to the person against whom sanction is granted. *In the matter of the petition of* SHEO PRASAD, **A.W.N. 1892, 31.**

(63)—*Sanction to prosecute for offences under Penal Code, ss.* 193 *and* 211—*Application for fresh order for sanction, original order having become time-barred—Crim. Pro. Code*, 1882, *s.* 195.—If a person to whom sanction to institute a prosecution for offences under ss. 193 and 211, Penal Code, has been granted allows such order to become void through lapse of time, he cannot afterwards, without showing substantial reason, get a fresh order for sanction in his favour. CHIDDU v. HARDEO PRASAD, **A.W.N. 1891, 40.**

(64)— *Crim. Pro. Code*, 1882, *s.* 195—*Sanction to prosecute — Discretion of Court to grant fresh sanction where former sanction granted by it has through lapse of time become incapable of being acted upon.*—Where under s. 195, Crim. Pro. Code, sanction to prosecute has been granted, and no action having been taken on such sanction, the order has lapsed, a Court should not, except on good cause shown, grant a fresh sanction in respect of the same matter. BALDEO SINGH v. PRASADI, **A.W.N. 1892, 245.** [*R.*, 18 A. 358.]

(65)—*Application for, by Magistrate—Mode in which such application should be made—Practice.*—The proper procedure for a Magistrate, who may think it advisable to apply to the High Court for sanction under s. 195 of the Code of Criminal Procedure to prosecute witnesses in a Criminal Case for perjury, is to cause a formal application to that intent to be presented to the Court through the medium of the Legal Remembrancer. *In re the application of* THE MAGISTRATE OF BASTI, **A.W.N. 1893, 13.**

(66)—*Sanction to prosecute—Application not* bona fide *for securing conviction but for enforcing payment of decree—Court's duty.*—Where it is likely that the sanction to prosecute, if granted, will not be used *bona fide* for the purpose of obtaining a conviction, but will, on the contrary, be used for enforcing payment of money due under a decree. *Held* that the Court ought to refuse to grant the sanction. MESSRS. DONALD GRAHAM AND CO. v. KEWALRAM GHANSHAMDAS, **5 S.L.R. 237=15 Ind. Cas. 805=13 Cr. L.J. 533.**

(67)—*Crim. Pro. Code* (*Act* V *of* 1898), *s.* 195, *sub-ss.* (6) *and* (7)—*Application to District Judge to revoke sanction to prosecute granted by Munsif—Transfer to Subordinate Judge, if valid—Civil Courts Act* (XII *of* 1887), *s.* 22, *cls.* (1) *and* (4).—An application under sub-s. (6) of s. 195, Crim. Pro. Code, is not an appeal within the meaning of sub-s. (2) of s. 22 of the Bengal Civil Courts Act. An application made to a District Judge for the revocation of a sanction to prosecute granted by a Munsif cannot therefore be transferred by him for disposal to a Subordinate Judge. HARI MANDAL v. KESHAB CHANDAR MANNA, **16 C.W.N. 903=13 Cr. L.J. 297=11 C.L.J. 515=40 C. 37.** (13 Ind. Cas. 1007=16 C.W.N. 645=13 Cr. L.J. 191, *Appr.*)

(68)—*Crim. Pro. Code*, 1898, *s.* 195, *cl.* 6—*Sanction proceedings—Appeal—Not confined to one superior Court—Sanction which has been revoked—Power to grant—Existence of.*—S. 195 (6) Crim. Pro. Code, does not contemplate one proceeding only in a superior Court. The appellate Court has power to grant a sanction which has been revoked; for a sanction which has been revoked is in effect a sanction which has been refused. LALU v. GURDASMAL, **6 S.L.R. 81=13 Cr. L.J. 768=17 Ind. Cas. 80.** (30 M. 382, *F.*)

(69)—*Crim. Pro. Code, s.* 476—*Civil suit—First Court's decree affirmed on appeal—First Court's jurisdiction.*—Where the decree in a

Sanction to prosecute—*concluded.*

civil suit was confirmed on appeal, it was competent to the Court of first instance, as also to the Court of appeal, to take action under s. 476 of the Code of Criminal Procedure, in respect of an offence of forgery committed in the course of the trial in the primary Court. LACHMAN OJHA v. ANUP RAI, **16 C.L.J. 569=18 Ind. Cas. 176=14 Cr. L.J. 32.**

(70)—*Crim. Pro. Code*, s. 195, *cls.* (*b*) *and* (*c*) *—Sanction to prosecute—Power of the appellate Court to grant sanction.*—A document was produced before a Munsif with an endorsement which he held to be a forgery. On appeal an Additional Judge agreed with the finding of the Munsif. An application for sanction to prosecute the plaintiff and his witnesses was made to the Additional Judge who had decided the appeal. *Held* that the Additional Judge had jurisdiction to entertain the application. *Held* further that an appeal from an order under s. 195 of the Crim. Pro. Code was a Criminal Appeal under that Code. BHADESAR TEWARI v. KAMTA PRASAD, **11 A.L.J. 11=14 Cr. L.J. 47=18 Ind. Cas. 271=35 A. 90.**

(71)—*Practice of Calcutta High Court in sanction cases— Sanction at first granted on verbal application—Effect—Subsequent written application for sanction—Jurisdiction to order sanction thereon—Application to revoke sanction granted by Judge on the original side of the High Court must be made to an appellate Bench—* S. 195, *Crim. Pro. Code.*—The practice of the Calcutta High Court is to grant sanctions for prosecution only on a formal petition being put in, upon which an order can be passed. In this case Counsel made a verbal application for sanction to prosecute, which was granted, but as the application was not made upon a formal petition, no order could be drawn up according to the practice of the Court. A formal petition for sanction having been subsequently put in, *held* that the Court had jurisdiction to grant the sanction. (7 M.H.C. 58, *R.*) Where a sanction has been properly granted by a Judge sitting on the original side of the High Court, an application to revoke the sanction ought to be made to an appellate Bench of that Court. The Judge granting the sanction has no jurisdiction to revoke it. THADDEUS v. JANAKI NATH SAHA, **40 C. 423.** (32 C. 379, *F.*)

Sanction to prosecute—High Courts' power of revision—*See* CIV. PRO. CODE, 1908, s. 115, **3 A. 506.**

Sub-Registrar—*See* CRIM. PRO. CODE, 1898, ss. 197, 468, **7 C.W.N. 494=30 C. 905.**

Application for—Limitation—*See* LIMITATION ACT, 1908, art. 181, **A.W.N. 1888, 92.**

Unsuccessful application for—Damages—*See* MALICIOUS PROSECUTION, **9 A. 59.**

See OFFENCE BEFORE PENAL CODE CAME INTO OPERATION, **5 W.R. Cr. 8=1 Ind. Jur. N.S. 97.**

See BEN. REG. V OF 1893, s. 15, **30 C. 916.**

See REVISION—GENERAL, **8 C.W.N. 73, 6 C.C. 216.**

Sanitary Drainage, Bengal.

See BEN. ACT VIII OF 1895.

Sanitary Inspector.

Of Union, whether a public servant under Mad. Act V of 1884—*See* MAD. ACT V OF 1884, s. 43, 21 M. 428.

Sankhola Land.

(1)—Sankhola *land—Growing of thatching grass—Agricultural land—Incidents of tenancy—Application of Bengal Tenancy Act.*—The cultivation of a particular kind of grass on certain land is sufficient to show that the land is agricultural land.—Therefore, the provisions of the Bengal Tenancy Act govern the incidents of the tenancy in *sankhola* lands on which thatching grass is grown and reaped. SARGAPATI v. KARMADHAN BARUA, **11 Ind. Cas. 942.**

Santan.

Meaning of—*See* DEED—CONSTRUCTION OF DEEDS, 7 C.L.J. 291.

Santhal Parganas.

See SONTHAL PARGANAS.

Sanyasis.

Inheritance among Sanyasis—*See* HINDU LAW—INHERITANCE, 1 A. 539.

Essentials of initiation—Joer—*See* HINDU LAW—RELIGIOUS ENDOWMENT, 13 M. 524.

Becoming a Gribasta — Succession — *See* MOHUNT, 41 P.W.R. 1910=6 Ind. Cas. 643.

Right of succession—Custom of *mutt*—Election of mahant—Burden of proof—Jurisdiction of Court to set aside election—*See* MOHUNT, 8 A.L.J. 286=10 Ind. Cas. 824.

Sapindas.

See HINDU LAW—INHERITANCE, 22 C. 339, 19 A. 215, F.B.=A.W.N. 1897, 53, 11 B. 47, 8 M. 133.

Sarak.

Nature of—Whether recoverable—Additions to actual rent under denomination of abwabs, nature of—Agreement to pay the same, effect of—*See* ABWABS, 17 C. 726, F.B.

Saranjam.

(1)—*Acquirement of occupancy rights.*—There is nothing to prevent a *saranjamdar* or inamdar from acquiring occupancy rights during the continuance of the *saranjam* or inam. GANPATRAV TRIMBAK PATWARDHAN v. GANESH BAJI BHAT, **10 B. 112.**

(2)—Saranjam — *If partible—Its nature—Descent.*—Ordinarily, a *saranjam* is impartible and descends entire to eldest representative of the past holder. NARAYAN JAGANNATH DIKSHIT v. VASUDEO VISHNU DIKSHIT, **15 B. 247.** [*R.*, 5 Bom. L.R. 983.]

(3)—Saranjam — *Inam — Miras, permanent tenancy — Denial of* Saranjamdar's *title—*

Saranjam—*continued.*

Attornment to successive Saranjamdars—*Estoppel—Claim to hold as Mirasi tenant—Limited interest—Adverse possession.*—In an ejectment suit brought by an Inamdar, against persons claiming to hold as Mirasi or permanent tenants, it was conceded that the Inam rights in the land in suit appertained to a *Saranjam* held on political tenure, and that the present incumbent of the *Saranjam* was the plaintiff. The defendants, resisted the plaintiff's claim to eject them, on the ground that the Inam rights were merely the rights to receive the royal share of the revenue, and that the proprietary rights in the soil were, prior to the date of the grant, vested in the grantee of the Inam, and had descended to his heirs independently of the Inam, and furnished the permanent leasehold or Mirasi right. *Held*, that the defendants' contention involved the denial of the title to the reversionary rights, in the lands in the defendant's occupation, of the successive *Saranjamdars* approved by Government. The defendants had, however, been continuously paying rent for their holding to the successive *Saranjamdars* including the plaintiff. They were thus estopped by attornment from disputing the plaintiff's title. The rights of the successive holders of hereditary and impartible estates not governed by ordinary rules of inheritance, but subject to the condition that Government shall approve of the heir, may be barred by adverse possession. (12 I.A. 197, *R.*) Where, in an ejectment suit by Inamdar, it was shown that the defendants, for more than twelve years before the suit, openly asserted their claim to hold as permanent Mirasi tenants. *Held*, that the defendants had acquired a title to the limited interest claimed by them, and could not be objected. TRIMBAK RAMACHANDRA PANDIT v. SHEKH GULAM ZILANI WALKER, **12 Bom. L.R. 208=5 Ind. Cas. 965 =34 B. 329.**

(4)—Jaghir—*Grant of revenue — Nature of the tenure.*—A *saranjam* or *jaghir* is *prima facie* and in the absence of express words or necessary implication to the contrary, a grant of the royal share of the revenue only, and not of the soil, for life only resumable at the pleasure of Government, and ordinarily impartible and inalienable. The grant may be on such terms as to render the estate hereditary and alienable, and even where the term *jaghir* is used if the grant is to the grantee and his heirs and there is nothing to control the meaning of those words, the grantee would take an absolute estate. But the meaning and effect of the grant is to be gathered from the surrounding circumstances and the object with which the *sanad* was granted. RAMKRISHNARAO v. NANARAO, **5 Bom. L.R. 983.**

Suit relating to management of such lands—*See* ACT XXIII OF 1871, 16 B. 596.

See ACT XXIII OF 1871, 2 B. 346.

Land held as—Resumption and re-grant by Government — Suit against Government — Jurisdiction—*See* BOM. ACT X OF 1876, s. 4 (*a*), 11 Bom. L.R. 1333.

Saranjam—*concluded.*

Claims relating to — Applicability of rules laid down by British Government—Saranjam grant not a grant of soil—Burden of proof on party alleging grant of soil—*See* GRANT—CONSTRUCTION, 6 B. 598.

Lands — Generally impartible — Custom to the contrary, proof of—*See* HINDU LAW — PARTITION, 15 B. 519.

See LIMITATION ACT, 1908, art. 144, 15 B. 247.

See PENSION, 4 B.H.C.A.C. 62.

See RESUMPTION, RIGHT OF—EFFECT OF RESUMPTION, 10 B. 112.

See SANAD, 1 B. 523.

Resumption of estate by Government—Political tenure—Mixed estate of—and Inam—*See* SERVICE TENURE, 17 B. 431, P.C.=20 I.A. 50.

Sarvasvadanam Marriage.

See HINDU LAW—MARRIAGE, 11 M. 157.

Nambudris — Sarvasvadanam marriage — Rights of inheritance of son — *See* MALABAR LAW—INHERITANCE, 9 M. 260.

Husband if lawful heir of his childless wife —*See* MALABAR LAW—MARRIAGE, 1 M.L.J. 303.

See MALABAR LAW — MARRIAGE, 25 M. 662.

Saunjidar.

(1)—Saunjidar — *Grant of land by proprietors of a village for taking services from the donee— Donee or his descendants failing to perform the service personally.*—*Held*, that a *Saunjidar*, loses his rights if he performs services by representatives. Where the proprietors of a village make a grant of land to a Brahmin conditionally on his performing certain services, the gift can hold good only so long as he or his direct descendants perform the services required of them personally. It is not competent for either of them to have the services performed by any substitute whom he or they select. FAQIRIA v. SOBHA, **18 P.W.R. 1911=9 Ind. Cas. 925.**

Position of—*See* LANDORD AND TENANT—GENERAL, 16 P.L.R. 1912.

Sayer.

(1)—*Settlement by Government—If relates to Sayer duties.*—The settlement by the Government with a proprietor of the soil, under the Decennial Settlement, made perpetual by Ben. Reg. VIII of 1793, relates to land-revenue only, and not to *Sayer* duties claimed by a party, not a landed proprietor. THE GOVERNMENT OF BENGAL v. NAWAB JAFUR HOSSEIN KHAN, **5 M.I.A. 467=1 Sar. 472.**

Sayer Compensation.

S. 16, Civ. Pro. Code, 1908—Sayer not an interest in immoveable property—Not a malikana—Jurisdiction to entertain suit to enforce

Sayer Compensation—*concluded.*

a mortgage bond relating to Sayer Compensation — *See* JURISDICTION OF MUNSIFF'S COURT, 19 C. 8.

Sayer Right.

See RESUMPTION, RIGHT OF—GENERAL, 5 M.I.A. 467.

Scandalous Matter.

Affidavit — Dishonest conduct— Scandalous matter—Procedure—*See* AFFIDAVIT, 10 C.L.J. 414=14 C.W.N. 153=4 Ind. Cas. 390.

Scheduled Districts.

See ACT XIV OF 1874.

Scheme.

(1)—*Scheme under a decree—Power of Court to alter.*—The Court has unquestionably powers, in a properly constituted proceeding, to alter a scheme under a decree; but an application to that end can only be successful, if it be evident that the proposed alteration is in the interests of the foundation and in harmony with its objects. The Court however would be slow to act when all that was proposed was an alteration in a detail of administration on which opinions might reasonably differ. KANDAS v. TALUKDARI SETTLEMENT OFFICER, **3 Bom. L.R. 238.**

School-buildings.

Not taxable under—Tax illegally levied, suit to recover—*See* MAD. ACT IV OF 1884, s. 63, 21 M. 367.

Scire Facias, Writ of.

(1)—Scire Facias, *Writ of—Suit upon writ—Non-joinder of plaintiff—Parties.*—Where a *Scire Facias*, was issued under the old Supreme Court procedure at the suit of two, and one of them only sued upon it. *Held*, that the non-joinder of the other was a ground of non-suit, and that the objection might be taken at any stage. ISSUR CHUNDER MUNDUL v. HEIRS OF GOLAM ALI, **1 Ind. Jur. N.S. 249.**

Law as to—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 9 C.L.J. 271=36 C. 543=1 Ind. Cas. 168.

See LIMITATION ACT, 1908, art. 183, 6 C. 504=8 C.L.R. 23.

Scribe.

(1)—*Attesting witness—Mortgage—Evidence Act (I of 1872), s. 68—Transfer of Property Act (IV of 1882), s. 59—Writer of the deed.*—A person who is present and witnesses the execution of a mortgage-deed and whose name appears on the document, though he is therein described merely as the writer of the deed, is a competent witness to prove the execution of the deed. He need not be described in the deed as an attesting witness. **RAJ NARAIN GHOSH v. ABDUR RAHIM, 5 C.W.N. 454. (20 A. 552, R.)**

Scribe—*concluded.*

Signature of—Whether attestation—*See* ATTESTATION, 6 N.L.R. 152.

Signing in margin of bond—*See* DEED—EXECUTION OF DEEDS, 20 A. 532=A.W.N. 1898, 148.

Attesting witness—Of a deed—*See* TRANSFER OF PROPERTY ACT, 1882, s. 59, A.W.N. 1897, 146.

Mortgage signed not by mortgagor but by scribe for him—Mortgagor illiterate—Validity—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 59, 123, 24 A. 319, F.B.=A.W.N. 1902, 127.

Sculptures.

See ACT X OF 1870, s. 42, 16 M. 369, P.C. =20 I.A. 80.

Sea Customs.

See ACT VIII OF 1878.

Seals.

This circular deals with uses of small new seals. **25 W.R.H.C. Rules Cir. Or No. 8, dated 12th May 1876, p. 10.**

See MORTGAGE—FORECLOSURE, 185 P.R. 1889.

Right of party to—up immaterial parts of documents—Affidavit of document, nature of—*See* PRACTICE AND PROCEDURE, 20 C. 587.

Seal Warrant.

Application for—To Calcutta S.C. Court—*See* LIMITATION ACT, 1908, ART. 182—STEP-IN-AID OF EXECUTION, 29 C. 580.

Search.

(1)—*Crim. Pro. Code, ss. 165, 103—Search—Not calling inhabitants of the locality as witnesses—Not conducting search under his very eye—No illegality.*—An officer in charge of a Police Station or an investigating officer conducting a search need not himself make the search, but has only to be present on the spot and exercise a general supervision over the search. An officer's failure to call the inhabitants of the locality as witnesses to the search does not render the search illegal. SRI SRI NADADURU RAJAGURU SATAGOPALACHARLU v. SATRUGHNA BEHARA, **M.W.N. 1912, 1111=23 M.L.J. 448.**

Recovery of articles seized by Police during, suit for—*See* CIV. PRO. CODE, 1908, s. 80, A.W.N. 1907, 170=29 A. 567.

For wrongful entrance and illegal—Of house—*See* DAMAGES—DAMAGES, SUITS FOR, 24 C. 691.

Malicious search by police—Suit for compensation—Jurisdiction—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, art. 35, cl. (1), U.B.R. 1910, 40=8 Ind. Cas. 1168.

House search by Magistrate—Tort—Statutory justification—*See* TRESPASS, 13 C.W.N. 458=9 C.L.J. 298=36 C. 433=5 M.L.T. 367 =2 Ind. Cas. 436.

Search Fees.

Scale of fees for search, &c., in the offices of the High Court, Appellate side. **14 W.R.H.C. Rules, p. 7.**

For searching for and producing documents not specified in summons — *See* CIV. PRO. CODE, 1908, O. XVI, r. 15, 5 S.L.R. 44.

Seaworthiness.

See BILL OF LADING, 19 B. 639.

See CONTRACT—CONDITIONS PRECEDENT, 2 B.L.R. O.C. 127.

Secondary Evidence.

See EVIDENCE—SECONDARY EVIDENCE.
See EVIDENCE ACT, 1872.

(1)—*Contracts written and verbal—Evidence—Acts of parties.*—Evidence cannot be admitted in proof of a verbal stipulation to vary a written contract; nor is evidence admissible of the acts of the parties when it is given entirely and absolutely in support of such verbal stipulation. MADHAB CHANDRA ROY v. GANGADHAR SAMANT, **3 B.L.R.A.C. 83=11 W.R. 450.** (5 W.R. 68, *R.*) [*Appl.*, 5 C. 300=4 C.L.R. 419; *R.*, 4 B. 594.]

(2)—*Secondary evidence—Copy of copy.*—When the original deed relied on by the plaintiff was at the command of the defendant, and plaintiff was only obstructed in producing it by the recusance of the defendant, the very best secondary evidence to which the plaintiff could have recourse in lieu of it was held to be an authenticated copy filed in another case, by the defendant herself, and, as such copy could not, under the ordinary rules of Court, be removed from the custody of the Judge, it was held that there was no rule of law in Indian Courts of equity and good conscience to prohibit the reception of a copy of such copy under the circumstances. MAHBUL ALI v. SRIMATI MASNAD BIBI, **3 B.L.R.A.C. 54=11 W.R. 396.**

Secretary.

Club—Rights and liabilities of Secretary—*See* CLUB, 20 A. 497.

Goods supplied to the member of a non-proprietary club—Suit in the name of the—, alone—*See* CLUB, 14 M. 362.

Personal liability—Principal and agent—*See* CLUB, 15 P.R. 1891.

Unregistered Society — and Depositor—Personal liability of—*See* CLUB, 11 P.R. 1892.

Principal and agent—Liquidator of Company—Advances and disbursements by Secretaries and Treasurers of Company—Lien on property of Company as against other creditors—*See* CONTRACT ACT, 1872, ss. 171, 217, 222, 13 B. 314.

Suit against—Of society for rent of premises let—Secretary when and how far liable as agent—Indian Contract Act, IX of 1872, s. 230—*See* RIGHT OF SUIT—GENERAL, 22 B. 754.

Secretary—*concluded.*

Contract—Liability of the—Of a Club on a contract entered into on behalf of the Club—*See* RIGHT OF SUIT — MISCELLANEOUS, A.W.N. 1898, 138.

Suit for subscription—, whether competent to sue—*See* RIGHT OF SUIT—MISCELLANEOUS, 10 C.L.R. 197.

Receipt given by Secretary of club to member for Club bill—*See* STAMP ACT, 1879, sch. II, art. 15 (*b*), 10 M. 85, F.B.

Secretary of State.

See CIV. PRO. CODE, 1908, s. 80.

(1)—*Act of State—Liability of the Secretary of State to be sued.*—The removal of a Municipal Commissioner, under s. 9 of the Town Improvements Act, is not an Act of State, as it is done under the sanction of the Municipal law, and as the East India Company would have been liable under such circumstances, to be sued in Her Majesty's Courts, the Secretary of State is liable to be sued in these cases. VIJAYA RAGAVA v. SECRETARY OF STATE FOR INDIA, **7 M. 466, F.B.** [*R.*, 6 Bom. L.R. 131, 93 P.R. 1908=164 P.L.R. 1908=133 P.W.R. 1908.]

(2)—*Secretary of State, how far liable for negligence of Government servants—Liability of the East India Company, the Crown and the Secretary of State for India in respect of acts of Government servants.*—The Secretary of State for India in Council is liable for damages caused by the negligence of Government servants, if the negligence is such as would render an ordinary employer liable. The liability of the East India Company, the Crown and the Secretary of State for India in Council discussed. THE PENINSULAR AND ORIENTAL STEAM NAVIGATION CO. v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **5 B.H.C. App. 1=Bourke A.O. C. 166.** [*F.*, 11 Ind.Cas. 58=5 S.L.R. 82; *Cons.*, 5 M. 273; *Expl.*, 12 C. 445; *R.*, 18 W.R. 124, 1 C. 11=24 W.R. 309, 4 M. 344, 20 C. 51, F. B., 3 S.L.R. 59, 5 L.B.R. 163, F.B. 39 C. 615=16 C.W.N. 362=15 C.L.J. 633=7 A.L.J. 585=13 Ind. Cas. 965=1912 M.W.N. 65, *D.*, 3 A. 829=1 A.W.N. 87=6 Ind. Jur. 323.]

(3)—*Suit against, by dismissed Government servant—Power of Crown to dismiss servants at will—Suit for salary and declaration of right to pension, whether maintainable.*—The Crown has the power of dismissing its servants at will, and no authority representing the Crown is able to contract with its servants, so as to deprive the Crown of the enjoyment of that power, and such power can be excluded and restricted only by an Act of the Legislature. Consequently, it is not sufficient for the plaintiff to merely allege a contract restricting the said power without referring to any statutory enactment exempting him from the liability imposed by law, on those who are engaged in the service of the Crown, and a plaint, therefore, alleging that the Government wrongfully and illegally dispensed with his services and claiming arrears of salary, with

Secretary of State—*continued.*

a declaration that he was entitled to a pension, does not disclose any cause of action enforceable at law. A.E. VOSS v. SECRETARY OF STATE FOR INDIA, **33 C. 669.** [*R.*, 31 B. 86=8 Bom. L.R. 904.]

(4)—*Parties — Suit to set aside sale for arrears of revenue under Public Demands Recovery Act* (I *of* 1895, *B. C.*)—*Secretary of State for India in Council.*—In a suit to set aside a sale effected under the provisions of Act I of 1895 (B.C.), the Secretary of State for India in the Council is a necessary party. GOBINDA CHANDRA SHAHA v. HEMANTA KUMARI DEBI, **31 C. 159=8 C.W.N. 657.**

(5)—*Secretary of State, addition of, as a party—Civ. Pro. Code, ss. 32 and* 434.—S. 424 of the Code does not preclude the addition of the Secretary of State as a necessary party under s. 32 of the Code. BAL MOKOOND LALL v. JIRJUDHUN ROY, **9 C. 271=11 C.L.R. 466.**

Protection afforded to judicial officer acting in his official capacity—Extends to Secretary of State for India in Council—*See* ACT XVIII OF 1850, 59 P.W.R. 1908.

Liability of—in damages for default of Post Office recovering the amount due on a value-payable insured parcel—*See* ACT VI OF 1898, s. 34, 15 M.L.J. 226=28 M. 213.

Decree annulling illegal sale not res judicata —Secretary of State not a necessary respondent—*See* BEN. ACT XI OF 1859, ss. 3, 8, 33, 25 C. 833, P.C.=25 I.A. 51=2 C.W.N. 513.

Contractor employed by Government and licensed by Calcutta Municipality—Obstruction in public way—Liability of corporation for breach of—Statutory duty—Liability of—*See* BEN. ACT IV OF 1876, ss. 189, 191, 213, 252, 10 C. 445.

See MAD. ACT IV OF 1884, s. 169, 15 M. 292.

Suit against—Plaint—*See* CAUSE OF ACTION, 4 O.C. 29.

See CESSION OF BRITISH TERRITORY, 1 B. 367, P.C.=3 I. A. 102=1 A.C. 322, 10 B.H.C. 37.

Act which is *ultra vires* of the, whether may be repudiated—*See* CIV. PRO. CODE, 1908, O. XLI, rr. 5, 6, 15 C.W.N. 475=13 C.L.J. 365.

See COSTS—TAXATION OF COSTS, 15 M. 405.

See CROWN DEBTS, 5 B.H.C.A.C. 23.

Suit against — Nominal defendant — *See* JURISDICTION - CAUSES OF JURISDICTION, 14 C. 256.

Suit against Government *eo nomine*—Local Government party sued — Jurisdiction at place of cause of action—*See* JURISDICTION —CAUSES OF JURISDICTION, 1 M.H.C. 286.

Secretary of State—*concluded.*

Whether trust can be imposed upon—by the Registrar of *Sudder Dewani Adawlut* or High Court—Liability of—to negligence of Comptroller-General and limitation applicable to a suit based on such liability—*See* LIMITATION ACT, 1908, s. 10, art. 48, 9 C.W.N. 443=32 C. 799.

Suit by agent against—for India—*See* LIMITATION ACT, 1908, arts. 115, 60, 14 C. 256.

See PARTIES TO SUIT—GENERAL, 9 C. 271 =11 C.L.R. 466.

Suit to set aside revenue—Sale—If necessary party—*See* PARTIES TO SUIT—GENERAL, 7 C.W.N. 377.

Land declared by Magistrate to be public thoroughfare—Suit against Magistrate as defendant—Amendment of plaint allowing substitution of — As defendant—*See* PLAINT—AMENDMENT OF PLAINT, 6 B. 670.

Plaint filed as against Magistrate, amendment of, substituting — As defendant—*See* PLAINT — AMENDMENT OF PLAINT, 6 B. 672.

Suit for damages for breach of contract against—for India—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, sch. II, art. 3, 5 O.C. 403.

Suit against—Illegal levy of import duties by a Collector—Jurisdiction—*See* RIGHT OF SUIT —ACTS DONE IN EXERCISE OF SOVEREIGN POWERS, 4 M. 341.

See SMALL CAUSE COURT — MOFUSSIL, JURISDICTION OF—GENERAL, 17 C. 290.

See SPECIFIC RELIEF ACT, 1877, s. 42, 19 M. 292.

Secretary of State for India in Council.

(1)—*Suit against Secretary of State for India in Council—Plaint not disclosing cause of action against defendant—Dismissal of suit.*—In a suit against the Secretary of State for India, the allegations in the plaint were, that in order to realize a fine imposed upon a third person, certain goods belonging to the plaintiff were wrongfully seized by the police, and that, while these articles were in the custody of the Court, the Magistrate rejected an application by the plaintiff for their release. After stating these facts, the plaintiff claimed these articles, or if they had been sold, Rs. 10 as their value, from the Secretary of State. *Held* that the plaint disclosed no cause of action against the Secretary of State, who was not alleged ever to have been in possession of them or to have any connection with them in any way whatever. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. SUKHDEV, **21 A. 341, F.B.=A. W.N. 1899, 151.**

Sects.

Rights of rival—*See* WORSHIP, 5 M. 304.

Secunderabad Cantonments.

(1)—*S.* 380, *Civ. Pro. Code*, 1832—*British Cantonment of Secunderabad.*—For the purpose of s. 380, Civ. Pro. Code, the British Cantonment of Secunderabad must be regarded as being a place out of British India. HOSSAIN ALI MIRZA v. ABID ALI MIRZA, **21 C. 177.**

Security.

See SECURITY FOR COSTS.

(1)—*Security from respondents.*—After an appeal had been asserted from a decree of the *Sudder* Court at *Madras*, the appellant had applied to that Court under s. 4 of Reg. VIII of 1818, and the Circular Order of the 21st *September*, 1826, for an order calling upon the respondents, who had been in possession of the estates in dispute before the institution of the suit, to give security as prescribed by that Regulation. The *Sudder* Court refused the application as not being within the provisions of the Regulation. Upon petition, the Judicial Committee declined to interfere as there was no allegation of waste by the respondent in the petition. *Quære.* — Whether there is any jurisdiction in the Judicial Committee under s. 3 of Mad. Reg. VIII of 1818. NAGALUTCHMEE UMMAL v. GOPOO NADARAJA CHETTY, **6 M.I.A. 309=1 Sar. 543.**

(2)—*Instalment decrees—Execution—Attachment of property—Mortgage—Release—Punjab Civil Code, Part* II, *s* 5, *para* 23.—Under para 23, s. 5 of Part II of the Punjab Civil Code, a judgment-creditor is entitled to demand security when the Court directs the judgment-debtor to pay the decree amount in instalments. Where the Court releases the property attached in execution of such decree, on the judgment-debtor promising to pay the decree amount by instalments, without taking any security merely because a mortgage of the attached property was set up, it is illegal and it is open to the Chief Court to revise such order and order an enquiry into the mortgage set up. If security is not given, then, the attached property might be brought to sale, but no sale need take place until the date fixed for payment of the instalments. JAYARAM DOSS v. DEWAN HUKUM CHAND, **50 P.R. 1866.**

This circular deals with securities taken from officers entrusted with public money. **Rev. Cir. No. 4, 25 W.R. Rev. Cir. 13.**

Stay of execution of decree—Amount of security required—Questions relating to execution—Reference to High Court under s. 617, whether can be made in such proceedings—*See* APPEAL — DECREES AND EXECUTION OF DECREES, 12 B. 30.

Appeal to Privy Council—Extension of time for giving security—*See* APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE, 6 A. 250, F.B. = A.W.N. 1884, 71.

Giving—in appeal—Extension of time—Powers of Court—*See* APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE, 10 C. 557, P.C. = 11 I.A. 7.

Security—*continued.*

Liability of third parties giving security for mense profits—*See* APPEAL TO PRIVY COUNCIL—STAY OF EXECUTION PENDING APPEAL, 19 M. 140.

Appeal to Privy Council—Security from successful party—*See* ATTACHMENT—ATTACHMENT PENDING APPEAL, 3 B.L.R.F.B. 45 = 12 W.R. 16, F.B.

For judgment-debtor applying to be declared insolvent—Discharge of surety on judgment-debtor applying in a month—Order against surety for realization of security amount—Appealability of order—*See* CIV. PRO CODE, 1908, ss. 47, 52, 145, 55, 13 M.L.J. 484.

For filing application by judgment-debtor to be declared insolvent—*See* CIV. PRO. CODE, 1908, s. 55, A.W.N. 1907, 120 = 4 A.L.J. 437 = 29 A. 466.

Loan of security of pension—Liability of pension—Attachment—*See* CIV. PRO. CODE, 1908, s. 60, A.W.N. 1881, 147.

For safe custody of property attached in execution—Realization by summary process—*See* CIV. PRO. CODE, 1908, s. 145 and O. XXI, r. 43, 13 C.P.L.R. 104.

Refund of—Powers of Court—*See* CIV. PRO. CODE, 1908, O. XLI, r. 5, 2 M.W.N. 1911, 432.

Appellate Court can call upon the respondent to furnish for the due performance of any decree which may be made on appeal notwithstanding that the lower Court's decree has been already executed—*See* CIV. PRO. CODE, 1908, O. XLI, rr. 5,6, s. 104, O. XLIII, r. 1, 3 C.L.J. 67 = 33 C. 927.

For due performance of appellate decree. suit for enforcement of—*See* CIV. PRO. CODE, 1908, O. XLI, r. 6, 23 C. 212.

Case when fit for security for costs of appeal being taken—*See* CIV. PRO. CODE, 1908, O. XLI, r. 10, 16 C.W.N. 119.

Appeal to Privy Council—Failure to give—*See* CIV. PRO. CODE, 1908, O. XLV, r. 7, A.W.N. 1881, 76.

See CONTRACT—ILLEGAL CONTRACTS, 11 B. 566.

For performance of decree—Deposit—Execution barred by limitation—*See* DEPOSIT IN COURT, 2 C.L.R. 206.

See EXECUTION OF DECREE—MODE OF EXECUTION, 19 B. 578.

Application for setting aside *ex parte* decree—Where security is required on such application—Whether such security should not be excessive—Whether such security should not be in excess of the value of the mortgaged property in suit—*See* EX PARTE DECREE, 14 Bur.L.R. 214.

Deposit of stolen Note as security—Detention by Public Debt Office—Claim to return note upon suit for recovery of debt—*See* GOVERNMENT PROMISSORY NOTE, 5 C. 654 = 5 C.L.R. 586.

Security—*continued*.

Necessity for furnishing—When judgment-debtor has once applied to a proper Court for insolvency—*See* INSOLVENCY—INSOLVENCY UNDER CIV. PRO. CODE, 9 O.C. 42 (B).

From administrator of Hindu estate—Personality—*See* LETTERS OF ADMINISTRATION. 1 Ind. Jur. N.S. 229.

Suit to recover money deposited as security for payment of rent—Limitation—*See* LIMITATION ACT, 1908, art. 120, 13 O.C. 286=8 Ind. Cas. 370.

Deposit of—Deposit made with third person under the master— Servant dismissed from service—Right to deposit—*See* MASTER AND SERVANT, 12 Bom. L.R. 780.

Diminution of mortgage—Omission of mortgagee to claim equivalent—Suit for redemption by mortgagor—Claim by mortgagee for compensation for loss of security, maintainability of—*See* MORTGAGE—REDEMPTION, 27 A. 313=A.W.N. 1904, 273=1 A.L.J. 715.

See MORTGAGE— SALE OF MORTGAGED PROPERTY, 20 W.R. 253.

Decree in cross-appeal, petition for leave to appeal from—Grant of leave without further—*See* PRIVY COUNCIL, PRACTICE OF SPECIAL LEAVE TO APPEAL AND TO DEFEND APPEAL, 19 A. 95=23 I.A. 167, P.C.

To be furnished by executor— Amount of security—*See* PROBATE AND ADMINISTRATION ACT, 1881, s. 78, 1 C.L.J. 180.

Furnishing of—Under s. 17 of the Provincial Small Cause Courts Act is a condition precedent to the entertainment of an application to set aside an *ex parte* decree— *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 17, 3 A.L.J. 318=A.W.N. 1906, 93=28 A. 470.

S. 17, Provincial Small Cause Courts Act (IX of 1877)—Deposit of decree amount or tender of security—Condition precedent to grant of new trial—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—PRACTICE AND PROCEDURE, 18 C. 83.

Stamp-duty payable—Security for due fulfilment of duties as cashier—*See* STAMP ACT, 1899, s. 26, sch. I, arts. 57 (*b*) and 62 (*c*), 27 M. 71.

See SUCCESSION CERTIFICATE ACT, 1860, 1 Agra Mis. 6.

Security—Appeal—Review—*See* SUCCESSION CERTIFICATE ACT, 1860, ss 5, 6, 1 A. 287.

To be furnished under Act VII of 1889—Whether fixed deposit in a Bank is a—*See* SUCCESSION CERTIFICATE ACT, 1889, ss. 3 (2), 8 and 9, A.W.N. 1906, 94=28 A. 477.

See SUCCESSION CERTIFICATE ACT, 1889, ss. 6, 19, 19 M. 199.

See SUCCESSION CERTIFICATE ACT, 1889, ss. 9, 19, 19 B. 790.

Security—*concluded*.

Sale of properties given as—Mortgage — Transfer of Property Act, ss. 67 and 99—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 58, 67, 99, 9 C.W.N. 372=32 C. 494=1 C.L.J. 118.

See WILL — EXECUTION, P.L.R. 1900, p. 251.

Security Bond.

(1)—*Security bond—Consideration, failure of —Voidability.*—Where the respondent executed a security bond in respect of certain debt incurred by his father under a previous bond, the consideration of the security bond being the withdrawal of a criminal prosecution against the respondent's brother by the appellant, but the High Court held that the offence could not be legally compounded and ordered his trial to be proceeded with, *held*, that the consideration for the surety-bond being the release of the respondent's brother from criminal prosecution, and that consideration having failed, the surety bond was bad for want of consideration. HET RAM v. DEBI PRASAD, A.W.N. 1881, 2.

(2)—*Security bond for payment of rent—Costs of Revenue suit.*—Where a security bond, charging immoveable property for payment of rents, does not provide for payment of costs of suits in Revenue Courts, such costs cannot be charged on the property as against a subsequent incumbrancer. BABU LAL v. ISHRI PRASAD NARAIN SINGH, 2 A 582, F.B.

(3)—*Right of suit—Suit on behalf of deceased lunatic's estate—Court of Wards — Security bond—Frame of suit—Parties.*—In December 1867, one L entered into a security bond by which he undertook to be answerable to the Court of Wards for any default in the payment of rent which S might make in performing a stipulation in a certain contract of lease which L, as recited in his security bond, had himself perused and had satisfied himself with regard to it. The lease was made to M who was described as manager under the Court of Wards of the estate of B, deceased. M brought a suit on the bond against S and his brother. *Held* that the defendants were not liable and that the suit was not properly framed. The suit should have been brought, as to arrears accruing due during the lifetime of B, by his personal representative; and as to arrears due after B's death, by the successor of B, M, not being in either position, was not entitled to sue. SYUD MAHOMED ABDUL HYE v. LUNJEET SINGH, 13 B.L.R. App. 14=22 W.R. 200.

See APPEAL TO PRIVY COUNCIL—MISCELLANEOUS, 14 C. 402.

See CIV. PRO. CODE, 1908, O. XLI, r. 5, 30 C. 1060=7 C.W.N. 914.

See STAMP ACT, 1879, sch. II, art. 12 (*b*), 3 A. 788, F.B.=A.W.N. 1881, 74.

Cancellation of—*See* SUCCESSION CERTIFICATE ACT, 1889, s. 9, 5 P.L.R. 1901.

Security Bond—*concluded.*

Where a security-bond amounts to a mortgage, it cannot be realized in execution by sale of secured property—Suit under s. 67, Transfer of Property Act, necessity for—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 58, 67 99, 9 C.W.N. 372=32 C. 494=1 C.L.J. 118.

Security for Costs.

See CIV. PRO. CODE, 1908, O. XXV, rr. 1, 2, O. XLI, r. 10.

(1)—*S.* 380 (2), *Civ. Pro. Code*, 1882, *scope and object of—Act* IV *of* 1888, *s.* 5—*Interpretation of Statutes—"May" and "shall."*—The object of s. 380, Civ. Pro. Code, 1882, is to provide for the protection of defendants in certain cases where, in the event of success, they may have a difficulty in realising their costs. The latter clause of s. 380 was introduced by the Debtors Act (VI of 1888) which prohibits the arrest or imprisonment of a woman in execution of a decree for money, and it is to be observed that it is only in suits for money that the power given under this clause of the section can be exercised. The power given to the Court under this section is discretionary and one which the Court ought or ought not to exercise according to the circumstances of each case; and unless it is shown that the exercise of the power is necessary for the reasonable protection of the defendant, the Court ought not to interfere. (17 C. 610, *Appr.*) It would be unduly straining the language of the section to hold that a plaintiff, being entitled under a will to a beneficial interest in a part of the surplus income derived from immoveable property, becomes thereby possessed of "sufficient immoveable property" within the meaning of the section. *In the goods of* PREMCHAND MOONSHEE, **21 C. 882.** [*Appr.*, 32 B. 602=10 Bom. L.R. 337.]

(2)—*Appeal—Security for costs from appellant—Practice—Civ. Pro. Code, s.* 549.—Upon a question whether or how far the mere poverty of the appellant is sufficient ground for taking security from him for costs of appeal, Justice *Mahmood, J.*, after discussing the Indian and English cases, *held* that the mere poverty of the appellant should not be the sole ground for requiring security and that the grant should be discretionary and dependent upon the circumstances of the case. AJUBULNISSA v. RIASAT HUSAIN, **A.W.N. 1888, 46.**

(3)—*Security for costs — Discretion.*—The Court has a discretion to order security for costs to be given not only where it doubts the *bona fides* of the defence, but also when it considers that matter of defence is raised, which does not appear to be strictly necessary, though it is not such as the Court ought to disallow. VONLINTZGY v. NARAYAN SINGH, **6 B.L.R. App. 64.**

(4)—*Security for costs—Delay in applying.*—Applications for security for costs already incurred and the probable costs of the appeal must be made promptly, not only on the ground

Security for Costs—*continued.*

that the respondent should apply for security for costs before he incurs them, but on the ground that it is unreasonable that security should not be applied for till the applicant has incurred the costs of the appeal. BHOBONATH LAHIRI v. RADHAPROSAD LAHIRI, **5 C.W.N. 119.** [*F.*, 17 M L J. 593.]

(5)—*Appellant—Costs—Security for costs.*—In exercising discretion under s. 549 of the Civ. Pro. Code, 1882, the appellate Court may well be guided by the provisions of s. 380 of the Code. RAMSING v. BALUBAI, **5 Bom. L.R. 661.**

(6)—*S.* 549, *Civ. Pro. Code*, 1882—*Security for costs—Practice and Procedure.*—The Court has power to require an appellant from an order under s. 244, Civ. Pro. Code, 1882, to give security for the costs of appeal and of the original suit. DAGDU v. CHANDRABHAN, **1 Bom. L.R. 837=24 B. 314.**

(7)—*Security for costs—Appeal—Civ. Pro. Code*, 1859, *s.* 342.—The appellate Court is competent to order the appellant to furnish security for the costs of the appeal, but not for costs of the original suit. BAMASUNDARI DASI v. RAMNARAYAN MITTER, **7 B.L.R. App. 59.**

(8)—*Civ. Pro. Code, s.* 549—*Court should be supplied with full information.*—Where security for costs is asked for by a respondent, which, if ordered and not found by the appellant, results as a matter of course, in the appeal being struck off, it is essential that the Court should be supplied with the fullest information and the most complete materials on which to base its formal opinion as to whether security for costs can or cannot properly be demanded. GAURA v. JHABBI LAL, **A.W.N. 1886, 64.**

(9)—*Act* VIII *of* 1859, *ss.* 342, 345, 346—*Costs of appeal—Security when can be demanded—Pauper appellant—Security.*—By the expression "before the appellant is called upon to appear and answer," in s. 342 of Act VIII of 1859, comparing the same with the use of similar words in the subsequent sections, especially ss. 345 and 346, is meant not the date mentioned in the notice, but the date on which the appeal is called on to be heard, and the Court has a discretion, at any time before the hearing of the appeal, to make an order demanding security for costs. [*R.*, 3 M. 66.] Where the appellant, by his own statement, is a pauper and utterly unable to meet the costs which the respondent will have to incur, and it appears that other persons, who are presumably able to furnish, the necessary security, are interested in the matter, it is only reasonable to give the respondent some security for his costs in the appeal. JOGENDRO DEB ROYKUT v. FUNNINDRO DEB ROYKUT, **18 W. R. 102.** [*R.*, 7 A. 542=A.W.N. 1885, 127.]

(10)—*Civ. Pro. Code*, 1882, *s.* 549—*Security for costs by appellant—Bombay High Court Rules*, 1885, *Rule* 190.—Under Rule 190 of of the Bombay High Court Rules, 1885, an

Security for Costs—*continued*.

appellant must deposit, with the memorandum of appeal, Rs. 500 as security for costs of the respondent. This is the general rule applicable to all cases, irrespective of any consideration as to the probable costs of the appeal. A very strong case should be made out before the Court is asked to depart from this ordinary rule. Where an appellant residing within the Court's jurisdiction has been ordered to pay the costs of the original hearing and has not obeyed the order, he cannot be required to furnish security for such costs before the hearing of the appeal, unless his conduct in not paying the costs as per order of the Court is proved to be vexatious —that is, such as indicates a wilful determination on his part not to obey the order of the Court. The fact that the appellant did not pay the costs owing to his inability to do so, would not make his conduct vexatious. AHMED *bin* SHAIK ESSA KALIFFA v. SHAIK ESSA *bin* KALIFFA, **13 B. 458.** [*R.*, U.B.R. 1892—1896, Vol. II, 279.]

(11)—*Security for costs—Appeals—Agreement to deposit security—Failure to make deposit.*—An order was made by the Court (pursuant to an agreement between the parties after a decree for the plaintiff) that the defendant who had appealed should pay into Court, to the credit of the cause, a certain sum of money for decree, costs, etc., including a sum of money for costs to be incurred on appeal. On an application by the plaintiff that the case be struck off for default of deposit, and that the defendant pay costs already incurred at the time of the application, it was ordered that the defendant should deposit a sum to cover costs of the future appeal, and that in default, the case should be struck off, although the summons to show cause was not in point of form to that effect ELIAS v. CHUCKERBUTTY, **1 Ind Jur. N.S. 223.**

(12)—*Security for costs—Suit by female—Civ. Pro. Code* (1882), *s.* 380—*Discretion of Court.*—The Court has a discretion in exercising the powers conferred by s. 380, Civ. Pro. Code, and it will not order the plaintiff to give security unless grounds are shown tending to shew that the defence is true. SHAMA SUNDARY DASSEE v. RASH BEHARY DHUR, **3 C.W.N. 753.**

(13)—*Practice—Joinder of parties.*—Where it appears that the plaintiff in a suit sues on behalf of another person, not on the record, the ordinary practice is to require security for costs and stay proceedings until the same is given or to make such party a party to the suit. RAM COOMAR COONDOO v. CHUNDER CANTO MOOKERJEE, **2 C. 233, P.C.=4 I.A. 23=3 Sar. 674.**

(14)—*Security for costs from plaintiff—Grounds.*—The Court will certainly require security for costs, if it finds that the plaintiff is not the real litigant, but that he is only a puppet in the hands of others, but not, merely

Security for Costs—*continued*.

from the fact that he is a poor man and has disposed of a portion of his interest in the subject-matter of the suit for carrying on the suit. KHAJAH ASSENOOLLAJOO v. SOLOMON, **14 C. 533.** [*R.*, U.B.R. 1892—1896, Vol. II, 279.]

(15)—*Nominal plaintiff—Real plaintiff—Security for costs by person not a party to suit.*—If a person who has an interest in having a question decided puts forward another to have it tried in a suit in his name, but the person putting the nominal plaintiff forward is the substantial plaintiff in the case (as where a landlord puts forward his tenant to dispute a claim of a right of way), the Court has power to and would require the real plaintiff, though not appearing as such, to give security for the costs. CHUNDERKANT MOOKERJEE v. RAMCOOMAR KOONDU, **13 B L R. 530=22 W.R. 138.** [*Affirmed*, 2 C. 233; *R.*, 19 B. 717.]

(16)—*Ss.* 549, 551, *Civ. Pro. Code*, 1882—*Application for ordering appellant to give security for costs of appeal on the ground of his poverty.*—Where the respondent filed an application that the appellant might be required to furnish security for the costs of the appeal, on the ground that he was not possessed of sufficient means, *held* that, under the circumstances of the case, the Court ought not to call on the appellant to furnish security and that the application should be refused. HEWETSONS v. DEAS, **21 C. 526.**

(17) *Statute*—*11 and 12 Vict., c. 21, s. 73—Act VIII of 1859, s. 342—Applicability- Orders of Commissioner of Insolvent Court.*—S. 342, Act VIII of 1859, does not apply to appeals from orders of the Commissioner of the Insolvent Court. The appeal from an order of a Commissioner is given by s. 73 of the Insolvent Act. The Court cannotimpose on the appellant a condition that he shall give security for the cost of such an appeal. *In the matter of* RAMSEBAK MISSER, **5 B.L.R. 179.** [*R.*, 17 B. 334.]

(18)—*Appeal — Poverty—Civ. Pro. Code*, 1882, *s.* 549.—Security for costs ought not to be demanded from the appellants, on the grounds that they are without means and a third person has advised or even incited them to bring the action, when it is not shown that the third person is the real litigant fighting under cover of the appellants. The difficulty of getting at a female appellant is not sufficient reason for requiring the active appellants to safe-guard the respondent's possible costs. MUHAMMAD HUSAIN v. AHMAD BAKHSH, **A W.N. 1886, 286.**

(19)—*S.* 81, *Act* VIII *of* 1859—*Appeal to Privy Council—Security from successful party.*—During the course of a suit for damages, plaintiff applied that security might be required from the defendants under s. 81, Act VIII of 1859, and, on their failure to give it, their property was attached. Plaintiff's suit was decreed in the first Court, but dismissed on appeal by the High Court. He then appealed to the Privy Council and prayed to the High

Security for Costs—*continued.*

Court either to continue the attachment, or to require security from the defendants, pending the result of the appeal. *Held*, that the Court was not competent to adopt either course. *In re* DITTA HARAKMAN SINGH, **3 B.L.R. F.B. 45=12 W.R. 16, F.B.** [*Appr.*, 4 B.L.R. O.C.92; *R.*, 11 P.R. 1871.]

(20)—*Plaintiff leaving India before decision of case — Defendant's application to Court to take security for costs — Judgment against plaintiff on default of security — Court of appeal not competent to pass order calling for security.*—Where a plaintiff leaves the country before the decision of the case, the defendant is entitled to apply to the Court to take security for costs before deciding the case, and, where no such security is furnished, the Court will pass judgment against the plaintiff by default. If, however, the defendant does not have recourse to the remedy under s. 35 of Act X of 1859, it is not competent to the Court on appeal to pass an order calling for further security for the costs of the lower Court which can at any time be realised in execution. *In re the petition of* THE CALCUTTA AND SOUTH EASTERN RAILWAY COMPANY, **8 W.R. 217.**

(21)—*Civ. Pro. Code*, 1859, s. 34— *Security for costs of suit.*— Where a plaintiff resident outside the jurisdiction of the Court in which the suit is filed has lease-hold property situate within the jurisdiction of the Court, *held* that such property is "immoveable property other than the property in suit" within s. 34, and that, therefore, security for costs cannot be ordered. ULLMAN v. THE JUSTICES OF THE PEACE FOR CALCUTTA, **7 B.L.R. Ap. 60.**

(22)—*Appellant not residing out of British territories — High Court whether competent to demand security for costs from, subsequent to issue of notice of appeal.*— In this case the question first arose for consideration whether the High Court has authority to demand security for costs from the appellant (the case not being one in which the appellant resides outside the British territories in India) after the issue of summons, *i.e.*, notice of the appeal. But the High Court simply expressed that they had considerable doubt on the point and left the question open, because it was not necessary to decide it expressly for the purposes of the case. HUFAZUTOOLLAH CHOWDRY v. HUMEEDHUR ROHMAN, **6 W.R. Mis. 123.**

(23)—*Security for costs— Extension of time —Rejection of appeal—Civ Pro. Code*, 1882, s. 549.—Where the High Court orders an appellant to give security for costs, the Court may extend the time within which it orders the security to be furnished, if an application is made with that time; but if the security is not given within the time ordered by the Court, and no application is made within that time to extend the time for giving security, the Court is bound by s. 549 of the Civ. Pro. Code to reject the appeal. BUDRI NARAIN v. SHEO KOER, **11 C. 716.** (1 A. 687, *Appr. & F.*)

Security for Costs—*continued.*

[*Reversed on appeal*, 17 C. 512= 17 I. A. 1, P.C.; *R.*, 16 B. 263, 15 M. 384, 19 A. 240, 21 B. 576, 6 C.L.J. 490.]

(24)—*Civ. Pro. Code*, 1882, s. 549—*Costs, Security for—Appellate Court's power to extend time for security being furnished.*— Where security was demanded from the appellant under s. 549, Civ. Pro. Code, 1882, by the High Court, it has power to enlarge time to enable the appellant to comply with the order. The application to enlarge the time for giving security may be made either before or after the expiration of the time within which the security has been ordered to be furnished and the Court may, thereupon, enlarge the time, according to any necessity which may arise, where it is just and proper that it should do so. If, ultimately, the order is not complied with and the security is not furnished, the appeal may be dismissed. BADRI NARAIN v. SHEO KOER, **17 C. 512=17 I.A. 1, P.C=5 Sar. 493.** (1 A. 687, *Over.*). [*Appr.*, 16 B. 263; *R.*, 78 P.R. 1909, 15 M. 384, 19 A. 240= A.W.N. 1897, 40, 21 B. 576, 4 O.C. 108, 8 O.C. 241, 6 C.L.J. 490, 30 A. 143=5 A.L.J. 109=A.W.N. 1908, 53=3 M.L.T. 221.]

(25)—*Costs, Security for—Court's discretion to refuse security.*—The High Court has a discretion to enlarge the time allowed for finding security and to accept other security in lieu of that rejected, or to refuse to do either. RAJAB ALI v. AMIR HOSSEN, **17 C. 1, P.C.=5 Sar. 389.** [*F.*, 17 C 512, P.C.=17 I.A. 1; *R.*, 78 P.R. 1909.]

(26)—*Security for costs from appellant— Extension of time for furnishing security—S.*549, *Civ. Pro. Code*, (1877).—Security for costs called for from an appellant must be furnished within the time fixed by the Court; if not so furnished, it is imperative on the Court to reject the appeal. If an application for extension of time be made before the expiry of the time fixed, the Court may extend the time; it cannot do so afterwards. HAIDRI BAI v. THE EAST INDIAN RAILWAY COMPANY, **1 A. 687** [*Overruled*, 17 C. 512, P.C.; *Not F.*, 16 B. 263; *F.*, 11 C. 716, 11 M. 190; *R.*, 21 B. 576, 8 O.C. 241.]

(27)—*Application for leave to appeal in forma pauperis—Unstamped memorandum of appeal —Order for payment of stamp and furnishing of security for costs of appeal—Stamps tendered in time but not received—Limitation—Furnishing security, allowance of further time for— Civ. Pro. Code, ss.* 98, 549.—On the dismissal of plaintiff's suit under s. 98 of the Civ. Pro. Code, she applied for getting the suit restored to file. Her application was rejected and, thereon, she presented a petition for leave to appeal in *forma pauperis*, annexing therewith a regular but unstamped memorandum of appeal. Rejecting this petition also, the Court directed her to pay the necessary Court-fees for the appeal and to deposit security for its costs. On her tendering the stamp, the officer of the Court declined to receive it. *Held* that, as the

Security for Costs—*continued.*

Court had made no order as to the day for paying stamp fees, the officer should have received it and that the case should therefore be treated as though the stamp had been affixed to the memorandum of appeal on the day on which the Court refused to receive the stamp when tendered. Appellant prayed also for extension of time granted for the giving of the security, stating that, owing to the exceptional state of affairs in Bombay, she had been unable to raise the requisite money. The High Court *held* that, under the circumstances, further time should be allowed for the purpose. S. 549 of the Civ. Pro. Code, 1882, does not absolutely preclude the Court from passing such an order, where the circumstances are such as to render it just that the time once granted for the purpose should be enlarged. JUMNABAI v. VISSONDAS RUTTON CHUND, **21 B. 576.** [*F.*, 84 P.R. 1904; *R.*, 22 B. 849, 78 P.R. 1909; *D.*, L.B.R. (1893—1900), 556, 9 Bom. L.R. 204.]

(28)—*Civ. Pro. Code*, s. 549—*Security for costs—Offer within due date—Omission to consider whether security offered was adequate.*—Where an appellant was ordered by the Judge to give security for costs within a certain date, *i.e.*, 13th December 1886, and the offer was made on that day but the Judge, without ascertaining whether the security was sufficient or not, dismissed the appeal on the ground that the offer of security should have been made a sufficient time before the due date so as to enable the Court to satisfy itself that it was adequate: *Held* that the Judge was wrong in declining to accept the security and dismissing the appeal without ascertaining whether the security offered on the due date was adequate or not. FASIHUDDIN v. BABU LAL, **A.W.N. 1888, 241.**

(29)—*Security for costs—Security by appellant—Power of single Judge of High Court to make order for security.*—A single Judge has full power to make an order for security for the costs of an appeal. MUZHUR HOSSAIN v. DENOBUNDOO SEN, **Bourke O.C. 119.** [*Affirmed on appeal*, Bourke A.C. 40.]

(30)—*Security for costs—Appeals—Grounds for ordering security.*—Cause being shown on a rule *nisi* for an order for security to be given by the appellant for the costs of an appeal (similar orders having been previously made on the application of other defendants), it appeared that an unusual number of defendants had been joined in the suit, which had been withdrawn on a previous occasion when nearly tried out; and that the plaintiff, who sued as a relator, was poor and resided out of the jurisdiction, and had not paid interlocutory costs, for which an attachment had issued. *Held* that an appellant will not be ordered to give security for costs previously incurred; that the fact of similar applications having been granted in the suit, the poverty of the appellant, and the fact of his dwelling out of the jurisdiction, as well as the peculiar circumstances of the

Security for Costs—*continued.*

case, non-payment of interlocutory costs, a former withdrawal of the suit, and the joining of an unusual number of defendants, are grounds for granting an order for security to be given by an appellant for the costs of an appeal: that a relator suing to enforce a public right must give security for the costs of those against whom he proceeds. MUZHUR HUSSEIN v. DINOBUNDOO SEIN, **Bourke A O.C. 40.** [*Confirming the judgment in the case in*, Bourke O.C. 119.]

(31)—*Security for costs—Power of single Judge of High Court to make order for security.*—On a rule *nisi* for security for the costs of an appeal to be given by a defendant, five-twenty-fourths of the property in dispute having been decreed to him, but subsequently attached under a prohibitory order, cause was shown that the Court had not jurisdiction, and that no reason for the application had been given. *Held*, that a single Judge is vested with all the powers of an appellate Court with reference to the costs of an appeal; that, when an appellant resides within the jurisdiction of the Court, he is amenable to its orders as to the costs of an appeal; and that an appellant who has no available property must, if required, give security for the costs of an appeal, before proceeding with it. MONOHUR DOSS v. KHODRUM BEGUM, **Bourke O.C. 110.**

(32)—*Security for costs, order requiring—Civ. Pro. Code*, s. 549.—The discretion given to an appellate Court to demand security for costs from an appellant, cannot be said to be properly or judicially exercised when the order demanding security has been made without giving the appellant an opportunity to show cause against it. SIRAJ-UL HAQ v. KHADIM HUSSAIN, **5 A. 380 = A.W.N. 1883, 60.**

(33)—*Security for costs—Notice to show cause—Demand—Rejection of appeal.*—The issue of a preliminary notice to show cause why security for the costs of the appeal should not be furnished is not tantamount to a demand. The order directing the appellant to furnish security must be served on him or on his vakil, and if this is not done, the appeal cannot be rejected for not furnishing the security. TIMMU v. DEVA RAI, **5 M. 265.**

(34) — *Security by surety — Realisation — S. 342. Act VIII of 1859.*—Security for costs demanded and taken before decree under s. 342 of Act VIII of 1859 (old Civ. Pro. Code) may be realised in execution-proceedings, but after notice to the surety, who had signed the bond. CHUTTERDHAREE LALL v. RAMBELASHEE KOER, **3 C. 318 = 1 C.L R. 347.** (7 W.R. 320, 13 W.R. 35, *D.*) [*R.*, 2 A. 604, F.B.]

(35)—*Beng. Reg. XIV of 1829, s. 2, cl. 1—Default—Laches.*—Beng. Reg. XIV of 1829, s. 2, cl. 1, enacts that every person, being an inhabitant of a foreign territory, shall be required to furnish security for costs; such security to be furnished by a plaintiff, or appellant,

Security for Costs—*continued.*

within six weeks of the date on which his plaint or appeal is filed ; and that unless such security be so furnished, the suit of such person, if plaintiff, should not be proceeded with, or appeal admitted, unless he had furnished the necessary security to cover costs in the appeal. Appeal to the *Sudder* Court from a decree of the *Zillah* Court by a party then temporarily absent in *England*, but having real estates and factories within the jurisdiction of the Court. No security was furnished by the appellant's *Vakeel* within six weeks after lodging the appeal. The respondent, in the first instance, put in an answer to the reasons of appeal filed by the appellant, but afterwards filed a petition for dismissal for non-compliance with the requirement of Beng. Reg. XIV, 1829, s. 2, cl. 1, contending that the appellant was a resident in a foreign territory, and had not furnished security within six weeks as required by that Regulation. The *Sudder* Court held, that such security ought to have been furnished by the appellant, who, residing in *England*, *pendente lite*, was to be considered as resident in a foreign territory within the meaning of the Regulation, and dismissed the appeal. Such judgment reversed on appeal by the Judicial Committee, and the suit remitted to *India* for trial, on the ground that the *Sudder* Court had not, by Reg. XIV of 1829, any power *ex mero motu* to dismiss the appeal, as the appellant was guilty of (1) no default under that Regulation, not having been called upon by the respondent or the Court to furnish security for costs ; (2) or of laches, in not voluntarily offering security ; the Regulation providing only that a suit, or appeal, should not be proceeded with until security was furnished. WISE v. JUGBUNDOO BOSE, **7 M.I.A. 431=1 Sar. 698.**

(36)—*Act* VIII *of* 1859, *s.* 34—*Decree—Appeal.*—The provisions of s. 34 of Act VIII of 1859 apply only to the costs of original suits and not to those which may be incurred by the defendant if, a decree having been passed against him, he chooses to appeal against that decree. Thus, where the plaintiff deposited in Court a sum of money, under s. 34 of the Civ. Pro. Code, Act VIII of 1859, as security for costs, the defendant is not entitled, as of right, to an order detaining the money in Court, pending an appeal preferred by him against the judgment which had been passed in favour of the plaintiff. FLEMING v. SHEARMAN, **4 B.L.R O.C. 92** (3 B.L.R. F.B. 45, *Expl.*)

(37)—*Small Cause Court—Act* XXVI *of* 1864, *s.* 8—*Security for costs, deposit of.*—A case should not be referred to the High Court by a Judge of the Small Cause Court, until security has been deposited in accordance with s. 8, Act XXVI of 1864, by the party against whom the judgment is given. If such party do not deposit the security "forthwith" he must be taken to submit to the judgment of the Small Cause Court. FORNARO v. RAMNARAIN SOONDEB, **14 B.L.R. 180=23 W.R. 136.** [*Discussed*, 28 C. 260.]

Security for Costs—*continued.*

(38)—*Civ. Pro. Code, s.* 549—*Security for costs—Rejection of appeal for failure to furnish security—Restoration.*—An appeal, although it may have been rejected by an appellate Court under s. 549 of the Civ. Pro. Code, Act XIV of 1882, upon failure by the appellant—to furnish security demanded under that section, may be restored on sufficient grounds at the Court's discretion. The High Court having apparently treated an appeal as though, after rejection of it under the above section, a petition tendering security to the amount demanded, and asking restoration of the appeal, was not entertainable and could not be considered, *held*, by the Judicial Committee, that restoration was within the Court's discretion, and that there were grounds for it, upon the appellant's giving approved security within such time as the Court might fix. BALWANT SINGH v. DAULAT SINGH, **8 A. 315, P.C.=13 I.A. 57=4 Sar. 707.** [*Cons. and D.*, 4 M.L.T. 416; *R.*, 17 C. 512 =17 I.A. 1, 21 B. 576, 30 A. 143=3 M.L.T. 221 =5 A.L J. 109=A.W.N. 1908,53, U.B.R. 1908, 1st Qr., Limitation, art. 178, 19 M.L.J. 304.]

(39)—*Surety for costs of appeal—Right to refund of money deposited—Procedure—Execution—Separate suit.*—A surety for the costs of an appeal stands precisely in the same position as the judgment-debtor himself, and the decree for costs may be executed against the surety just in the same manner as against the judgment-debtor. If the surety therefore wishes to recover the surplus amount due to him after the satisfaction of the decree, he can do so in the execution department by moving the Court executing the decree and not by regular suit. BALDEO DUBE v. MUHAMMAD KARJIM, **A.W.N. 1886, 38.** (2 A. 604, F.B., *R.*)

(40)—*Security bond for costs of appeal, Enforcement of—Course to be adopted.*—The proper course of proceeding to enforce a bond executed to the Court for securing the costs of an appeal on the breach of the condition therein is to move for the issue of a notice to the obligor and the sureties to show cause why the bond should not be assigned to the party beneficially entitledthereunder. POYNOR BIBEE v. NUJJOKHAN, **5 C. 437=5 C.L.R. 524.** [*R.*, 19 B. 694, 31 C. 162.]

Order rejecting appeal on failure to pay security for costs, not appealable as a decree or order—Order to appellant to give security whether should specify amount of security—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 18 A. 101, F.B.=A.W.N. 1895, 238.

Rejection of appeal for failure to furnish security--*See* APPEAL—DECREES AND EXECUTION OF DECREES. 5 A 380=A.W.N. 1883, 60.

Order refusing to receive security for costs—*See* APPEAL—LETTERS PATENT, 25 M. 654 =12 M.L.J. 34.

See APPEAL — MISCELLANEOUS, A.W.N. 1890, 75.

Security for Costs—*continued.*

See APPEAL TO PRIVY COUNCIL—MISCELLANEOUS, 12 C. 402.

See CIV. PRO. CODE, 1908, O. XXI, r. 10, A.W.N. 1883, 254.

Circumstances under which Court will order —*See* CIV. PRO. CODE, 1908, O. XXV, r. 1 (1), (3), 17 C. 610.

Appeal *in forma pauperis* - Security for costs —Jurisdiction--Delay in making the application —*See* CIV. PRO. CODE, 1908, O. XLI, r. 20, 17 M.L.J. 583.

Divorce, suit for—Security for wife's costs —Absence of means of wife—*See* DIVORCE, 6 C.W.N. 414.

Enforcement of security bond before and after Act VII of 1888—Procedure—*See* EXECUTION OF DECREE—EFFECT OF CHANGE OF LAW PENDING EXECUTION, 16 C. 323.

See EXECUTION OF DECREE—STAY OF EXECUTION, 13 B. 241.

See LEGAL PRACTITIONERS — ATTORNEY AND CLIENT, 3 C. 473.

See LETTERS PATENT, HIGH COURT, 1865 —MADRAS, s. 15, 26 M. 502.

Suit by Mahomedan wife for dissolution of marriage--Husband not liable to costs of suit and to give security for costs of appeal—English law rule as to costs of wife in divorce proceedings, inapplicable—Alimony not grantable to wife until disposal of appeal—*See* MAHOMEDAN LAW—DIVORCE, 21 B. 77.

Merger of securities—*See* MERGER, 10 M. 160.

Appeal—Poverty no ground for demanding security for costs — *See* PRACTICE AND PROCEDURE, 3 B. 241.

Second appeal—Amount not fixed—Security not furnished—Liability of appeal to dismissal —*See* PRACTICE AND PROCEDURE, 9 A. 164 = A.W.N. 1887, 7.

See PRACTICE AND PROCEDURE, 3 M. 66.

Stay of proceedings, application for, High Court's jurisdiction to order—Pending appeal by special leave to Privy Council—Privy Council, jurisdiction of—*See* PRIVY COUNCIL, PRACTICE OF—STAY OF PROCEEDINGS IN INDIA PENDING APPEAL, 27 C. 1, P.C. = 26 I.A. 281 = 4 C.W.N. 34.

See BEN. REG. XVI OF 1797, s. 4, B.L.R. Sup. Vol. 541 = 6 W.R. Mis. 84.

See RESIDENCE, 9 B. 244.

See RES JUDICATA—GENERAL, 6 B. 482.

See RIGHT OF SUIT—ENDOWMENTS, SUITS RELATING TO, 5 C. 700.

Of appeal — *See* RULES OF THE HIGH COURTS AND SUPREME COURTS — NORTH WEST PROVINCES, A.W.N. 1889, 147.

Security for Costs—*concluded.*

See SPECIAL OR SECOND APPEAL--ERRORS OF LAW OR PROCEDURE, 6 N.W.P. 172.

See ST. 11 AND 12 VICT., C. 21, s. 73, 15 B. L.R. App. 10.

See WAIVER, 7 M.I.A. 431.

Security for good Behaviour.

Malicious prosecution, suit for—Application for—Criminal offence—Maintainability of suit —*See* MALICIOUS PROSECUTION, 13 M.L.J. 370.

Seduction.

See BUDDHIST LAW—MARRIAGE, L.B.R. 1872—1892, 235.

See DAMAGES—MISCELLANEOUS, L.B.R. 1872—1892, 114.

See MARRIAGE, L.B.R. 1872—1892, 533.

Seizure.

See DAMAGES—DAMAGES, SUITS FOR, 16 C. 159.

Select Committee.

Reference to reports of, to ascertain object of enactments—*See* O. P. ACT XI OF 1898, ss. 38, 41 (3) (*b*), 3 N.L.R. 40.

Selection.

Copyright in selection of poems—*See* COPYRIGHT, 17 C. 951.

Self-acquired Property.

(1)—*Hindu law — Self-acquired property, father's power of disposition—Custom.*—Among the Bedi Khatris, a father has a perfect right to dispose of self-acquired property as he chooses, and there is no custom limiting his power of alienation over such property. BABA NATHA SINGH v. WAZIR SINGH, 63 P.R. 1880.

Self-acquisition.

See HINDU LAW—INHERITANCE.

See HINDU LAW—JOINT FAMILY.

See HINDU LAW—PARTITION.

See CUSTOMS — PUNJAB — GIFT, 41 P.R. 1879.

Separation Deed.

(1)—*Husband and wife — Agreement for future separation—Void agreement—Estoppel.* —The principle upon which the law looks askance at agreements contemplating the future separation of husband and wife is a principle which, if not *quod semper, quod ubique, quod ab omnibus* is at least a thoroughly fixed and intelligible principle having its foundations in the welfare of society and the permanence of the marriage tie. It is, therefore, a principle which a Judge may enforce with less diffidence than if he were dealing with a doctrine of public policy of an uncertain or fluctuating nature.—An agreement, between

Separation Deed—*concluded.*

husband and wife, providing for an immediate re-union, coupled with a provision for subsequent separation is bad under English law, as also under Mahomedan law. MEHER ALLY v. SAKERKHANOOBAI, **7 Bom. L.R. 602.** [*R.*, 8 Ind. Cas. 412=8 M.L.T. 314=34 M. 398.]

(2)—*Mahomedan law — Restitution of conjugal rights.* — According to the Mahomedan Law, it is not competent to parties contracting a marriage to enter into a separation deed, by which the husband consented that his wife might live with her parents; and in a suit for restitution for conjugal rights by the husband against his wife, who also pleaded non-payment of her prompt dower in bar of the suit, he would be entitled to a decree for restitution conditional on payment of the dower. ABDUL v. HUSSEINBI, **6 Bom. L.R. 728.** [*R.*, 7 Bom. L.R. 602; *D.*, 30 B. 122=7 Bom. L.R. 684.]

(3)—*Restitution of congugal rights.* — An agreement between husband and wife to live separate bars a subsequent suit for restitution of conjugal rights. PURSHOTAM v. BAI JADI, **2 Bom. L.R. 72.** [*D.*, 6 Bom. L.R. 728.]

Sequestration.

(1)—*Contempt of decree or order of Court—Process of sequestration—Practice.*—The power is resident in the High Court of issuing writs of sequestration for seizing the property of persons guilty of contempt of Court. The object of requiring a memorandum, as required by Rule 389 of the Supreme Court Rules, to be endorsed upon the copy of the order served upon the party guilty of contempt, is to enable the party complaining of non-compliance with the order to make an *ex parte* application to the Court for a writ of sequestration and to give the person upon whom the order is served notice that he will be liable to have his estates sequestered forthwith upon his disobedience of or non-compliance with the order. In the absence of such memorandum, the party should give proper notice to the opponent of his intention to apply for the writ. HARIVALLABHDAS KALLIANDAS v. UTAMCHAND MANIKCHAND, **8 B.H.C. O.C. 135.**

(2)—*Letters Patent, s. 12—Charter, Supreme Court of Bombay, s. 41—24 & 25 Vict., ch. 104, s. 9—Constructive residence—Writ of sequestration—Jurisdiction of High Court.*—A permanent resident of Baroda who carried on the business of a banker at Bombay by means of a *munim* and had a place of business there, was held to be constructively an inhabitant of Bombay and subject to the orders and processes of the High Court, in its equity jurisdiction as was provided by s. 1 of the Charter of the Supreme Court of Bombay and by s. 9 of Act XXIV and XXV Vict., Ch. 104. The High Court will assert its jurisdiction to prevent the writ of sequestration from becoming a mere form, in such manner as the circumstances of the case may justify and render most expedient;

Sequestration—*concluded.*

and acting upon the analogy by which the Court of Equity grants injunctions to obtain indirectly a control over property which is beyond the jurisdiction, the Court would, under proper circumstances, operate *in personam* with a view to prevent its own writ of sequestration from being frustrated. HARIVALLABHDAS KALLIANDAS v. UTAMCHAND MANIKCHAND, **8 B H C.O.C. 236.**

(3)—*Sequestrator in possession—Rights of.*—A sequestrator in possession is not to be disturbed by a claimant, without leave of the Court. The usual mode is to apply for permission to bring an action of ejectment, or to examine *por interesse suo.* Under a writ of sequestration the Sheriff seized a moiety of an estate in the possession of A; A presented a petition to the Court, entitled in a cause then pending, claiming the land under a deed of sale executed by the defendant, *pendente lite*, praying to be put in possession, and to be allowed to go before the master and examine witnesses, *pro interesse suo.* Proceedings were taken under this petition before the master, but afterwards it was agreed by consent that the matter of the petition should be tried by the Court, and the witnesses examined *viva voce* by the Court at the hearing of the cause in which the petition was entitled. *Held*, that there was nothing irregular in such a mode of proceeding. MUSADEE MAHOMED CAZUM SHERAZEE v. MEERZA ALLY MAHOMED SHOOSTRY, **6 M.I.A. 27=8 Moo. P.C. 110=1 Sar. 489.**

See ACT OF STATE, 9 B.H.C. 314.

Serai.

See ACT X OF 1870, ss. 30, 55, 21 P.R. 1871.

Serjeant William's Rules.

Covenants, dependent or independent—Question one of construction—*See* CONTRACT—CONSTRUCTION OF CONTRACTS, 3 M.H.C. 125.

Servant.

See MASTER AND SERVANT.

Wages of private servant not attachable in advance—*See* ATTACHMENT—SUBJECTS OF ATTACHMENTS, 21 M. 393.

Right of—To prove preferentially to other creditors—Wages of captain and crew—*See* COMPANY—WINDING UP OF COMPANY, 2 Ind. Jur. N.S. 17.

Property of temple, not alienable as such—Temple land held by—As remuneration, saleability of—*See* HINDU LAW — RELIGIOUS ENDOWMENT, 6 B. 596.

Occupation of land as remuneration for service—Creation of tenancy—*See* LANDLORD AND TENANT — RELATIONSHIP OF LANDLORD AND TENANT, 15 C.P.L.R. 42.

See LIMITATION ACT, 1908, arts. 2, 6, 7, 8, 9, 22, 24, 25, 40, 48, 49, 1 B.L.R.S.N. 20 (*b*).

Suit for salary—Limitation—*See* LIMITATION ACT, 1908, arts. 2, 6, 7, 8, 9, 22, 24, 25 40, 48, 49, 118, 120, 84 B.L.R. App. 68=13 W.R. 150.

Servant—*concluded.*

Possession of temple property by the shevaks as servants of the idol, whether could be adverse to rights of hereditary manager—*See* POSSESSION—ADVERSE POSSESSION, 12 B. 322.

Liability of Secretary of State for damages occasioned by negligence of Government—Negligence which would render ordinary employer liable—*See* SECRETARY OF STATE, 5 B.H.C. App. 1=Bourke A O.C. 166.

Crim. Pro. Code, ss. 70, 332—Service of summons for attendance as a juror—Service on—Of the person summoned—*See* SUMMONS, A.W.N. 1899, 13.

Service.

Land given in lieu of — Non-performance—Suit for damages—Jurisdiction—*See* DAMAGES—DAMAGES, SUITS FOR, 12 C.L.J. 480=8 Ind. Cas. 96.

Land allotted for performing—Holding land after discontinuing—Denial of title, effect of—*See* LANDLORD AND TENANT—EJECTMENT, 4 A.L.J. 556=A.W.N. 1907, 231=29 A. 652.

Possession granted for doing prohibit service — Cessation of—Effect *See* POSSESSION — ADVERSE POSSESSION, 7 Ind. Cas. 252=8 M. L.T. 280.

Grant for taking services from grantee—Right of grantee to have service performed by a substitute—*See* SAUNJIDAR, 18 P.W.R. 1911.

Service Grant.

(1)—*Private service*, Mokhasa *granted in lieu of wages—Presumption that such grant is resumable at will, when included in the* mal *assets of the Zemindari—Previous attempts at resumption and enhancement of rent with mokhasadar's consent, strong evidence to show that the grant is resumable at will.*—In the case of a grant burdened with service, the grant is not resumable merely because the necessity for the service has ceased, although it may be liable to forfeiture in cases of wilful failure in the performance of the service. In the case of lands held by a private servant in lieu of wages, it is assumed that they are resumable. (7 M.I.A. 128, *R.*) In this Presidency there is a series of decisions that, in cases where a service grant was included in the *mal* assets of a zemindari at the time of the permanent settlement, there is a presumption that the zemindar can resume. (3 M. 367, 7 M. 268, 14 M. 365, 26 M. 403, 1 M.W.N. 436, 2 M.W.N. 36, 14 M. 367, *F.*; 22 C. 93, 14 M.I.A. 152, *Appr.*; 18 W.R. 321, 13 Bom. L.R. 124, 28 B. 305, 9 M. 307, 19 M. 100, *D.*) Where, therefore, it is found that a *mokhasa* was granted subsequent to the permanent settlement, between 1815 and 1824 burdened with a payment of Rs. 584, that it was resumed in 1841 and restored in 1844 on a *kattubadi* of Rs. 775, out of which Rs. 100 were again remitted, and that finally in 1898 the *kattubadi* was raised to

Service Grant—*concluded.*

Rs. 780 with defendant's (grantee's) consent, *held*, the *mokhasa* was a grant resumable at will. Further, *held*, the respondent (grantor) is entitled to the compensation money paid to the appellant (grantee) for some lands acquired in the suit villages. VADISAPU APPANDORA v. SRI RAJAH SRI SRI SRI VYRICHERLA VEERABHADRA RAJU BAHADUR, 10 M.L.T. 391=2 M.W.N. 1911, 406=12 Ind. Cas. 487.

Service Inam.

See INAM.

(1)—*Mokhassa tenure—Right of mokhassadar to hold land irrespective of performance of services—Right of zemindar to dispense with services and resume land—Burden of proof in suit for ejectment.*—The "mokhassa" is a well-known tenure in the Northern Circars and consists of the assignment of a village or land to an individual either rent-free or at a low quit-rent on condition of service. If the lands given to the mokhassadars had been granted to them simply as payment for their services in lieu of money, then the employment may be discontinued and the remuneration for the same put an end to. But if the lands had been granted outright subject only to certain services to be performed, the mokhassadars cannot be ejected until they refuse performance of the services. The former is the grant of an office the performances of whose duties is remunerated by the use of certain lands, and the latter is the grant of an estate burdened with a certain service. Where lands, belonging to a zemindar, were granted by him on condition of the grantee rendering services and of paying a certain sum of money to the zemindar in recognition of his ownership thereof, *prima facie*, the ownership remained with the zemindar and the burden of proving that the zemindar had no right to eject the grantee would lie on the latter. (14 M. 365, *R.*) Suit to recover lands granted on mokhassa tenure on the ground that plaintiff did not require services from the persons in possession thereof. No office by any particular designation had been conferred upon the original grantee, but an obligation of a feudal character had been imposed on him. He was to provide a certain number of men as custodians of the zemindar's property. When the men were actually on duty they were paid batta. The services were rendered intermittently and not continuously. However, the mokhassadars paid a uniform rent for more than 120 years without any alteration at any time, and the lands had descended from father to son hereditarily during that period. There had been no instance of resumption, or even an attempt at resumption during all this time. There had been no attempt to enhance or alter the rent or to interfere with the devolution of the property from heir to heir. Further, plaintiff himself had taken leases from the mokhassadars and purchased some of their *Kamatam* lands, showing a consciousness that they held a permanent tenure. *Held* that the plaint lands had been granted in perpetuity to the mokhassadars

Service Inam—*concluded.*

and were not resumable by the plaintiff. SRI RAJAH SOBHNADRI APPA RAO BAHADUR v. SRI RAJAH VENKATANARASIMHA APPA RAO BAHADUR. **26 M. 403.** [*Affirmed*, 29 M. 52=16 M.L.J. 1=1 M.L.T. 2=10 C.W.N. 161=3 C.L.J. 1=8 Bom. L.R. 1=3 A.L.J. 55=33 I. A. 46, P.C.]

(2)—*Service Inam—Resumption by Government, effect of—Resumption does not extinguish prior incumbrances—Reg.* VI *of* 1831—*Private Service Inam, not within its purview—Jadaba Service, nature of.*—A mortgaged certain service inam lands with possession to B in 1892. A subsequently sold them to the plaintiff. In 1898 Government resumed the lands, assessed them fully and issued patta in the name of the plaintiff on the strength of his sale-deed. The plaintiff now sued to recover possession of the lands in question free of B's mortgage. He contended (1) that the mortgage was extinguished by reason of the resumption by Government; and (2) that the mortgage was invalid, the inam being inalienable under s. 2 of Reg. VI of 1831. *Held*:—(1) the resumption by Government did not operate to extinguish prior incumbrances. Also *held*:—(2) that the inam (Jadaba service), though originally granted partly for public and partly for private service, had been latterly treated as one granted for private service, and therefore did not come within the purview of s. 2 of Reg. VI of 1831. SREEVADHU YERRANNA v. KANNAMMA, **2 M.W.N. 1911, 354=21 M.L.J. 962=12 Ind. Cas. 457.** (7 M.I.A. 128, 26 M. 339, 30 M. 434, *R.*)

(3)—*Grant of, Construction of grant*—'Sudda Inam,' *meaning of—Grant of* melvaram *right—Enfranchisement of service inams, effect of—Abandonment by Government of right of resumption—Madras Act* (II *of* 1894).—The expression 'Sudda Inam,' appearing in a deed of grant of a service *inam*, does not show that the *inam* consisted of the land itself and not merely of the *melvaram*. The meaning of the expression is merely that there is nothing payable to Government in consideration of the inamdar's possession of the land. The effect of the enfranchisement of a service *inam* under Madras Act II of 1894, where the Government merely gives up the right of resumption possessed by it and does not resume the *inam*, is that the title rests where it was before. SESHAGIRI AIYAR v. TIRUMALAI AMBALAM, **17 Ind. Cas. 481.**

Matam—*See* ACT XXIII OF 1871, 5 M. 302.

Enfranchisement in name of office-holder—Right of other members of family to claim partition — *See* HINDU LAW — PARTITION, 26 M. 339.

See POSSESSION — ADVERSE POSSESSION, 7 M.L.J. 54.

Reg. VI of 1831, s. 3—Suit to recover damages claimed in respect of profits which the plaintiffs would have derived from—Lands — Small Cause Court — Jurisdiction — *See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 5 M.H.C. 383.

Service of Notice to quit.

Mode of service of notice to quit—*See* LANDLORD AND TENANT—EJECTMENT, 2 C.W.N. 125.

Notice to quit sent by post—Refusal to receive—Service, whether good—*See* NOTICE TO QUIT, 6 C.W.N. 134.

Service of Process.

(1)—*Defendant absent from home but his whereabouts known, affixture of summons to the outer door not a good service.*—Appeal from an order refusing an application made by one of the defendants, the present appellant, to have an *ex parte* decree obtained against him set aside under s. 108, Civ. Pro. Code, as he was not duly served with the summons. The affidavit of the process-server was to the effect that the person to be served was not found at his house, but that his wife informed the process-server that her husband was absent at a place of a distance of 34 miles and would return in 8 or 10 days. Without any further attempt to serve the summons, personally, the process-server affixed the summons to the outer door of the house. It was urged for the appellant that the summons had not been served in a legal manner. Setting aside the order appealed against and directing that the *ex-parte* decree be set aside, so far as regards the appellant, *held*, that when a serving officer finds a defendant to be away, temporarily, from home, and knows where he is, it is not a good service if he does no more than fix the summons to the outer door of the house; he must make further efforts to effect personal service, by finding the defendant or the summons should be again sent to the defendant's house to be served upon him when the information shows that he is likely to be at home. DWARKABAX RAMACHANDRA v. NORMAN CRANTOME MACLEOD, **2 N.L.R. 63.** (19 C. 201, 21 B. 223, 21 M. 419, 24 A. 302, *F.*; 21 M. 324, *D.*)

(2)—*Process—Sufficiency of service—Act* VIII *of* 1859, *s.* 239—*Service of prohibitory order, sufficiency of.*—Where service of the prohibitory order was effected by affixing it to the wall of the dwelling-house of the person on whom it was intended to serve it,—*held*, it was not a sufficient service under s. 239 of Act VIII of 1859. It ought to have been served by delivery or by registered letter. GOBIND CHUNDER DUTT v. KHERODE CHUNDER MITTER, **10 B.L.R. App. 12.**

Competency of the Head Clerk of Small Cause Court to sign requisitions to other Courts with a view to the service of process. **Cir. No. 27, dated the 6th Sep. 1864, 1 W.R. Civ. Cir. Orders, p. 2.**

Through whom Processes to be issued. **Cir. No. 23, dated the 15th Sep. 1865, 4 W.R. Civ. Cir. Order, p. 2.**

Suit for dissolution of marriage—Plaintiff's petition should be personally served, under

Service of Process—*concluded.*

s.50, Indian Divorce Act, on respondent or sufficient notice of its contents should be given him—*See* ACT IV OF 1869, ss. 14, 50, 12 C. W.N. 1009.

Right to question date of service of summons — *See* CIV. PRO. CODE. 1882, Ch. XXXIX, 23 C. 573.

Practice under—Sufficiency of service—*See* CIV. PRO. CODE, 1908, O. V, rr. 21, 23, 22 C. 889.

Respondent leaving for England—Service of notice of appeal on him — Practice —*See* FRAUD—EFFECT OF FRAUD, 13 C.W N. 18 =4 M L T. 421=9 C.L.J. 244=36 C. 226= 1 Ind. Cas. 158.

Of notice of appeal whether sufficient without declaration required by s. 82, Civ. Pro. Code—*See* LIMITATION ACT, 1908, art. 169, 18 M.L.J. 96.

Affixing summons to door — Temporary absence no ground—*See* SUMMONS, 8 M.L.J. 84.

Service Settlement.

See BOM. ACT III OF 1874, s. 4, 3 Bom. L.R. 249=25 B. 470.

Service Tenure.

(1)—*Service tenures—Grant on condition of performing service.*—A grant to a man and his heirs on condition of performing service does not, in general, mean that the service is to be personally performed by the grantee or his heirs, but that it is to be performed, and the grantee is to be responsible for its performance. SHIB LALL SING v. MOORAD KHAN, **9 W.R. 126.**

(2)—*Grant not genuine—Long possession—Presumption of permanent tenure.*—Where, in a suit to eject the defendant from certain lands, the Court found that the grant under which the defendant claimed them, in return for certain services, was not genuine, *held*, the Court was not bound, as a matter of law, to presume a permanent tenure in the defendant's favour, from the fact of his long possession of the lands. NOBIN CHUNDER DUTT v. MODUN MOHUN PAL, **7 C. 697=9 C.L.R. 233.**

(3)—*Suit by zemindar against mesne tenant in mourasi right to enhance rent—Reg.* XLIV *of* 1793, *ss.* 5, 7, 8—*Reg.* VIII *of* 1793, *s.* 41—*Beng. Reg.* XI *of* 1822, *ss.* 30, 32, 33—*Long possession as mourasi from before decennial settlement—False witnesses— Forged documents—Effect of such evidence in presence of reliable independent evidence—Ancient tenure, existence of.*—Suit, by a *Zemindar* against a mesne tenant of his *Zemindary*, holding by hereditary tenure, in the nature of a *Mouroosee Istimrari*, to enhance the rent of the lands which had been held by the tenant and his predecessors anterior to the Decennial Settlement at an invariable fixed rent, dismissed. By s. 5 of Ben. Reg. XLIV of 1798, it is provided that, when a

Service Tenure—*continued.*

Zemindary is sold by public sale for discharge of arrears due from the *Zemindar*, or others, to Government, "all engagements which such proprietor shall have contracted with dependent *Talookdars*, whose *Talooks* may be situated in the lands sold, as also all the leases to under-farmers and *pottahs* to *ryots* for the cultivation of the whole or any part of such lands (with the exception of the engagements, *pottahs* and leases, specified in ss. 7 and 8), shall stand cancelled from the day of sale, and the purchaser, or the purchasers, of the land shall be at liberty to collect from such dependent *Talookdar* and from the *ryots* or cultivators of the lands let in farm, and the lands not farmed, whatever the former proprietor would have been entitled to demand according to the established usages and rates of the *Pergunnah* or District in which such lands may be situated, had the engagements so cancelled never existed." And the 7th section provides that s. 5 is not to authorize the assessment of any increase upon the lands of such dependent *Talookdars* as were exempted from increase by s. 41 of Reg. VIII of 1793, at the Decennial Settlement of 1793. In 1823, a *Zemindar* fell into arrears of revenue, and Government sold the *Zemindary* at a public sale for discharge of the arrears due, whereby the auction-purchaser acquired such rights to cancel leases, &c., as then existed; but he took no steps under Ben. Reg. XI of 1822, ss. 30, 32 and 33, which gave power to a purchaser to cancel the leases, or to enhance the rent; nor was any claim in that respect made by subsequent purchasers from him, until the year 1856, when the *Zemindar* then in possession brought a suit to enhance the rent. *Held*, reversing the *Sudder* and *Zillah* Courts' decrees:—First, that the tenure, a *Mouroosee Istimrari*, under which the defendant held, was hereditary, and, as it had been uninterruptedly held anterior to the Decennial Settlement at a fixed rent, the *Zemindar* had no power to enhance the rent. Secondly, that such a tenure was not cancelled, *ipso facto*, by the sale in 1823, as the language in s. 7 of Ben. Reg. XLIV of 1793 showed that what was intended by s. 5 of that Regulation was not the destruction of the tenure, but the enhancement of rent, under certain specified and equitable limitations. *Quære.*—Whether such power is not confined to the auction-purchaser himself, and not to those claiming under him? When false witnesses or forged documents are produced to support a case, such fact naturally creates suspicion; but if the appellate Court has to deal with a just case though foolishly and wickedly attempted to be supported by false evidence, such circumstances will not prejudice the judgment on the merits, when the case is supported by independent evidence. So ruled, when their Lordships were satisfied from the evidence that an ancient tenure existed, which was endeavoured to be supported by a forged document and evidence. RANEE SURNOMOYEE v. MAHARAJAH SUTTEESCHUNDER ROY BAHADOOR, **10 M.I.A. 123=2 W.R.P.C. 13=2 Sar. 60.**

Service Tenure—*continued.*

(4)—*Rent in arrears—Successor's liability.*—Where the holder of a service tenure subject to a quit-rent payable to the zemindar dies leaving his rent for the last three years unpaid, the zemindar could not sue his son who has succeeded him in the tenure, as his father's successor in the tenure for his father's arrears of rent. RAJA NILMONI SINGH v. MADHAB SINGH, **1 B.L.R. A.C. 195.** (Mar. 308, *R.*; 7 W.R. 178, *Rel.*)

(5)—*Service tenure—Rent in lieu of service—Presumption.*—Where the donee of a service tenure ceased to do any service and paid instead rent which his descendants continue to pay, the proper conclusion is that, no service being required to be performed, the nature of the tenure had become altered from service to rent. RAJAH MAHENDRA SINGH v. JOKHEE SINGH, **19 W.R. 211.**

(6)—*Long possession—Cessation of service—Exemption from payment of rent.*—The mere fact of a long prior possession of a service-tenure on no rent at all gives the holder no exemption from the payment of rent when the service is no longer required or performed. CHUNDER NATH ROY v. BHEEM SIRDAR, **W.R. 1864, Act X, 37.**

(7)—*Private service tenure—Sale for arrears of rent—Legality.*—If a service tenure is of a private nature and personal to the holder of a decree for arrears of rent due thereon, it is liable to be sold in execution of that decree. But the tenure is not liable to sale if the service with which it is burdened is of a public nature. RAJAH NIL MONEE SINGH DEO v. KASHEE MAHTOON, **25 W.R. 206.**

(8)—Srotriyam—*Alienation by holder—Validity.*—A *Srotriyam* conferred for lives is inalienable by the holder for the time being except as to his own life-interest. SUNDRAMURTHI MUDALI v. VALLINAYAKI AMMAL, **1 M.H.C. 465.** [*D.*, 2 M.H.C. 341.]

(9)—*Property attached to office—Death of office holder, effect of.*—In a suit brought by G against S for the recovery of land which had been enjoyed by G's husband, the Kurnam of a village, but which, on his death, had been given to S with the office of Kurnam, where it appeared that the land had been orginally attached to the office, but G's husband for a long time before his death was enjoying the land as his private property, *held* that the miras of the land continued to be attached to the office, notwithstanding that it may have been for sometime enjoyed as private property, that the property being annexed to the office was indivisible, and as the Collector, in ejecting G, appropriated the land to the office by putting it in the possession of the Kurnam whom he appointed in place of her husband, G had no right to recover. M. SESHAIYA v. M. GAURAMMA, **4 M.H.C. 336.** [*F.*, 7 M. 85; *R.*, 12 M. 235, 14 M.L.J. 438.]

(10)—*Enfranchisement—Inam patta does not confer new estate.*—A palayam held on service tenure was not brought under the permanent

Service Tenure—*continued.*

settlement under the provisions of Reg. XXV of 1802. After the death of the last male holder, service was discontinued, and, in lieu thereof and of the reversionary right of the Crown, a fixed quit-rent was imposed and an inam patta issued to the widow, which recognized her title and confirmed it as her absolute property subject to the quit-rent. Under these circumstances, the widow did not take the estate as her self-acquisition, but the enfranchisement was an accretion to what was already an ancestral and heritable estate. NARAYANA v. CHENGALAMMA, **10 M. 1.** [*F.*, 6 M.L.J. 119; *R.*, 21 M. 47, 13 C.P.L.R. 81, 26 M. 339, 30 M. 434, F.B. = 17 M.L.J. 101 = 2 M.L.T. 101; *D.* 23 M. 47.]

(11)—*Lands given for* japam *service—Failure to perform service - No hereditary right to lands—Effect.*—Where lands were granted to person for the *japam* service alone, and he had no hereditary right to them; *held*, that failure to perform the service for a long time entailed dismissal. MUTHU ALAGAPPA v. RAMALINGA GURUKHAL, **8 M.L.T. 364.**

(12)—*Service land—Partition between joint proprietors—Services rendered—Right of shareholder to withdraw his land from burden of service.*—The plaintiff and others were joint proprietors of a certain talook, and under that state of things, a portion of land within the talook was assigned to the defendant by all the proprietors of the talook jointly in consideration of his services throughout the area of the talook as *pasban*, *i e.*, services of a Chowkeedaree character. Subsequently, a butwarra of the talook was effected and the plaintiff, as a result of the butwarra, obtained a certain one-fourth of a share of it, but the whole of the land which the defendant held as consideration for his services fell within the share thus allotted to the plaintiff. The plaintiff now sued to resume or to take back from the defendant three-fourths of his service land upon the ground that, although the defendant was performing exactly the same service which originally constituted the consideration for this land, still he (plaintiff), being a one-fourth shareholder only of the talook, ought not to pay more than a one-fourth share of the consideration for those services, while the effect of the whole service land falling within his putta was that he was made to bear the whole of the burden. *Held*, that, as long as the defendant's services were required and rendered, the plaintiff could not withdraw from the defendant that land which was given to him by all the shareholders together, when they were joint, as consideration for those services. BEECHOCK PASBAN v. KULLAR SINGH. **20 W. R. 369.**

(13)—*Watan—Partition of watan—Cessation of duties attached to watan*—An impartible watan is not rendered partible by the cessation (even though sanctioned by the Government) of the performance of the duties attached to it. SAVITRIBAI v. ANANDRAV, **12 B.H.C. 224.** [*R.*, 6 B. 211.]

Service Tenure—*continued.*

(14)—*Suit for* patilki watan—*Adverse possession—Burden of proof—Discovery of new evidence—Review—Civ.Pro. Code*, 1859, s. 376. —In a suit for a declaration of title to the whole of a *patilki watan*, plaintiffs produced a decree of the Peshwa's Government dated 1722 in which they were declared to be the sole owners of the *watan*. The defendants, on the other hand, produced a decree dated 1742 declaring them entitled to a moiety of the *watan*, and a document dated 1743 in which orders were given that the terms of the decree were to be adhered to; but they were unable to prove that their ancestors had had any concern with the *watan* for a period of 96 years subsequent thereto. The plaintiffs, on the other hand, showed that, during the whole of this period, their ancestors were recognised as sole owners. *Held* that, under the circumstances, the burden of proving uninterrupted possession for more than 30 years prior to the institution of the suit lay on the defendants. [*R.*, 18 P. L.R. 1900.] The High Court refused to grant an application for review of judgment on the discovery of new evidence, as the applicant failed to show that the document brought forward was admissible in evidence, and that it was not within his knowledge or could not have been adduced by him at the time when the judgment was passed. AMRIT RAV v. MANAJI, **3 B.H.C A.C. 49.**

(15)—*Service* vatan—*Hereditary deputy, creation of.*—The plaintiffs in this case claimed the management of a certain *deshpande vatan*, on the ground that they had been created hereditary deputies, by a grant from a previous incumbent. *Held* that the suit was not maintainable because the holder of a hereditary office being simply a tenant for life, the nomination of a hereditary substitute to his successors in the office is an act clearly beyond his competency, and because no appointment of a deputy made by any particular incumbent can have effect beyond the incumbent's life. RAVJI RAGHUNATH v. MAHADEVRAV VISHVANATH, **2 B.H.C. 237.** [*R.*, 12 B. 80, 14 B. 82, 22 B. 422.]

(16)— Majumdari watan — *Inheritance — Female—Act* XI *of* 1843—*Reg.* XVI *of* 1827 — *s.* 20—*Proceeds of* watan—*Collector's power.*— A female can inherit a *majmudari watan* as, since Act XI of 1843, a female is allowed to appoint a deputy to perform service, and, *a fortiori*, in case in which no service is to be performed at all, the interpretation previously put upon s. 20 of Reg. XVI of 1827, that a female could not hold a *majmudari watan*, is no longer applicable. The Collector is competent to order the payment of the whole proceeds of a *watan* to the officiating person. BAI SURAJ v. THE GOVERNMENT OF BOMBAY, **8 B.H.C.A.C. 83.**

(17)—*Service* Vatan *land— Successive life tenants--Cause of action--Practice.*—Where land belonging to a service *vatan*, held on a tenure of successive life estates, passed out of the

Service Tenure—*continued.*

possession of the *vatandars*, the cause of action to recover such land accrues to each successive life tenant, when the previous life tenant dies. KURIA *bin* HANMIA v GURURAV, **9 B.H.C. 282.** [*R.*, 10 B. 34; *Cons.*, 9 B. 198, F.B.; *D.*, 2 B. 120.]

(18)—*Holder of* vatan, *competency of, to create perpetual* mutalik— Vatandar, *whether could exclude his successors from entire management.*— In this suit brought by the plaintiff in 1884 to recover possession from the defendants of certain *vatan* property with profits, the defendants answered that the plaintiff's great grand-father executed, in 1825, a *karar-patra* and *sanad* to the ancestor of the defendants, by which they acquired the hereditary right to keep the whole *vatan* in their possession and management and to take one-third share of the income derived from the same. The lower Court found the defendants' documents not proved, and that the rights set up by them, if any, had ceased on the resumption and subsequent new grant by Government to plaintiff's father in 1864, and passed a decree in favour of the plaintiff. The defendants appealed to the High Court which held that the *kararnamah* and *sanad* were proved and that the Regulation of 1827 forbidding alienations of service *vatan* could not have retrospective effect. The creation of a perpetual *mutalik* with a certain share of the *vatan* as *vritti*, is within the powers of the holder of a *vatan* for the time being, especially when created in return for good and valuable consideration passing to the *vatan*. The performance of service as *mutalik* was not the entire consideration or motive for the grant under the *kararnamah* in this case, nor did the document expressly provide for the grant ceasing with the cessation of the services incidental to the *vatan*. As for the *sanad*, the grantor was held to be incompetent to have excluded his successors in the *vatan* from its entire management, to vest it in the permanent *mutalik* and whilst leaving his successors as absolute owners of the two-thirds, to deprive them of all control over its management. This was virtually attaching an incident to their estate which was inconsistent with its nature, and this he was not competent to do. BHIMAJI BALVANT v. GIRIAPA TIMAPA DESAI, **14 B. 82.** [*F.*, 22 B. 422.]

(19)—*Gordon Settlements with* vatandars *in Southern Mahratta Country, nature of—Service* vatan *land—Alienability*—Vatandars' *Act* III *of* 1874 (*Bombay*).—What is termed a Gordon Settlement was an arrangement entered into in 1864 by a Committee, of which Mr. Gordon, as Collector, was Chairman, acting on behalf of Government—with the *vatandars* in the Southern Mahratta country, by which the Government relieved certain *vatandars* in perpetuity from liability to perform the services attached to their offices in consideration of a "*judi*" or quit-rent charged upon the *vatan* lands Act, III of 1874, s. 15, cls. 2 and 3, gave these settlements binding legal effect. At the time when the Gordon Settements were made service lands

Service Tenure—*continued.*

were regarded as the remuneration of the hereditary officer andmade inalienable by Reg. XVI of 1827 (as construed by the Court) beyond the life of the actual incumbent. It was not the intention of either party to the Gordon Settlements to convert the *vatan* lands into private property of the *vantandars* with the necessary incident of alienability, but to leave them attached to hereditary offices which, although freed from the performance of service, remained in tact, as shown by the definition of "hereditary officer" in the declaratory Act (VIII of 1874). APPAJI BAPUJI v. KESHAV SHAMRAV; KESHAV SHAMRAV v. APPAJI BAPUJI, **15 B. 13.** [*R.*, 11 Bom L.R. 1102=34 B. 91; *D.*, 25 B. 470.]

(20)—*Gordon settlement by Government* — Vatan *service lands—Mortgage by* vatandar—*Effect—Mortgage*—Vatan *property — Adverse possession by trespasser—Limitation—Government effecting "Gordon settlement" with trespasser—Result—Entry by Collector of* vatan *lands in name of trespasser—Succession to* vatan *lands held by trespasser.*—The "Gordon settlement" made by Government (to which legal effect was given by s. 15 of Act III of 1874 (Bombay) was not intended to convert the *vatan* lands into the private property of the *Vatandars*, with the necessary incident of alienability but to leave them attached to the hereditary offices which, although freed from the performance of service, remained in tact. An alienation by way of mortgage of any portion of *vatan* property has no force beyond the life of the *Vatandar* mortgagor. [*Reversed*, 24 B. 556, P.C.] This was a suit to have it declared that a mortgage executed by one K (plaintiff's step-mother) to the defendant's predecessor-in-title was null and void and for possession of the mortgaged villages, or, in the alternative, for redemption of the mortgage, under the following circumstances. In 1847, plaintiff's father died leaving him surviving his two widows K and R. In 1848, plaintiff was born to R. The sevice *vatan* lands of the plaintiff's father had been attached by the Government, because he refused to produce the *sannad* under which he claimed those lands, but a portion thereof was subsequently restored by Government, the same having been entered in the name of K (without Government recognizing the plaintiff as the legitimate son of the owner of the *vatan* lands). The remaining portion of the *vatan* lands was subsequently restored by the Government to K, who was acknowledged as the holder thereof, the agreement with her being under the "Gordon Settlement." Thereupon, K mortgaged two *vatan* villages for Rs. 9,900 to S, the defendants' predecessor-in-title, to whom possession was given and revenues paid by the village officers as per directions of the mortgagor. The mortgagor repented of the transaction subsequently and ordered the village officers not to pay the revenues to S, who brought a suit, obtained a decree and in execution got possession of the property. The plaintiff having quarrelled with K, the latter adopted one B.

Service Tenure—*continued.*

The validity of the adoption was challenged by the plaintiff in a suit in which his legitimacy (as the heir of his father) was established. As a result of this decision in favour of the plaintiff, the Collector entered the *vatan* lands in the plaintiff's name. The plaintiff and S had been moving amicably as long as S was alive. After the death of S, his sons (the present defendants) fell out with the plaintiff. Hence the present suit. On the evidence adduced in the case, it was *held* (1) that the suit property was part of a *desai vatan*, and as such was held on service tenure, (2) that the mortgage by K to S was not valid beyond the life-time of the *vatandar* K who mortgaged it, (3) that K must be considered to be a trespasser for the reason that the plaintiff became the rightful *vatandar* from his birth in 1848, he having established his legitimacy (as the son of his father) the original owner of the *vatan* lands in a Civil Court, (4) that the fact that the Government effected the Gordon settlement, with K (a trespasser) would not have the effect of making her the *vatandar* so long as the plaintiff was alive, (5) that the property having become K's by adverse possession (as a trespasser) the plaintiff's right to recover the property in virtue of his *vatan* right had become barred, and (6) that the plaintiff (as heir of his step-mother K) was entitled to redeem the plaint mortgage which had been proved. SWAMI RAO v. PADAPA *bin* BHUJANGRAV, **18 B. 22.** [*Reversed*, 24 B. 556, P.C.; *D.*, 1 O.C. 174.]

(21)—*Act* XI *of* 1843—*Hereditary officers*—Deshmukh—*Limitation for* deshmukhi vatan *arrears—Act* XIV *of* 1859, *cls.* 12, 16.—By s. 2 of Act XI of 1843, hereditary officers are bound to render the usual services of their respective officers, as far as the same may be required by the Collector or other officer under whose control they may be placed by usage or orders of Government. The usual services of a *Deshmukh* consist in making himself thoroughly acquainted with all circumstances affecting the Land Revenue in his district and in communicating such information to the Mamlatdar or Mahalkari; and he is bound to perform or get performed so much writing business as is necessary for the above purposes and no more. It does not follow from this that he is bound to employ a *karkun* in every kutcheri in his district. He may perform all his duties personally or with the assistance of a single *karkun*. The period of limitation to recover arrears of *deshmukhi watan* is 6 years. RANGOBA NAIK *bin* RAGHOBEE v. THE COLLECTOR OF RATNAGIRI, **8 B.H.C.A.C. 107.**

(22)—*Forfeiture of, by repudiation of tenancy —Ejectment, Suit for—Notice, if necessary—Act shewing intention to determine the lease—Bengal Tenancy Act* (VIII *of* 1885), *ss.* 151, 181—*Transfer of Property Act* (IV *of* 1882), *s.* 106 *and* 111 *cl.* (*g*).—Where the holder of a service tenure renounced the title of his landlord and executed a *kabuliat* in favour of a third party in respect of the whole of the land comprised in the tenure, and the landlord

Service Tenure—*continued.*

brought a suit for ejectment: *Held*, that the case falls within the Transfer of Property Act and not within the Bengal Tenancy Act; that no notice to quit was necessary, as the defendant forfeited his tenancy by denying the landlord's title; but that the landlord, before he can eject the tenant, must do some act or other shewing his intention to determine the lease, and this intention must be shown at some time antecedent to the institution of the suit. ANANDAMOYI v. LAKSHI CHANDRA, **3 C.L.J. 274=33 C. 339.** (2 C.L.J. 403, 17 A. 45, *R.*) [*F.*, 31 M. 403=4 M.L.J. 221.]

(23)—*Land held on service tenure—Alienation without consent of grantor—Cessation of services—Effect.*—The suit lands had been held of plaintiff and his ancestors for a very long period by the defendants and their ancestors upon a service tenure, namely a tenure which bound the tenants from time to time to serve as guards to a certain idol. The grantees, defendants, alienated the lands to strangers without the acquiescence of the grantor, and then ceased to perform the services. Hence this suit for *khas* possession. *Held* that the defendants had forfeited their right to hold the lands at all, and that the plaintiff was entitled to *khas* possession. RAM GOPAL CHUCKERBUTTY v. CHUNDERNATH SEIN, **10 W.R. 289.**

(24)—*Service tenures—Death of tenure holder without heirs—Custom of reversion to grantor.*—In this case, the Judicial Commissioner arrived at the finding on remand that "it is the custom of the country that, on the death of a service tenure-holder without heirs, his *jagheer* reverts to the grantor." The High Court held that on the above finding, the Judicial Commissioner should have recognised the right of the grantor to recover the land on the death of the grantee without heir and accordingly gave the grantor a decree declaring him entitled to resume the two *mouzahs* sued for. RAJAH RAMESSURNATH SINGH v. HURO LAL SINGH, **6 W.R. 87.**

(25)—*Act* IX *of* 1859, *s.* 20—*Confiscation of rebel's property—Claim to mokurrurree tenure—Limitation.*—A mokurrureedar who has fled and abandoned his tenure carved out of a rebel's property, which was taken into the absolute and direct possession of Government under colour of confiscation of the rebel's property, and then assigned to the defendants, is not entitled to recover the tenure, inasmuch as the *mokurrurree* is not an absolute tenure, but one on condition of service to be rendered to the former proprietor, whose estate has been confiscated for rebellion. A suit by a *mokurrureedar* to recover his tenure appertaining to a rebel's estate confiscated by Government is governed by s. 20, Act IX of 1859. BABOO NEPAL SINGH v. RAM SURUN SINGH, **W.R. 1864, 5.**

(26)—*S.* 32, *Bombay Act* VII *of* 1863—*Service watan—Resumption—Succession.*—The payment of a *hak* in respect of a *majumdari watan* though charged on villages is not a

Service Tenure—*continued.*

share of the revenues of the villages, and therefore, Bombay Act VII of 1863 does not apply. The law in the Bombay Presidency recognizes that females can held watan, males being appointed by them to perform the service. THE GOVERNMENT OF BOMBAY v. DAMODHAR PARMANANDAS, **5 B.H.C.A.C. 202.** [*R.*, 8 B.H.C.A.C. 83.]

(27)—*Bombay Act*, VII *of* 1863, *s.* 11, *cl.* 4—*Lands held for service, action regarding tenure of—Jurisdiction — Civil Courts— Competency of local Legislature to curtail jurisdiction of Mofussil Courts.*—It has been enacted by cl. 4 of s. 11 of Bombay Act VII of 1863 (an Act for the Summary Settlement of claims to exemption from the payment of Government Land Revenue) that "no suit or action between the Government and the holders of any *lands held for service*, in regard to the tenure of such lands, shall be entertained in any Court of Civil Judicature." *Prima facie*, the provision in the said cl. 4 is a direct bar to the exercise of jurisdiction by the Civil Courts in such cases. It was contended in this case that the clause applies only to holders of service lands, that the plaintiff denied that his land was subject to provide for service at all and that therefore the clause could not apply to him. But it was held that the phrase 'lands held for service' mean not necessarily lands so described in the plaint, but those declared to be so by Government under the powers conferred by s. 32 (*d*) of the Act. Art. 3 of cl. 3 says that 'service lands shall be resumable under general rules' and, on the provision thus made for some degree of regularity in the determination of claims, it was sought to be contended that the Government was in these cases protected against a civil action only when it had in fact laid down some general rules and conformed to them. It was, however, held that, since the Act has prescribed without qualification that 'no suit or action' shall be entertained as to the tenure of service lands, the jurisdiction cannot be restored by a mere direction in another clause, that Government is to follow general rules such as it "may think proper from time to time to lay down." [*R.*, 8 B. 264, 5 L.B.R. 162, F.B.] The provisions of a statute must generally receive a plain construction liberal enough to admit of the local legislature extending or restricting the powers of the Courts, its own creatures, even though the possible occasions for the exercise of the High Court's jurisdiction may thus indirectly be increased or diminished in number. PREMSHANKAR RAGHUNATHJI v. THE GOVERNMENT OF BOMBAY, **8 B.H.C.A.C. 195.** [*R.*, 8 B. 264, 5 L.B.R. 163, F.B.]

(28)—*Adverse possession — Landlord and tenants' relationship — Registration.*— The plaintiff sued for the resumption of certain lands granted by his ancestors to the first defendant's ancestors in connection with, and as remuneration for, the office of *Mutalik* Desai alleging that the defendant had become unfit for such service, and refused to render service

Service Tenure—*continued.*

though asked to do so; but his suit was dismissed by the lower Court on the ground that as the first defendant had enjoyed the lands without rendering any service for 30 years, his possession was adverse to the plaintiff and barred the claim: *Held*, (remanding the case for a fresh finding), that as the lands were held for service, the fact that no service was performed would not of itself make the holding adverse. *Held*, also, that the render of service was on the same footing as payment of rent, and to make the possession of such lands adverse, there must be a refusal to perform service or a claim to hold the lands free of service. *Held*, also, that a document containing merely a statement of past facts with a promise for the future to act in accordance therewith did not require registration, and was admissible in evidence. *Per Ranade, J.*—The mere fact that lands are held on service tenure makes no change in the relation of landlord and tenant, s. 105 of the Transfer of Property Act expressly classes service with money or grain rents. The rulings in regard to rents apply with equal effect to service tenure lands. In dealing with questions about the resumption of lands held on service tenure, the general principles to be observed have been laid down in *Forbes* v. *Meer Mahomed Tuqee* (13 M.I.A. 438) followed in *Sitaramrazu* v. *Ramchandrarazu*, I.L.R. 3 Mad. 369. KOMARGOWDA v. BHIMAJI, **1 Bom. L.R. 61=23 B. 602.**

(29)—*Grant to village servant—Resumption.*—A grant to a village servant for service is tenable only during the pleasure of the grantors and is resumable by them when they desire to dispense with the services of the grantee, or for any other reason, at their pleasure. But where the grant has been made jointly by the village proprietary body, and the shares are joint and not separate, the grant can be resumed only as a whole and not piecemeal, and it cannot be resumed until proprietors representing the major part of the property of the village desire its resumption. MAZOOLA v. BAHADUR KHAN, **70 P.R. 1868.** [*F.*, 4 P.R. 1877.]

(30)—*Chakeran lands in Bengal—Resumption.*—Chakeran lands in Bengal, held anterior to the Decennial Settlement, under the zemindar of Burdwan, not merely in lieu of wages for personal services to the zemindar, but also for the performance of the duties of village watchman, are not resumable as *Tannahdary* lands by the Government, under s. 8, cl. 4 of Ben. Reg. I of 1793, but are, by s. 4 of Ben. Reg. VIII of 1793, annexed to the *Malguzary* lands, and responsible for the public revenue assessed on the Zemindary. Chowkeedars, or village watchmen, are liable to services to the Talookdar, but chakeran lands held by them for such services are not liable to be resumed by the Talookdar for his own use discharged of the obligation to which they are subject. So held by the Judicial Committee, affirming the judgments of the Zillah and Sudder Courts, in a suit for resumption by the appellant as Talookdar, under a purchase of certain lands from the

Service Tenure—*continued.*

Zemindar of Burdwan, which he alleged to be *Gram Suranjamee* (rent-free village lands), but which were proved to be chakeran lands, appropriated to the maintenance of Chowkeedars in the Talook in which the lands were situate. The right of appointing Chowkeedars belongs to the Talookdar, such officers being liable to the performance of services to the Talookdar: and as by usage in the Zemindary of Burdwan, Chowkeedars had been accustomed to render such services to the Zemindar, the Chowkeedar was held entitled to possession of the chakeran lands under such tenure. JOYKISHEN MOOKERJEE v. THE COLLECTOR OF EAST BURDWAN, **1 W.R P.C. 26=10 M.I.A. 16=1 Suther. 542=2 Sar. 54.** [*Expl.*, 14 W.R.P.C. 28=13 M.I A. 438=5 B.L.R. 529; *R.*, 26 M. 403, 1 C.L.J. 303=9 C.W.N. 571, 34 C. 109 =5 C.L.J. 33=11 C.W.N. 201, 33 C. 596=5 C.L.J. 299=10 C.W.N. 598, 34 C. 753= 5 C.L. J. 583=12 C.W.N. 193, 6 C.L.J. 572, 13 C.W. N. 71.]

(31)—*Resumption—Chakeran or service-lands—Regulation* VIII *of* 1793, *s.* 41.—The lands, the subject of the suit, being certain mehals comprised in a zamindaree, were granted by the Government, before the Permanent Settlement, to the ancestors of the persons through whom the defendants claimed, as a hereditary jagir tenure, in consideration of services which they had rendered to the Government in repressing the incursions of wild elephants upon the cultivated lands of the zemindaree. The plaintiff in 1851 purchased the zemindaree from an auction purchaser at a sale for arrears of Government revenue, and he sued to resume the lands in the jagir, which had been held rent-free by the defendants and those from whom they claimed for nearly a century. *Held* that, notwithstanding that the lands were the subject of assessment when the zemindaree was permanently settled by the Government with the zemindar in 1802, the plaintiff had no right to assess these lands. The settlement between the Government and the zemindar could not affect the rights of the jagirdars, whose rights were derived, not from the zemindar, but from the supreme authority in the State. The lands held on this tenure, even if chakeran, differed from the ordinary chakiran lands contemplated by s. 41, Regulation VIII of 1793. The jagirdars were bound, if occasion required it, to protect the pergunnah from the incursions of wild elephants, and might forfeit the tenure if they wilfully failed in the performance of that duty but were not liable to have their lands resumed, because there was no longer any occasion for the performance of the particular service. ALEXANDER JOHN FORBES v. MIR MAHOMED TAKI, **5 B.L.R. 529, P.C.=14 W.R. P.C. 28=13 M.I.A. 438=2 Suther. 358=2 Sar. 588.** [*F.*, 11 B.L.R. 71, P.C., 26 M. 403; *R.*, 1 B. 586, 6 B. 211, 9 B. 198, 8 A. 552, 12 B. 80, 14 B. 82, 22 C. 938, 22 B. 422, 23 B. 602, 28 B. 305=6 Bom. L.R. 364, 9 C.W.N. 663, 34 C. 753=5 C.L.J. 583=12 C.W.N. 193; *D.*, 3 M. 367, 23 M. 262.]

Service Tenure—*continued.*

(32)—*Possession of lands as* chowkeedaree chakeran—*Presumption of lands having been set apart at Decennial Settlement*— Onus *on zemindar to prove that lands were private lands —Resumption.*—This was a suit for possession of land which the plaintiff alleged to belong to his *mal* lands, but which were in the possession of the chowkeedar of the village as his chakeran lands. The Government who represented the chowkeedar alleged that the lands had always been *chowkeedaree chakeran* lands and as such, could not be taken possession of by the zemindar. The contention on second appeal that, since the Government could not prove that at the time of the Decennial Settlement, the lands had been appropriated to the chowkeedar, the zemindar was at liberty to resume and take possession of them, was not accepted by the High Court which *held* that the *onus* of proof that the lands were private lands of the zemindar, not set apart at the Decennial Settlement for the maintenance of the chowkeedar, rested on the plaintiff, the zemindar. It was not for the Government to prove that they were then set apart as *chowkeedaree* lands. The presumption from the facts admitted in this case, more especially from the long possession of the lands as *chowkeedaree chakeran* by the chowkeedar, was that the lands were set apart at the Decennial Settlement for the chowkeedar. MOOKTAKESHEE DEBIA CHOWDHRAIN v. THE COLLECTOR OF MOORSHEDABAD, **4 W.R. 30.**

(33)— Bhoomear *tenures, not resumable — Duty of* Bhoomears *to render customary services.* —Plaintiffs instituted this suit alleging that defendants, who were aboriginal *Bhoomears* holding land on the *Bhoomear* tenure according to the custom in Chota Nagpore, were mere modern settlers in their village. It was found however, that they were the ancient *Bhoomears* of the village holding rent-free on a hereditary tenure which plaintiff was not entitled to interfere with, and, it was *held* that the defendants, as *Bhoomears*, were bound to render certain customary services, but the lands held by them were not liable to resumption. GOPALNATH TEWAREE v. BHOOYAH ORANOO, **6 W.R. 137.**

(34)—Ghatwalee *lands*—Jaghirs *and rent-free tenures, whether could be granted by zemindar—Resumption.*—The plaintiff in this case sued to recover possession of the disputed lands upon the ground that they were subject to a tenure for private services to be rendered to the zemindar and that such tenure had been forfeited in consequence of the defendant not having rendered such services. The case was not one for the resumption and assessment of invalid *lakheraj*; upon the facts found by the lower Court the plaintiff had not made out any case and had not shown that the defendant held under a tenure upon which private services were reserved so that the tenure was forfeited on account of the refusal of the defendant to perform such services: the High Court accordingly confirmed the decree of the lower appellate Court in favour of the defendant. Also the

Service Tenure—*continued.*

tenure had existed before the lands were settled with the zemindar and the lands had been described there as *jaghirs*. If so, they must have been created by the British or the Native Government before the grant of *dewanee*, and a zemindar had no power, before the Permanent Settlement to grant a rent-free tenure or the tenure at a less rent than the share of the produce payable to Government for revenue, nor had he power to grant *jaghirs*. RAJAH NILMONEE SINGH DEO v. THE GOVERNMENT, **6 W.R. 121.** [*Affirmed on appeal*, 18 W.R. 321; *R.*, 5 C. 339, 9 C. 187, P.C., 12 C.W.N. 178.]

(35)—*Service tenure—Quit-rent—Lapse of tenure—No need for service—Effect.*—As an ordinary rule, if land is given on a quit-rent or no rent at all in consideration of service to be performed, the tenure would lapse when those services ceased. *Quæe*:— Where no service has been required or performed for a long series of years, and the tenure has been allowed to be held at a quit-rent or no rent at all, whether there has not been such a waiver of service as puts it out of the power of the grantor to resume the tenure simply on the ground that he has now no need of the service for which the tenure was originally created? *Quære*:—Also when land is given at quit-rent on condition that the grantee shall aid the grantor in repelling the attacks of his enemies, or any other particular purpose, whether, while the grantee is willing to render these services, the grantor can put an end to the contract by saying that he has no enemies to repel, and therefore no need of the grantee's further services. MAHARAJAH NILMONEY SING DEO v. SHEO TEWARY, **W.R. 1864, 324.**

(36)—*Zemindar—Service tenure — Resumption of land.*—A zamindar is *prima facie* entitled to resume lands granted to persons on condition of their rendering services and paying a certain sum to the grantor, when these services are dispensed with. The zamindar may also, at his pleasure, enhance the quit-rent. SANNIYASI RAZU v. SALUR ZAMINDAR, **7 M. 268.**

(37)—*Service tenure tenant alleging gift—Resumption, Right to, not traversed—Kattubadi, Enhancement of—Inam— Zamindar's rights.* —Where the tenant, under a service tenure, alleged a gift and did not traverse the allegation of the Zamindar that he was entitled to resume the grant when the services were not required and the kattubadi was enhanced on one occasion, there was evidence to warrant the conclusion that the village was neither 'Inam' nor granted in perpetuity burdened with a certain service? In such a case, when the services were not required, the Zamindar could enhance the kist and recover it. SITARAMARAZU v RAMACHUNDRARAZU, **3 M. 367.** [*R.*, 14 M. 365, 23 B. 602.]

(38)—*Lands burdened with service—Cessation of service—Tenure not determined—Lands as remuneration of service—Right of grantor to resume.*—Where there is a grant of lands

Service Tenure—*continued.*

burdened with some service, the tenure does not determine on the cessation of the service, if the instrument of grant does not contain any such express provision. But, where the grant is of an office the performance of whose duties is remunerated by the use of certain lands, *prima facie*, the grantor would be entitled to resume the lands if the service ceased. KEVAL KUBER v. THE TALUQDARI SETTLEMENT OFFICER **1 B. 586.** [*R.*, 6 B. 211, 9 B. 198, F.B.]

(39)—*Resumption of estate by Government—Political tenure—Mixed estate of* saranjam *and* inam.—The engagements entered into by the English Government with the Raja of Satara and with the several Jaghirdars by treaty in 1819, did not impart any greater fixity of tenure than had been previously enjoyed by those Jaghirdars under the Native Rulers, and their Jaghirs remained liable to resumption at the will of the Government, although from reasons of political expediency, the English authorities would not be disposed to add to the disturbance and confusion attending a conquest by dispossessing the holders of property to any greater extent than was necessary for safety. The question to whom a *saranjam* or jaghir shall be granted upon the death of its holder is one which belongs exclusively to the Government, to be determined upon political considerations, and it is not within the competency of any legal tribunal to review the decision which the Government may pronounce. The *inam* villages and lands with the *mokasa* included as parts of one *saranjam* for the support of troops remained after 1820, a personal and military jaghir. The tenure created was political. A mixed estate of *saranjam* and *inam* was granted by the treaty of 1820 to be held on the same political tenure, and passed intact to the person whom the Government might recognize as the head of the family, so that it would not be competent for any Court of law to dispute it. SHEKH SULTAN SANI v. SHEKH AJMODIN, **17 B. 431, P.C. = 20 I.A. 50 = 6 Sar. 52.** [*R.*, 5 Bom. L. R. 983, 34 B. 329 = 12 Bom. L.R. 208.]

(40)—*Service tenures— Resumption—Notice to quit—Resumption of service lands.*—A service tenure created for the rendering of services, private or personal to the zemindar, is resumable, when the services are dispensed with by the zemindar or refused to be performed by the holder. (7 M.I.A. 128, 13 M. I.A. 438, 13 B. L.R. 124, 18 W.R. 321, S.D.A. 1857, p. 1772, 4 C. 67, 7 M. 268, 14 M. 365, *R.*) [*F.*, 2 C. L.J. 403; *R.*, 23 M. 262, 8 C.W.N. 904, 34 C. 753 = 12 C.W.N. 193 = 5 C.L J. 583.] A holding of lands (granted for services), without rendering the services, for more than 12 years, does not legitimately lead to the inference that the tenure is of a permanent character; but the grantor cannot, in such cases, resume the lands, without giving a proper notice to quit. *N.B.*—The distinction between the grant for services of a public nature, and one

Service Tenure—*continued.*

for services, private or personal, to the grantor, and the distinction between the grant of an estate burdened with a certain service, and that of an office, the performance of whose duties is remunerated by the use of certain lands, pointed out. RADHA PERSHAD SINGH v. BUDHU PARSHAD, **22 C. 938.** [*F.*, 2 C.L.J. 403; *R.*, 23 M. 262, 8 C.W.N. 904, 34 C. 753 = 12 C.W.N. 193 = 5 C.L.J. 583.]

(41)—*Resumption of land—Notice.*—Where land held on service tenure is resumable at the will of the grantor, the tenure-holder cannot be dismissed and the lands resumed without reasonable notice being given. LAKSHMI v. CHENDRI, **8 M. 72.** [*R.*, 8 C.W.N. 904.]

(42)—*Ejectment—Notice—Service, refusal to perform—Bengal Tenancy Act* (VIII *of* 1885), *ss.* 155, 181—*Practice—Remand—New point.*—The tenant of a service-tenure, who refuses to perform his services, is liable to be ejected, even without a notice to quit. (4 C. 67, 22 C. 938, *F.*) It is an incident of a service-tenure that the holder thereof is liable to ejectment upon refusal to perform service; as this incident would be materially affected, and practically destroyed, if the provisions of s. 155 of the Bengal Tenancy Act, relating to relief against forfeiture, were made applicable, service tenures must be held to be excepted from the operation of s. 155 by virtue of s. 181 of the Bengal Tenancy Act. (25 C. 131, *Appl.*) When a case has been remanded by an appellate Court, in an appeal against the decision given after the remand, fresh points which might and ought to have been urged before the remand, cannot be allowed to be taken. ANSAR ALI JEMADAR v. C. E. GREY, **2 C.L.J. 403.** [*R.*, 33 C. 339 = 3 C.L.J. 274, 5 C.L.J. 53, 11 C.W. N. 46 = 5 C.L.J. 593.]

(43)—*Under-tenants, if can acquire occupancy, —Ejectment—Notice to quit.*—When land was granted to a person as a service-tenure, the condition being that he was to hold it in lieu of services to be performed by him as Chowkidar; *held*, that tenants under him did not acquire occupancy right by holding the land for more than 12 years. *Held*, further, that, on the death of the grantee, the grantor was entitled to sue the under-tenants in ejectment without previously serving them with notices to quit. MRITUNJOY ROY CHOWDHRY v. KENATULLAH NARYA, **11 C.W.N. 46 = 5 C.L.J. 53.** (2 C.L.J. 403, *R.*)

(44)—*Service tenure—Refusal to perform service—Forfeiture—Co-sharer landlord—Suit for ejectment—Transfer of Property Act, s.* 111.—A co-sharer landlord of a service tenure is not entitled to a decree for ejectment to the extent of his share, that is, to *khas* possession with the defendant, the holder of the tenure, who refused to perform the stipulated service for the plaintiff, the co-sharer landlord, without proving that the whole body of landlords have, by some overt act, for instance, a notice to quit taken advantage of the forfeiture, that is, have

Service Tenure—*continued.*

done some act showing their intention to determine the lease. ATUL CHANDRA MAJUMDAR v. BEJOYA DHUPI, **11 Ind. Cas. 695.**

(45)—Mokhasa *tenure, meaning of—Circuit Committee — Proceedings if evidence.*—The tenure known as "*Mokhasa*" is one, which was created by an assignment of a village or land to an individual, either rent free or at a low quit-rent on condition of service. Where such a tenure was created as a grant subject to a burden of service and not merely as a grant in lieu of wages, so long as the holder of the grant is willing and able to perform the service, the Zemindar has no right to put an end to the tenure whether the service is required or not. (13 B.L.R. 124=1873 I.A. Sup. Vol. 181, *F.*) The proceedings of the Circuit Committee of 1786 is good evidence, with reference to the system upon which the Government claimed to deal with the zemindar's property but they cannot affect the rights of the "Mokhassadars" as against the Zemindars. SRI RAJA VENKATA NARASINHA APPA RAO BAHADUR v. SRI RAJA SOBHANADRI APPA RAO BAHADUR. **3 C.L J. 1=10 C.W.N. 161=3 A.L.J. 53 =8 Bom. L R. 1= 16 M.L J. 1=1 M.L.T. 3, P.C.=29 M. 52=33 I.A. 46=8 Sar. 897.**

(46)—*Land held by performance of services—Ejectment — Consideration — Occupancy right and service tenure.*—Where land was held by the performance of services, and the holders refused to perform those services, the consideration for their being allowed to continue in possession would wholly fail, and they would be liable to be ejected, however long they might have held the lands. *Obiter* :—Tenants holding by a service tenure cannot acquire a right of occupancy. HURROGOBIND RAHA v. RAMRUTNO DEY, **4 C. 67.** [*F.*, 2 C.L.J. 403 ; *R.*, 22 C. 938, 1 C.L J. 16, Note.]

See BEN. ACT X OF 1871, s. 3, 7 C.L.R. 373.

See BEN. ACT VIII OF 1885, ss. 89, 181, 25 C. 131.

See BOM. ACT III OF 1874, s. 13, 19 B. 250.

Lands held under amaram tenure—Stoppage of performance of military service—Reasonable notice necessary before resumption of lands—*See* EJECTMENT, SUIT FOR, 26 M. 262.

See GHATWALI TENURE, 10 W.R. 255.

See GRANT—CONSTRUCTION, 4 B.H.C. A.C. 1, 15 B. 222=18 I.A. 22, P.C.

See GRANT—MISCELLANEOUS, 18 W.R. 321.

See JURISDICTION OF CIVIL COURTS, 12 B.H.C. 232.

Suit to eject a tenant holding under a service tenure —Jurisdiction—*See* LANDLORD AND TENANT—EJECTMENT, A.W.N, 1893, 224.

Suit for resumption of—Landlord and tenant —*Res judicata*—Civ. Pro. Code, ss. 13, 43—Dispensing with service—Enhancement of rent —*See* LANDLORD AND TENANT—TENANT'S LIABILITY FOR RENT, 14 M. 365.

Service Tenure—*concluded.*

Tenant renouncing character as service tenant—Notice—*See* TRANSFER OF PROPERTY ACT, 1882, s. 111, 2 Ind. Cas. 993.

Service Vatan.

See BOM. ACT III OF 1874, s. 13, 19 B. 250.

See LIMITATION ACT, 1908, art. 144, 9 B. 198, F.B.

Of mortgage—*See* MORTGAGE—REDEMPTION, 2 Bom. L.R. 211=24 B. 482.

Sessions and Joint Zilla Judges.

See ACT XXIX OF 1845.

Set-off.

See CIV. PRO. CODE, 1908, O. VIII, rr. 6, 7.

See CIV. PRO. CODE, 1908, O. XXI, rr. 18, 19.

(1)—*Set-off—Principles of English Courts of Equity or of Roman Law of compensation applicable—No weight given to statutes of set-off.*—The High Court would deal with the questions as to set-off on the principles of English Courts of Equity or of the Roman Law as to compensation and would give no weight to objections derived from the peculiar language of the statutes of set-off. RAM GOPAL v. MAJETI MALLIKKARJANUDU, **1 M.H.C. 396.** [*F.*, 7 N.W.P. 157.]

(2)—*Civ. Pro. Code*, s. 111—*Set-off—Extent to which set-off may be allowed.*—The provision in the Civ. Pro. Code, in regard to set-off is one regulating procedure, and not intended to take away any right of set-off, whether legal or equitable, which parties would have had independently of it; and the right of set-off will be found to exist not only in cases of mutual debts and credits, but also where the cross-demands arise out of one and the same transaction, or are so connected in their nature and circumstances, as to make it inequitable that the plaintiff should recover, and the defendant be driven to a cross-suit. (N.W.P. 1875, p. 157, 4 M.H.C. 120, 4 B. 407, *F.*) [*R.*, 15 A. 9, 85 P.R. 1908=80 P.W.R. 1908=130 P.L.R. 1908.] In such cases, the set-off claimed by the defendant may be allowed in its entirety, and not simply to the extent of defeating the plaintiff's claim, so that the defendant may obtain a decree, for the excess of his claim over that of the plaintiff. (*Oldfield, J.*) Where the set-off claimed cannot be brought under the provisions of s. 111, the defendant cannot be allowed to obtain a decree against the plaintiff, having paid no Court-fees on that account. (*Duthoit, J.*) PRAGI LAL v. MAXWELL, **7 A. 284=A.W.N. 1885, 40.**

(3)—*Right of set-off—Circumstances under which right arises—Defendant putting in evidence written contract liable to an optional stamp—Plaintiff's right, effect on.*—The right of set-off exists where there are cross demands arising out of one and the same transaction, or where they are so connected in their nature and

Set-off—*continued.*

circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit. [*F.*, 7 A. 284; *R.*, 4 B. 407, 10 A. 587, 15 A. 9, 24 C. 908=1 C. W.N. 597.] Where a written contract liable to an optional stamp is put in evidence by the defendant, the plaintiff cannot recover a larger amount under it than (if stated) the optional stamp upon the instrument would have been sufficient to cover. T. KRISHNASAMY PILLAI v. THE MUNICIPAL COMMISSIONERS, **4 M.H. C. 120.** [*F.*, 2 N.W.P. 465.]

(4)—*Civ. Pro. Code*, 1882, *s.* 111.—In order that the principle of set-off may apply, it is necessary that the parties must fill the same character with regard to both claim and *set-off*, and that the nature of the opposed rights must have some sort of identity. MULA KUAR v. ULFAT SINGH, **A.W.N. 1886, 172.**

(5)—*Decree—Set-off—Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 209—*Scope.*—S. 209, Act VIII of 1859, which allowed a set off, refers not only to cases of decrees of the same Court, but also to decrees *in* the same Court. HADOO SIRDAR v. JADOO MONEE DOSSEE, **17 W.R. 46.**

(6)—*Set-off, Requirements of.*—It is essential to the validity of a set-off that the debts should be mutual, due from and to the same parties, and in the same right. BHOIRUB CHUNDER DOSS v. HAFEZUNISSA KHATOON, **2 C.L.R. 144.**

(7)—*Set-off—General cases—Joint and separate debts—Mutual dealings.*—A had dealings with a firm consisting of a father and two sons, who carried on business jointly. Shortly after the father's death, the two brothers separated, and A dealt with each separately, having notice of the separation. A could not set-off against a claim made by one of the brothers, in respect of the separate dealings between himself and A, a debt due to himself from the former joint concern. DHUNPUT SINGH v. FORBES, **1 Ind. Jur. N.S. 354.**

(8)—*Civ. Pro. Code, s.* 111—*Set-off.*— In order to entitle a defendant to plead a set-off, the debt to which it relates must be an ascertained sum of money due and owing to the defendant by the plaintiff, out of a transaction in which mutual credits are directly proper by reason of their being in respect of the same right. ABUL HASAN v. ZOHRA JAN, **5 A. 299 =A.W.N. 1883, 45.** [*R.*, 16 C.P.L.R. 118.]

(9)—*Set-off, equitable—Transactions not same but distinct—Whether set-off may be allowed.*—Where S sued to recover a sum of money due from M as balance of a commission agency account, and M claimed to set-off an amount due to him by S as damages in respect of two contracts of sale of grain to S. *Held*, that M's claim of set-off, though of an unascertained amount, could be allowed, by way of equitable set-off. The equity of set-off arises out of the recognition of the natural justice of allowing the balance only to be recovered in cases where there have been mutual credits. The Courts

Set-off—*continued.*

will take hold of a very slight thing in order to give effect to this equity and to do justice. The rule of set-off is not confined only to cases where the cross-demands are connected by being part of the same transaction or series of transaction, but applies also to cases where the transactions are distinct, if the one party has given credit to the other on the faith of goods deposited by the other party with him. SHIVANDAS BUDHARMAL v. MULOMAL, **6 S.L.R. 138=19 Ind. Cas. 390.**

(10)—*Civ. Pro. Code* (*Act* X *of* 1877), *s.* 11—*Claim for unliquidated damages, whether can be set off—General right of set-off, how far affected by the Code of Civil Procedure.*—Under the provisions of the Civ. Pro. Code (Act X of 1877), claims for unliquidated damages are not capable of being set-off, but neither that Code nor the Code of 1859 was intended to take away any right of set-off, whether legal or equitable, that the parties would have independently of its provisions. KISHORCHAND CHAMPALAL v. MADHOWJI VISRAM, **4 B. 407.** [*F.*, 11 C. 557, 7 A. 284; *R.*, 10 A. 587, 15 A. 9, 18 B. 717, 21 B. 126, 29 M. 336=16 M.L.J. 395=1 M.L.T. 153.]

(11)—*Set-off — Sum not ascertained.*— No decree can be passed in favour of a defendant by way of set-off for a sum to be ascertained and which may possibly be found out by an enquiry in the suit of the plaintiff, when, as a matter of fact, it is found that nothing is due to the plaintiff. HURO SOONDUREE DOSSEE v. BUNGSEE MOHUN DOSS, **5 W.R. Mis. 32.**

(12)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 121—*Set-off—Unascertained damages for breach of contract.*—In a suit to recover the amount due on certain dishonoured hundies, the defendant cannot, under s. 121, Act VIII of 1859, claim a set-off for damages in respect of an alleged breach of contract which have not been ascertained. RAM DYAL v. RAM DHUN DASS, **3 Agra 43.**

(13)—*O.* VIII, *r.* 6, *O.* XX, *r.* 19 (= *Civ. Pro. Code, Act* VIII *of* 1859, *ss.* 121, 195) — *Set-off — Effect of provisions of Code in enlarging right of set-off — Suit on bill of exchange — Right of defendant to set-off claim for unliquidated damages.*—While the language used in ss. 121, 195 of Act VIII of 1859 had not the effect of enlarging the the right of set-off, the provisions of the Code were not intended to take away any right of set-off, whether legal or equitable, which parties would have had independently of its provisions. The right of set-off exists not only in cases of mutual debts and credits, but also where cross-demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it in equitable that a plaintiff should recover and the defendant be driven to a cross-suit. Plaintiff sued to recover the amount due under certain bills of exchange, and the defendant sought to set-off a claim for unliquidated damages not connected with the bills of exchange. *Held* that the

Set-off—*continued.*

defendant had no right to set off the claim against the amount sued for and his only remedy was by way of a cross suit for any damages to which he might be entitled. STEPHEN CLARK v. RUTHNAVALOO CHETTI, **2 M.H.C. 296.** [*F.*, 17 W.R. 177, 11 C. 557, 16 C. 711; *R.*, 4 M.H.C. 120, 7 N.W.P. 157, 4 B. 407, 15 A. 9, 21 B. 126, 24 C. 908, 8 C W.N. 174, 16 C.P.L.R. 118, 32 C. 576=2 C.L.J. 73.]

(14)—*O.* VIII, *r.* 6, *Civ. Pro. Code*, 1908—*Set-off—Sum ascertained—Right to sue—Joint—Not several.*—The defendants in a suit cannot claim to set off, as against the plaintiffs, a sum for which they could not have sued without making another person a party to the suit. UMA NATH DAS v. MONSUR ALI HOWLADAR, **11 C.L.J. 406=14 C.W.N. 786=5 Ind. Cas. 570.**

(15)—*O.* VIII, *r.* 6, *Civ. Pro. Code*, 1908—*Kinds of set off—Washerman not returning articles made over to him—Right to set off value of articles against his wages.*—There are two kinds of set-off: (1) statutory, and (2) equitable. Statutory set-off can be claimed as of right under O. VIII, r. 6. Civ. Pro. Code. But this provision of the law is not exhaustive, and does not take away any rights of equitable set-off which parties would have independent of it. Such set-off should be allowed only where the Court deems it equitable to allow it. So if a washerman loses some of the articles given to him to wash, his employer is entitled equitably to set off the price of those articles when paying him his wages. MAIDEN v. BHONDU, **77 P.R. 1910=108 P.W.R. 1910=145 P.L.R. 1910=7 Ind. Cas. 1006.**

(16)—*Civ. Pro. Code*, 1882, *s.* 111 (= *O.* VIII, *r.* 6, *new Code*)—*Scope of—Right to set off—English Law.*—S. 111, Civ. Pro. Code, 1882, is not exhaustive of the circumstances under which a right to set-off may arise; nor is such a right restricted to circumstances under which it would arise under English Law. (2 M.H.C. 296, 4 M.H.C. 120, 4 B. 407, 7 A. 284, 11 C. 557, 16 C. 711, *R.*) Where the plaintiff agreed to purchase from the defendant certain timber, and after paying part of the price and taking delivery of some part of the timber, refused to take delivery of the rest, and sued the defendant to recover part of the price paid by him, on the ground that the portion of timber delivered to him was not of the quality contracted for, *held* that the defendant in the suit could claim by way of set-off compensation for the loss sustained by him in the re-sale of that portion of the timber of which the plaintiff refused to take delivery, because the cross demand in this case arose out of the same transaction. NIAZ GUL KHAN v. DURGA PRASAD, **15 A. 9=A.W.N. 1892, 115.** [*F.*, 27 A. 145=A.W.N. 1904, 193=1 A.L.J. 529; *Expl.*, 19 A.W.N. 143; *R.*, 85 P.R. 1908=80 P.W.R. 1908=130 P.L.R. 1908.]

(17)—*Denial of plaintiff's claim and plea of set-off.*—A defendant may deny the plaintiff's claim and also plead a set-off, and may obtain

Set-off—*continued.*

a decree for it, although no sum may be found due to the plaintiff. HAYATKHA v. ABDULAKHA, **B.H.C.A C. 151.** [*R.*, 130 P.L.R. 1908=85 P.R. 1908=80 P.W.R. 1908.]

(18)—*Defendant pleading set off—Defendant to be treated as plaintiff.*—Where a defendant raises a claim of set-off, he must, on the trial of that issue, be considered as plaintiff. SRIMATI JAGADAMBA DASI v. J. M. GROB, **5 B.L.R. 639.**

(19)—*Res judicata—Set-off of claim already dismissed.*—The plea of set-off is one form of bringing a suit, and the defendant, as regards such plea, becomes, in fact, the plaintiff, and the real plaintiff is allowed an opportunity to answer to the plea set up in defence. A person cannot be allowed to set up again, as defendant, the same claim for which he had already brought a suit as plaintiff, and which suit had been dismissed. ABDOOLLAH KHAN v. SREEKUNTO PERSHAD HAJRAH, **15 W.R. 252.**

(20)—*Civ. Pro. Code, s.* 111—*Set-off—Written statement—Plaint—Stamp-duty.*—A distinction ought to be made between the character in which a liability is sought to be enforced and the conditions of the liability in that character. Unless the defendant admits that the debt he seeks to recover is not legally recoverable from the plaintiff, the plea of set-off must be allowed to be set up and proved, and ultimately allowed or disallowed according as the cross-debt is or is not shown to be recoverable from the plaintiff. [*R.*, 16 C.P.L.R. 118.] A written statement containing a claim of set-off must be regarded as a plaint in regard to such set-off, and should be stamped accordingly. CHENNAPPA RAI v. RAGHUNATHAYA, **15 M. 29=1 M.L.J. 598.**

(21)—*Civ. Pro. Code*, 1882, *s.* 111—*Set off—Pecuniary limits of Court's jurisdiction.*—The amount claimed to be set off must be within the pecuniary limits of the Court's jurisdiction for the Court to order the defendant's demand to be set off against that of the plaintiff. THAKAR DAS v. NAND LAL, **17 P.R. 1890.**

(22)—*Civ. Pro. Code, s.* 121—*Set-off, when allowed—Jurisdiction—Set off—Appeal—Subject-matter of suit—Jurisdiction.*—S. 121, Civ. Pro. Code, allows a defendant in a suit for a debt to set off against the claim of the plaintiff the amount of any debt due to him from the plaintiff, subject to the proviso that, if the sum so claimed to be set off exceeded the amount cognizable by the Court, the defendant shall not be allowed to set-off the same unless he abondons the excess. From this proviso it follows that a Court cannot entertain the question of set off if the amount claimed by the defendant exceeds the amount cognizable by it. When a defendant pleads a set-off and claims a decree, the subject-matter of the suit is no longer the mere claim of the plaintiff, but the cross-claims of both parties. Consequently, if the claim of the defendant was for a sum in excess of Rs. 5,000 the forum of appeal would

Set-off—*continued.*

be the High Court and not the Court of the District Judge. RAM LAL v. LANCASTER, **3 N.W.P. 114.**

(23) — *Set-off claimed exceeding pecuniary limits of Court's jurisdiction—Maintainability of the suit.*—A suit which is cognizable by a certain Court as being within the pecuniary limits of its jurisdiction should be disposed of by the Judge presiding over it, irrespectively of the question whether a set-off claimed by the defendant in that suit is in amount beyond his jurisdiction to entertain. KISHEN SAHAI v. BEHARI LAL, **A. W. N. 1885, 7.**

(24)—*Expl.* 1, *s.* 18, *Act* XV *of* 1882 (*Presidency Small Cause Courts*)—*Set-off exceeding pecuniary limit.*—A Presidency Small Cause Court cannot allow a set-off if the amount sought to be set off exceeds the amount of its pecuniary jurisdiction. BROJENDRA NATH DAS v. THE BUDGE-BUDGE JUTE MILL & CO., **20 C. 527.** [*R.*, 19 A.W.N. 143, 17 C.P. L. R. 139.]

(25)—*Small cause suit in Court of Subordinate Judge invested with small cause powers—Set-off claimed for amount in excess of Court's small cause jurisdiction, triable in exercise of ordinary jurisdiction—Civ. Pro. Code*, 1882, *s.* 111.—In a small cause suit instituted in the Court of Subordinate Judge invested with small cause powers, defendant claimed to set off an amount exceeding the small cause pecuniary jurisdiction of the Judge, and it was held that there was no objection to the Subordinate Judge trying the set-off. He was not the Judge of two Courts but only had two jurisdictions, and could exercise his small cause jurisdiction in trying the plaint claim and his ordinary jurisdiction in trying the set-off. Further, as regards the procedure to be observed, he was governed by the Civ. Pro. Code, and could set off the one debt against the other as provided by s. 111 of the Code. RAMPRATAP v. GANESH RANGNATH, **12 B. 31.** [*D.*, 31 B. 314=9 Bom. L. R. 327.]

(26)—*Civ. Pro. Code*, 1859, *s.* 121—*Set-off—Pleadings—Written statement showing particulars.*—A defendant desirous of setting-off, under s. 121 of Act VIII of 1859, against the calim of the plaintiff, the amount of any debt due to him by the plaintiff for any payment by him on plaintiff's account, is bound to tender a written statement containing the particulars of his demand. POORNO CHUNDER ROY v. BEHAREE LALL MOOKERJEE, **14 W. R. 473.**

(27)—*Act* VIII *of* 1859, *ss.* 121, 195—*Demands arising out of same transaction—Set-off—Cross suit.*—Where the right of set-off claimed arose out of one and the same transaction as that in which the suit originated, it would not be equitable to drive the defendant to a croes suit. The decree of the Court in respect of the sum awarded to the defendant under s. 195 of Act VIII of 1859 and the latter portion of s. 121 is of the same effect and subject to the same rules as if this sum had been claimed in a separate suit by the defendant. RADHA RAM DEB v. JAMES, **20 W.R. 410.**

(28)—*Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 202—*Award of private arbitration—Set-off.*—An award of private arbitration *per se* does not come under the provisions of s. 202 of Act VIII of 1859 so that it can be set off against a decree of Court. DHEERAJ SINGH v. DEEN DYAL SINGH, **11 W.R. 144.**

(29)—*Suit for money for carriage of goods by plaintiff — Defendant whether entitled to set off on account of damage to goods.*—Plaintiff claimed money from defendant, as agent of a tea Company on account of the carriage of certain goods, including a batch of tea; defendant pleaded not indebted and also a set-off to the amount claimed by plaintiff on account of damage caused, through plaintiff's neglect, to the above mentioned batch of tea. *Held* that the defendant could not answer the claim with the set-off, on account of damage sustained in regard to the batch of tea. The question as to what extent, if any, defendant was entitled to draw back, on account of the failure of the plaintiff to deliver the tea entrusted to him in good condition, might be put in issue, but after the decision of such issue it would still be open to the defendant to bring an action against plaintiff for any special damages sustained by him owing to plaintiff's negligence. SCANLAN v. HERROLD, **10 W.R. 295.** [*Appl.*, 2 A. 252.]

(30)—*Civ. Pro. Code*, 1882, *s.* 111 (=*O.* VIII, *r.* 6, *new Code*)—*Set-off—Suit for balance of account.*—Government leased a bridge of boats over the Ganges to A for five years for a certain sum to be paid by instalments extending over the term of the lease. There were also provisions in the lease to the effect that the Government may at the expiration of the term, farm this bridge to any other contractor, taking over the lessee's plant at a fair valuation to be determined by arbitration, and also that "if the Government should see fit to cancel the lease during its currency with a view to substitute a pontoon bridge, or for any other cause for which the lessee is not responsible, he will be entitled to full compensation from Government for all losses." A died before the expiry of the lease, and the District Magistrate, acting on behalf of Government, seized all the stock and materials and deprived A's representatives of the use of the bridge. The Magistrate then directed two gentlemen to assess the value of the stock, and adding a certain percentage to their assessment fixed the value at a certain sum. Then a suit was filed on behalf of Government against the representatives to recover the balance of money due under the lease after giving credit to the defendants for the assessed value of the stock. *Held* that the sum assessed in the manner described above could not be strictly considered as a set-off, that the suit was one for balance of account, and that the

Set-off—*continued.*

defendants, therefore, were entitled to question the correctness of the value assessed on the stock and credited in their favour. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. MADARI LAL, **13 A. 296, F.B.=A.W.N. 1891, 85.**

(31)—*Account stated — Claim of different natures—Set-off—Procedure.*—It is not equitable to allow a set-off against a claim relating to a particular account, of a matter of another nature altogether. A Court should not go into the question of set-off in a suit for money due upon an account stated, but must confine itself to giving the plaintiff a decree for the amount which may be found due upon the account stated. KALEE KOOMAR CHUCKERBUTTY v. HURO CHUNDER CHUCKERBUTTY, **17 W.R. 177.**

(32)—*In partition suits.*—In suit for accounts in partnership or partition suits, each party however arrayed formally becomes in turn either plaintiff or defendant; and a decree may be passed in favour of the defendant, although he has not claimed a set-off. NANCHAND v. MUSSA, **6 Bom. L.R. 692.**

(33)—*Civ. Pro. Code*, 1882, *B.* 111—*Set-off—"Legally recoverable"—Company — Liquidation—Director—Companies Act* (VI *of* 1882), *s.* 214.—The words "legally recoverable" in s. 111 of the Civ. Pro. Code, 1882, have no reference to the ability of the debtor to pay the demand in full; and a sum is legally recoverable though in the result the creditor must be satisfied with a dividend. In an action by a Company to recover a sum fraudulently obtained by the defendants before the liquidation of the Company, one of the defendants claimed set-off against the Company a debt from the company to him incurred prior to the commencement of the ewinding up: *Held*, that the defendant could set-off the debt due to him, though the amounts of the debts were ascertained after the liquidation, as the debts which were sought to be set off one against the other were debts between the same parties, and in the same interest and neither resulted from a dealing with the liquidator. A director can set off a debt due to him from the Company in an action brought against him by the Company though he cannot set off a debt due to him against a claim made by a liquidator under s. 214 of the Indian Companies Act. AHMEDABAD ADVANCE S. & W. CO. v. LUXMISHANKER, **7 Bom. L.R. 246=30 B. 173.**

(34)—*Act* VIII *of* 1859, *s.* 121—*Suit for mesne profits—Set-off.*—A suit for mesne profits not being a suit for a debt within the meaning of s. 121, Act VIII of 1859, a set-off is not admissible in such a suit. ROTEE RUMUN OOPADHYA v. GREEJA NUND OOPADHYA, **5 W.R. 160.**

(35)—*Suit for possession — Maintenance, defendant's right to, out of the property—Set-off.*—In a suit for possession of immoveable property if the defendant has a right to maintenance out of the property in dispute, effect can

Set-off—*continued.*

be given to such right by way of set-off against the liability in the execution proceedings in respect of mesne profits, and, as regards maintenance after the delivery of possession, by a suit. BRIJ MOHAMMAD MUMTAZ ALI KHAN v. SAKHAWAT ALI KHAN, **5 C W.N. 881, P.C. =28 I.A. 190=23 A. 394=8 Sar. 85.**

(36)—*Act* VIII *of* 1859, *s.* 195—*Set-off.*—S. 195 of Act VIII of 1859 applies where the defendant is allowed to set off a demand against the plaintiff's claim. But the section does not apply to a suit for mesne profits, where the defendant asks for certain deductions in the nature of allowances for costs of cultivation or collection expenses, to be made from the amount that is proved to have come into his hands. TILUCK CHAND BABOO v. SOWDAMINEE DASSEE, **25 W.R. 275.**

(37)—*Civ. Pro Code*, 1882, *s.* 111—*Set-off—Suit between principal and agent—Cross claims.*—There can be only one suit between a principal and his agent on the whole account relating to the agency. In a suit by the principal against his agent, the agent's pleading cross-claims for moneys spent by him for the principal in the course of the agency is not a plea of set-off but of debit and credit. In such suits, the whole account must be gone into and settled by the Court trying them. LACHHMI NARAIN v. MUTSADDI LAL, **138 P.L.R. 1901.**

(38)—*Civ. Pro. Code*, 1882, *s.* 111—*Claim for money due on commission agency—Set-off not claimed in a formal manner—Equitable set-off, power of Court to grant.*—In a suit by the plaintiffs, as brokers for the sale of indigo seed, to recover the amount due to them, as commission, on account of certain sales of indigo seed made by them on behalf of the defendants, the defendants, claimed a set-off, though not in a formal manner, in respect of the loss they had sustained owing to the plaintiff's negligence in not carrying out their instructions respecting the selling of the seed. *Held*, that, though the set-off was not claimed in a formal manner, the Courts in India have a right to give relief, by way of an equitable set-off, otherwise than under s.111 of the Code and that the defendants are entitled to a set-off as against the plaintiffs' claim for the loss occasioned by the plaintiffs. NAND RAM v. RAM PRASAD, **27 A. 145=A.W.N. 1904, 193=1 A.L.J. 529.** (15 A. 9, *F.*)

(39)—*Act* X *of* 1859, *s.* 24—*Jurisdiction—Revenue Court—Agent—Negligence—Damages—Set-off.*—S. 24 of Act X of 1859 provides for suits against agents employed in the collection of rent, either for money or for papers in their hands; but there is nothing whatever in that section to give jurisdiction to the Revenue Courts to try a claim for damages against such agents arising from an alleged neglect of duty. Under the same section, a Revenue Court has jurisdiction to allow a set-off to the defendant for any sums which he might have either paid to the plaintiff directly or used for the benefit

Set-off—*continued.*

of the plaintiff with his sanction and authority. MOHIMA RUNJUN ROY CHOWDHRY v. NOBO COOMAR MISSER, **18 W.R. 339.**

(40)—*Jurisdiction—Set off—Civil and Revenue Courts.*—No Court can entertain a set-off if it would not have had jurisdiction to entertain a suit if one had been brought to recover the money sought to be set off. BENI MADHO v. GAYA PRASAD, **15 A. 401 = A.W.N. 1893, 168.** [*R.*, 12 O.C. 124.]

(41)—*Suit for rent—Set-off—Plea of payment.*—When, in a suit by a zemindar for arrears of rent, the defendant pleaded that the Collector was in charge of his property on his behalf and that the Collector, on his (defendant's) behalf, had paid the rent which is the subject-matter of the suit, *held* that it was not clearly a plea of set-off but one of payment. KOONJO BEHARY SINGH v. RAJAH NILMONEY SINGH DEO BAHADOOR, **4 C.L.R. 296.**

(42)—*Suit for rent—Unascertained claim for damages—Past profits—Suit for rent—Claim to set off deposit money.*—An indefinite claim of the nature of damages for past profits cannot be set up as a set-off against a specific claim for rent of later years. Such a claim must be made the subject of a separate suit. The defendant, in a suit for rent, can not set off against the plaintiff's claim money in deposit with the plaintiff, unless at the time of the suit the deposit money has been due from the plaintiff and payable to the defendant. GOCOOL COOMAR v. BABOO BHICHOOK SINGH, **22 W. R. 1.**

(43)—*Suit for rent—Sum deposited by defendant under s. 4 of Act* VI (*B.C.*), 1862—*Right of defendant to set off.*—The plaintiff, an ijardar, sued the defendant, a dur-ijardar, for a year's rent. Defendant alleged that he had deposited money under the provision of s. 4 of Act VI (B.C.) of 1862 in the Deputy Collectorate division where the plaintiff's *mal* cutcherry was situate. The first Court finding everything in favour of the defendant dismissed the plaintiff's suit. The Judge on appeal having considerably modified that decision, it was held by the High Court on special appeal that the defendant was entitled to claim a set-off for the sum deposited by him in the sub-division. It was not denied that the *mal* cutcherry of the plaintiff lay in that sub-division, nor was it denied that notice of the deposit was given to the plaintiff under s. 5 of the Act. GRISH CHUNDER SEIN v. THE EASTERN BENGAL JUTE MANUFACTURING CO., **10 W.R. 492.**

(44)—*Suit for arrears of rent—Set-off—Taking of account—Duty of Court in passing decree.*—A suit for arrears of rent in which the defendant, alleging that, by virtue of an agreement between him and the plaintiff's ancestors, rent had been paid in kind and also in cash, claims a set-off and asks for the taking of an account, must not be decreed on the ground that the Court could not go into evidence on the question of set-off in a rent

Set-off—*continued.*

suit, but the Court is bound to take an account. ROY NUNDEEPUT MOHATOON BAHADOOR v. MR. W. STEWART, **23 W.R. 20.**

(45)—*Contribution—Sums paid by one party in excess of his share of rent—Set-off—Proper mode of taking account.*—A decree was obtained against the plaintiff and defendant jointly for certain rent. The plaintiff paid the amount of the decree and brought this suit for contribution. *Held* that, in ascertaining the amount due for contribution, the Court was bound to take into account certain sums which the defendant had previously paid for the plaintiff in respect of the same rent. The sums so paid by the defendant were not in the nature of a set-off. GOGUN CHAND DUT v. HURI MOHUN DUT, **12 C L.R. 539.**

(46)—*Co-sharers — Suit between—Set-off—Zemindari and Shikmee holdings—Limitation Act*, 1859. *s.* 1, *cl.* 8 — *Applicability.*—Where plaintiffs, as being entitled collectively to a 11-anna share of the jumma of a taluq, and alleging that they had obtained such portion of their share as the 14-anna talukdars were liable for, instituted a suit against the 2-anna sharer for recovering what he ought to have contributed, and it was found that the defendant had a 2-anna share in the zemindaree and Shikhmee, *held*, that the one right could not be set-off against the other. Though these were in a certain sense opposing rights, still they were not mutual rights as between the parties to the present suit. The plaintiffs were entitled to get a 2-anna share of the rent from the defendant and the other 14-anna taluqdars jointly, and the defendant was entitled to get a like share of the rent from these 14-anna taluqdars and himself jointly. But the defend ant had no right to set off the debt due to him from the 14-anna taluqdars and himself against the debt due to the plaintiff from the same persons. The words of cl. 8, s. 1, Act XIV of 1859, apply to agricultural land, as well as any other form of land, and are not qualified by the preceding words of the section. HUREE KISHORE ROY v. HUR KISHORE ADHIKAREE, **23 W.R. 134.**

(47)—*Lambardar or co-sharer—Claim to set off for revenue paid.*—A lambardar, who was an agent of the co-sharers of a village to make collections in the village, and after payment of the revenue to divide the profits, paid out of the collections of subsequent years, an arrear of Government revenue. In a suit by one of the co-sharers for his portion of the profits, *held*, the lambardar was entitled to claim a set-off of the revenue paid by him. There is nothing in the Revenue law, which restricts a lambardar or other co-sharer, who may make collections, to discharge arrears of revenue out of the collections of the particular year in which the arrear may accrue. UDAI SINGH v. JAGAN NATH, **1 A. 135, F.B.**

(48)—*Purchase of Zamindaree shares by some putneedars—Suit for rent--Putnee liability set off*

Set-off—*continued.*

against Zemindaree right.—Where four putneedars A, B, C and D have purchased Zemindaree shares, and two of them, A and B, sell their Zemindaree right to plaintiff, the other putneedars C and D, have, as between themselves and the plaintiff, a right, in a suit for rent, to set off their putnee liability against their Zemindaree right. GOOROO DYAL CHUCKERBUTTY v. KESHUB BIBEE, **20 W.R. 409.**

(49)—*Part payment—Lessor and lessee—Suit for rent—Claim by lessee to allowance in respect of money wrongfully realised by lessors from leased property—Jurisdiction—Civil and Revenue Courts—Act* XII *of* 1881 (*N.W.P. Rent*), *ss.* 93, 95 *and* 96.—The plaintiffs gave to the defendant a lease of a certain village, including *mal* and *sayar* items. After the expiry of the term of the lease, the plaintiffs sued the defendant in a Court of Revenue, for arrears of rent. The defendant, though no distinct claim for a set-off was made in his written statement, set up the following defence, namely, that, during the continuance of the lease to him, the plaintiffs had allowed certain other persons to enter on a part of the property leased, to dig earth, and to remove and sell the earth for the purpose of making bricks; that this was done without the defendant's permission; and that the plaintiffs received from the persons whom they allowed to dig and sell earth sums amounting to Rs. 287. The defendant claimed this money as the proceeds of the earth which the plaintiff had, as he alleged, illegally allowed to be removed, and which, having regard to the lease, he was exclusively entitled to. *Held* by *Strachey, C.J.*, and *Banerji, J.*, that the defendant's claim was a claim to a set-off and could not be regarded as part payment of the rent due to the plaintiffs. HAFIZ SULEMAN v. BARODA DAS, **A.W.N. 1899, 143.** (4 B. 407, 11 C. 557, 16 C. 711, 20 C. 527, 7 A. 284, 15 A. 9, *R.*) [*R.*, 12 O.C. 124.]

(50)—*Act* VIII *of* 1859, *s.* 121—*Set-off.*—By a deed of *zuri-peshgi* lease, X let certain land to Y for securing a sum advanced by him to her and the interest thereon, the said Y covenanting to pay certain dues annually to X. On failure by Y, X obtained a decree against him for the amount, in execution of which Z purchased his interest in the sum secured by the deed of *suri-peshgi*, and sued X to recover the same. *Held* that X had a right in such suit to set-off the amount of the decree obtained by her against Y. BHAGAWANI KUNWAR v. LALA BAIJ NATH PRASAD, **2 B.L.R.A.C. 34.**

(51)— *Suit for rent—Damage suffered by cultivator in execution of Civil Court's decree—Set-off.*—Although a cultivator who has suffered damage in execution of a decree of a Civil Court may sue and claim compensation for such damage, yet, until such damage has been ascertained and decreed, it cannot be set-off against a claim for rent. RAI GOBIND SINGH v. SOONDERPAL, **2 Agra 377.**

Set-off—*continued.*

(52)—*Suit for rent—Bond — Liquidated debt.*—A liquidated sum due on a bond can, according to law, be set off against sums due for rent, even though there may be no contract to that effect. MESSRS. R. WATSON AND CO. v. MAHARANEE BROJO SOONDUREE DEBIA, **16 W.R. 224.** [*R.*, 16 C.P.L.R. 118.]

(53)—Malikana — *Remission subsequent to payment — Suit to recover arrears for subsequent years— Right to set off amount paid and remitted.*—Where, subsequent to the payment of *malikana* for a year, the Revenue officer passed an order remitting the payment of *malikana* for that year, in a suit by the superior proprietor to recover arrears due for subsequent years, the inferior proprietor could set off the amount paid by him and remitted. RAGHUNATH MAHADEO DOYE v. DAJIBA BHAU, **16 C.P.L.R. 189.**

(54)—*Civ. Pro. Code*, 1882, *ss.* 111, 216—*Written statement containing a claim of set-off —How to be construed—Court-fee.*—A written statement containing a claim of set-off must be regarded as a plaint in regard to such set-off and is therefore chargeable with the court-fee which would be payable on a plaint of that nature. BAI SHRI MAJIRAJBAI v. NAROTAM HARGOVAN, **13 B. 672.** [*Diss.*, 8 C.W.N. 174; *Appr.*, 15 M. 29; *R.*, 28 B. 244, 32 C. 654=1 C.L.J 364, 85 P.R. 1908=80 P.W.R. 1908=130 P.L.R. 1908.]

(55)— *Court-fee not paid at time of written statement—Levying of Court-fee after claim had become barred — Payment within time.*—Where the Court-fee payable in respect of a claim of set-off was not paid at the time of the written statement and was levied by the Court after the claim had become barred, the claim had to be regarded as presented on the day on which the written statement was put in, inasmuch as the omission of the Court to levy the Court-fee for a considerable time was as much the mistake of the Court as the default of the party. RAJA PAPAMMA ROW v. SITARAMAYYA, **5 M.L.J. 233.**

(56)—*Civ. Pro. Code*, 1882, *s.* 111—*Suit on mortgage—Equitable set-off—Same transaction —Court-fees if necessary.*—A suit for enforcement of a mortgage security, the right to claim personal decree against the mortgagors having become barred, is not a suit for money within the meaning of s. 111 of the Civ. Pro. Code. [*R.*, 85 P.R. 1908=80 P.W.R. 1908=130 P.L.R. 1908.] An equitable set-off can be claimed only when it arises out of the same transaction as that on which the suit is based. [*R.*, 85 P.R. 1908=80 P.W.R. 1908 = 130 P.L.R. 1908.] S. 111 of the Civ. Pro. Code, merely says that a written statement claiming a set-off shall have the same effect as a claim in a cross-suit so as to enable the Court to pronounce a final judgment both on the suit claim and the set-off. From this it does not follow that such a statement should be stamped as a plaint—*Per Banerjee, J.* (*Pargiter, J., not concurring*).

Set-off—*continued.*

FAKIR CHANDRA DUTTA v. MESSRS. GISBORNE & CO., **8 C.W.N. 174.** [*Not F.*, 10 C.W. N. 199.]

(57)—*Contract—Cost incurred in defending suit—Right to recover such costs from third party—Damages—Negligently selling goods of another—Set-off—Sale of goods—Insolvent purchaser—Re-taking of goods in good faith—Liability to make good loss.*—Unless a person defends a suit and incurs costs thereby at the request of another, either express or implied, he cannot claim to be re-imbursed for the expenditure from that other. Claim for damages for negligently selling the goods of another is rather matter for a suit than for set-off. Taking back the goods from an insolvent purchaser who had not paid for them and their resale for less value, if done in good faith to protect defendant, should not be a cause of loss to plaintiff. RAM LALL v. KOONDUN MULL, **3 Agra 97.**

(58) — *Decrees — Execution — Costs.*—A set-off cannot be allowed for costs of a sum of money that was never due. Where a decree of the High Court awarded to the successful appellant costs of that Court and of the lower appellate Court only, but omitted to award the costs of the first Court, no set-off can be allowed. It would not be equitable or right or consistent with principles of justice to allow a decree, which is incapable of being enforced, to be set off against a decree which is alive. HURO PERSHAD ROY CHOWDHRY v. FOOL KISHOREE DOSSEE, **16 W.R. 308.**

(59) — *Execution — Transfer of decree — Questions as to transferee's right to execution—Jurisdiction—Rights of transferee.*—Where a decree is transferred, and the name of the transferee put upon the record by the Court which passed the decree, and the transferee applies to execution in a Court to which the decree is transferred for such purpose, such latter Court has no jurisdiction to entertain any question as to the transferee's right to execution. A transferee merely occupies the position of the transferor relative to the judgment-debtors, and takes the decree subject to the same rights of set-off as those under which it was held by the transferor. RAM CHUNDER v. MOHENDRO NATH BOSE, **21 W.R. 141.**

(60)—*Decree—Purchase of—Rights of judgmenet-debtor against decree-holder.* — A judgment-debtor is entitled to set off his cross decree against the claim of the purchaser of the right and interests of his decree-holder. OOPENDRO MOHUN MOOSTAFEE v. POORNO CHUNDER BHUTTACHARJEE, **19 W.R. 85.**

(61)—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 246 —*Order for set-off—Transfer of decree.*— An order for set-off made under s. 246, Civ. Pro. Code, is binding upon a transferee of the decree sought to be executed, when the transfer is subsequent to the order for set-off. VEERABHADRA RAZU v. JAGANNADHA RAZU, **3 M. L.J. 220.**

Set-off—*continued.*

(62)—*Set-off in execution of a decree—Reciprocal liabilities under same decree.*—It is quite clear that, where, under a certain decree, A has to recover a certain amount from B, and B has to recover a certain amount from A, on the application of A to execute the decree against B, a set-off ought to be allowed in respect of the amount recoverable by B from A. It would appear by analogy to s. 209, Civ. Pro. Code, 1859, that there being only one decree, and not cross-decrees, the party entitled to the lesser sum could not be allowed to take out execution against the party entitled to the large sum, and, therefore, the Court would be certainly bound to direct a set-off or to enter satisfaction of the smaller sum upon the decree. JUGO MOHUN BUKSHEE v. SOORENDRONATH ROY CHOWDRY, **13 W.R, 106.** [*R.*, 6 A. 351.]

(63)—*Stay of execution of decree pending decree in cross-suit.*—Upon certain bonds given by J to A, A instituted a suit in Court against J. At that time, a cross-suit was pending in the same Court which J had instituted against A in respect of certain claims of J. Acting upon the discretionary power vested in him by s. 209 of the Civ. Pro. Code, the Principal Sudder Amin stayed the execution in A's suit until the decree should be passed in the cross-suit brought against him by J. After decree was obtained against A in the cross-suit, A proceeded to attach it in execution of his decree. One R, who had purchased the rights and interests of J in his suit against A while it was pending, objected to the attachment, and the present suit was brought by A to have his right declared to attach the whole of the decree in the cross-suit in execution of his decree against J, and also to set aside the sale by J to R as a fictitious and collusive transaction intended to deprive him of his rights under his decree. The Court directed the sale of the whole of J's decree, without regard to the sale of his rights in the suit. A, the execution of whose decree the Court had stayed, should be regarded as being in the position of a creditor who has obtained an attachment by written order, and no subsequent purchase could be set up against the right of the attaching creditor. MUSSAMUT PEELOO CHOWDHRAIN v. THE COURT OF WARDS, **7 W.R. 219.**

(64)—*Pendency of suit in Court against decree-holder — Competency of Court to stay execution—Act* VIII *of* 1859, *s.* 209.—Where a suit is pending against the holder of a decree, it is necessary, in order to make the Court in which such suit is pending competent to order stay of execution of the decree, on an application made for the purpose that the decree executed must be one that has been passed by such Court. Also, an application of such description is not one which can be granted or entertained without an affidavit or satisfactory proof of the complaint alleged in it. MITTUN BIBEE v. BUZLOOR KHAN, **8 W.R. 392.** [*Disappr.*, 10 A. 389=8 A.W.N. 51.]

Set-off—*continued.*

(65)—*Act* VIII *of* 1859, s. 209—*Execution of decrees—Set-off—Decrees of different Courts—Act* X *of* 1859.—It is doubtful whether the provisions contained in s. 209 of the Civ. Pro. Code, are applicable to decrees passed under Act X of 1859. A decree passed by a Revenue Court under Act X of 1859 connot be set off under s. 209 of the Code against a decree passed by a Civil Court. IGNATIUS PETER D'SILVA v. AMEER SHAHA, **16 W.R. 303.**

(66)—*Suit by vendor for recovery of unpaid purchase-money—Deduction claimed by defendant.*—In a suit by a vendor to recover unpaid purchase-money (in respect of property sold free from incumbrance) left in the hands of the vendee, the latter may claim set-off of an amount which he was compelled to pay to save the property from an impending sale in execution of a decree outstanding against the property. KHETSIDAS AGARWALA v. SHIB NARAYAN MURDA, **9 C.W N. 178.**

(67)—*Decree in redemption suit—Set-off of costs against mortgage-money—Attorney's lien.*—Where the decree in a redemption suit directed the mortgagor to pay the mortgage-money with interest to the mortgagee, and the mortgagee to pay the mortgagor the costs of the suit, it was held that the mortgagor could set off his costs against what he was liable to pay under the decree, notwithstanding any claim of the mortgagee's attorney against his client in respect of his costs of suit. BRIJNATH DASS v. JUGGERNATH DASS, **4 C. 742=4 C.L.R. 122.** [*F.*, 17 B. 32; *D.*, 16 C.P.L.R. 73; *Appl.*, 6 A. 351=A.W.N. 1884, 125, 6 O.C., 23.] N.B.—*See also* BALDEO PARSHAD v. BALDEO SINGH, **3 O.C. 323.**

(68)—*Mortgage — Revenue paid by mortgagees — Profits received by mortgagees in excess of their dues.*—A mortgagee is entitled to maintain a suit for the recovery of any sum he may have paid as revenues, as money paid for the defendants (mortgagors); but the latter are entitled to set off the sum found due to them on the settlement of accounts in a prior redemption suit between the same parties. CHAND MAL v. RAGHUNATH, **A.W N. 1883, 4.**

(69)—*Master and servant—Suit for wages.*—Plaintiff sued the defendant for Rs. 77 and odd, arrears of salary. The defendant claimed a set-off of Rs. 119 being money received by the plaintiff on his behalf in the course of service. The Court refused to allow the defendant's claim on the ground that the amount exceeded the plaintiff's claim. *Held* that the defendant was entitled to set off the sum claimed. It was a definite pecuniary demand, not of the nature of unliquidated damages, and in the claim the parties filled the same character as in the suit. When the amount claimed by the defendant did not exceed the pecuniary jurisdiction of the lower Court it ought to have entertained the defendant's claim. RAMZAN KHAN v. BIKHA MISR, **A.W.N. 1883, 6.**

Set-off—*continued.*

(70)—*Insolvency of husband—Administration by widow—Rights of Official Assignee—Fraud on creditors—Their rights—Separate suit.*—In a suit by a widow, as administratrix of the estate of her husband, against her son, to recover certain moveable property on the allegation that it had been misappropriated by the defendant, the latter pleaded that it was fraudulently kept out of his father's schedule in the insolvency proceedings. *Held*, that it was not competent to any third party to set up a claim, where the Official Assignee, having been made a party to the suit, disclaimed all interest in the suit property, the right of ownership being vested in the plaintiff notwithstanding the alleged fraud. The creditors, who had been defrauded, have their remedy against the Official Assignee for the disclaimer by means of a suit. MR. D.W. MANLY v. MRS. SARAH MANLY, **14 W.R. 136.**

(71)—*Insolvent Act* (*Stat.* 11 *and* 12 *Vic.*, *C.* 21), *s.* 39—*Mutual credit and mutual debt—Right to set off.*—When there was a debt due from an insolvent to another from whom a debt was due to the insolvent prior to his insolvency, then, in a suit by the Official Assignee to recover the latter debt, the defendant is entitled, under s. 39 of the Insolvent Act, to set off the debt due from him to the insolvent against sums claimed by the Official Assignee for the insolvent. (*Rose* v. *Hart*, 8 Taunton 499, *F.*) A. B. MILLER v. A. BEAR, **6 C.L.R. 294.**

(72)—*Cross-decree — Set-off, when can be allowed.*—In order to admit of a set-off being made where there are cross-decrees, the parties must be the same, and the sum due under each decree or decrees must be definite. MOULVIE REAZOODDEEN HOSSEIN v. FUZLOONISSA, **5 W.R. Mis. 12.**

(73)—*Act* VIII *of* 1859, *s.* 209—*Cross-decrees.*—The provisions of s. 209 of the Civ. Pro. Code, (Act VIII of 1859) apply to cross-decrees of the same Court between the same parties or to cross-decrees between the same parties, though of different Courts, which have found their way for execution to the same Court. RAM COOMAR GHOSE v. GOBINDNATH SANDYAL, **7 W.R. 480.** [*F.*, 12 W.R. 391; *R.*, 11 W.R. 488.]

(74)—*Act* VIII *of* 1859, *s.* 209—*Cross-decrees—Assignment of decree.*—S. 209, Act VIII of 1859, does not extend beyond the case of cross-decrees to which the parties and the parties executing it are the same, and it does not apply to a case in which A takes by assignment a decree obtained by B against C. and in which, on a proceeding to execute that decree, C applies to set off a decree which he has against B. SHAIKH RAZEEOODEEN v. SHAIKH JEHANGEER, **5 W.R. Mis. 22.** [*R.*, 6 W.R. 21, 7 W.R. 219.]

(75)—*Cross-decrees—Civ. Pro. Code*, 1882, *s.* 246.—A judgment-debtor may set off against the decretal amount the amount of a decree obtained by him against the judgment-creditor and others. The principle is that, if the decree-holder in the one case has a right to take out execution against the decree-holder in the other

Set-off—*continued.*

case, the judgment may be set off. HURY DOYAL GUHO v. DIN DOYAL GUHO, **9 C. 479 =13 C.L.R. 93.** [*F.*, 14 A. 339 ; *R.*, 9 C. 920.]

(76)—*Cross-decrees—Execution must be in one Court.* — Before cross-decrees can be set off the one against the other, it is necessary that they should be in the same Court for execution. EAST INDIAN RAILWAY CO. v. HALL, **3 N.W.P. 104.**

(77)—*Execution of decree — Cross-decrees—Cross-claims under same decree — Different rights of enforcing execution—Civ. Pro. Code, ss.* 246 *and* 247.—S. 246 of the Civ. Pro. Code, dealing as it does, with cross-decrees, has no application to cross-claims under the same decree. To make s. 247 applicable, the parties entitled, under the one decree, to recover from each other, must hold the same character and possess identical rights of enforcing execution, and it is only when this is the case that enforcement of the decree shall be refused and satisfaction entered up. Therefore, where under the same decree, the plaintiff was entitled to recover a certain amount of money from the defendant by sale of his property only, and the defendant was entitled to recover a certain amount from the plaintiff personaliy and from his property, the provisions of s. 247 were not applicable. KALKA PRASAD v. RAM DIN, **5 A. 272.** [*Diss.*, 16 A. 395 ; *Not F.*, 23 M. 121 ; *R.*, 16 C.P.L.R. 73.]

(78) — *Cross-decrees — Setting off.*—The amount of a decree, held by a judgment-debtor against the judgment-creditor alone, cannot be set off against a decree held by the latter along with other persons, which did not specify the separate interests of each of them. MURLI DHAR v. PARSOTAM DAS, **2 A. 91.**

(79) — *Cross-decree — Set-off— Appeal.*— Whether a judgment-creditor may or may not raise any objections, on appeal, regarding the judgment-debtor's decree, the judgment-debtor is entitled to have his decree set off against the decree of the judgment-creditor. HURO PERSHAD ROY CHOWDHRY v. SHAMA PERSHAD ROY CHOWDHRY, **5 W.R. Mis. 52.**

(80)—*Act* VIII *of* 1859, *s.* 209—*Execution—Cross-decree—Set-off.*—Where the purchaser of a decree proceeds to execution under s. 208, Civ. Pro Code, 1859, the judgment-debtor cannot be allowed to setoff on account of joint decrees obtained by himself and others against the vendor subsequent to the sale of the purchased decree. Even where joint decrees are obtained by the judgment-debtor and others against the vendor of a decree before the sale of the decree, they cannot be set off against the purchaser under s. 209. KASIMUNISSA BIBI v. HILLS, **6 B.L R. App. 125=15 W.R. 127.**

(81)—*Cross decrees—Set-off— Purchaser of decree—Act* VIII *of* 1859, s. 209.—A party taking by assignment a decree obtained by A against B takes it subject to a set-off on account of a cross-decree obtained by B against A.

Set-off—*continued.*

KAIM ALI JAWARDDAR v. LAKHIKANT CHUCKERBUTTY, **1 B.L.R. F.B. 23=10 W.R. F.B. 32.** [*F.*, 19 W.R. 85; *D.*, 15 W.R. 127.]

(82)—*Purchase of decree—Right of judgment-debtor to set off cross decree against purchaser.* —The purchaser of the rights and interests of a decree holder is entitled to execute the decree purchased in like manner and to the same extent as the original decree-holder might have done, and consequently the purchaser takes it subject to the rights of the judgment-debtor to set off any cross decree, which he might have against the original decree-holder. DOORGA CHURN NUNDEE v. DEBNATH ROY CHOWDHRY, **18 W. R. 442.**

(83)—*Cross-decree—Liability of purchaser of decree to set-off.*—In the case of cross-decrees one of which is set-off against the other, the purchaser of one of such decrees cannot stand, as regards the judgment-debtor, in a better position than the person whose rights he has purchased ; he can take the decree only subject to all the equities and liabilities attaching to it. His right is therefore to be deemed to be subject to the set-off with the cross-decree under the provisions of s. 209 of Act VIII of 1859. NUNDO COOMAR BUKSHEE v. KOONJO KISHORE ROY, **6 W.R. Mis. 73.**

(84)—*Cross-decree—Sale of decree--Rights of assignee — Special appeal.*—A got a decree against B for Rs. 373 who subsequently got a decree against A for Rs. 500. Thereupon B sold his decree to C. Then, A executed the decree he had got against B and put up B's decree against himself for sale in execution and bought it himself. Subsequently C executed the decree against A, and A's claim under s. 246 of Act VIII of 1859 having been disallowed, he brought a suit to establish his claim and to have it declared that the sale by B to C was invalid on the ground that it was a collusive transaction. Both the lower Courts found that the sale was *bona fide*. *Held* that the special appeal must fail, as that finding could not be set aside in special appeal. As to any equity which A may have under his decree, that must be determined in another suit. But when C takes out execution, A can apply under the provisions of s. 209 of Act VIII of 1859, and may be entitled to set off his decree against B and pay the balance only. SHEO NARAIN SINGH v. CHOONEE BHUGGUT, **24 W.R. 299.**

(85)—*Cross-decrees—Fraudulent assignment, right of set-off not affected by.*—There are conflicting decisions on the point, which is a doubtful one, whether, where the decree-holder has assigned his decree *bona fide* and for a valuable consideration, the assignee would take the decree subject to the equities and liabilities of the decree-holder to the judgment-debtor. Where however, as in the present case, the assignment itself has been found to be fraudulent, there is no conflict of decisions, and the judgment-debtor has a good cause of action for a suit to set aside the assignment as fraudulent and being without consideration. It was, under

Set-off—*continued.*

the circumstances of the present case, *held* that the two cross-decrees possessed by the judgment-creditor and the judgment-debtor remained as they were originally passed and could be set off, the one against the other in execution department. SYUD TALUB HOSSEIN v. R. WALKER, **7 W.R. 470.**

(86)—*Set-off—Cross decrees—Civ. Pro. Code*, 1859, s. 209—*Stay of execution of decree.*—Where a decree for the plaintiff has been obtained in a suit, and a cross suit is pending, the Court will not stay proceedings in execution of the first suit, or order the proceeds of that decree to be paid into Court to abide the result of the second. MOOLCHAND v. RAJNARAIN GHOSE, **1 Ind. Jur. N.S. 330.**

(87)—*Act* VIII *of* 1859, *s.* 209—*Stay of execution—Cross-decrees—Set-off.*—S who had a decree for costs against M in the Court of R, got it transferred to the Court of B for execution. M who had a suit pending against S, prayed for stay of execution till the disposal of the suit. After the decision of the suit in M's favour the Court of B struck off S's execution petition, as the amount of his decree against M was less than the amount of M's decree against S. *Held* that the order of the Court was not in accordance with s. 209 of Act VIII of 1859, that, after the decision of the suit, it ought to have been ascertained which party had a decree for the larger sum, and that execution should have been taken out by that party only, and for so much as should remain after deducting the smaller sum, which should have been entered on the decree for the larger sum. SHIB CHUNDER SIRCAR v. JUGGUT INDUR BUNWAREE GOVIND BAHADOOR, **12 W.R. 212.**

(88)—*Execution—Cross-decrees—Possession—Mesne profits.*—Plaintiffs obtained a decree for possession and mesne profits in respect of certain land. The defendants subsequently obtained a decree for possession and mesne profits in respect of the same land as well as other lands. Both decree-holders took out execution. *Held* that there was no reason why each party should not take out execution of his decree and be entitled to receive wassilat separately. ANUND MOHUN HAJRAH v. SHIBO SOONDUREE DABEE, **16 W.R. 256.**

(89)—*Cross-decrees—Execution of one barred by limitation—Right of set-off.*—A tenant obtained a decree reversing the sale of his tenure and giving him possession with mesne profits, but directing him to pay the amount of rent due to the zemindar with interest up to date of realization. The decree was kept alive intermediately by repeated applications. The defendant zemindar made no attempt to realize the amount of rent awarded him under the decree, and the execution of his decree was barred by limitation. When the tenant again sued out execution of his decree, the zemindar applied to have the sum decreed to him deducted as a set-off against the tenant's claim. *Held* that the zemindar could not be allowed to execute his barred decree in the shape of a set-off. PROSUNNO COOMAR GHOSE v. SHAM LAL GUNGOPADHYA, **5 W.R. Mis. 8.**

(90)—*Cross-decrees — Set-off, when can be allowed—Cross-decrees whether can be kept alive by action of opposite party—Act* XIV *of* 1859, *s.* 20—*Order striking case off file—Enforcement of decree—Limitation.*—In the case of cross-decrees, a set-off is admissible only where the respective decree-holders are seeking to execute and not where a cross-decree is not capable of execution by lapse of time. [*D.*, 9 W.R. 590 (591).] A cross-decree must be kept alive by the action of the party entitled under it and an application by the opposite party to execute his cross-decree, cannot bring the decree of the other party into activity. The making of a note by some officer of the Court in the margin of a register to the effect that the case had been struck off the file is not a proceeding under s. 20, Act XIV of 1859, to keep alive a decree. ANUND MOHUN SURMA MOJOOMDAR v. HURO CHUNDER BHUTTACHARJEE, **5 W.R. Mis. 16 = Wym. 109.**

(91)—*Execution of decree—Cross-decrees—Set-off—Limitation.*—The act which the law requires one man to do to save his limitation as to his decree of one date and character, cannot be considered the same act which another is required to do to save his limitation in respect to that other man's decree of a totally different date and character. HEMRAJ CHOWDHRY v. ASOODUN, **5 W.R. Mis. 43.**

(92)—*Cross-decrees — Two judgments and decrees in same suit—Set-off—Execution—Limitation.*—In a suit for the resumption of various parcels of land, the Court gave the plaintiff a decree for a portion of her claim with proportionate costs. Subsequently, plaintiff applied to the Court for a review of its judgment, and obtained from the same Court a further decree for the rest of her claim. In appeal, the High Court reversed the further decree and gave judgment for the defendant on that part of the case with costs of the proceedings in proportion. Plaintiff allowed more than three years to elapse without making any application to execute the partial decree which she had at first got. When defendant applied to execute his decree for costs, plaintiff petitioned that, before executing the defendant's decree, so much of the costs as had been decreed to her under the former decree might be deducted and set off. *Held* that, although in form the decree obtained by the defendant was distinct from the decree passed in the other portion of the case, yet substantially these two judgments and decrees being in the same suit, and relating to parts of the same subject-matter, were in fact only parts of one general judgment and decree and that the two decrees must be treated as if they had been reduced to one, wherein judgment was given in part for the plaintiff and in part for the defendant, with proportionate costs to the several parties, and that it was the duty of the Court before issuing a warrant of execution, to ascertain how much on the whole case was actually

Set-off—*continued.*

due to the party executing, and to issue a warrant for that sum, and no more. *Held*, further, that the question of limitation could not arise in the case ; because, at the time when the original Court gave the further decree in favour of the plaintiff, her original partial decree was not barred by limitation. The moment that the High Court's decree, which was for a larger sum of money, was passed, plaintiff's decree became incapable of execution under s. 209, Act VIII of 1859, having become merged, as it were, in the decree obtained against her by operation of law. NUBO LALL KHAN v. THE MAHARANEE OF BURDWAN, **9 W.R. 590.**

See ABATEMENT OF RENT, 6 W.R. Act X, 24.

Suit for account—Suit for damages—Claim of set-off by cross-appeal—*See* ACCOUNTS—SUIT FOR ACCOUNTS, 13 C. 124, P.C.=13 I. A. 48.

Sustainability of plea of, in respect of sum legally recoverable at the date of suit—*See* ACT VI OF 1882, ss. 136, 177, 28 M. 240.

—by a director from the Company.—*See* ACT VI OF 1882, s. 214, 7 Bom. L.R. 246=30 B. 173.

See BEN. ACT X OF 1871, 11 C.L.R. 140.

See U. P. ACT XXII OF 1886, s. 140, 1 O.C. 100.

Suit against tenant who happens to be lambardar—Defendant's right to set-off—*See* U.P. ACT II OF 1901, s. 193 (*g*), 4 A.L.J. 681=A.W.N. 1907, 269.

See APPEAL—DECREES AND EXECUTION OF DECREES, 6 W R. 21.

Different transactions—*See* CIV. PRO. CODE, 1882, ss. 20, 211, 9 C.W.N. 748.

Mortgagor's right to deduct amount of costs payable to him under decree from mortgage deed payable by him—*See* CIV. PRO. CODE, 1908, s. 35, O. XX, r. 6 (3), 17 B. 32.

See CIV. PRO. CODE, 1908, s. 49, O. XXI, rr. 29, 18, 16 C. 619.

Effect of omission to claim a portion on subsequent suit for such portion—*See* CIV. PRO. CODE, 1908, O. II, r. 2, O. VIII, r. 6, 1 C.L.J. 364=32 C. 654.

—by a decree-holder who purchases the property at the Court sale with the permission of the Court—*See* CIV. PRO. CODE, 1908, O. XXI, r. 72, 10 Bom. L.R. 296=32 B. 379.

Deposit by purchaser of immoveable property—Option of, when exercised—Waiver of cash deposit—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 72, 84, 85, 86, 5 C.L.R. 181.

See CIV. PRO. CODE, 1908, s. 95, O. XXXVII rr. 2, 3, 18 B. 717.

Company in voluntary liquidation—Deposit by defendant with Company—Suit by liquidators for amount due by depositor on loan—Defendant's right to plead, of deposit amount. *See* COMPANY—MISCELLANEOUS, 15 M.L.J. 230.

Set-off—*continued.*

Breach of contract—Right to set off unascertained damages—*See* CONTRACT—BREACH OF CONTRACT, 37 C. 334=6 Ind. Cas. 924.

Claim to, in a suit for contribution—*See* CONTRIBUTION, SUIT FOR—GENERAL, 12 C.W.N. 60.

See CONTRIBUTION, SUIT FOR—VOLUNTARY PAYMENTS, 2 C.L.R. 414.

See CO-SHARERS—SUIT BY CO-SHARERS, 3 M.H.C. 339.

See COSTS—SPECIAL CASES, 4 B. 407.

Written statement of defendant claiming set-off—Whether requires *ad valorem* Court-fee—*See* COURT-FEES, 80 P.W.R. 1908=130 P.L.R. 1908=85 P.R. 1908.

—pleaded in written statement, Court-fees payable in the case of—*See* COURT FEES ACT, 1870, s. 6, 8 A. 396=A.W.N. 1886, 159.

See DECREE—DECREE, CONSTRUCTION OF, 12 W.R. 308.

Cross-decrees—Set-off—Execution of decree in parts—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 3 B.L.R. A.C. 114=11 W.R. 488.

See HINDU LAW—DEBTS, 1 W.R. Mis. 23.

See HINDU LAW—JOINT FAMILY, 5 P.L.R. 1900.

See JURISDICTION OF REVENUE COURTS, 15 A. 404=A.W.N. 1893, 168.

Malabar Law—Kanom — Arrears of rent—Improvements—Set-off—Hypothecation of improvements—*See* LANDLORD AND TENANT—COMPENSATION FOR IMPROVEMENTS, 7 M. 545.

Tenant's right to deduct expenses of repairs—Set-off—*See* LANDLORD AND TENANT—PAYMENT OF RENT BY TENANT, 6 Ind. Cas. 131 =12 C.L.J. 351.

See LEASE—GENERAL, A.W.N. 1892, 217.

Zurpeshgi lease—of rent against sum advanced by lessee—*See* LEASE—ZURIPESHGI LEASE, 5 C. 333.

—disallowed on technical grounds—Defect of jurisdiction — *See* LIMITATION ACT, 1908, s. 14, 13 C.L.R. 214.

See LIMITATION ACT, 1908, s. 19, 60 P.R. 1887.

Suit for price of goods—Damages claimed by way of—*See* LIMITATION ACT, 1908, art. 83, 7 A. 284=A.W.N. 1885, 40.

See LIMITATION ACT, 1908, art. 132, 21 W.R. 88.

Application to receive Poundage-fee—Application for set-off—Not steps in aid of execution—*See* LIMITATION ACT, 1908, ART. 182—STEP IN AID OF EXECUTION, 23 C. 196.

Hindu widow—Suit by adopted son for possession and profits—Amounts to be set off—*See* MESNE PROFITS—MODE OF ASSESSMENT, 25 A. 266=A.W.N. 1903, 34.

Set-off—*concluded.*

See MORTGAGE—REDEMPTION, 15 B. 186.

See MORTGAGE — USUFRUCTUARY, 2 A. 252.

See PARTNERSHIP—RIGHTS AND LIABILITIES OF PARTNERS, 53 P.R. 1898.

By a defendant in the written statement, remand of case by appellate Court—*See* PRACTICE AND PROCEDURE, 6 Bom. L.R. 790.

Cost to be—*See* PRE EMPTION—MISCELLANEOUS, 3 O.C. 323.

See PRE-EMPTION — MISCELLANEOUS, 6 A. 351=A.W.N. 1884, 125, A.W.N. 1906. 198 =3 A.L J. 804=28 A. 676.

—not agreed by defendant—*See* PRESIDENCY SMALL CAUSE COURTS ACT, 1882, s. 18, expl. 1, 21 C. 419.

See PRINCIPAL AND AGENT—GENERAL, A.W.N. 1883, 218.

Rights and liabilities of surety — Mutual debts—Discharge of surety—*See* PRINCIPAL AND SURETY — SURETY, RIGHTS AND LIABILITIES OF, Bourke O.C. 227.

Ascertained sum due to defendant in the same matter as the plaint transaction, set-off allowable in respect of—Ground of claim for—in subsequent suit not in issue in previous suit, no *res judicata*—*See* RES JUDICATA—ADJUDICATIONS, 8 A. 396=A.W.N. 1886, 159.

—by trespasser — Equitable defence — *See* RIGHT OF SUIT—TRUSTS, SUITS RELATING TO, 18 B. 721.

See SMALL CAUSE COURTS, MOFUSSIL, JURISDICTION OF—GENERAL, 5 B.L.R. App. 1=13 W.R. 307.

See SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 7 N.W.P. 157.

Contract—Suit to recover costs of preparing deeds of indenture and debenture—Stamp-duty —Place of origin of cause of action—Jurisdiction—Counter claim against plaintiff not allowed—*See* STAMP, 21 B. 126.

Right of—*See* ST. 11 AND 12 VIC., C. 21, s. 39, 8 Ind. Cas. 761=9 M.L.T. 132.

What may be set off—*See* ST. 11 AND 12 VIC., C. 21, s. 39, 33 M. 53=5 Ind. Cas. 845 =8 M.L.J. 83.

Mutual credit — Claim for unliquidated damages, whether can be set off — *See* ST. 11 AND 12 VIC., C. 21. ss. 39, 40, 7 M.L.T. 207=5 Ind. Cas. 379=33 M. 467.

Assignment of lessor's right—Suit by assignee against lessee for rent — Prior mortgage of leased property to lessee—Mortgagee's (lessee) right to set off mortgage amount against lease amount—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 8, 130 and 135, 17 M.L J. 87=30 M. 285.

Settlement.

1.—GENERAL.
2.—CONSTRUCTION.
3.—EFFECT OF SETTLEMENT.
4.—EVIDENCE OF SETTLEMENT.
5.—MODE OF SETTLEMENT.
6.—RIGHT TO SETTLEMENT.
7.—SUBJECTS OF SETTLEMENT.
8.—MISCELLANEOUS.

——1.—General.

(1)—*Settlement — Long possession.*—Long possession itself does not give a title to settlement if the parties asking for the settlement do not comply with the requirements of the law. GOLAK CHANDRA CHOWDHRY v. ALI MOLLAH, **8 B.L.R. 528, Note.**

(2)—*Lease—Term of settlement — Meaning of.*—Plaintiffs claimed the land in suit under a lease of 1863 made for the term of settlement. The settlement was made for 10 years. The Government extended the settlement by 7 years more. *Held* that the lease lapsed at the end of 10 years, as there could be no reasonable doubt that the parties intended the lease to be for 10 years, the term of settlement announced to them by the Settlement Officer. MAHOMED BUX v. OULIYA, **27 P.R. 1873.**

(3)—*Presumption of invalid* lakhiraj—*Settlement with lakhirajdar.*—Where land is resumed as invalid *lakhiraj*, there is no provision of law which compels Government, under a decree of the Civil Court, to make a settlement with the ex-lakhirajdar if for some reason of its own, it declines to do so. BHIKU SING v. THE GOVERNMENT, **8 B.L.R. 529, Note, 10 W.R. 296=13 B.L.R. 119, Note.** [*R.*, 8 B.L. R. 524=17 W.R. 145.]

(4)—*Settlement—Power of Revenue Board—Commissioner.*—A settlement of resumed *lakhiraj* land made by a Collector "subject to the orders of the Board of Revenue," may be set aside by that Board. Under the Board's rules, a Commissioner has authority to set aside such a settlement, and is limited to no time in the exercise of his powers of revision. HARLAL TEWARI v. THE COLLECTOR OF BHAGULPORE, **3 B.L R. App. 82=12 W.R. C.**

(5)—*Limitation—Act* XIII *of* 1848—*Settlement award—Suit to set aside—Adjudication.*—Act XIII of 1848 applies only to suits for contesting the justice of an award as between the contending parties, and not suits for the purpose of amending a settlement, and establishing the rights of persons who were not parties contesting between themselves before the Collector. KOMUL KISSEN SURKHUL v. BISSONATH CHUCKERBUTTY, **B.L.R. Sup. Vol. App. 5=W.R.F.B. 128.**

(6)—*New settlement, effect of, on rights recorded or acquired at old settlement.*—A new settlement could not take away from any tenant rights acquired under or recorded in the old settlement. AZMUT ALI KHAN v. HARNAM, **61 P.R. 1875.**

Settlement—continued.

——1.—General—*continued.*

(7)—*Agreement in first settlement regarding absentee and resident owner out of possession—Agreement not repeated in subsequent settlement, effect of—Abandonment—Limitation.*—It is a general rule that settlement agreements are only intended to last for term of the settlement in which they are made, unless a different meaning can be gathered from the context. Two brothers N and S who had been originally entitled to several plots of land in a village, were out of possession of them, at the time of the first settlement of the village which was only for a term of ten years, the former residing in the village, and the latter being recorded as an absentee. It was provided in the *wajib-ul-arz* of the settlement, that the absentees on their return would be entitled to recover their lands upon payment of losses, and with regard to N, there was a distinct agreement on the part of two of the proprietors holding a portion of his share, that they would restore it to him when he was in a position to cultivate the land with his own ploughs and cattle. In the revised settlement (which took place ten years after the first settlement), neither the agreement with respect to absentees, nor that with regard to N's holding was repeated. More than 12 years after the deaths of N and S, the sons of N claimed to recover their father's and uncle's share in the land (S having left no issue) held by defendants on the basis of the agreement in the first settlement, urging that their cause of action under it only arose when they were in a position to cultivate the land with their own cattle and ploughs, a position which they had only recently been able to assert. *Held* that their claim to succeed to their uncle's (S's) share as his nearest heirs was barred by limitation as he died upwards of 12 years ago; that the special agreement relied on by them had ceased to be operative by efflux of time, as they omitted to enforce the conditional promise contained in the *wajib-ul-arz* within the period of the currency of the first settlement, and as a similar agreement was not embodied in the papers of next settlement, and that they must be deemed to have abandoned their rights in the ancestral property by conduct, as they raised no objection when, during the second settlement, their father's and uncle's lands were partitioned by the sons of the proprietor (who held it during the first settlement) though they remained in the village at the time. ARORA v. MOHRA, **114 P.R. 1880.**

(8)—*Suit to contest enhancement of rent—*Wajib-ul-arz — *Effect of.*—A cultivator who brings a suit to contest an enhancement of rent by the zemindar is not affected by the usage of the village, as laid down in the *wajib-ul-arz* to which he was no party. HAKEEM SYUD MEHUR ALI v. KUNHYEE, **1 Agra Rev. 12.**

(9)—*Act* XIX *of* 1865, *s.* 22—*Act* XXXIII *of* 1871, *s.* 17—*Financial Commissioner, jurisdiction of—Settlement in progress.*—Settlement

Settlement—continued.

——1.—General—*continued.*

operations must be considered to be in progress in any Parganna within the meaning of s. 22, Act XIX of 1865, and s. 17, Act XXXIII of 1871, as long as the sanction of Government has not been given to the record of rights and the assessment, and the special jurisdiction of the Financial Commissioner has not been withdrawn; and consequently appeals during that period lie to the Financial Commissioner and not to the Chief Court. FATTA v. KALA, **39 P.R. 1874.**

(10)—*Settlement—Proprietors, unwillingness of, to engage for revenue—Farm of land, grant of, to third party—Right of successors in title to proprietors to recover possession—Limitation.*—Certain land had been given in farm for a fixed period, to the person through whom the defendants claimed a proprietary title, after an offer of settlement with its proprietors (the ancestors of the plaintiffs) had been made and declined. *Held*, that a suit for recovery of possession would lie on the expiration of the farm, notwithstanding the non-payment of *malikana* by persons deriving title from the farmer; and that plaintiffs' suit was not barred by their not suing to set aside what purported to be a transfer of proprietary right to the defendants, of which they had no notice. PHULA v. KRISHNA, **10 P.R. 1874.** [*Appr.*, 36 P.R. 1885; *D.*, 41 P.R. 1881.]

(11)—*Lease for term of settlement continues till re-settlement.*—In cases where lands are leased for the term of a settlement, the Government assessment and many other considerations besides the mere number of years enter into the calculation, and the parties usually look to change of terms merely on Government changing its terms, and, consequently, such leases are good until re-settlement, though the term of years for which the settlement was made, has expired. STAINES v. HURBHUJ, **41 P.R. 1870.** [*D.*, 27 P.R. 1873.]

(12)—*Voluntary settlement — Revocation of trusts.*—Where an unmarried person created, by a voluntary settlement, trusts for himself for life and, after his death, for his issue and widows with ultimate trusts over, with a provision therein for the revocation of the trusts with the trustee's consent, and after his subsequent marriage, executed a deed of revocation, *held*, upon the trustee refusing to hand over the property, that the settlement could not be revoked, as there was an infant beneficiary in the person of his minor wife. GOLAM YASSEIN v. THE OFFICIAL TRUSTEE OF BENGAL, **8 C. 887.** [*R.*, U.B.R. 1892-1896, Vol. II, 645; *D.*, 133 P.R. 1889.]

(13)—*Deed of settlement—Wakf—Possession under Mahomedan Law—Transfer to trustees—Deed void—Transfer of Property Act* (IV *of* 1882), *s.* 2 (*d*)—*Trusts Act* (II *of* 1882), *s.* 6.—A Mahomedan by a deed of settlement, dated the 30th January 1897, transferred his immoveable properties situate in Bombay to four

Settlement—continued.

——1.—General—*continued.*

trustees including himself, upon trust to pay the whole of the net rents and profits thereof to the settlor, and upon his death—(*a*) to pay 2 annas in the rupee thereof to his wife for maintenance during her life; (*b*) to pay 2 annas and 4 pies in a rupee to each of his five sons (one of whom was appointed a trustee) during their respective lives and after their respective deaths to their respective lives and their respective children; (*c*) to pay 1 anna and 2 pies in the rupee to each of his two daughters during their respective wives and after their respective deaths to their respective children and in the absence of their children, their share to go to the settlor's heirs; and (*d*) to allow the settlor's brother and his wife to live in the loft of one of the settled properties, without rent until their deaths. The settlor's wife and one of his daughters died in his lifetime, and on his death on the 5th October 1902 the defendants 16 and 17 were the only children of the pre-deceased daughter surviving her. Upon the admissions of the parties and on evidence, the Court found that the trustees assented to act as trustees by simply executing and registering the settlement and the settlor continued to collect the rents and profits in the same manner as he had done before: *Held*, (1) that as the settlor could have transferred the properties to the four trustees in the books of the Municipality and of the Collector and could also have caused bills of rent from tenants to be made out in their joint names, he had not done everything he could have done in order to transfer possession. The settlement was, therefore, void and inoperative, according to Mahomedan law; (2) that upon reading s. 6 of the Trusts Act with s. 2 (*d*) of the Transfer of Property Act, the expression in s. 6 of the Trusts Act "should transfer trust property to trustees" does not affect the rule of Mahomedan law and means act of conveyance to settlor and others but s. 6 of the Trusts Act does not affect any rule of Mahomedan law as to deeds of gift but renders possession necessary, and the settlement fails as a deed *inter vivos*; (3) that as the settlement as a whole is not consistent with a testamentary disposition to take effect after settlor's death, it fails as a testamentary disposition also; and the children of the settlor's pre-deceased daughter are entitled to no rights under the settlement. ABDUL KADAR v. TAJOODIN, 6 Bom. L.R. 263. [*R.*, 29 B. 267=7 Bom. L.R. 45.]

See ABSENTEE, 38 P.R. 1878.

Settlement by revenue authorities—Right of suit—*See* BEN. ACT IX OF 1847, 4 C. 103=3 C.L.R. 151.

Time of—*See* BEN. ACT XI OF 1859, s. 37, 24 C. 887.

See BEN. ACT VIII OF 1885, ss. 104 (2), 105, 106, 108, 16 C. 596.

See BOM. ACT III OF 1874, ss. 5, 10, 15, 20 B. 428, F.B.

Settlement—continued.

——1.—General—*concluded.*

See PUN. ACT XVII OF 1887, s. 16, 2 P. R. 1889, Rev.

Entry of a person's name at the last revision of—as a fixed rate tenant is conclusive evidence of his fixed rate tenancy—*See* U. P. ACT II OF 1901, s. 9, A.W.N. 1906, 68=3 A.L.J. 842.

Noabad Taluqs Chittagong — Perpetual or permanent—*Onus* of proving—*See* BURDEN OF PROOF—GENERAL, 26 C. 792=3 C.W.N. 695.

Attachment—Claim—Sale—Purchase of settlor's right—Right to set aside deed—Fraud—Suit on behalf of all creditors—Limitation Act XV of 1871, art. 95—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 60, 63, 16 B. 1.

See COLLECTOR, 6 N.W.P. 153.

See CUSTOMS—PUNJAB — CESS, 118 P.R. 1879, 136 P. R. 1879.

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 111 P. R. 1876.

Construction of deed of—*See* DEED—CONSTRUCTION OF DEEDS, 20 M.L.J. 519=8 M. L.T. 139=7 Ind. Cas. 357=33 M. 304.

Deed of—Trust—Beneficiary—Proviso for forfeiture of interest in case of insolvency if bad for repugnancy—*See* DEED—CONSTRUCTION OF DEEDS, 20 B. 310.

—by a husband upon his wife under Hindu law—*See* HINDU LAW—HUSBAND AND WIFE, 6 Bom. L.R. 625.

See JURISDICTION OF CIVIL COURTS, 25 P.R. 1872.

Suit to contest, if maintainable—Resettlement—Government if must settle same area with former holder—*See* NOABAD MEHAL, 13 C.W.N. 235=9 C.L.J. 265=4 Ind. Cas. 49.

Settlement proceedings before the Deputy Commissioner — Appeal to High Court — *See* BEN. REG. III OF 1872, s. 5, 7 C. 376.

See SERVICE TENURE, 18 B. 22.

See STAMP ACT, 1879, s. 3 (19) (*b*), 7 M. 349, F.B.

Settlement—Stamp duty—*See* STAMP ACT, 1879, sch. I, art. 57, 8 M. 453, F.B.

Unsettled and unoccupied waste land not belonging to private owner—*See* WASTE LANDS, 26 C. 792=3 C.W.N. 695.

——2.—Construction.

(1)—*Engagements made at settlement—Divesting of proprietary title*—Huq malikana—*Settlement Regulations*—"Ikrarnama"—"Roobkaree"—*Construction.*—All engagements made at the time of settlement ought to be considered *prima facie* as intended to subsist only during the continuance of the settlement. There should be very clear expression of the intention on the

Settlement—continued.

——2.—**Construction**—*continued.*

part of a proprietor to divest himself absolutely of his proprietary title, before the Courts should hold that, by the acceptance of a specified sum as *Huq malikana*, he has no title to prefer his proprietary claim, when a new settlement is about to be made. The Settlement Regulation provides carefully for the preservation of the rights of parties who, being proprietors, are excluded from motives of policy or other temporary reasons from engaging for the payment of Government Revenue. On the construction of an *ikrarnama* executed at the time of settlement, and of a *roobkaree* settlement, it was *held* that an agreement therein referred to was only binding on the plaintiffs for the currency of the settlement. DIAL SINGH v. JAWAHIR SINGH, **2 Agra 108.**

(2)—*Settlement*—Roobakaree—*Construction.*—On the construction of a Settlement *Roobakaree* it was held that the arrangement under it was to continue for the period of settlement, and no longer, and that the respondents had acquired a hereditary and transferable interest as cultivators of the land by the acquiescence of the zemindar in the action of the Settlement Officer. On this view the Settlement Officer was held to be at liberty to settle the estate direct with the representatives of the original proprietors. IKRAM ALI KHAN v. LUDWA, **2 Agra 113.**

(3)—*Act* XI *of* 1859, *s.* 37—*Settlement, meaning of — Permanent settlement.* — The word "settlement" as used in the first paragraph of s. 37 of Act XI of 1859 refers not to the permanent settlement, but to the settlement which took place after resumption by Government of the lands previously held as *lakhiraj*. RAJ CHUNDER CHOWDHRY v. SHAIKH BUSHEER MAHOMED, **24 W.R. 476.** [*R.*, 10 C.W.N. 503.]

(4) — *Settlement proceedings — Temporary settlement—Proprietary right*—Maliki *allowance — Co-sharer.* — A settlement of a talook, although temporary, made with a person professing to be a proprietor, confers a proprietary right and not a limited interest; and a party admitted to a share in the settlement with a *Maliki* allowance, becomes a co-sharer in the proprietary interest. MR. W. G. N. POGOSE v. AOZAN BIBEE, **18 W.R. 274.**

(5)—*Grant of taluq upon which a* 'hat' *used to be held—Whether a monopoly—Calculation.*—Although the Government settles a taluq, upon which '*hat*' has been held for many years, the Government only grants the lands included in the taluq. The fact of such settlement being arrived at by taking into calculation the profits of the '*hat*' does not amount to any grant of tolls; for, the only reason for looking at the tolls was to ascertain the value of the lands. Such a settlement does not imply a monopoly, which will enable the holder, to restrain other persons from setting up a market anywhere close by. RAKHAL DAS ADDY v. DURGA SUNDARI DASI, **17 C. 458.**

Settlement—continued.

——2.—**Construction**—*concluded.*

(6)—Maafee *grant—Sale of rights and interests of one of several zemindars—Right of auction-purchaser to claim settlement.*—The auction-purchaser of the rights and interests of one of several zemindari who, at the time of the purchase, held only certain *nankar* land in lieu of their zemindari right during the continuance of the *maafee* grant by Government to another party, stands in the place of the zemindar, not in respect of *nankar* land only, but in respect of all the right to settlement as zemindar, after the *maafee* grant comes to an end. GOKUL PERSHAD v. RUGHO NATH, **3 Agra 245.**

See ABSENTEE, 6 P.R. 1871.

——3.—**Effect of Settlement.**

(1)—*Resumed* maafee *land—Settlement of—Temporary holder—Original holder—Right of settlement—Limitation.*—Where a revenue settlement of a resumed *maafee* land is made with a stranger in consequence of the real owner refusing to fulfil the revenue engagements, *held* that the right of the former to enjoy the property extended only up to the expiration of the term of such settlement, after which the original owner would be entitled to it, and that his exclusion for that term would not bar his claim to be re-admitted. MAHOMED ATAOOL-LAH v. MAHOMED MOHIB-OOL-LAH, **1 Agra 231.**

(2)—Lakhiraj *land in Government* khas mehal, *holder of on resumption, liability of, to pay rent.*—The defendants in this case were holders of certain invalid *lakhiraj* land within a Government *khas mehal* which was resumed. The revenue authorities, under the provisions of the Reg. VII of 1822, while they settled the whole estate settled and assessed the said lands also. The lower appellate Court had held that the defendant, having failed to sue in a Civil Court to set aside the settlement by the Revenue authorities or under Act X of 1859 for getting the rents mitigated or re-settled, was bound to pay the rents demanded according to the jumabundee; and the High Court was of opinion that the lower appellate Court was right in its decision. HURO PERSHAD CHOWDHRY v. SHAMA PERSHAD ROY CHOWDHRY, **6 W.R. Act X, Rul. 107.**

(3)—Lakhirajdar *in Assam — His status—Settled estate.*—Whatever might have been the position of the *Lakhirajdar* under the ancient Governments of the country, it is quite clear that he is now entitled to manage his lands in any manner he pleases consistently with the existing Regulations, and, as holder of a resumed *lakheraj* grant which has been settled with him by the Government at half jumma, he is entitled to eject a tenant whose occupation does not extend over a period of more than five years and who has no lease of any kind to support his title. JULLOW SURMA PATWAREE v. MADHUB RAM ATOI BOORHA BHUKUT, **16 W.R. 202.**

***Settlement*—continued.**

——3.—Effect of Settlement—*continued*.

(4)—*Resumption by Government—Subsequent joint settlement—Presumption.*—The mere fact that a settlement after resumption by Government was made with 13 persons jointly does not raise a presumption that the 13 persons had equal rights, especially when the settlement proceedings clearly indicated that the settlement was made jointly with the whole without prejudice to title. GOOROO CHURN PODDAR v. HAFEEZA BIBEE, **7 W.R. 366.**

(5)—*Farm made by Government on account of recusancy of settlement, maintainability of.*—A farm made by Government on account of recusancy of settlement will be maintained, notwithstanding dispute and decision as to proprietary right in the Courts. AMEEROONNISSA KHATOON v. MOULVIE ABDOOL ALI, **2 W.R. 136.**

(6)—*Co-sharers' settlement with Collector—Absent co-sharer's representative in possession—Suit for possession.*—The Collector called upon certain co-sharers in a zemindari to state whether they agreed to settle for themselves, and take the share of the absent co-sharer, G, as zemindar, and they having signified their assent, a settlement was made accordingly. G afterwards returned, and although he did not apply to the Collector to give him his share and to make settlement with him, he did apply for the proceeding which is called *Dakhil Kharij*, and had his name entered as one of the proprietors of the property. Subsequently the Government issued a notification by which it was declared that all existing settlements were continued for a further period of thirty years. G then sold his share to the defendant who got into possession of that share. The co-sharers sued to recover possession of it. *Held* that they took settlement of G's share, not in any sense adversely to him but expressly as zemindars or, in a sense, as trustees. Whatever the proceedings might have been which it was necessary for G to take if he had been out of possession, as he or his purchaser had got into possession, the plaintiffs must show their right before they could be restored to possession. ABHEEMUNNO DOBEY v. RUNGODHUR KUR, **20 W.R. 222.**

(7)—*Settlement of lands—Government, rights of—Sale—Subsequent permanent settlement—Suit by purchaser—Limitation.*—In respect of lands settled by them, Government have nothing more than a right of action by virtue of their being proprietors, and not the right of action of an auction-purchaser; and only the former right passes by the settlement. Where A, who buys the benefit of a settlement of certain land for 10 years, sells his rights to B with whom Government, subsequently makes a permanent zemindari settlement, and the purchaser of the latter's title sues for possession of certain specified land, *held* that the question is one of private right and plaintiff does not stand in the position of Government in respect

***Settlement*—continued.**

——3.—Effect of Settlement—*continued*.

of the Statute of Limitation. RUGHOONATH SURMAH v. GOBIND CHUNDER ROY, **14 W.R. 170.**

(8)—*Re-settlement of land by Government as ruling power with those entitled to such settlement under Reg.* XI *of* 1825 *and Act* XXXI *of* 1858—*Effect.—Quære.*—Whether a subsequent settlement of land by the Government, as the ruling power, with the owners of the property entitled to such settlement under Reg. XI of 1825 and Act XXXI of 1858, if made subsequent to a judgment of the High Court relating to such land, may be viewed as having conferred upon the owners a fresh right. MODHU SUDAN KUNDU v. PROMODA NATH ROY, **20 C. 732.**

(9)—*Resumption—Settlement—Under-tenures.*—The settlement of revenue in consequence of resumption under Reg. XIX of 1793. cannot confer a new estate upon the lakhirajdars, but merely fixes and limits the demand as respects revenue originally chargeable. Such resumption and settlement, therefore, do not extinguish under-tenures. PRATAP NARAIN MOOKERJEE v. MADHU SUDAN MOOKERJEE, **8 B. L.R. 197 = 16 W.R. 35.** [*F.*, 21 W.R. 327.]

(10)—*Settlement of talookdaree rights with agreement for re-settlement—Refusal by Talookdar to re-settle at increased rent—Subsequent settlement with him by Government—Effect.*—The Government as zemindars of certain lands made a settlement with the plaintiff recognising him as talookdar for a certain period, and agreed also to re-settle with him at the end of that period. At the end of the first settlement, the plaintiff having refused to re-settle at an increased rate, the jumma was put up to auction, but before a settlement was made with any other person, the plaintiff agreed to pay the amount of the highest bid, and Government re-settled with him upon the former conditions and upon the former description of the nature of the talook. *Held*, the effect of the transaction was that the Government renewed the contract, and placed the plaintiff exactly in the position in which he would have stood if he had never refused to pay the increased rent demanded by Government. OGNEE COOMAR ROY v. KUMOLA KANT ROY, **11 W.R. 38.**

(11)—*Settlement by Government, whether permanent or farming—Acceptance of farming lease subject to right of Government—"Abadkari talookdari" rights not affected—Meaning of 'abadkari talookdari.'*—The decision of this special appeal turned on the meaning of the terms "abadkari talookdari" that occurred in the lease in this case. Agreeing with the plaintiff's contention, the lower appellate Court held that the terms did not convey any talookdari rights but merely those of an abadkari. The first Court had held, as the defendant contended, that the defendant's tenure was one with talookdari rights and not one of an abadkar only, andthat no intermediate settlement of Government could affect the talookdari right

Settlement—continued.

——3.—Effect of Settlement—*continued.*

The High Court *held* that the lower appellate Court was wrong and concurred with the first Court. A Government settlement, whether permanent or farming, so far from destroying the rights of a talookdar, always preserves them, if there be really a dependent tenure. Neither the acceptance of farming leases by a person *qua farmer* subject to the Government proprietary right, nor the sale of the Government right, in any way *ipso facto* extinguishes talookdari rights existing in the abadkari talookdar in that capacity, if otherwise valid. HURO PERSHAD BHUTTACHARJEE v. BHYRUB CHUNDER MOJOOMDAR, **8 W.R. 391.**

(12)—*Right of inferior proprietors over village forest and waste lands.*—The action of the settlement authorities in conferring inferior proprietary rights was directed to giving the inferior proprietor as full proprietary power over the villages held by them as was secured to the zemindars themselves over the rest of their estate, subject only to the payment to the zemindar of a fixed annual sum. The right of the inferior proprietors extended over the forest and waste lands within their village boundaries to the exclusion of the zemindar. DAHARAJ SINGH v. TRIBHUBAN SINGH, **2 C.P.L.R. 25.**

(13)—*Effect of settlement—Claims not considered at settlement—Right to sue for share in property granted—Effect of settlement—Settlement in equal shares to members of family—Grant amounting to partition.*—Persons whose claims were not considered at the settlement cannot sue for their shares in the property granted unless they were entitled at the time of the settlements to interests in the mouza granted of the same nature as those upon consideration of which the Settlement Officer awarded the mouza. [*R.*, 13 C.P.L.R. 81.] Where, at the settlement, the proprietary rights in a village were granted not jointly but in equal shares to the members of a family the grant of itself amounted to a partition among the members thereof. TULSIRAM v. GIR LAHARI, **3 C.P.L.R. 109.** [*R.*, 13 C.P.L.R. 81.]

(14)—*Settlement—Effect of—No breaking up of pre-existing rights.*—The effect of an award at settlement is not to break up any pre-existing co-parcenary rights and to make the share conferred the separate property of the person on whom it is conferred. If the award is in favour of a widow, on her death, the estate devolves on the heirs of the last full owner and not necessarily on the heirs of her husband. RAMPERSHAD TIWARI v. ANANDILAL, **13 C.P.L.R. 81.** (28 A. 39, *F.*) [*R.*, 16 C.P.L.R. 3, 14 C.P.L.R. 94 ; *Expl.*, 2 N.L.R. 1.]

(15)—*Sub-settlement—Suit by superior proprietor to recover money due—Claim to enforce charge on land and to obtain personal decree.*—A superior proprietor can, in a suit against an inferior proprietor to recover money due under a sub-settlement, ask for a mere personal decree or enforce his charge on the land or pursue

Settlement—continued.

——3.—Effect of Settlement—*concluded.*

both remedies together. SETH KANAKMAL v. SHEO PERSHAD, **13 C.P.L.R. 110.**

See ABSENTEE, 40 P.R. 1871, 84 P.R. 1874, 78 P.R. 1875, 49 P.R. 1876.

Effect of—See BOM. ACT VII OF 1863, s. 32, 17 B. 407.

Record of Settlement Officer—Finality of entry therein—*See* C.P. ACT XII OF 1898, ss. 69 and 83, 15 C.P.L.R. 12.

See CUSTOMS—PUNJAB—GENERAL, 13 P.R. 1870, 55 P.R. 1871.

See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT, 9 P.R. 1896, Rev.

——4.—Evidence of Settlement.

(1)—*Purchaser of Zemindary at Government sale—Right to possession—Resumption.*—A purchaser of a *Zemindary* at a Government sale under Ben. Reg. XI of 1822, to satisfy arrears of revenue, is entitled as purchaser, first to immediate possession of such lands as were at the time of the sale in the possession of the *Zemindar* ; and secondly, under ss. 30, 32 and 33 of that Regulation, to set aside by suit all sub-tenures created since the Decennial Settlement by the *Zemindar* last seized, or his predecessors. *Mouzahs*, forming a *Shikmee Talook* before the Decennial Settlement and held of the *Zemindar* by *Mocurrary* tenure at a fixed rent are not liable to resumption by a purchaser under Reg. XI of 1822, ss. 30, 32 and 33. WISE v. BHOOBUN MOYEE DEBIA CHOWDRAINEE, **3 W.R. P.C. 5=10 M I.A. 165=1 Suther. 563=2 Sar. 91.**

(2)—*Alluvion—Gradual accretion—Ownership—Issues—Burden of proof.*—At the time of the permanent settlement, the river Gunduck divided *mouzah* Sohagpore from the village of Doomree. In 1837, the river, whether by gradual recession or sudden shifting, got into its southern channel, and a quantity of chur land to the north of that channel was then resumed by Government and settled with the zemindar of Sohagpore, who remained in undisturbed possession till 1848, when the river having returned to the northern channel, the *deara* land so settled was claimed by proprietors on the southern side of the river, but was adjudged in favour of the zemindar of Sohagpore under Act IV of 1840. On a question as to the ownership of the land in dispute, *held*, that the proper issues to be tried were (1) whether the land was settled in 1837 with the zemindar of Sohagpore as proprietor of alluvion which had gradually accreted to his estate or upon what other grounds ; and (2) whether there had been, at the permanent settlement and since then, any clear usage that the main channel of the Gunduck should be the boundary of the zemindaries is question. *Held*, also, that the burden of proving gradual accretion was on the zemindar of Sohagpore and the burden of proving the existence of the usage was on the zemindar of

Settlement—continued.

——5.—Evidence of Settlement—*concluded*.

Doomree. MAHARAJAH RAJENDUR PERTAB SAHEE v. LALLJEE SAHOO, **20 W.R. 427.** [*R.*, 6 A. 479.]

See CUSTOMS — PUNJAB — GENERAL, 31 P.R. 1866, 15 P. R. 1869.

See EVIDENCE— SECONDARY EVIDENCE, 1 P. R. 1875, Rev.

See RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT, 8 P. R. 1895, Rev.

——5.—Mode of Settlement.

(1)—*Power of Collector to alter settlement—Recognition of title by settlement officer—Beng. Reg.* VIII *of* 1882, *s.* 20.—Where the plaintiff's title was recognized by the settlement officer in 1836, who assigned an allowance of 5 per cent. on the Government demand—*held* that the Collector had no power in subsequent years during the pendency of this completed settlement to interfere with the arrangement of the settlement officer, except to the extent allowed by s. 20, Reg. VII of 1922. S. 20, Reg. VII of 1822, did not confer on the Collector the power of remodelling the arrangements completed by the settlement officer under s. 10 of the Regulation; nor could the notification of Government extend to revenue officers an authority that the law did not allow to them. RAI HIMMUT SINGH v. COLLECTOR OF BIJNOUR, **2 Agra 258.**

(2)—Maafee *land— Resumption —Settlement with* ex-maafeedar—*Right of* ex-maafeedar.—A plot of *maafee* land being resumed was settled with the *ex-maafeedar*, who engaged for the Government revenue for the term of settlement. The settlement with the *ex-maafeedar* was made under s. 5, Reg. XIII of 1825, and therefore, under the rules then in force, para 151, Circular Order of the Sudder Board of Revenue —they were entitled to settlement. *Held* that the mere fact of the last settlement having expired would not deprive them of the right of being assessed with revenue as proprietors of *maafee* land, but where there had been a grant of the soil and possession taken and long continued thereunder, the ownership thereof rests in the grantee, although the grant as to exemption from payment of revenue may be invalid and subject to assessment. TOOLSEE RAM v. NARAIN SINGH, **3 Agra 265.**

(3)—*Effect of* ex-maafidar—*Status of* maafidar *after settlement of resumed* maafi.—An *ex-maafidar*, with whom a sub-settlement has been made of the resumed *maafi*, is presumably not a hereditary cultivator, but his position is that of a proprietor subject to payment of Government revenue. UMMEED-OOL-LAH KHAN v. PRAN SOOKH, **3 Agra 280.**

——6.—Right to Settlement.

(1)—*Expiry of temporary settlement—Right of proprietor to claim Permanent Settlement from Government, except when forfeited by his own conduct.*—On the expiration of a temporary Settlement, whether the holder of that temporary Settlement had been the proprietor of the land within the meaning of the words of the old Regulations, or a stranger, the proprietor is entitled to come forward and to claim as of right from the Government a permanent Settlement of the land, unless he has, by his own conduct, in some way or other forfeited that right. MESSRS. WATSON AND CO. v. BROJOSOONDUREE DABEE, **10 W.R. 395.** [*R.*, 17 W.R. 376.]

Settlement—continued.

——6.—Right to Settlement—*continued.*

(2)—*Permanent settlement of land—Proprietorship—Dispossession of putneedar.*—A person declared entitled to the permanent settlement of certain land as proprietor is not entitled to dispossess putneedars in possession. MESSRS. R. WATSON AND CO. v. RANEE BROJO SOONDUREE DEBIA, **17 W.R. 376.**

(3)—*Co-sharers—Arrangement* re *collections for term of settlement—Right of co-sharers to engage for their shares after settlement.*—Where, at the time of a settlement, it was arranged that one co-sharer should make the collections and the other co-sharers should receive a money allowance, and such arrangement was to last for the term of settlement only, *held* that, after the expiry of the settlement, such co-sharers were, if the Revenue authorities thought fit, entitled to be allowed to engage for their shares. KOONWER SINGH v. SHIB DYAL, **3 Agra 297.**

(4)—Ghatwallee *tenure, resumption of, by Government—Claim by former holder as proprietor—Subsequent settlement by Government with another—Former holder's right of suit—Limitation.*—After the resumption of a *ghatwallee* tenure by Government, H, the former holder of it, claimed settlement as proprietor; but the Government offered him a lease on finding security. Such security not having been furnished, Government entered into a temporary settlement with one J who entered into possession. With this J, Government subsequently settled the land permanently. The present suit was brought by an heir of H seeking to set aside the settlement with J and for a declaration of plaintiff's right to have a settlement concluded with him. The High Court held that plaintiff had not been in possession for 20 years and his temporary possession as a farmer was lost by his own refusal to furnish security. The right of suit in the plaintiff, if any, by virtue of his position as a dispossessed *Jagheerdar*, was independent of the action of the Revenue authorities, and at the time when the plaintiff at last thought fit to call on the Civil Court to recognise the same, he was found to have not been in possession since 1841 for a period of more than 20 years. Also, there is no law or invariable practice binding the Revenue authorities irrevocably, or such as would lead the Civil Court to bind those authorities, and, in this view, plaintiff's case should fail even if he had sought in time, and he had not shown that he could claim to force himself on the

Settlement—continued.

——6.—**Right to Settlement**—*continued.*

Government as a tenant. THE GOVERNMENT v. TEKHAET POKHARUN SINGH, **7 W.R. 465.** [*D.*, 17 W.R. 145.]

(5)—*Reg.* VII *of* 1822— *Suit to establish right to settlement—Limitation—Decision on point of limitation—Court may go into merits.*—This was a suit by plaintiff to recover a share of *malikhana* paid over by the Collector to defendants. The Revenue authorities had considered the defendants and not the plaintiffs entitled to settlement under the provisions of Reg. VII of 1822 and other settlement laws. It was this decision which deprived plaintiff of settlement and also of *malikana*. Under the circumstances, it was obviously the plaintiff's duty, under the provisions of Reg. VII of 1822, to obtain such settlement by the aid of the Civil Courts together with the reversal of the orders of the Revenue Courts in defendant's favor within the time allowed by law, *viz.*, 12 years. And, as he had not done this, the plaintiff was properly *held* to have been barred by the law of limitation. It was also contended in this case that, when the lower appellate Court decided the case on limitation, it should not have gone into the merits at all, but the High Court observed that it cannot be laid down as a general rule that, whenever a case is decided on limitation, it is not competent to the Court to go into the merits. There may be many such cases where it would be most right and necessary that the merits should also be gone into. SHIBO DOORGA CHOWDHRAIN v. SYUD HOSSEIN ALI CHOWDHRY, **6 W.R. 218.**

(6)—*Possession, Right of—Talook—Presumption*—Churs—*Enhancement — Notice.*—A was the owner of a talook in a zemindari which was purchased by the Government at an auction sale for arrears of revenue. The Government did not cancel the talook, but settled it with A for twelve years. When the term expired, Government refused to make a new lease with A, and, instead, leased it for a year to B. *Held* that the refusal of Government to settle the land with A in no way affected his right to a settlement on the expiration of the lease to B. When a Zemindar sues to enhance the rent of a talookdar, and specifies certain *churs* as part of the land, the rent of which is to be enhanced, he, by implication, must be considered to admit that the tenant has some valid tenure or right of occupancy in the land mentioned in the notice. KHAJAH ASHANOOLLAH v. KISTO GOBIND DAS, **2 C.L.R. 592.** (13 W.R. 11, P.C., *Cited.*)

(7)—*Separately numbered estates—Right to settlement.*—To estate No. 667, some alluvial land accreted, of which temporary settlement was made separately under No. 3148. During the currency of this settlement, the owner sold all his rights in No. 667, making no allusion whatever to any *churs* as appertaining thereto. At the same time, he sold all his rights and interests in No. 3148 to the defendants. On

Settlement—continued.

——6.—**Right to Settlement**—*concluded.*

the expiry of the temporary settlement of No. 3148, the plaintiff, as owner of No. 667, the original estate, claimed and ultimately brought this suit to establish his title to the permanent settlement of No. 3148. *Held* that the suit would not lie, and that the plaintiff had no claim to have a settlement of No. 3148. KHUB LAL v. CHINA HAZARI, **2 B.L.R. A.C. 339.**

(8)—*Suit for a declaration of right to participate in Permanent Settlement of Mahal — Parties—Defect—Limitation—Cause of action*—Malikana—*Proprietary rights.*—A suit for a declaration of plaintiff's right to share in the settlement of an accretion will lie without the Government being made a party to it. The period of limitation which bars the claim to a settlement does not begin to run so long as the proprietary right of the zemindar is formally recognized by the revenue authorities (*e.g.*, by temporary settlements), and no permanent settlement is made with any other person. The payment of *malikana* is not the only method in which a proprietary right can be recognized. But the keeping of the *malikana* in deposit, as in this case, for the benefit of the recorded proprietors generally, is a sufficient recognition of a sharer's proprietary rights. KRISHNA CHANDRA SANDYAL CHOWDHRY v. HARISH CHANDRA CHOWDHRY, **8 B. L. R. 524 = 17 W. R. 145.** [*Cons.*, 22 W.R. 520.]

(9)—*Resumption of Lakheraj lands—Shikmee Taluqdars— Their rights.*— Where there are shikmee taluqdars holding under lakherajdars and the rent-free tenures have been resumed by Government, they (Taluqdars) could claim to have their rights upheld, and cannot institute a suit to obtain an independent settlement. GRISH CHUNDER ROY v. BOYDONATH DEY, **W.R. 1864, 262.**

See WASTE LANDS, 4 M.H.C 429.

——7.—**Subjects of Settlement.**

(1)—*Ryotwari lands — Nature of right possessed by ryot in his lands—Right of Government to grant to other ryots lands allowed to lie waste.*—In ryotwari lands, the ryot has by immemorial custom and usage an indefeasible right of occupation so long as he pays the Government assessment fixed on the lands; but on his abandoning the lands and ceasing to make the payment, the Government possess the power of granting them to other ryots for purposes of cultivation. KUMARADEVA MUDALI v. NALLATAMBI REDDI, **1 M.H.C. 407.** [*Cons.*, 7 M.H.C. 98; *R.*, 2 M.H.C. 1, 4 M.H.C. 108, 12 B.H.C. O.C. 1, 2 B. 19, 1 M. 205.]

(2)—*Julkar rights in navigable rivers—Settlements by Government.* — A settlement Dol will include all that ordinarily passes as assets of the settlement, except what is specified in terms as excepted in the Dol. But it will not on that account legally include what the law

Settlement—continued.

——7.—Subjects of Settlement—*concluded.*

itself declares is not included, and is exclusively reserved as the sole right of the sovereign—such, for instance, as the right of the state to the julkar of navigable rivers. THE COLLECTOR OF JESSORE v. MR. J. BECKWITH, **5 W.R. 175.**

——8.—Miscellaneous.

(1)—*Act* XVI *of* 1842 *and Reg.* XIV *of* 1842 *—Extent of application —Resumed lakheraj— Permanent Settlement with proprietor— Grant of mokurruree lease pending confirmation of settlement — Proprietor bound by lease after confirmation of settlement.*—Act XVI of 1842 has modified Reg. XIV of 1842 in respect of the time for which zemindars were empowered to grant leases, but both enactments apply to the ceded and conquered provinces only, including Cuttack and certain parts of Midnapore, and not to the district of Tirhut. The proprietor of a resumed *lakheraj* with whom a permanent settlement was made subject to the confirmation of the Commissioners, gave a *mokurruree* lease of the lands for valuable consideration, before the proceedings were returned by the Commissioner. The Commissioner declined to confirm the settlement for more than 10 years, but subsequently the Board of Revenue interfered and ordered that the settlement should be permanent. *Held*, that the proprietor gave the pottah on the supposition that the settlement was a permanent one, and that she could not afterwards turn round upon the lessee and say that she had given what she had no power to give because the settlement with her at the time of granting the lease was temporary and not permanent. AMEER ALI v. AMEEROONISSA BEGUM, **11 W.R. 11.**

(2)—*Landlord and tenant—Settlement proceedings—Tenant to be party to Collector's inquiry.*—If a landowner seeks to bind his tenants by the Settlement Proceedings, he should show distinctly that they were parties to an inquiry held by the Collector into the nature and extent of their holdings. SYUD SHAH ALI AHMED v. DOORGA ROY, **22 W.R. 455.**

(3)—*Suit for rent—Appeal—Act* VIII *of* 1869 *(B.C.), s.* 102—*Reg.* VII *of* 1882, *s.* 9—*Jummabundee—Signature by tenants—Costs of collection.*—A suit for rent below Rs. 100 is not taken out of the purview of Act VIII of 1869 (B.C.), s. 102, by the fact that the rate of rent has been varied by the decision of the Court, unless there is a determination of "the right to vary the rent." [*F.*, 25 W.R. 103.] Tenants who are aymadars and who voluntarily sign a jummabundee drawn up under s. 9, Reg. VII of 1882, specifying the amounts of rent payable by them to the Government farmers with whom the settlement was made, are not entitled to a deduction on account of costs of collection. WATSON & CO. v. MOHENDRO NATH PAL, **23 W.R. 486.** [*Expl.*, 16 C.L.J. 328.]

(4)—*Settlement—Power of Revenue Board—Commissioner.*—A settlement of resumed *lakhiraj* land made by a Collector "subject to the

Settlement—continued.

——8.—Miscellaneous—*continued.*

orders of the Board of Revenue," may be set aside by that Board. Under the Board's rules, a Commissioner has authority to set aside such a settlement, and is limited to no time in the exercise of his powers of revision. HARLAL TEWARI v. THE COLLECTOR OF BHAGULPORE, **3 B.L.R. App. 82.**

(5)—*Reg.* I *of* 1824, *s.* 9, *cl.* 11 *and s.* 14—*Salt Department Rules—Construction — Fuel lands — Rights of Government.*—The Rules mentioned in Reg. I of 1824, relating to the Salt Department should not be construed in such a way as to restrict their operation to the four districts named, but should be enforced wheresoever lands might be held or required by Government for the manufacture of salt. Cl. 11, s. 9, Reg. I of 1824, refers to lands which at one time appertained to an estate which has been permanently settled, but, having been severed from it, have become the property of Government. Under s. 14 of Reg. I of 1824, which relates to fuel lands, the Government has no right to take them on the same terms as lands taken, under s. 9, for purposes of salt manufacture. In the absence of any special engagement, the zemindar cannot be ousted from possession of the land. When the Government does not occupy it for cutting fuel, he has a right to enjoy it, and no fresh right accrues to Government in exchange for the abandoned right to take fuel. RAJAH GUJENDRO NARAIN ROY v. COLLECTOR OF MIDNAPORE, **23 W.R. 197.**

(6)—Sanad *on summary settlement, whether revocable by Government—Jurisdiction of Civil Court—Bombay Act*, VII *of* 1863.—S. 7 of Bombay Act VII of 1863 contemplates the possibility, in the course of the summary settlement of land revenue, of the occurrence of mistakes as to the ownership of lands, for which exemption (partial or total) from liability to revenue assessment was claimed, and lays down what the legal consequences of such an error should be. The section in nowise disturbs, so far as regards the quit-rent payable, the finality of the *sanad* as laid down in the 2nd and 6th sections of the Act. There has not been any intention on the part of the Legislature, to permit Government, on the ground of its having fallen into an error as to the ownership, to recede from the settlement, to treat the lands as *Khalsa* or *sarkari* or *muzmun* and to re-assess the lands. What shall be the legal results of mistakes as to ownership has been, as stated above, specially provided by the Act itself, but the question was left open whether to Government, or other parties to the summary settlement of claims under Bom. Act VII of 1863, a Civil Court can give relief either by reforming or cancelling the *sanads* against mistakes found to exist therein, other than those relating to ownership. DOLSANG BHAVSANG v. THE COLLECTOR OF KAIRA, **4 B. 357.** [*R.*, 4 B. 643, **15 B. 172, F.B.**]

Settlement—continued.

——**8.—Miscellaneous**—*continued.*

(7)—*Temporary settlement, dependent talookdars under, if liable to ejectment at close of settlement.*—Plaintiffs in this suit, alleging that they were dependent talookdars in the estate of the defendant, and that the latter had illegally dispossessed them, sued to recover possession of their talook. The High Court confirmed the decrees of their claims given to the plaintiffs by the lower Courts. Although the talookdars had been re-admitted to certain temporary settlements for a certain number of years only, it could not therefore be taken that the talookdars were liable to ejectment at the close of such settlement. If a ryot holds a right of occupancy, but at a variable rate of rent, it does not follow that because he enters into an agreement to pay a certain rate of rent for a number of years, he loses his rights of occupancy at the end of that time. HURO GOBIND DOSS v. KALA CHAND SHAHA, **6 W. R. Act X, Rul. 26.**

(8)—*Dependent talookdar under temporary settlement—Collector's acts placing settlement in abeyance, not dispossession for purposes of limitation — Dispossession by purchaser at sale.*—When a dependent talookdar holding under a temporary settlement, has that settlement placed in abeyance by the fact of the Collector taking the collections of *khas*, into his own hands, the Collector's acts cannot be deemed to amount to one of dispossession from which the period of limitation can be calculated. The collections of a mehal *khas* and the issue of the necessary orders to that effect pending orders as to future settlement do not necessarily involve ejectment or repudiation of former talookdaree right or tenure. On the other hand, the instruction of the Revenue Office was that talookdaree rights should be respected. Consequently, dispossession by the new purchaser can alone be taken to have given a cause of action. Limitation will thus have to be reckoned only from the date when the purchaser, after the Collector had ceased to hold *khas*, had himself made collections and so created a cause of action by dispossession of the former talookdar. MOULVIE MYENOODDEEN v. RAM MONEE CHOWDHRAIN, **7 W.R. 182.**

(9)—*Shikmee Talookdaree right—Pottah from Government—Right to settlement—Allowance—Malikana.*—Where a pottah granted by Government to a shikmee talookdar and accepted by him, in its recital admitted him to be a person having a right to a settlement, but although the allowance, which had, under the previous settlement, been made to him under the name of malikana, was no longer by this pottah given to him under that name, still, it was given to him in fact as a separate and distinct allowance under the head of expenses, in addition to the usual allowance for collections and other incidental charges, *held* that, if he accepted the payment under the new head of expenses instead of under the head of malikana, because he knew that his rights as malik of

Settlement—concluded.

——**8.—Miscellaneous**—*concluded.*

the shikmee talook was at an end, and he was no longer recognised as having the shikmee talookdaree right, then his shikmi talookdaree right came to an end at that time. MOULVIE MAINOODDEEN v. MUSSAMUT NUBO COOMAREE DEBIA, **24 W.R. 247.**

(10)—*Limitation—Regular suit for correcting settlement record—Summary order—Award in contested case.*—In 1866, land was thrown up by the river. The plaintiff brought a summary suit to be recorded proprietor. His claim was granted but he was directed to pay certain dues, "huq zemindari," to the defendants as provided for in the settlement record. On appeal this was confirmed but plaintiff was told to lodge a regular suit for correcting the settlement record if he considered the entry to be erroneous. This order was dated 27th October, 1866. The regular suit was lodged on 4th April, 1870. *Held* that, if the order of October 1866 was considered a summary order or decision, then a regular suit to set aside that order should have been brought within one year from the date of the order. If the order was considered an award in a contested case, the suit was barred by cl. 6, s. 1, Act XII of 1859, for when it was lodged more than 3 years had elapsed from the date of that order. MUNSA SING v. SOOLTAN, **9 P.R. 1871.**

(11)—*Settlement Officer—Decision as to rent—Award—Limitation—Arrears of rent, Suit for.*—In a contested case before the Settlement Officer in July, 1867, between the plaintiff and the father of defendant that officer decided that defendant's father should pay an amount of rent equivalent to the Government revenue payable by him and that, if either party felt aggrieved, a civil action to set aside his order, which was based on the report of the assessors, should be brought within one year from the date of the order. Plaintiff sued for arrears of revenue. *Held* that the order of the Settlement Officer passed in 1867 was an award given in a contested case, and a suit to set aside such award should have been brought within three years from the date of the award; and as defendant's father or defendant took no steps to set it aside by an appeal to proper authority, the defendant as a representative of his father was bound by the award. The plaintiff was therefore held entitled to the arrears claimed. BUNDE KHAN v. LALL DASS, **68 P.R. 1871.**

Settlement Award.

Of proprietary rights, legal effect of the grant of—*See* C. P. ACT XVI OF 1889, s. 87, **2 N.L.R. 1.**

Settlement, Bengal Rent.

See BEN. ACT VIII OF 1879.

Settlement Court.

Interest on arrears of rent—Tenant, Suit for arrears of rent and interest—Decree of—*See* U.P. ACT XXII OF 1886, ss. 3 and 14, **5 O.C. 187.**

Settlement Court—*concluded.*

Decree of—*See* U.P. ACT IX OF 1889, 3 O.C 94.

Decrees of Settlement Court, nature of such decrees—Procedure of—*See* MORTGAGE—REDEMPTION, 1 O.C. 289.

See RENT, 7 O.C. 108.

Suit for rent or in default for possession of land under Settlement Court decree entitling landlord to demand any reasonable rent at his option—Landlord and tenant, relation of—Oudh Rent Act—Resjudicata—Cause of action—Civ. Pro. Code, 1882, s. 43—Limitation—*See* RENT—SUIT FOR, 6 O.C. 341.

Settlement Decree.

(1)—*Transfer against the terms of settlement decree, invalidity of—Rent Act (Oudh), s. 108 cl. (4)—Jurisdiction.*—Where a person obtained in the Settlement Court a decree for *haq quabzadari* and the decree expressly provided that the decree-holder should have a permanent and heritable right in the land, but should not have the power of transfer, *held*, that a transfer of such land by the tenant was invalid as it was forbidden by the decree. *Held* further that, where such land was transferred by the tenant, a suit by the *lambardar* to recover possession of the land being maintainable under s. 108, cl. (4) of the Rent Act. was not cognizable by the Civil Court. MUSSAMMAT BILASA v. DARSHAN SINGH, **14 O.C. 225.** (2 O.C. 204, 6 O.C. 289, *R.*)

(2)—*Settlement decree against Talukdar for a perpetual hereditary farming lease, construction of—Talukdar's power to have a non-transferable tenure sold—Under-proprietary right.*—The predecessor-in-title of the judgment-debtor obtained a decree from the Financial Commissioner in 1869, which was based on a compromise, under which he obtained a perpetual hereditary farming lease from the predecessor of the appellant Talukdar on payment of Government revenue *plus* 30 per cent. In a previous suit brought by the Talukdar against a person who had obtained a decree against the lessees and wanted to have their rights sold in execution, it was decided that the rights were not transferable. The question in the present suit was whether the Talukdar himself could have the same rights sold in execution of his own decrees. *Held* that, the decree not being one for under-proprietary rights, the Talukdar could not, for purposes of his own, convert a non-transferable tenure into a transferable one against the wishes of the holders and in this way effect their ejectment in a manner not contemplated by law. MUHAMMAD ABDUL KARIM KHAN v. NIWAZ SINGH, **12 O C. 267 =3 Ind. Cas. 868.**

Settlement Deed.

Settlement deed, stamp on—*See* STAMP ACT, 1899, art. 58 (*a*), 7 Bom. L.R. 931.

Settlement, Khoti.

See BOM. ACT I OF 1880.

Settlement Manual.

Part III, chap. XVI, rule 7—*See* ANNUAL JAMAS, 9 C.L.J. 341=13 C.W.N. 683=3 Ind. Cas. 986.

Settlement Officer.

(1)—*Settlement Officer, order of—Civil Courts power to cancel order.*—A Civil Court has no jurisdiction to cancel the order of a Settlement Officer by decree in a civil suit. TARAPAT OJHA v. RAM RATAN KUAR, **15 A. 387=A.W.N. 1893, 164, F.B.**

(2)—*Sanads granted by Settlement Officers, effect of—Bom. Act* II *of* 1863.—Sanads granted by Settlement Officers under Bom. Act II of 1863 could not deprive a third person of any rights in the land, or the profits arising therefrom, which he may have possessed at the time they were granted. PUJU KADAN v. MALHARI RAMA, **1 B.H.C. 171.**

(3)—*Settlement Officer—Duty to record names of persons in possession or wrongfully dispossessed.*—The duty of the Settlement Officer is to record the names of those whom he finds in possession of rights, or whom he finds within a certain time to have been wrongfully dispossessed of rights; it is not his duty to determine the question whether the plaintiff, who avers that the defendants are mortgagees whose debt has been satisfied out of the usufruct, is on that account entitled to possession. BHYRO RAI v. GOLAB SINGH, **3 Agra 303.**

(4)—*Settlement Officer—Rent—Enhancement—Non-liability of tenant.*—A Settlement Officer is bound to record in the jummabundee the existing rights of cultivators, and he cannot impose an enhanced rent without causing a notice to be served on those entitled to notice. If he acts in contravention of the law, and enters in a jummabundee a higher rate of rent than the tenant admits to have paid in previous years, and does so, in spite of a protest on the part of the tenant, such entry does not conclude the tenant from showing when he is sued for rent that the jummabundee does not correctly represent the conditions of his tenure, and that he is not liable for the rent therein recorded, the correctness of which he has never admitted. J.W. LEDLIE v. SREEMUTTY DOORGA MONEE DOSSEE, **21 W.R. 410.** [*Rel.*, 32 C. 463, Note.]

(5)—*Act* X *of* 1859, *s.* 28, *proceeding under, to be deemed a suit subject to the provisions as to appeals—Act* XIV *of* 1863, *s.* 6, *power given to Settlement Officer by—Settlement Officer not competent to try right to resume and assess.*—This was a claim to assess a certain garden under s. 28 of Act X of 1859, brought before the Settlement Officer who dismissed the same. On appeal, the Judge held that he had no jurisdiction to hear it, such appeal lying not to him but to the Commissioner. On appeal to the High Court, the matter was referred to a Full Bench which ruled that an order passed in a proceeding under s. 28 of Act X of 1859 is appealable to the Judge and not to the Commissioner, and the Division Bench thereon *held*

Settlement Officer—*continued.*

that the Judge was wrong in having refused to hear the appeal. Also, the Settlement Officer before whom the proceedings were originally laid had no power to entertain the application. S. 8 of Act XIV of 1863 empowers the Settlement Officer merely to decide suits of the nature mentioned in s. 23 of Act X of 1859 or in Act XIV of 1863; and, under s. 9 of the last-mentioned Act, he has power to determine dispute regarding rates of rent payable to the zemindar, but neither of the above sections gives him the power to try a right to resume and assess. CHOWDREE JEYCHUND v. KADHOREE, **2 N.W.P. 244.**

(6)—*Act* XIV *of* 1863, *ss.* 8 *and* 10—*Suit for enhancement of rent preferred to superior officer—Reference of such suit to another whether legal—Act* X *of* 1859, *ss.* 150, 162.—A suit for enhancement of rent, which had been originally preferred to a Covenanted Settlement Officer, was referred by him, to a Settlement Deputy Collector who was neither employed in making or revising settlements of the land revenue nor invested with the powers of a Collector under s. 8 of Act XIV of 1863. Whether the superior officer (who referred the case) had jurisdiction to try the suit by reason of his having been invested with the special powers under s. 8 of the Act was not clear. The Deputy Collector decreed the plaintiff's claim which was confirmed by the lower appellate Court with certain modifications. *Held*, on special appeal by the defendant, that under s. 10 of Act XIV of 1863, if a suit for enhancement of rent be brought before any officer, empowered under s. 8 of the Act to hear the same, such suit *shall* be heard and determined by such officer, and it is not provided that he may refer it for trial and decision to another. The powers which the Local Government may confer on any officer employed in making or revising settlement under s. 8 of Act XIV of 1863 are the powers referred to in s. 150 of Act X of 1859, and are distinct from such powers as those given to a Collector by cl. 2 of s. 162 of the said Act. PUNCHUM SINGH v. MUSSUMAT HOOMUT-OON-NISSA, **5 N.W.P. 64.**

(7)—*Rent—Enhancement in course of settlement—Necessity for ryots' consent.*—Rentat an enhanced rate cannot be claimed from the ryots as imposed at the settlement proceedings, unless it is proved that the ryots have consented to the Collector's jummabundee. REAZOODDEEN MAHOMED v. MC ALPINE, **22 W.R. 540.** [*F.*, 16 C. 586; *R.*, 32 C. 463, Note, 16 C.L.J. 328.]

(8)—*Act* X *of* 1859, *s.* 28—*Proceeding of Settlement Officer, suit to set aside—Proceedings void for want of jurisdiction.*—When a suit under s. 28, Act X of 1859, had been determined by a Collector having jurisdiction to try it, it was subject to an appeal to the Judge (of the District), and could not be contested in a separate suit. The powers which the Government is authorized by Act XIV of 1863 to confer on Settlement Officers, are limited to powers for the decision of suits of the nature

Settlement Officer—*continued.*

mentioned in s. 23 of Act X, or in Act XIV of 1863. There is no authority given to Government to invest Settlement Officers with any other of the powers which are vested in a Collector by Act X of 1859. Consequently a proceeding of a Settlement Officer purporting to be a proceeding under s. 28 of Act X of 1859, is void on the face of it for want of jurisdiction. THAKOOREE v. DHULEEP SINGH, **2 N.W.P. 261.**

(9)—*Powers of Settlement Officer—Board of Administration—Revenue Civil Circular No.* 8 *of the* 11*th February* 1852—*Liability of Government for acts of its servant—Grant of zemindari by Government, what passes under.*—The Circular of 1852 authorized Settlement Officers to grant the zemindar proprietary rights in *Khana Khalee* or Government estates to private persons, and a wide discretion was entrusted to such officers in this matter. But the Circular did not refer to all lands which were the property of Government, but only to those which were used for agricultural purposes or which might by reclamation or otherwise be used for such purposes. It did not include lands held by Government for public purposes. The acts of a Government Officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority, or, if he exceed that authority, when the Government in fact or in law directly or by implication ratifies the excess. (8 M.I.A. 554, *F.*) When the Government owns the zamindari interest in a village and grants that interest to a private person, nothing is intended to pass by the grant except what the Government holds as *zemindar*. In this case, it appeared that the Settlement Officer, purporting to act under Circular No. 8 of 1852, granted the zamindari of the village of R to one D without reserving to Government the plots in dispute which were, in 1852 and previously, the property of Government and in the possession of the Canal department, and used by that department for the purposes of the Western Jumna Canal. Plaintiffs as successors in title to the said zamindary claimed *inter alia* the plots in dispute. It was not proved that the grant of these plots to D was ratified in fact or in law actually or by implication by the Government. Nor did the plaintiffs show any act or admission on the part of the officers of Government since the date of the grant, which would have the effect of estopping the Government from contesting their claim. *Held*:—that the Settlement Officer exceeded his authority in granting the zamindari without reserving the said plots, and that, under the circumstances, the plaintiffs were not entitled to claim the same. BANSI LALL v. THE SECRETARY OF STATE, **1 P.R. 1878.**

(10)—*Grant of land to lambeardar by way of remuneration—Arrangement by Settlement Officer and village community—Rights of lambeardar under terms of grant at settlement.*—Plaintiff alleged that, under the grant made at settlement to him as the Chief lambeardar of the

Settlement Officer—*continued.*

village, he was entitled to receive the half share of the produce of the land in question and sued to recover the value of the share from defendant. The question arose whether the grant made at settlement to the chief lamberdar as an *Inam* included only the Government revenue assessed upon the land set apart for the purposes of the grant or extended also to the landlord's right to manage the land and receive the rent. The Chief Court held that the allotment of a plot of common land to the Chief lamberdar by way of remuneration for his services to the villages was usually a matter of arrangement by the Settlement Officer in consultation with the village community and with their consent, and that while it was usual to make over the land to the Chief lamberdar and to allow him to cultivate it for his own benefit without payment of revenue or malikana, this was not necessarily always the case, and therefore the terms upon which any particular grant was made must be gathered from the circumstances of the particular case,and that there was no reason for taking exception in special appeal to the finding of the lower Courts, that by the terms of his grant, the Chief lamberdar was entitled to realise from the cultivators what the proprietors could have realised. In other words, not merely was he the muafidar of the land, but was also entitled to take the rent, or the proprietor's share of the produce. GURBAKSH SINGH v. QUTBUDDIN, **105 P.R. 1879.** [*Diss.*, 101 P.R. 1901=15 P.L.R. 1901, 105 P.R. 1894.]

Jurisdiction of—To entertain application to settle rent of land, made by party concerned and not by Government—*See* BEN. ACT VIII OF 1865, ss. 101 to 107, 9 C.W.N. 504=1 C.L.J. 239=32 C. 518.

Obstruction to canongoe appointed by settlement officer—*See* BEN. ACT V OF 1875, s. 45, 6 C.W.N. 120.

Status of the ryots dealt with in the decision of—Order of special Judge on appeal from settlement officer's decision—Second appeal—*See* BEN. ACT VIII OF 1885, ss. 104 (2), 106, 107, 108, cl. 2, 21 C. 776.

Entry in survey settlement officer's record—Finality—*See* BOM. ACT I OF 1880, ss. 16, 17, 20 B. 729.

Survey officer's decision as to tenure, binding effect of, until reversed by Court's decree—Settlement officer's statement of facts in dharepatrah admissible in evidence as entries coming under s. 35, of Act I of 1872—*See* BOM. ACT. I OF 1880, ss. 20, 21, 21 B. 695.

License to Government to fell timber—Notification by Government constituting the land as reserved forest—Refusal by—Tc offer commutation for jenmi rights—Right of jenmi to claim compensation—*See* MAD. ACT V OF 1882, ss. 4, 10, 23, 7 M.L.J. 13.

See U.P. ACT XIV OF 1863, ss. 8, 9, 2 Agra 288.

Settlement Officer—*concluded.*

Decision on questions of title, not final—Suit to contest such orders—Limitation—*See* U.P. ACT XIX OF 1873, ss. 62, 63, A.W.N. 1881, 15.

See U.P. ACT XIX OF 1873, ss. 241, cls. (*d*), (*e*), (*h*), 62, A.W.N. 1886, 23.

Rent—Determination of, by—*See* U.P. ACT XVII OF 1876, ss. 40, 108, cl. (16), 2 O.C. 273.

Authority of settlement officer to make entry as to pre-emption—Probative value of entry—*See* EVIDENCE ACT, 1872, s. 35, 25 A. 90=A.W.N. 1902, 207.

Power of Civil Court to go behind settlement officer's order—*See* JURISDICTION—QUESTION OF JURISDICTION, 1 C.P.L.R. 146.

Settlement officer's decision liable to be reversed by Civil Court—Adverse possession of lands as dhara—*See* LIMITATION ACT, 1908, art. 14, 18 B. 244.

Proceedings of—as to cess—*See* LIMITATION ACT, 1908, arts. 45 and 46, 1 Agra 134.

See LIMITATION ACT, 1908, arts. 45, 46, 2 Agra 8.

Award of—*See* LIMITATION ACT, 1908, arts. 45, 46, 1 Agra 228.

"Baibilwafa" mortgage—Proceedings of—Upon award before mortgage—Rghts of mortgagee—*See* LIS PENDENS, A W.N. 1888, 246.

See PUBLIC OFFICER, 14 B. 395.

See REFERENCE TO HIGH COURT, 6 C.L.R. 555.

Rent fixed by settlement officer, liability to pay—*See* RENT, SUIT FOR, 6 O.C. 346.

See RES JUDICATA—ADJUDICATIONS, 60 P.R. 1870.

See RES JUDICATA—COMPETENCY OF COURT, A.W.N. 1881, 24, A.W.N. 1882, 111.

See REVENUE, 5 O.C. 70.

Settlement Papers.

(1)—*Settlement papers*—Nugdee *lands*—*Admissibility in evidence*—*Registration.*—Settlement papers prepared at the beginning of each year and signed by the ryots, setting forth the *nugdee* lands to be held and the rent to be paid by each tenant, are admissible in evidence and need not be registered where the amount of rent is under Rs. 100 and the term is only one year. MUSSUMUT NUSRUN v. RAM DEBUL SINGH, **17 W.R. 273.**

(2)—*Collection of Kamiana dues authorised by custom, legality of, even in absence of entry in settlement papers and sanction by Government.*—Where the collection of Kamiana dues by the proprietary body of a village from its Kamins was authorized by custom, such collection may be lawful, although the proceeds have not been taken into account at settlement or the collection been sanctioned by the Local Government. KHODA BUKSH v. DULLA, **118 P.R. 1879.** [*Appl.*, 136 P.R. 1879.]

Settlement Proceedings.

(1)—*Settlement Proceedings—Record of name of tenant and rent—Effect*—The mere record of the name of a tenant, who is found in occupation of a particular piece of land, in settlement proceedings, and of the rent payable by him, does not invest him with any permanent title to hold it. ARUT SAHOO v. PRANDHONE PYKURA, **10 C. 502.**

See BEN. REG. III OF 1872, s. 5, 11 C.L. R. 30.

Settlement Record.

(1)—*Settlement record—Alteration—Jurisdiction of Civil Court.*—Suit in a Civil Court for an alteration of the Settlement Record, wherein defendants were recorded as hereditary cultivators, which *status* the plaintiff denied. *Held* that the Civil Court had no jurisdiction to direct such alteration. The plaintiff's proper remedy would have been a suit for possession after notice to quit. KUZANA v. WARIAN, **27 P.R. 1867.**

(2)—*Hereditary cultivator—Possession for a long time — Entry in Settlement Record as proprietor—Suit in ejectment.*—In a previous suit for rent, the defendant, who was erroneously recorded in the Settlement Record as having proprietary rights, pleaded such rights, and the plaintiff's suit was dismissed on this ground, and he was referred to a regular suit to establish his right. Having then obtained a decree establishing such right, the plaintiff brought the present suit in ejectment. Defendant now pleaded that he was a hereditary cultivator. *Held* that the burden of proving this plea was clearly on the defendant who was not recorded as such in the Settlement paper, but was erroneously recorded as having proprietary rights. His previous assertion, unsuccessfully made, that he was proprietor, placed him in the position of one *allegans contraria*. But more than that, if nothing had taken place in the way of contest as to the respective rights of the parties, the mere fact of long possession on the part of the defendant would not, as wrongly held by the lower Courts, constitute him a hereditary cultivator. PURSOTAM DOSS v. BYMULL, **34 P.R. 1867.** [*On review*, 81 P.R. 1867.]

(3)—*Suit involving alteration of Settlement Record—Leave to sue unnecessary—Circular Order No.* 33 *of* 1860.—An application for leave to bring a suit involving the alteration of the Settlement Record—an application required by Circular Order No. 33 of 1860—is now no longer a legal preliminary to a suit for land or for proprietary rights. NOORPOO v. JUGGUT SINGH, **57 P.R. 1867.**

(4)—*Suit for land—Decision first given in accordance with impugned settlement record—Correctness of Settlement record not to be left for separate suit.*—It has been repeatedly declared by the Chief Court that it is improper and illegal to decide the first suit which is brought for land in accordance with the settlement record which is impugned and then to refer the party impugning the record to a separate suit

Settlement Record—*continued.*

to establish the point; the right to the land should be tried out and out in the first case. GHABA v. DATA, **55 P.R. 1869.**

(5)—*Forest land, reclamation of—Settlement Records — Jageerdar—Zemindar —Respective rights of.*—There was a large tract of jungle which was not assessed, within the area of estate of the plaintiff Jaghirdar. A portion of the jungle tract was reclaimed by the defendants-Zamindars and brought under cultivation. The plaintiff claimed a share of the produce of the newly cultivated land and the defendants contended that the plaintiff's right only extended over the jungle or forest and that, whenever they cut down the forest and cultivate the lands, the proprietary right vested entirely in them and the plaintiff could no longer claim to receive any share of the produce of the lands. As regards this question, the Settlement records provided that the Zamindars and residents of the village might graze their cattle there free of charge and take dry wood for domestic purposes and that the Zamindars had the right to cut down the forest and jungle for the purpose of bringing the land under cultivation without the consent of the jaghirdar, in which case the proprietary rights in the land vested entirely in them and the jaghirdar had nothing to say to it. *Held* that the reasonable construction to be put upon the settlement record was that the Zamindars were the original owners and entitled to proprietary possession and that the jaghirdar was only entitled to the income from the forest and jungle tract so long as it existed. *Held* also that no such custom as alleged by plaintiff existed, *viz.*, that jaghirdars, who are not proprietors, have a right to compensation for forest rights destroyed by breaking up of "Khol" land. SIRDAR RUNJEET SINGH v. KHODA BUKSH, **53 P.R. 1870.**

(6)—*Entry in Settlement record—Entry not in accordance with settlement award—Suit for correction of entry, if maintainable — S.* 6, *Hazara Settlement rules — No bar to suit.*—Plaintiff was the proprietor of certain land in the district of Hazara by virtue of an award of the land by the Superintendent of Settlement, but the entry in the Settlement record did not show him to be the proprietor. *Held* that a suit for correction of the entry in the Settlement record would lie in a Civil Court. S. 60 of the Hazara Settlement rules was no bar to such suit. SHAM PERKASH v. ILAHI BAKSH KHAN, **3 P. R. 1880.**

(7)—*Hazara Settlement rule, No.* 60—*Finality of decision of Settlement Superintendent.*—Doubted whether R. 60 of the Hazara Settlement Regulation could be rightly construed so as to give finality to the decisions of a Settlement Superintendent on every point incidentally dealt with in preparing the record. SHER ALI v. MIRWALI KHAN, **17. P. R. 1887.**

Non-entry of plaintiff's name in Settlement record how far evidence of abandonment by or adverse possession against, him.—*See* ABANDONMENT OF TENURE, 62 P.R. 1890.

Settlement Record—*concluded*.

Correctness of—Absence of evidence to the contrary—*See* C.P. ACT XVIII OF 1881, s. 82, 3 C.P.L.R. 189.

Use and meaning of the word "*Mahaz*"—*See* ALLUVION—GENERAL, 45 P.R. 1888.

See CUSTOMS—PUNJAB—GENERAL, 5 P. R. 1895.

Entry in, evidentiary value of—*See* JURISDICTION—GENERAL, 8 C.L.J. 116=12 C.W.N. 1036.

See JURISDICTION OF CIVIL COURTS, 25 P.R. 1889.

See LIMITATION ACT, 1908, s. 19, 145 P.R. 1889.

See LIMITATION ACT, 1908, art. 120, 27 P. R. 1881.

Settlement Register.

Entry in—as to liability of occupancy khoti tenant not final decision but final entry—*See* BOM. ACT I OF 1880, s. 33, 21 B. 244.

Government—Classification of land as village, poramboke in — Effect—*See* DECLARATORY DECREE, SUIT FOR—GENERAL, 6 M.L.T. 306 =5 Ind. Cas. 121=4 Ind. Cas. 1070=20 M.L. J. 71=33 M. 173.

Settlement Reports.

This circular states that the data on which proposed rate for each class of land is calculated is to be fully recorded in Settlement Reports. **Rev. Cir. No. 3, 21 W.R. Rev. Cir., p. 10.**

This circular states that the Settlement Reports are to be submitted in April. **Rev. Cir. No. 3, 24 W.R. Rev. Cir., p. 25.**

Settlement Rules.

When an estate is re-settled, steps should at once be taken to secure the execution of the agreement, with the proviso for subsequent revision prescribed by para. 9 of Revised Settlement Rules. **Rev. Cir. No. 1, 21 W.R. Rev. Cir., p. 10.**

Settlement and Survey, Bombay.

See BOM. ACT I OF 1865.

Sewing Machine.

Agreement for the hire and purchase of—*See* AGREEMENT, 6 Bom. L.R. 871.

Shade Right.

(1)— *Customary right—"Shade right"—Nature—Running with land—Non-alienability to strangers.*—A "shade right" or the customary right of the owner or occupier of adjacent land to compensation for the damage done to his crops by the shade of the trees, in the form of a share of their produce, is substantive right running with the land. (3 Berar L.J. 72, 5 N. L.R. 52, *R.*) It cannot be dissociated from the land, nor can it be transferred to any one who does not hold the land. APPAJI v. KHUSHAL, **7 N.L.R. 1.**

Shajoog Hundi.

See NEGOTIABLE INSTRUMENTS—HUNDIS—GENERAL, 18 B. 570, 7 B.L.R. 289, Note.

See NEGOTIABLE INSTRUMENTS—HUNDIS—ENDORSEMENT OF HUNDIS, 5 C.W.N. 313.

See NEGOTIABLE INSTRUMENTS ACT, 1881, s. 10, 26 A. 493=A.W.N. 1904, 100=1 A.L.J. 254.

Shall.

(1)—*Interpretation of statutes — "May" and "shall".*—The words "must" and "shall" may, in some cases, be substituted for the word "may" but only for the purpose of giving effect to the intention of the Legislature. In the absence of the proof of such intention, the word "may" should be taken as used in its natural, *i.e.*, in a permissive, and not in an obligatory, sense. DELHI AND LONDON BANK v. ORCHARD, **3 C. 47=4 I A. 127, P.C.=3 Sar. 721=3 Suther. 423=4 P.R. 1878=1 Ind. Jur. 457.** [*R.*, 21 C. 832.]

(2)—'*Shall*'.—The word 'shall' in cl. (1) of s. 643-B, Civ. Pro. Code, 1882, has only a directory sense, and is not mandatory. MADAN GOPAL v. BHAGWAN DAS, **11 A. 304=A.W.N. 1889, 75.**

See BEN. ACT III OF 1884, s. 339, 17 C. 329.

See STATUTES, CONSTRUCTION OF, 21 C. 832.

Shamilat Land.

See COMMON LAND.

(1)—Shamilat *land—Occupation—Adverse or permissive.*—A person, by merely occupying *shamilat* land for more than seventeen years, does not acquire by prescription a title to it. A distinction exists between private land and common land; in regard to the former, a presumption may arise that the owner gave up his right to the land, while, in the latter case, there is no such presumption. Where a majority of the proprietors object to the defendants remaining on the land, a decree in ejectment must be passed conditioned on payment of compensation by the plaintiffs. GOLAB SINGH v. HEERA LALL, **92 P.R. 1866.**

(2)—*Right of allocating* shamilat *land, given by* wajib-ul-arz *to Lumberdars—Allotment on partition between co-parceners.*—The land in suit was admittedly *shamilat deh* newly broken up. Plaintiff claimed on the allegation that the land bordered on his cultivated field and was first broken up by him; the defendants rested their defence on the same averments with regard to themselves. The *wajib-ul-arz* gave to the Lumberdars the right of allocating *shamilat* lands to cultivators. It also reserved to a co-parcener the prior right to break up land bordering on his cultivated field. It was however not clear whether the sanction of the Lumberdar was necessary to entitle the cultivator to break up *shamilat* land not situated on the border of his field. In the present case, that land was not situate on the border of the

Shamilat Land—*continued.*

cultivated fields of either of the parties, and no priority accrued to either of them on that account. The Chief Court accordingly modified the order of the lower Courts in so far as to declare that the defendants' possession of the land shall not operate to necessitate its allotment to them on a partition of the *shamilat* lands, the propriety of allotting to them or otherwise having to be determined on grounds other than that of possession. Also, till the making of an application to divide the *shamilat*, the defendants' possession must be maintained. KURM v. HUSSUN ALI, **34 P.R. 1869.**

(3)—*Private partition of* shamilat *by consent of parties—Imperfect Revenue partition—Effect—Distinction between private and imperfect partition and* butwara.—A private partition of the *shamilat*, made by the mutual consent of all concerned, is not of any the less binding effect than an imperfect partition conducted by the Revenue authorities under the rules. If a private partition has been completed and taken effect, and it be established that a particular plot of land fell to a certain proprietor by that partition, then the title of that proprietor in the land is as good as if he held it by a *butwara*; and a subsequent partition, in the absence of any agreement between the parties to that effect, altering the distribution of land previously divided among the proprietors by a private partition, complete in all its features as above explained, cannot legally be had. There is no difference in the effect of a private and an imperfect partition; but the main distinctions between such partitions and a regular *butwara* under Reg. XIX of 1814 or Act XIX of 1863, where this Regulation or Act is in vogue, consists in the maintenance of the joint responsibility of the whole village for the Government revenue by the one, while it is put an end to by the other. WALI v. GAMAN, **66 P. R. 1869.**

(4)—Shamilat—*Dispute as to use of* Shamilat *land—Rights of minority.*—Whatever, by village usage, might be the rights of the disputing sides of a village community, where such dispute had in reality arisen as to the use of the common land, but the dispute was not as to the *bona fide* use of common land for common purposes arising amongst the co-proprietors, but the use of it for a *serai* was put forward to cover the real claim, effect must be given to the objection by the minority. HIDAYAT ALI v. AKBAR ALI, **76 P R. 1873.** [*R.*, 78 P.R. 1877, 7 P.R. 1885, 54 P.R. 1886.]

(5)—Shamilat *granted rent-free—Some of the proprietors whether competent to sue to oust grantee — Application for partition, proper course.*—Where the *shamilat* land of a mouza has been granted as dholi by the proprietors jointly, and the use of such land continues in consequence of such joint grant, one section of the community has not, under all circumstances, a right to bring a suit, against another section, for ouster of the grantee. The proper course for the discontented section would be to apply for a partition. RATU DAS v. INDRAJ, **40 P.R. 1875.**

Shamilat Land—*continued.*

(6)—*Village common land—Prescriptive right of user of non-proprietors, for agricultural purposes*—Shamilat *land—Occupation of portion with consent of proprietors—Survival of right of occupation after partition.*—Non-proprietors can, by long use and prescription, obtain a right to the use of part of the common land, whether it is the *abadi* or the *shamilat deh* at large, for the purpose of keeping up their agricultural employment such as building a *khurli* or a *bara* (cattle trough). A common devolution by the village proprietors of a spot on the *shamilat* to a particular purpose, *e.g.*, allowing tenants to have a *bara* there, will, as an arrangement for a common village object, survive a partition and hold good against the individual who gets the spot on such partition. GHOUSA v. ABADAN, **34 P.R. 1877.** [*F.*, 152 P.R. 1882; *Appr. & D.*, 11 P.R. 1879, 36 P.R. 1882.]

(7)—*Building on shamilat land by malik kabza—Occupation for several years without paying malikana—Non-liability to pay* hak bua *malikana, &c.—Suit for chowkidari dues not maintainable by proprietor other than lamberdar.*—The defendant, who was a malik kabza, built a house on the common land of the village (shamilat deh) and had resided in it ever since. At a partition of the common land eight years before the suit, that portion on which the defendant had his house fell to the plaintiff's share. Plaintiff thereon brought the present suit to recover from the defendant malikana and chowkidari dues. On the facts found, defendant was held to be not liable to pay malikana for the site on which the house stood. He built the house eighteen years ago on shamilat land and had ever since occupied it without paying any malikana. Also, as regards the chouwkidari, notwithstanding the admission of the defendant that, like other proprietors, he was also liable to pay it, his contention, that the plaintiff not being the lamberdar, was not entitled to collect it, was upheld by the Chief Court. MUHAMMAD KHAN v. NUR KHAN, **11 P.R. 1879.**

(8)—*Forfeiture of rights in—Failure to contribute towards expenses incurred in recovering* shamilat *land from third party.*—The plaintiffs admitting that defendants had rights in *shamilat* land, claimed that the defendants' right was extinguished, for failure on their part to contribute towards expenses, incurred by plaintiffs in recovering the land from third parties. *Held* that the claim was not valid. MAULA v. KHUSHIA, **166 P.L.R. 1906.**

(8-*a*)—*Rights in — Burden of proof— Waste lands in Jhang District.*—The plaintiffs sued for declaration that only members of the *Bhutta* tribe were entitled to share in the village *shamilat* lands and the defendants, who were *Aroras* by caste, had no right in them. There was nothing in the village records, which stated that the lands were *shamilat* of the village, to indicate that the sales made in favour of the ancestors of the defendants which took place in 1836 and 1851, did not carry with them rights

Shamilat Land—*continued.*

in the *shamilat*. The sale-deeds were silent as to them. It was not shown that the defendants were excluded from a share in the enjoyment of such profits as might have been derived from the *shamilat*. *Held*, that the claim must be dismissed. DUNI CHAND v. MUHAMMAD BAKSH, **8 P.L.R. 1907=36 P.W.R. 1907.**

(9)—*Trespasser acquiring right to proprietary holding by adverse possession—Right to* shamilat *land.*—In 1863 one G claimed 25 *ghumaos* of land from S by right of ownership, but the suit was dismissed as barred by limitation, it having been found that S had first obtained possession of G's land in pre-British times. Since then S and his descendants were recorded in revenue and settlement papers as proprietors of the land and the *shamilat* lands were described as owned by the proprietors. It was contended in this suit that S and his descendants were not entitled to a share in the *shamilat* land, for even if S. became owner of the 25 *ghumaos* by adverse possession, it did not follow that he thereby became owner of a proportionate share of the *shamilat*, and even if G lost his rights in the *shamilat* at the same time that he lost his rights in the proprietary holding, the former rights should be held to revert to the other co-sharers in the village. *Held*, that the contention was not valid. JALAL v. BELI RAM, **9 P.L.R. 1907=37 P.W.R. 1907.**

(10)—*Burden of proof—Presumption of accuracy of entries made in settlement records.*—The defendant's ancestor purchased orally a proprietary holding in 1864 and since then the names of the vendee and his heirs appeared in settlement papers as proprietors. There was nothing to show that the sale did not include *shamilat* lands. The plaintiff claimed exclusive right to such lands. He failed to prove his exclusive possession. *Held*, that the suit must be dismissed. SANT SINGH v. JWALA SINGH, **10 P.L.R. 1907=34 P.W.R. 1907.**

(11)—*Portion only of such land purchased from co-sharer—Right of purchaser to claim partial partition of such land.*—A purchaser, from a co-sharer in the village of a portion only of the common *shamilat* land is not entitled to claim partial partition and could not have that plot alone partitioned. SHEO NATH v. PARAMA NAND, **32 P.R. 1908=76 P.W.R. 1908=161 P.L.R. 1908.** (19 M. 267, 23 B. 184, *Expl.*; 77 P.R. 1887, 12 C. 566, 13 M. 275, 20 M. 243, 24 B. 128, *R.*)

(12)—Shamilat—*Entry in settlement papers—Rebuttal of its correctness—Ownership claimed by a person recorded as a tenant—Emerged land—Presumption from long possession—Apportionment—Estoppel.*—Where H M., who in the settlement papers were entered as tenants at will of a certain area out of the *shamilat* of the village, contended that they were its exclusive owners: *Held*, that their contention is good, inasmuch as the following circumstances are sufficient to rebut the presumption arising from the settlement entry:—(1) That their proprietary holding immediately adjoins

Shamilat Land—*continued.*

the area in dispute. The rule is that, when land is emerged, the person who owns the adjacent land is entitled to get it. (2) That they have been in possession as owners, ever since the area emerged and have reclaimed it. *Held*, also, that in land acquisition cases persons deliberately omitting to claim the property to be acquired, are accepting the award treating the land as *shamilat*, are ordinarily estopped from afterwards asserting their rights before the Civil Court. HAJI UMAR DIN v. KHAIR DIN, **138 P.W.R. 1909=4 Ind. Cas. 1146.**

(13)—*Punjab Land Revenue Act* (XVII *of* 1887), *s.* 117—*Partition proceedings—Jurisdiction of Civil and Revenue Courts*—Shamilat *land—Partition of—Right to retain possession of land broken up and cultivated for many years by one of the co-sharers.*—At a partition of *shamilat* land, the plaintiff alleged that the land in dispute in the present suit was broken up by him and was in his possession for many years, and contended that according to custom his possession should not be disturbed. The Revenue authorities did not accept the contention and the land was allotted to a different co-sharer. The plaintiff sued in the Civil Court for a declaration that he was entitled to retain possession of the land by custom. *Held* that the Civil Court had no jurisdiction to take cognizance of the case. KHUDA BAKHSH v. KAIM DIN, **3 P.L.R. 1910=6 Ind. Cas. 486=116 P.W.R. 1910.**

(14)—*Common land—Village divided into* tarafs *and occupied by different tribes—Holdings not equivalent in extent but similar in kind——Settlement Records—Entries in, when not made after full inquiry*—Res judicata—Obiter dictum—*Admission, when not binding—Statement made by several persons representing all the proprietors—Registration Act, III of* 1877, *s.* 17—*Immoveable property—Value not shown to be exceeding Rs.* 100—*Document merely admitting an antecedent right.*—The plaintiffs, *Dhamials* of the village Jhurmat Khurd in the Rawalpindi District, sued for a declaration of their rights as proprietors of the land in suit in the village and to shares in the common land. It was found that the village was occupied by members of three tribes, the *Budhals*, who had a *taraf* of their own, and the *Kathrils* and *Dhamials* who had seven *tarafs* between them, the *Kathrils* owning three pattis out of it and the *Dhamials* one. There was nothing to show that the *Dhamials* acquired their holding in village in any manner different to the *Kathrils* and *Bhudals*; their holdings were not equivalent in extent but were presumably similar in kind. At the summary settlement of 1853, the *Dhamials* were shown as having a share in the *shamilat* of their *taraf*. When the settlement of 1860 was proceeding, the *Kathrils* sued the *Dhamials* to eject them from the lands in their possession, alleging that the latter were their tenants. The suit was dismissed, but the Court observed in the judgment that the *Dhamials* had no right in the *shamilat*. In the regular settlement it was decided that the *Dhamials*

Shamilat Land—*continued.*

had no share in the *shamilat*. In 1868 the *Dhamials* secured from several *Kathril* proprietors a stamped aknowledgment that the former were entitled to share in the *shamilat*. It was contended for the defendants that the document was not admissible in evidence for want of registration. In 1885 settlement the *Dhamials* were only recorded as *malikhan cabza* of their proprietary holdings and as tenants *ghair maurusi* of two *shamilat* fields. *Held* that the plaintiffs were entitled to the declaration prayed for. The observation in the judgment in 1860 case was a mere *obiter dictum* and was not *res judicata*. That the acknowledgment was not inadmissible in evidence, for (1) it was not shown that plaintiff's share in *shamilat* in 1868 had a money value of Rs. 100, and (2) the document merely admitted antecedent right. (26 P.R. 1891, 95 P.R. 1894, *R.*) It was not shown that the rights the plaintiffs had in the land and to the *shamilat* were in any way lost or transferred to the defendants. KALU v. FARMANA, **94 P.L.R. 1910=8 Ind. Cas. 495.**

(15)—*Grant of* shamilat *land by Government* —"*Family*"—*Meaning of the word used in the grant.*—The word "family" has various meanings; and it has to be construed with reference to the context in each particular case. The Government of Punjab made a grant of a certain land, out of the *shamilat* of a village, to A rent free for life, and it was stipulated that the proprietary right was to remain in the *family* of the grantee on his demise, subject to assessment. Before this grant was made, the father of A had died, and the brothers of A were not living together as members of a joint family at the time of the grant. *Held*, since the grant was made under those circumstances to A, in consideration of his personal services as a military man, the word "family" used in the *sanad* must be taken to be employed in its restricted sense, *i.e.*, as meaning "the wife and children" of the grantee, and not in the more extended sense of a household comprising all the blood relations of the man. JAIMAL SINGH AND NEHAL SINGH v. GURUMUKH SINGH, **20 P.R. 1910=28 P.W.R. 1910=5 Ind. Cas. 898=206 P.L.R. 1910.**

(16)—Shamilat—*Sale—Interpretation of the deed of sale of original holding.—Held*, that the rights of a proprietor in the *shamilat* of a village are not merely accessory to the land owned by him, and a sale of the latter does not ordinarily convey *shamilat* rights to the purchaser, unless the contrary intention is clearly and unequivocally established. The *onus*, in such cases is on the purchaser, and this *onus* is not discharged by the mere fact that expressions such as noted below have been used in the deed of conveyance. (1) *Haq-i-milk-i-khud* (which means "right, title and interest"). (2) *Shamilat Chah* (which is distinct from *shamilat deh*). (3) *Bajami haquq dakhili wakhaiji* (which only mean external and internal rights in the area actually sold). *Held*, also, that an

Shamilat Land—*continued.*

entry in the *wajib-ul-arz* of a village, to the effect that *shamilat* will be partitioned in proportion to *khewat*, does not confer on the vendee any right to get a share in the *shamilat* not expressly conveyed to him. *Held*, further, that the facts of vendee's incurring expenses incidental to *shamilat*, without showing that the vendor was asked but refused or failed to pay, or vendee's getting some compensation under Act I of 1894 for a portion of it or vendee's getting a share of *shamilat* in incomplete partition proceedings and possessing it for a short time, are insufficient to show that the vendee has also purchased the vendor's share in the *shamilat*. AHMAD v. AHMAD, **75 P.W.R. 1910=6 Ind. Cas. 1003.** (113 P.R. 1901, *F.*)

(17)—Malick-i-Qabza's *incompetency to get share in* shamilat—*Breaking up a bit of* shamilat—Onus probandi—*Discharge of* onus.—The general rule is that a *Malick-i-Qabza* is not entitled to a share in the *shamilat*, and the *onus* of proving that he is entitled lies on him. The mere fact of his having broken a bit of *shamilat* and having been allowed to retain it on partition of a portion of the *shamilat*, is not sufficient to discharge this *onus*, especially where in three successive settlements he is recorded as being a *maliki Qabza* only. FAZAL DAD KHAN v. WARIS KHAN, **9 Ind. Cas. 230=10 P.W.R. 1911.** (53 P.R. 1879, *F.*; 5 P.R. 1867, 113 P.R. 1900, 26 P.L.R. 1900, *D.*)

(18)—*Partition—Mode of partition of* shamilat—*To maintain possession—Compensation for turning* barani *into* chahi.—*Held*, that, at the time of partition of the *shamilat*, the possession of the share-holders should be maintained only up to the extent of their respective shares therein. But when a share-holder has sunk a well which has changed the land occupied by him from *barani* into *chahi*, he is equitably entitled to retain, by way of compensation, some portion of it. In such a case it is advisable to direct the parties to appoint arbitrators to decide what additional share out of the joint holding should be allowed. HUKAM SINGH v. SHAM SINGH, **1 P.W.R. 1911, Rev. =10 Ind. Cas. 293.**

(19)—*Village road*—Shamilat—*Thoroughfare —Encroachment upon village road by a member of the proprietary body—Other members of the same body competent to sue.—Held*, that, no member of the proprietary body of a village is authorized to encroach upon the *shamilat* land devoted to the purposes of a road used for inter-village communication. Although it is a sort of thoroughfare, yet some of the proprietary body can successfully maintain a suit against a trespasser, even if he be a member of the same body, for restoring the land encroached upon by him to its original use, without proving any special damage to themselves, as compared to the rest of the public, as a condition precedent to obtaining a decree to that effect. The fact that the revenue authorities have refused to interfere in the matter is also

Shamilat Land—*concluded.*

immaterial. ACHHAR SINGH v. BADHAWA SINGH, **84 P.W.R. 1911=11 Ind. Cas. 104.** (73 P.R. 1882, 74 P.R. 1885, *F.*; 4 P.R. 1895, *D.*)

(20)—*Custom*—Shamilat *land*—*Grazing rights of non-proprietors*—*Reasonable area to be set apart* — *Cross-objections* — *Revision-petition*—*Civ. Pro. Code* (*Act V of* 1908), *O.* XLI, *r.* 22. —Where non-proprietors enjoy rights of grazing over *Shamilat* land, they are only entitled to have a reasonable area set apart for their animals to graze. (119 P.R. 1889, *Rel. on.*) The respondents in a revision petition have no right to file cross-objections. GURDITTA v. DHERU, **150 P.W.R. 1912=160 P.L.R. 1912=14 Ind. Cas. 562.**

(21)—*Limitation*—*Adverse possession*—*Estoppel*—*Declaratory suit*—Shamilat Qasba—*Collector recording a person as non-occupancy tenant*—*Effect of accepting this order in partition proceedings, &c.*—*Held*, that, where a Biswadar in possession of certain area of *Shamilat* land has been recorded by the Collector as non-occupancy tenant against his asserting right of ownership therein, and he does not thereafter renew his claim for more than 12 years, he accepts the status given to him by that officer and is estopped from re-asserting his proprietary right or adverse possession, particularly when in the subsequent settlement the area has been recorded as *Shamilat Qasba* and in the partition proceedings between the claimant and other proprietors it has been treated and taken into account as *Shamilat* without any objection on his behalf. *Held*, also that generally the knowledge of an agent must be imparted to the agent's principal. DEWAT RAM v. MUHAMMAD RUSTAM ALI KHAN. **151 P.W.R. 1912=163 P.L.R. 1912=16 Ind. Cas 391.**

Suit *re* profits of—Non-joinder of co-sharers—Maintainability—*See* U. P. ACT XXII OF 1886, s. 108, cl. 15, 8 Ind. Cas. 742.

Suit by co-sharer for possession of—Dismissal on the ground that remedy lay in suit for partition—Revision—*See* PUN. ACT XVIII OF 1884, 13 P.R. 1910=20 P.W.R. 1910=5 Ind. Cas. 808=60 P.L.R. 1910.

Shamilat—Right of purchaser of Khewat land — *Onus probandi* — *See* BURDEN OF PROOF—MISCELLANEOUS, 34 P.L.R. 1902=113 P.R. 1901.

See JURISDICTION OF CIVIL COURTS, 69 P R. 1877.

Denial of right to share—in a Revenue partition proceeding—Revenue officer's order to establish the right by a civil suit — Cause of action in such a case, when arises—*See* LIMITATION ACT, 1908, art. 120, 11 P.W.R. 1908.

Land allotted to widow on partition of—Effect of her not getting possession — Transfer of her right to reversioner—Reversioner's right to sue— Limitation —*See* LIMITATION ACT, 1908, arts. 141, 144, 133 P.W.R. 1911.

See PRE-EMPTION—RIGHT TO PRE-EMPT, 169 P.R. 1889.

Sham Transaction.

See BENAMI TRANSACTION.

(1)—*Sale-deed*—*Transfer, in name of vendee with intent to defeat a third person's right to inherit vendor, whether a sham transaction*—*Consideration for the sale, whether strangers can question.*—Basing his claim on a sale-deed from 1st defendant (the mortgagor), plaintiff instituted the suit for redemption. The mortgagee was the second defendant. First defendant died pending the suit and his daughter (the fourth defendant) was brought on record as his representative. In the Court of first instance, defendants 2 and 4 set up the defence that the sale deed to the plaintiff was not really intended to transfer the property to him but was executed by the first defendant merely with the object of depriving his daughter of the said property. The lower Courts found that the sale to the plaintiff was a sham transaction not really intended to convey any property but merely created with intent to defraud the fourth defendant of her title to inherit the property after the lifetime of the first defendant. *Held*, if depriving his daughter of the property in question were the motive which actuated the first defendant, it would follow that he had an intention of transferring the property to the plaintiffs and, consequently, the sale-deed was not anything that could be termed a sham transaction but, on the other hand, it effectively transferred the property to the plaintiffs, who were, therefore, entitled to being the suit for the redemption of the property and in such a suit by the vendee it was not open to the persons not parties to the sale-deed to question the consideration for the sale. CHINNASAMY REDDIAR v. KRISHNA REDDY, **16 M.L.J. 146.** [*F.*, 32 M. 325=4 M.L.T. 279 =5 M.L.T. 255=17 M.L.J. 386; *R.*, 5 A.L.J. 167 (*n*).]

Shanghai.

A person residing at, cannot apply to the Court for the Relief of Insolvent Debtors at Bombay to be declared an insolvent—*See* ST. 11 AND 12, VIC , C. 21, s. 5, 10 Bom. L.R. 84.

Property of the insolvent in vesting of, in the Official Assignee—*See* ST. 11 AND 12 VIC., C. 21, s. 26, 10 Bom. L. R. 965=33 B. 462.

Shankaracharya.

Dispute as to setting up a claim as a,—Claim for injunction, if suit of civil nature—*See* RIGHT OF SUIT—OFFICE ON EMOLUMENT, SUITS RELATING TO, 11 Bom. L.R. 58=33 B. 275=1 Ind. Cas. 331.

Share-certificate.

Deposit of—*See* EQUITABLE MORTGAGE 11 Ind. Cas. 783.

Sale of—Loss resulting by fall in value of shares detained by vendor—Suit to recover loss in value—Limitation—*See* LIMITATION ACT, 1908, arts. 48, 49, 12 Bom. L.R. 513=7 Ind Cas. 447.

Share-holder.

(1)—*Joint Stock Companies—Share-holder—Written acceptance of shares—Act* XIX *of* 1857, *Table B—Defendant holding himself out as share-holder.*—Suit for the amount due on calls made upon an alleged share-holder in respect of shares taken by him in a Banking Company. Defendant pleaded that he was not a share-holder. There was evidence to the effect that the defendant had attended meetings of the Bank, voted at those meetings, had given a promissory note for the amount due upon certain calls and had held himself out as a share-holder by offering shares for sale, but there was no written acceptance of shares by the defendant as required by Table B of Act XIX of 1857 under which the Bank was registered. *Held* that if the matter rested on the contract actually entered into, there could be no doubt that the defendant by his own conduct would be precluded from denying that he was a share-holder. But Act XIX of 1857 declares that unless a person does a particular act, *i.e.*, testifies in writing to the acceptance of the shares in a form to be provided by the Company, he shall not be constituted a share-holder. And the present case depended upon the prohibitory words of the Act and not upon the actual transactions of the parties. Defendant therefore could not be deemed to be or held liable as a share-holder. On the one hand, he could not have insisted upon receiving shares (if they had gone up and he was desirous of having them) and, on the other, the Bank could not compel him to pay calls upon them. It was true that the defendant had entered into a special contract to pay certain calls by executing a promissory note. But the liability under that contract was quite distinct from the liability under the general conditions of a share-holder. For the value of the calls covered by the promissory note, the remedy would be by suit upon it. MOHAN LALL v. SECRETARY, UNITED BANK OF INDIA, LTD., **38 P.R. 1868.**

Suit against, by a liquidator to recover calls, can lie in the Court of the Subordinate Judge —*See* ACT VI OF 1882, s. 182, 9 Bom. L.R. 825.

Company—Meeting of—Time and place for taking a poll—Object of taking such poll—Powers of Chairman—*See* COMPANY—MEETINGS AND VOTING, 15 B. 164.

Of compay, right of, to inspect books and take extracts—Special interest and definite object, necessary—*See* CORPORATION, 12 C.W. N. 825, P.C.=5 A.L.J. 463=4 M.L.T. 16=8 C.L.J. 103.

Shares.

See ACT VI OF 1882.

See COMPANY.

(1)—*Issue, framing of—Point of law, which is clear—Sale of shares—Future delivery—Concurrent acts—Readiness and willingness.*—There is nothing in the Civ. Pro. Code, which imposes upon the Judge the duty of allowing an issue to be raised on a point of law which

Shares—*continued.*

the Judge considers to be perfectly clear. [*R.*, 13 B. 126.] In a contract for sale and purchase of shares, the plaintiff agreed to transfer the shares to the defendant on his paying the purchase-money at any time between the making of the contract and a certain specified time. At the time of the contract the plaintiff was in possession of the shares and continued in possession until after default made by the defendant. In a suit by the plaintiff for damages for breach of contract on the ground that, though within the day named in the contract, he had tendered the share certificates with transfer deeds in blank to the defendant, the defendant had refused to accept them or pay the purchase-money, *held* that the acts necessary to be done on the day fixed in the contract were concurrent, and that, as the plaintiff was able and willing to make a valid transfer on payment of the purchase-money within the specified time, he had done everything that was necessary for him to do and that he was not bound to take any further step, until the purchase-money was paid by the defendant, and that consequently the issue as to readiness and willingness must be found in favour of the plaintiff. IMPERIAL BANKING AND TRADING CO. v. PRANJIVANDAS HARJIVANDAS, **2 B.H.C. 258.** [*F.*, 8 B.H.C. 133.]

(2)—*Court of Wards—Minor—Admission—Share-holder—Separation of share.*—The payment by the Court of Wards of the revenue due from the other share-holders as well as the minor's own share to save the estate from sale, was held not to be an admission of the minor's liability for the excess revenue so paid. On a share-holder applying to have his interest separately recorded in the books of the Collectorate, the Collector has no authority to vary the share specified in the application. RAM RUNJUN CHUCKERBUTTY v. BANEE MADHUB MOOKERJEE, **21 W.R. 253.**

(3)—*Shares—Blank transfers—Tenders.*—On the 19th April, plaintiff sold to defendants sixty shares in the N Bank to be delivered and paid for on Thursday, April 26th. The sold note was as follow: "Baboo Lall Mohun Mullick. Sold by your order, and on your account, to Messrs. Peary Chand Mittra and Sons (Metcalfe Hall) sixty shares in the N Bank at Rs. 4 premium per share. (Sigued) Sree Comar Sircar, Broker." The bought note exactly corresponded. On the 23rd April, plaintiff received from defendants the following: "With reference to the Sixty N Bank shares sold by you, we shall thank you to send us three transfer deeds on Friday next, *viz.*, two for twenty-five shares each and one for ten "shares." On the 26th April plaintiff sent to defendants sixty N Bank shares, some standing in the name of H and some in the name of P, accompanied by transfers, all executed by P alone. These shares were all returned by the defendants, with the following memorandum: "The accompanying shares in the N Bank purchased for delivery to-day are not in order." Later, on the same day, the 26th, plaintiff

Shares—*continued.*

took personally to defendants the same sixty shares with transfers, executed some by H and some by P, the name of the transferor corresponding number by number with the name in the shares. On this, as on the previous occasion, the name of the transferee was left blank. These shares were also rejected by the defendants as not in order. Plaintiff then, on April 27th, about 1 P.M., had the shares registered in his own name, and, within two hours afterwards, sent them to the defendants with corresponding transfers, and with the following letter: In compliance with request in your memorandum of the 23rd instant, I now send you the sixty shares N Bank, with three transfer deeds, and will feel obliged by your paying the amount to the bearer." The defendants declined to receive the shares, and they were re sold at a loss. The plaintiff never had any personal interest whatever in the shares, either on the 26th or 27th April, and was a mere *benami* holder for H and P. The articles of association of the N Bank required transfers to be in the form F appended to Act XIX of 1857. The transfers tendered by plaintiff were on each occasion in that form. The defendants swore that the "Friday, the 27th April, mentioned in their memorandum of the 23rd April, was inserted by accident, instead of Thursday," the 26th April, and that they consequently rejected the tender on the 27th. *Held* (1) that the contract, as it stood on the bought and sold notes, was a contract by the vendor (as in *Stephen* v. *De Medina*) that "in consideration of such a sum I will execute any proper conveyance which you tender me;" (2) that the memorandum of April 23rd, coupled with the fact of the vendor having made tenders of transfers of the shares, was evidence enough to show that the vendor bound himself to tender a proper conveyance to his vendees; (3) that the document of conveyance must be complete at the time of tender, or capable of being then made complete; (4) that the transfers, with a blank for the name of the transferee, were incomplete and insufficient, the vendor showing no authority from H and P; (5) that the Court below must deal with the question of fact, whether or no the mention of Friday, the 27th, instead of Thursday, the 26th was a mistake; and *semble* that, if the defendants had received the blank transfers and acted upon them, the waiver would have rendered them complete. LALL MOHUN MULLICK v. PEARY CHAND MITTER, **1 Ind. Jur. N.S. 383.**

(4)—*Sale of shares—Blank transfer.*—The allottee sold shares in the National Bank. A transfer in the form required by the Articles of Association of the Bank was executed but no name was inserted as transferee. The purchaser subsequently pledged them with the Indian Peninsular London and China Bank and deposited with the Bank the blank transfer. Subsequently, the same Bank sold the shares to the plaintiff, and delivered him the blank transfer which they had received. The plaintiff, thereupon, inserted his own name in the

Shares—*continued.*

transfer and requested the National Bank to register the shares in his name which they refused to do. The plaintiff thereupon brought this suit against the National Bank, to recover the price which he had paid for the shares. *Held* that they were justified in refusing to register. KNOWLES v. THE NATIONAL BANK OF INDIA, **2 B.L.R. O.C. 158.**

(5)—*Contract for delivery of shares sold, whether assignable in equity—Failure to take delivery—Right of assignee to maintain suit for damages, subject to equities between vendee and assignor—Readiness and willingness to deliver—Actual tender, if necessary.*—A alleged that B had agreed to take delivery of certain Bank-shares from C and to pay C their price and that he had failed to do so, and that C had assigned the contract to A. A thereon instituted the present suit for damages sustained by reason of B's not taking delivery of the shares. The first Court found that the contract was not a satta or time-bargain contract as pleaded by B, but rejected the claim on the ground that the shares had not been tendered to the defendant on the day fixed for their delivery, and this decision was affirmed by the District Judge on appeal. *Held* that the District Judge ought not to have held that the contract in suit was a time-bargain, upon which the bringing of an action is prohibited by Act XXI of 1848. Also he should, on the assumption that the said contract was not an agreement by way of wagering or gaming, have held that in equity it was assignable for a valuable consideration subject to any equities existing between the defendant and the original vendor. *Held* also that the plaintiff is not always bound to make an actual tender to the defendant in order to establish the allegation of his readiness and willingness to perform his part of the contract. DAYABHAI DIPCHAND v. DULLABHRAM DAYARAM, **8 B.H.C. A.C. 133.** [*R.*, 9 Bom. L.R. 838.]

(6)—*Promissory note due on demand—Stamp Act X of 1862—Sale of shares—Articles of Association—Option of shareholders—Constructive and positive frauds.*—A promissory note dated 1st March and purporting to be payable on demand, bore the words "Due 4ht June" which were written on the day that it was signed, in pursuance of an understanding between the parties to the note that the money due thereon was not payable before the 4th June. The note was actually signed by the defendant on some day after the day it bore date. *Held* that an one anna stamp was not sufficient under sch. A, cl. 10, of Act X of 1862. [*Disappr.*, 7 C. 256=8 C.L.R. 533; *Appr.*, 11 C. 285, F.B., *R.*, 5 B. 630, 9 Bom. L. R. 1164.] In a suit upon the promissory note of the description stated above, the consideration for the note being the price of shares bargained for and sold to the defendant, the note itself having been held to be inadmissible owing to insufficiency of stamp, the plaint was amended by a prayer for the price of shares bargained for and sold to the defendant but not accepted by him,

Shares—*continued.*

and for money due on account stated. *Held*, the plaintiffs could not recover as no shares were really bargained for and sold and as a mere form was gone through to deceive the public by making it appear that shares had been sold at a certain price. *Held*, further, that Courts of justice could not enforce a contract which was made for the purpose of defrauding other persons. Contructive frauds are such acts or contracts as, although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury on other persons, are yet, by their tendency to deceive or mislead others or to violate private or public confidence, or to impair or injure the public interest, deemed equally reprehensible with positive frauds, and therefore, are prohibited by law as within the same reason and mischief as acts and contracts done *malo animo*. EASTERN FINANCIAL ASSOCIATION v. PESTANJI CURSETJI SHROFF, **3 B.H.C.O C. 9.**

(7)—*Sale of shares and re-purchase for future delivery—Forfeiture — Liability of Company for acts of Directors.*—On 3-1-1865, the plaintiffs purchased from the defendants, 2,000 shares in the defendants Company at Rs. 15 per cent. premium, and the plaintiffs paid for the same. Simultaneously with the above mentioned sale, the defendants agreed to repurchase from the plaintiffs the same 2,000 shares at Rs. 29½ per cent. premium, to be delivered and paid for between the 1st and 15th days of July then next ensuing. These contracts for re-purchase were signed by three of the directors of the defendant Company, and on the back of one of such contracts was a memo initialled by two of them to the following effect. "Having signed, you have delivered to us a list of the 'share' receipts. We are to receive the same after examining them with the initials which have been made thereon. We are duly to examine and receive the same at the fixed time of July." There were in all 190 letters of allotment, in the names of several persons and for various numbers of shares, endorsed by the original allottees, and initialled by one of the directors. These letters together with receipts for the first call, were handed over to the plaintiffs, by the three directors of the defendant Company who made the contracts. In April, the defendant Company made a fresh call payable on the 4th of May. A list of the names and addresses of the original allottees was made, and notices of forfeiture for non-payment of the call was sent by post to them. As to the 2,000 shares, sold to the plaintiffs, the notices were issued to the original allottees and not to the plaintiffs, whose names did not even find a place in the list mentioned above. On the 27th of May, all the shares upon which this second call was not paid, were declared to be forfeited for the benefit of the Company. The plaintiffs did not of course comply with the call, in respect of the 2,000 shares purchased by them, and in consequence, their shares were declared forfeited. The plaintiffs sued the defendants for damages for the latter's refusal to re-purchase the shares

Shares—*continued.*

as originally agreed upon. The questions to be determined were:—(i) whether the defendants were bound by the contracts which had been signed by three of their directors on behalf of the Company; and (ii) whether the shares had, before the time for delivery, been legally forfeited for non-payment of a call, and the plaintiffs thereby rendered incapable of performing the contract. It was found that the defendant Company as stated in the memorandum of association, was established, among other objects, for "the purchase and sale of Debentures, Stocks, Shares, of Joint Stock Companies (including the shares of this Company), and other securities, the making loans and advances on such securities as the directors of the Company may think fit." *Held* that (i) the above object of the Association showed that the contract for re-purchase was within the scope of the authority of the directors; (ii) that the defendants were, therefore, bound by the contracts; (iii) that the defendants were bound to give the plaintiffs the notice of call required by the articles of association; (iv) that the notices given to the original allottees were of no avail as against the plaintiffs; (v) that the defendants were bound to treat the plaintiffs as the holders of those shares; (vi) that in the absence of such notice, there had been no legal forfeiture of the shares by the plaintiffs; and (vii) that, as the defendants refused to re-purchase the shares as contracted by them, they were liable in damages to the plaintiffs to the full extent of the amount indicated by their contract. ORIENTAL FINANCIAL ASSOCIATION v. MERCANTILE CREDIT AND FINANCIAL ASSOCIATION, **3 B.H.C.O.C. 1.** [*R*, 12 B.H. C. 23.]

(8)—*Sale of shares — Future delivery — Readiness and willingness.*—The plaintiff gave notice to the defendant of his readiness and willingness to deliver certain shares, the subject of a contract contained in a written agreement between the parties upon the due date for the delivery of the shares; and the defendant, even prior to the due date, gave a notice in reply to the plaintiff, that he, for reasons wholly unconnected with the readiness and willingness of the plaintiff, would not accept such shares (on which reasons the defendant did not rely in the lower Court). *Held* that in such a case, the issue as to the readiness and willingness of the plaintiff was quite immaterial and the defendant had, by his reply notice, exonerated the plaintiff from giving proof of such readiness or willingness. The mere fact that those shares were pledged to a third person would not negative the readiness and willingness on the part of the plaintiff, especially when the shares had fallen in their value, thereby creating an interest on the part of the pledgee to have the shares sold to advantage. DAYABHAI DIPCHAND v. MANIKLAL VRIJBHUKAN, **8 B.H.C.A.C. 123.** [*R*, 8 B.H. C.A.C. 133.]

(9)—*Sale of shares for future delivery—Specific performance—Readiness and willingness.*—A share in a company signifies a definite

Shares—*continued.*

portion of its capital, and a contract to sell a share is a contract to sell and transfer that right. By using the word "share" the parties to a contract of sale do not necessarily mean the right of a person whose name is then actually on a register of share-holders. And a contract to deliver shares in a public company is sufficiently performed when the contracting party places the other in the position of being the legal owner of them. PARBHUDAS v. RAMLAL, **3 B H.C O.C. 69.** [*F.*, 8 B.H.C. 133.]

(10)—*Sale of shares for future delivery—Suit for damages for non-acceptance—Readiness and willingness to transfer—Necessary acts.*—This was a suit for damages for non-acceptance of shares, contracted to be purchased by the defendant. The plaintiff vendor had contracted to execute proper transfers, and do all other things necessary on his part to transfer the shares and to bear all the expenses of such transfer. The question was whether the plaintiff had fulfilled his part of the contract. It was found that the vendor had the necessary documents in his possession on the date fixed for the transfer, and was prepared to do all in his power to transfer the shares to the defendant. There was no condition in the contract that the vendor should get the transfer registered in the company's books. *Held* that where the vendor has transferred the shares to the purchaser, executed the deed of transfer, and delivered it over to the transferee, it becomes the duty of the latter to go to the office of the company and get the transfer made in his name in the absence of a specific condition to the contrary; and that in present case, the defendant could not escape liability on this ground. MAGANBHAI v. MANCHHABHAI, **3 B.H.C.O.C. 79.** [*F.*, 8 B.H.C. O.C. 133; *R.*, 12 B. 585.]

(11)—*Specific performance—Sale and purchase of shares — Future delivery — Readiness and willingness.*—Plaintiffs sued defendant for specific performance of an agreement by which the latter purchased from the former certain shares in Companies A and B. The terms of the agreement were that all calls were to be duly paid by the plaintiffs to date of delivery and that delivery should be made at the defendant's option at any time within 6 months from the date of the agreement. On the last day for delivery, plaintiffs produced allotment receipt papers all bearing date prior to date of contract, for the number of shares contracted to be sold in both Companies. Regarding Company A's shares nothing beyond allotment papers indorsed by the original allottee were offered within the stipulated date. No transfer nor application for transfer paper, was offered to the defendant; nor had the plaintiffs any such signed by the original allottee in their possession. *Held* that the plaintiffs could not be considered to have been in the full and plenary position of being able to have constituted the defendant the owner of those shares and they must fail to this extent, upon the issue of readiness to complete their contract.

Shares—*continued.*

Of the B Company receipts, 9 were indorsed by the allottees, one had no indorsement, and over the allottee of it and of another receipt, plaintiffs had no power to enforce delivery. *Held* that, although plaintiffs had done all they were required to do, by the usage of the market, to transfer the interest in 8 of them, yet the contract being an entire one, they must fail in respect to them also. If a party bound to do an act upon request, is ready to do it when it is required, he will fully perform his part of the contract; although he might happen not to have been ready, had he been called upon at some anterior period. JIVRAJ MEGJI v. POULTON, **2 B.H.C. 253.**

(12)—*Sale of shares—Future delivery—Contract for payment and transfer—Readiness and willingness.*—Plaintiffs entered into a contract with the defendant by which the latter purchased three shares in a Company for Rs. 33,300 to be paid on or before 1st July 1865, and on payment the plaintiffs as vendors agreed to execute proper transfers and do all such things necessary on their part to transfer the shares thereby agreed to be sold, and to bear all such expenses as may be necessary to get the said shares transferred in the name of the purchaser, in the books of the Company. On the 1st July the plaintiffs tendered to the defendant in person three share allotments and receipt papers together with each a transfer paper and application paper each signed in blank by the original allottee. The defendant received the papers and the plaintiffs demanded payment of the stipulated price which the former refused to pay. Plaintiffs were not beneficial owners of the shares, but had entered into a contract at the desire of the constituent, who had previously to their doing so, handed to them the allotment papers, which remained in their possession continuously down to the period of tender. On production of the allotment paper and of the transfer and application papers which were handed to the defendant, a transfer of the share of the allottee would, according to the usage of the Company, have been made, as a matter of course, to the defendant. In a suit by the plaintiffs to recover damages for breach of contract: *Held* that a covenant for transfer of shares and payment of purchase-money were concurrent and that, if the plaintiffs did all that was in their power to put the defendant in possession of the shares as legal owner, it was wholly immaterial to the defendant whether plaintiffs were legal owners or not. *Held*, further, that the ability of the plaintiffs to constitute the defendant as legal owner and their willingness to do so amounted to readiness and willingness on the part of the plaintiffs to do their part of the contract. IMPERIAL BANKING AND TRADING CO. v. ATMARAM MADHAVJI, **2 B.H.C. 246.** [*F.*, 8 B.H.C.A.C. 133]

Transfer of, to the sole surviving co-parcener of a deceased Hindu—*See* BOM. ACT XI OF 1876, s. 27, 2 Bom. L.R. 467 = 24 B. 350.

Shares—*concluded.*

Bank of Bengal—Right to refuse to register a transfer of shares—*See* BANK OF BENGAL, 3 C. 392=1 C.L.R. 507.

"Goods" in s. 178, Contract Act, includes shares in Joint Stock Companies—*See* CONTRACT ACT, 1872, s. 178, 12 Bom. L.R. 870=8 Ind. Cas. 183.

Undivided lease of—*See* LEASE—MISCELLANEOUS, 1 Bom. L.R. 855.

Applicability of doctrine of mushaa to—*See* MAHOMEDAN LAW—GIFT, 4 A.L.J. 572, P.C. =11 C.W.N. 973=9 Bom. L.R. 872=17 M. L.J. 408=6 C.L.J. 695=35 C. 1=34 I.A. 167.

In a company, a *wakf* cannot be created of—*See* MAHOMEDAN LAW—WAKF, 10 C.W. N. 449

Shares in a limited company cannot be made the subject of a wakf—*See* MAHOMEDAN LAW—WAKF, 9 Bom. L.R. 1337.

Shares, Transferof.

See COMPANY—TRANSFER OF SHARES.

Sharik Shikmi.

Whether jointness of holding essential to the status of—Application of the term—*See* CUSTOMS—PUNJAB—PRE-EMPTION, 12 P.R. 1908 =22 P.W.R. 1908=175 P.L.R. 1908.

Shastri.

(1) *Civ. Pro. Code*, 1859, *ss.* 305, 306—*Reg.* VI *of* 1827, *repeal of—Inquiry, how to be made—* Shastri *of Court.*—Inquiry under ss. 305 and 306 of the Civ. Pro. Code, should be made by the Judge himself in person and not by the *shastri* of the Court; and the provisions contained in Reg. VI of 1827 have been repealed by Act X of 1861. *In the matter of* EKNATH MADOBA, **1 B.H.C. 102.**

Shebait.

See ACT XX OF 1863.

See DEBUTTER PROPERTY.

See HINDU LAW—RELIGIOUS ENDOWMENTS.

See IDOL.

See RELIGIOUS ENDOWMENTS.

See TRUST.

See TRUSTEES.

(1)—Shebaitship *of Family Thakur.*—By the law of inheritance, on the death of the husband (the *shebait* of his Family Thakur), his widows, as heirs, would take the *shebaitship*. SURENDRO KESHAB ROY v. DOORGA SUNDARI DOSSEE, **19 C. 513=19 I.A. 108, P.C.=6 Sar. 150.**

(2)—*Shebaits, one of several, suit by, of Muth —Primogeniture, custom of—Eldest son, sole shebait—Suit for, recovery of possession—Mortgage-decree, declaration, suit for, invalid and not binding — Hindu Law — Mitakshara —*

Shebait—*continued.*

Brothers, one of the substitution of—Survivorship —Custom of Muth—Suit for possession on ejectment, conversion of, into one for redemption, if and when allowable—Co-shebaits, made defendants—Refusal to join as plaintiffs—Collusion when not proved or alleged.—Where property belonging to an endowment is sought to be recovered from a third party, who asserts that he is the owner thereof, all the trustees of the endowment should be made parties to the suit, and such of them as refuse to join as plaintiffs should be made defendants. All the trustees should ordinarily be co-plaintiffs, and only such of them should be made defendants, as are unwilling to be joined as co-plaintiffs, or have done some act precluding them from being plaintiffs; because, where the administration of the trust is vested in several trustees they all form, as it were, but one collective trustee, and they must exercise the powers of their office in their joint capacity. Their interest and authority being equal and undivided, they cannot act separately, but all must join. (11 C. 338, 8 I.A. 135, 8 C. 42, *R.*; 26 C. 409, *D.*) Upon the death of one of several joint trustees, the validity of the exercise of the trust powers by the survivors depends upon the nature of such powers; if these powers are coupled with an interest, or are annexed to the office of the trustee, they will pass with the trust to the survivors and can be exercised by them. As regards the members of a Mitakshara family who are joint *shebaits*, the right of *shebaitship* passes by survivorship; and, consequently, upon the death of the original plaintiff, the right to prosecute the suit or an appeal preferred by him vests by survivorship in all his brothers, and one of them is not competent to obtain an order for substitution, as if he is alone entitled to the office of *shebait*. (33 C. 507, *R.*; 26 C. 409, *D.*) Although a suit, brought as one for possession, may, in the discretion of the Court, where the circumstances of the case permit, be equitably converted into one for redemption, which could only be allowed when the mortgage is a valid and binding one, a plaintiff must ordinarily succeed on the case he has made in the plaint, and, unless there are special circumstances, an action instituted for purposes absolutely inconsistent with redemption cannot properly be converted into an action to redeem, as it would in reality amount to the conversion of a suit of one character into a suit of another and inconsistent character. KOKILASARI DASI v. MOHUNT RUDRANAND GOSWAMI, **5 C.L.J. 527.** (5 C. 265, 5 C. 269, 6 C. 317, 3 C.W.N. 325, 19 A. 541, 21 A. 235, 8 C. 79, 8 C. 690, 12 C. 414, 28 C. 517, 6 B. 495; 6 B. 515, 7 B. 146, 7 B. 526, 8 B. 168, 10 B. 88, 20 B. 196, *Expl. & D.*) [*F.*, 2 Ind. Cas. 85; *R.*, 5 C.L. J. 653.]

(3)—*Shebait, Office of—Succession—Deed of appointment—Construction—"Shishya shishyanukrame."*—Where it was provided by deed that the succession to the office of a shebait should be "shishya shishyanukrame," (*i.e.*, disciple following disciple). *Held*—that upon

Shebait—*continued.*

a proper construction of the document, there was nothing to prevent one disciple from succeeding a co-disciple in the line of the original shebait. GOPAL CHANDRA CHAKRABARTY v. RADHARAMAN DAS BABAJI, **16 C.W.N. 108.**

(4)—*Hindu Law—Appointment of* shebait.—Where a testator appointed by his Will, his nephew to be *shebait* for life, and directed that after his (nephew's) death his eldest son or, adopted son, and it he (nephew) had no son, or adopted son, such person as the nephew should by Will or Deed appoint, should be *shebait*, *held*, that the limitations to the nephew, and his son then alive, were equally valid. MANORAMA DASSI v. KALI CHARAN BANERJEE, **31 C. 166=8 C.W.N. 273.** [*R.*, 11 O.C. 271.]

(5)—*Will—Probate—Bequest to idol*—Shebait—*Executor by implication—Letters of Administration with will annexed.*—Probate may be granted to a *shebait* as being executor by implication (6 C.W.N. 310, *Rel. on.*) Where the estate was very small and letters of administration had actually issued in favour of the *shebait*, and the opposite party had no interest in the matter and could only embarrass the position if any concession were made in his favour, the High Court did not interfere with the decree of the District Judge. KALI CHARAN v. ANNAD KANTA, **8 Ind. Cas. 763.**

(6)—*Turn of worship in a temple, whether an immoveable property—Transfer of Property Act, ss. 2, cl. (c), 59*—Shebait—*Usufructuary mortgage of right to worship—Mortgage bond, whether requires, attestation—Applicability of Transfer of Property Act—Undisputed possession of mortgagee—Whether mortgagee is a* shebait—Shebaitship, *alienability of.*—A turn of worship is not an interest in immoveable property. (4 C. 683, *F.*). An usufructuary mortgage bond creating an interest in a turn of worship in a certain temple for a certain number of days every month, does not therefore require attestation by witnesses under s. 59 of the Transfer of Property Act, which is applicable only to mortgages of immoveable property. Under s. 2, cl. (c) of the Transfer of Property Act, the Act was also held not to apply to the bond in question, as it was executed before the Act came into force. Where the plaintiff, who is himself one of recognised *shebaks* on other days, claims a turn of worship as the mortgagee of another *shebak*, and is in undisputed possession thereof for over 20 years, and has been expressly recognised to have performed the *Debsheba* whenever such a turn came: *Held*, that the facts found would be quite sufficient to make out *prima facie* title of the plaintiff as a *shebait* as such a mortgagee. JATI KAR v. MUKEMDA BASTIA, **14 C.L.J. 369.=39 C. 227=11 Ind. Cas. 884=16 C.W.N. 129.** (19 C. 776, *R.*)

(7)—*Hindu Law*—Shebait—*Widow — Decision of previous suit with widow or* shebait—*How far binding on reversioner or subsequent* shebait—*Want of collusion or dishonesty—Subsequent* shebait—*Limitation—Adverse possession—Fresh start of adverse possession.*—The

Shebait—*continued.*

decision of a suit fairly conducted against a widow, in the absence of collusion or dishonesty, binds the reversioner. And when the widow occupies the position of a *shebait* her sex makes no difference. (28 M. 197, 6 C.L.J. 621, *Rel. on.*) Decrees against *shebaits* in honest suits bind their successors, for *shebaits* with their predecessors and successors form one continuous representation of the idol, and consequently subsequent *shebaits* are regarded as the same persons in law as their predecessors. (2 I.A. 145, 23 W.R. 253, 14 B.L.R. 450, 6 C.L.J. 404, 11 C.W.N. 489, 6 C.L.J. 621, *Rel. on.*) Consequently, a subsequent *shebait* cannot obtain a fresh start in the calculation of adverse possession. JHARULA DAS v. JALANDHAR THAKUR, **14 Ind. Cas. 142=39 C. 887.**

(8)—*Hindu Law*—Shebait *of thakur—Right of indemnity—Expenses incurred in defending title as* Shebait *and in performing obligations of trust, a first charge on trust estate*—Shebait *if bound to spend only income in hand — Suit to recover amount spent by* Shebait *out of personal estate—All claimants to office made parties—Amendment directing determination of question of right to office—Character of suit, if altered — "New defendant"— Limitation Act* (XV *of* 1877), *s.* 22, *sch.* II, *art.* 120.—Where the legal representatives of a deceased *shebait* of an idol sued for recovery of amounts alleged to have been spent by him in protecting the *debutter* estate and performing his obligations as a *shebait*, making the appellant, along with all other possible claimants to the office of *shebait* as parties, but the Court directed an amendment in the prayer of plaint so as to raise directly the question as to which of the claimants was entitled to the office of the *shebait* and should represent the estate, and the appellant was found, upon a trial of this issue, to be the *shebait*. *Held* that the amendment did not alter the nature of the suit, and the appellant was not brought on the record as a "new defendant" within the meaning of s. 22 of the Limitation Act. The period of limitation for the suit was six years from the date of the death of the *shebait*. The right of indemnity is incident to the position of the trustee. The liability in respect of the indemnity is the first charge on the trust estate. A *shebait* is entitled to be reimbursed all moneys properly expended by him in defending his position as *shebait* against an unsuccessful claimant to the office. The *shebait* is entitled to be reimbursed all moneys properly expended in performing the obligations imposed upon him by the founder. Where the income of *debutter* estate suffered diminution owing to the wrongful acts of a rival claimant to the office of the *shebait*, but it was not unreasonable to expect that, on the cessation of those acts or on the interposition of the Court, whose aid had been invoked, the income would be sufficient to defray expenses incurred in the meantime by the *shebait* and paid out of his own personal estate for the *shebait* of the idol; *Held* that, in the absence of any provisions by the founder directing that the *shebait*

Shebait—*continued.*

must not spend more than what he at any time actually received and create no outstanding claim against the estate, the *shebait* was entitled to be reimbursed the moneys so spent by him out of his personal estate. RAJA PEARY MOHUN MOKERJI v. NARENDRA NATH MUKERJEE, **7 M.L.T. 63=14 C.W.N. 261, P.C.=7 A.L.J. 125=11 C.L J. 220=12 Bom. L.R. 257=37 C. 229=20 M.L.J. 171=5 Ind. Cas. 404=37 I.A. 27.**

(9)—Shebait *of endowed property—Powers of alienation.*—The creation of a *putni* by the *shebait* of an endowed property is not absolutely null and void. Such an alienation under special circumstances of necessity will be valid. TAYUBUNISSA BIBI v. KUWAR SHAN KISHORE ROY, **7 B.L.R. 621=15 W.R. 228.** [*R.*, 5 B. 393, 19 B. 271, 25 A. 296.]

(10)—*Hindu Law*—Shebait—*Lease, permanent, granted by* shebait—*Effect of lease.*—The effect of a permanent lease of certain land granted by a *shebait* will enable the grantee to hold the land during the continuance of the grantor's interest. PRAHALD CHANDRA GHOSE v. BEHARI LAL MOOKERJEE, **13 Ind. Cas. 686.** (18 W.R. 439, 19 B. 271, *F.*)

Land dedicated to an idol or to religious and charitable purposes generally—Acquisition for public purposes—Position of shebait—*See* ACT I OF 1894, s. 32, sub-s. (1), cls. (i) and (ii), 13 C.L.J. 597.

See ATTACHMENT—SUBJECTS OF ATTACHMENT, 6 B.L.R. 727=15 W.R. 339.

Claim by judgment-debtor as—to deity—Appeal—Revision—*See* CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 58, 8 C.W.N. 353.

Judgment against, binds his successors—*See* ESTOPPEL—ESTOPPEL BY JUDGMENT, 6 C. L.J. 621.

Decree binding endowed property—Judgment-debtor, no interest in property—*Shebait* if can object to execution—Decree made for execution of trust—Powers of trustees—*See* EXECUTION OF DECREE—GENERAL, 14 C.L. J. 337.

Right of inheritance to, same as that to immoveable property, in the absence of directions in will—*See* HINDU LAW—INHERITANCE, 8 C.L.J. 369.

Transfer of debutter land by shebait—When valid — *See* LANDLORD AND TENANT — GENERAL, 13 C.W.N. 242=3 Ind. Cas. 560= 10 C.L J. 610.

Suit to oust nominated—*See* LIMITATION ACT, 1908, art. 120, 19 C. 776.

Suit for office of—*See* LIMITATION ACT, 1908, art. 124, 25 C. 354.

Suit by—for khas possession of mokurari property—*See* LIMITATION ACT, 1908, arts. 134, 144, 23 C. 536.

Shebait—*concluded.*

Proprietor of an estate and Hindu widow or shebait, distinguished--Mortgagor—*See* MORTGAGE—MISCELLANEOUS, 22 C. 364.

Sheiks of Mulana.

Umballa District—Ancestral property—Custom of descent—*Chundavand* or *Pagvand*—*See* CUSTOMS—PUNJAB—INHERITANCE, 11 P.R. 1905=126 P.L.R. 1905.

Shells.

Tenants for paddy cultivation right of, to dig up shells—Property in the shells so dug up —*See* LANDLORD AND TENANT—GENERAL, 25 M. 669=12 M.L.J. 406.

Shelly's Case, Rule in.

See RULE IN SHELLY'S CASE.

(1)—*Trust, resulting, vested in the Official Assignee on the insolvency of a person—Expectancy—Civ. Pro. Code, s.* 266 (*k*)—*Indian Succession Act, ss.* 80, 81, 83 *and* 84—"*Heirs*"—"*Next of kin*"—Res judicata—*The Portuguese law, applicable to.*—The rule in Shelly's case is based on feudal considerations and is unsuitable to the people of this Presidency and has not been adopted in framing ss. 80, 81, 83, and 84 of the Indian Succession Act. Under the Indian Succession Act the question whether the word "heirs" or "relations" or "next of kin" or "heirs of the body" are words of purchase or of limitation depends, not so much on an absolute hard and fast rule, as on the intention of the parties and the construction of the instruments in which they occur. Resulting trust is not a mere expectancy or contingency under s. 266 (*k*) of the Civ. Pro. Code. Resulting trust in favour of a person passed on his insolvency to the Official Assignee and became vested in him. ANTAO v. ARDESHIR BYRAMI, **1 Bom. L.R. 303.**

Parsis in mofussil of Bombay—Construction of agreement—Rule in Shelly's Case, applicability of—*See* PARSIS, 5 B. 506.

Agreement between members of Parsi family—Construction in accordance with intention of parties—Not applicable—*See* PARSIS, 6 B. 151.

Sheriff.

(1)—*Right of poundage — Sheriff's sale.*—Where a decree is satisfied, after attachment but before sale, the Sheriff will be entitled to his poundage. ROYCHURN DUTT v. AMEENA BIBI, **2 C. 385.**

(2)—*Act* VIII *of* 1859, *s.* 253—*Warrant of Arrest—Execution of decree—Sheriff's poundage.*—Suit in the Bombay Court of Small Causes to recover Sheriff's poundage on the amount indorsed on a warrant of arrest in execution of a decree obtained by the defendants, under which the plaintiff, at the request of the defendants, arrested H, who applied to the High Court under s. 273 of Act VIII of 1859, and was ordered to be

Sheriff—*continued*.

discharged from custody; the Judge found for the defendants with costs, subject to the opinion of the High Court. *Held* that the words "debt levied by execution" used in the Table of Fees for the Recorder's Court, and continued in the subsequent tables being ambiguous, the principle that if an instrument be an ancient one, and its meaning doubtful, the acts of its author may be given in evidence, in aid of its construction was applicable; that as the Sheriff was the officer of the Court, and his fees were received under its authority, the case need not be referred back to the Small Cause Court in order that evidence of usage might be taken; that, having regard, as well to the usage and practice of the Supreme Court as to the liability of the Sheriff at the time the old Tables of fees were settled, the words used entitled the Sheriff to poundage, upon his executing a warrant for the arrest of a defendant in execution of a decree; and that if the Sheriff's right accrued upon his executing the warrant, the subsequent discharge by the Court, of the defendant from custody did not deprive him of it. VINAYAK VASUDEV v. RITCHIE STEUART AND CO., **4 B.H.C.O.C. 139.**

(3)—*Attachment of property—Compromise before sale—Sheriff's right to poundage.*—The very principle on which the Sheriff is entitled to poundage shows that he is not entitled to more than the sum actually received. What the Crown actually obtains, though not under the direct compulsion of the process, is considered as being in fact the amount levied by the hands of the Sheriff. If, therefore, the amount received by the Crown is to be taken as the criterion for one purpose, it must be also for another. Where property is attached by the Sheriff after judgment, and the parties compromised the matter before sale, the Sheriff would be entitled to poundage only on the sum received on compromise. THE BOMBAY JOINT STOCK CORPORATION v. THE SHERIFF OF BOMBAY, **6 B.H C. O.C. 22.**

Turning out the Sheriff's officers—*See* CONTEMPT OF COURT, 2 Ind. Jur. N. S. 99.

See ESCAPE FROM LAWFUL CUSTODY, 1 Ind. Jur. N. S. 228.

See EXECUTION OF DECREE—MODE OF EXECUTION, 3 M.I.A. 164.

Suit against a—For having let off a judgment-debtor—Judgment-creditor's consent to such letting off—*See* RIGHT OF SUIT—MISCELLANEOUS, 4 W.R.P.C. 99=6 M.I.A. 467.

Sheriff's sale in execution—Area of land sold, deficiency in—Application for setting aside sale or for compensation—*See* SALE—GENERAL, 27 C. 264=4 C.W.N. 18.

Jurisdiction of the—Of Madras to seize and sell properties outside Madras—*See* SALE—SALE IN EXECUTION OF DECREE—GENERAL, 6 W.R.P.C. 126=2 M.I.A. 88.

See SALE—SALE IN EXECUTION OF DECREE—PURCHASERS, RIGHT OF, 6 C. 856.

Sheriff—*concluded*.

Execution sale of moveable property—Warranty as to title—Remedy of execution creditor if title defective—Sheriff's liability—*See* SALE—SALE IN EXECUTION OF DECREE—RIGHT OF PURCHASER ON SETTING ASIDE SALE, 2 B. 258.

Purchaser at Sheriff's sale—Suit for purchase money—*See* SALE—SALE IN EXECUTION OF DECREE—RIGHT OF PURCHASER ON SETTING ASIDE SALE, 1 C. 55=24 W. R. 372.

Sale by Sheriff under writ of fieri facias—Warranty—Eviction of purchaser—Purchaser's remedy—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 3 C. 806=5 I. A. 116, P.C.

Jurisdiction of, to issue fieri facias—*See* SALE—SALE IN EXECUTION OF DECREE—WRONGFUL AND INVALID SALES, 8 C. L. R. 4.

Sheriff's Fees.

This circular forwards copy of letter to Judge of the 24 Pergunnahs on the subject of Sheriff's fees—*See* Civ. Cir. Or. No. 15, dated 17th June 1874, 22 W. R. Civ. Cir. 4.

Sherishtadar.

This circular cancels C. O. No. 20, dated 1st August 1870, requiring information for the promotion of Sherishtadars from "B" to "A" Districts—*See* Civ. Cir. No. 12, dated 19th April 1871, 15 W. R. Civ. Cir. 20.

This circular calls for information with a view to the promotion of Serishtadars from "B Districts" to "A Districts"—*See* Civ. Cir. No. 20, dated 1st August 1870, 14 W. R. Civ. Cir. 8.

This circular forbids the employment of Sherishtadars on the Bench — *See* Civ. Cir. No. 27, dated 4th October 1871, 16 W. R. Civ. Cir. 10.

Shet Sanadi.

(1)—Shet-Sanadi—*Rules framed under Bombay Act XI of* 1852—*The* Shet Sanadi *discharged by Government without any fault on his part—The lands continued to him on payment of full survey assessment—The new* Shet-Sanadi *remunerated from out of the assessment by Government—The* Shet Sanadi *lands converted into ryotwari holding Resumption of lands by Government.*—In 1865, *Shet-sanadi*, on being discharged without fault from his office by Government, was, under the rules then in force, allowed to remain in possession of the *Shet-sanadi* lands, but full survey assessment was imposed thereon. The defendant No. 2, who was appointed the new *Shet-sanadi*, was remunerated from the extra assessment levied upon the *Shet-sanadi* lands. In 1905, the Government resumed the lands and handed them over to defendant No. 2: *Held*, (1) that the order passed, and the action taken, under the rule by the Government, had in law the effect of converting the lands from a *Shet-sanadi vatan* into a ryotwari holding, and of investing the holder

Shet-Sanadi—*concluded.*

of the land with the rights of an ordinary occupant, entitled to it, so long as he paid the survey assessment; (2) that the defendant No.2 had held the office of *Shet-sanadi* independently of the lands in dispute; and all that was done in 1865 was that his remuneration for that service was increased, and the enhanced amount was made payable not from the lands in dispute but out of the assessment payable to Government by the occupant; that that was an arrangement between defendant No 2 and Government, which could not prejudice the rights of the preceding *Shet-sanadi* in the absence of any law affecting that right; (3) that the proceedings adopted by the Collector in 1905 were on the supposition that what was done in 1865 had the effect of continuing the land in dispute as one reserved for *Shet-sanadi* service; but that was not its effect, and the proceedings in question were *ultra vires* of the Collector. SELLAPPA RAMAPPA KURI v. MARLINGAPPA CHAVADAPPA, **12 Bom. L.R. 577.**

Shetsanadi Vatan.

Emoluments of Shetsandi vatan—*See* LIMITATION ACT, 1908, art. 62, 10 B. 665.

Shiahs.

See MAHOMEDAN LAW.

Power of devise amongst—Will—*See* MAHOMEDAN LAW — WILL, A.W.N. 1908, 55=5 A.L.J. 169=30 A. 153.

Shia Imami Ismailis.

History of the—*See* AGA KHAN, 11 Bom. L.R. 409=2 Ind. Cas. 874.

Shikmi Cultivation.

Waste land brought under cultivation — *See* RIGHT OF OCCUPANCY — ACQUISITION OF RIGHT, 1 Agra Rev. 32.

Shikmi Talukdars.

(1)— *Talukdars subordinate to Zemindar, Zemindar's right to enforce payment of rents by— Relation of landlord and tenant.*—Where shikmee talukdars have estates on the towjee of the Collectorate separate from the plaintiff's estate, and the payment of their revenue through the zemindar is only a matter of convenience amongst themselves, such talukdars not being subordinate to the zemindar, the latter can sue only in the Civil Court for their share of the revenue. Where however, the shikmee talooks were at the Permanent Settlement, comprised within the zemindar's estate, then, such taluks will not be borne upon the Collector's towjee and the talukdars will be subordinate to the zemindar; and as the zemindar's estate would be liable to sale if the revenue were not paid, so the talukdar's estate would be liable at the suit of the zemindar if its rents be not paid, and the zemindar, standing in the position of landlord to the subordinate talukdar, could take the same measures to

Shikmi Talukdars—*concluded.*

enforce the payment of rents as he could take against any other under-tenant. CHUNDER KANT CHUKERBUTTY v. JOY GOPAL CHUCKERBUTTY, **4 W.R. Act X, Rul. 41.**

Shikmi Tenure.

See PARTITION—RIGHT TO PARTITION, 6 W.R. 192.

Ship.

See JURISDICTION—ADMIRALTY AND VICE ADMIRALTY JURISDICTION.

(1)—*Co-owners of ship—If partners.*—The several co-owners of a ship are not partners on that account, there is a distinction between co-ownership and co-partnership. HAYDER ALI v. ELAHEE BUX MALOOM, **8 C. 1011=10 C. L.R. 606.**

(2)—*Ship built in a foreign port in India—Registration.*—A ship, built in a foreign port in *India*, in 1817, within the limits of the Company's Charter, by foreigners, and which sailed under foreign flags, until 1838, when it was then and there after owned by, and belonged to British subjects, resident at *Bombay*, is entitled under the Proclamation of the Governor-General in Council, and the Act of the Legislative Council of *India*, No. X of 1841 (passed in pursuance of the powers granted by the Statute 3 and 4 Vic., c. 56), to be registered at *Bombay*, as a British ship, for the purposes of trade, within the limits of the Company's Charter. CRAWFORD v. SPOONER, **4 M.I.A. 179=6 Moo. P.C. 1.**

(3)—*Ship—Policy—Warranty of sea-worthiness.*—The warranty of sea-worthiness in a time policy, at the commencement of the risk, is not a continuing obligation cast upon the assured while the risk is running. So *held* by the Judicial Committee, affirming the judgment of the Supreme Court at *Calcutta*, in an action brought for a total loss, by stranding within the time of the running of the policy, after leaving an intermediate port, the defence being that, at the time of the loss, the vessel was unseaworthy by reason of an insufficient crew, she having sailed from the intermediate port without sufficient hands to work the vessel, although she had a sufficient crew at the time she started for the voyage. *Semble.* —There is no implied warranty of seaworthiness in a time policy. JENKINS v. HEYCOCK, **5 M.I.A. 361=8 Moo. P.C. 351=1 Com. Law Rep. 406=1 Sar. 452.**

(4)—*Suit to recover amount of policies of insurance on the cargo and disbursements of a ship—Form of notice of abandonment.*—Suit brought to recover the amount of two policies of Insurance upon the cargo and disbursements respectively of a Ship; both Policies being for a total loss. The Ship having become a wreck, the Captain, without taking any steps to save or discharge the cargo, deeming such impracticable, proceeded to dismantle the Ship, and gave notice to the Insurers of abandonment of

Ship—*continued.*

the cargo, and sold both Ship and cargo by public auction. A large part of the cargo was afterwards saved. The Court below held, that as the cargo might have been, and was, in fact, partially saved, there was no such total loss of the cargo and freight as entitled the Assured to recover on either of the Policies. Such ruling, as regarded the cargo, affirmed, but as the Ship when she was reduced to a wreck, was incapable of earning any freight, the Judicial Committee were of opinion, that there was such a total loss of the disbursements, to be paid out of the freight, as to entitle the Assurers to recover on that Policy. The authority of *Parmeter* v. *Todhunter* (1 Camp., 541), with respect to the form of notice of abandonment, observed upon and questioned. M. R. CURRIE AND CO. v. THE BOMBAY NATIVE INSURANCE CO., **6 Moo. P.C. N.S. 302=L R. 3 P. C. 72=39 L.J.P.C. 1=22 L.T. 31=18 W.R. 296 Eng.**

(5)—*Navigation—Ship not carrying lights—Collision.*—When one ship by her wrongful act suddenly places another ship in a position of extreme danger, the same amount of skill, as is expected under other circumstances, cannot be expected. Any Court ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances, and the Court ought not, in fairness and justice to him, to require perfect nerve and presence of mind enabling him to do the best thing possible. In this case, it was held, that, even if, in the moment of emergency, the *serang* of the ship placed in a position of extreme danger by the gross negligence of another ship (in carrying no lights), gave an order to starboard instead of to post the helm (which resulted in collision), the former ship was not guilty of such negligence as would make her responsible for the collision (*The Bywell Castle*, 4 P.D. 219, *The Owners of "Tasmania"* v. *Smith*, 15 App. Cas. 223, *Appl.*). INDIA GENERAL STEAM NAVIGATION CO. v. JAGAT CHANDRA KUNDU, **31 C. 36.**

(6)—*Ship, Sale of—Contract between British subject and non-British subject as to registered ship in Calcutta—Merchant Shipping Acts, ss. 53, 55—Jurisdiction of Small Cause Court—Execution of Small Cause Court decree—Form of transfer to purchaser.*—A, not a British subject, contracted with B, a British subject, for the purchase of a ship which was registered in the port of Calcutta in the name of C (also a British subject). A and B entered into the contract as if both had been British subjects. *Held* that, on the evidence, the parties contracted with reference to the Merchant Shipping Act, and that the intention was that a title under that Act should be given. *Held* also that, although it turned out that A's nationality prevented the possibility of his being registered as owner, this did not affect the liability taken upon himself by B to have himself put on the register as owner, or his liability to put A in a position to have a change of ownership noted in the register

Ship—*continued.*

under s. 53 of the Merchant Shipping Act. *Held* further that B not having had himself put on the register as owner, and not having put A in a position to have a charge of ownership noted under s. 53, and B having declined to take any further steps towards attaining either of these objects, A was entitled, although he had got possession of the ship, to rescind the contract, and to recover back a portion of the purchase money which he had paid, and also to recover damages for the breach of contract. The Calcutta Court of Small Causes had power to seize and sell a vessel in execution of a decree of that Court, and the bailiff who sells the vessel is the person who ought to execute the bill of sale to the purchaser. A British ship having, in execution of a decree of the Calcutta Court of Small Causes, been sold to a person qualified to be the owner of the British ship,—*Held* that it was necessary that the transfer to the purchaser should be by bill of sale as prescribed in s. 55 of the Merchant Shipping Act, and the mere sale and delivery to the purchaser did not pass a title to him. ESAU AHMED v. JASSIM BINSAFF, **2 Ind. Jur. N.S. 251.**

(7)—*Ship, Sale of—Sale in execution of decree—Form of transfer—Merchant Shipping Act, s. 55—Mandamus to Registrar to register transfer—Jurisdiction of Small Cause Court—Execution of Small Cause Court decree.*—The transfer of a ship should be in the form, or as near the form as may be, laid down by the Merchant Shipping Act; therefore, where a ship sold in execution was transferred by the clerk of the Court, in a form usual in sales in execution, but quite irregular, having reference to the Merchant Shipping Acts, the Court refused a mandamus to order the Registrar to register the transfer. *Quære.*—Whether a ship can be sold in execution of a decree of the Calcutta Small Cause Court, and *quære* whether the clerk of the Small Cause Court can execute a transfer of a ship, supposing she is saleable, in execution of that Court's decree. *In the matter of the Ship*, "SHAH CALLANDER," **1 Ind. Jur. N.S. 263.**

(8)—*Ship—Trading.*—Case of a vessel with a cargo taken in at one port of the island of Java and proceeding to another, with an intention (as asserted) to procure from the latter place a clearance, and proceeded to America with such cargo, held to be a trading within the order 7th January 1807. The presumption being that she was going to the latter port for the purpose of discharge. Ship and cargo condemned. CORA, VAN ALLEN, MASTER, **2 Acton 44.**

Arrest of, for salvage—*See* ADMIRALTY, 1 Bom. L.R. 557=24 B. 55.

See ARREST, Cor. 123.

Ship-owner, Interest of, in mortgaged ship—Sale under prior mortgage—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 1 Ind. Jur. N.S. 241.

Ship—*concluded.*

Exemptive clause in Bill of lading—Effect—Shipping—Negligence of servants of ship—Period of loading—Fitness of the ship—*See* BILL OF LADING, 13 B. 571.

Carriers by sea—Bill of lading, Construction of—Loss by fire—Liabilities of ship-owners for goods after being landed—*See* BILL OF LADING, 5 C.L.R. 157.

See BOTTOMRY BOND, 5 B.L.R. 258.

Misdescription in charter party as to tonnage of—, whether renders voidable the contract to charter the ship—Indian Contract Act, ss. 14, 19—*See* CHARTER PARTY, 14 B. 241.

Bill of lading—Delivery of cargo not conditional on payment of freight—Insolvency of charterer—Right of Captain of—To retain cargo for freight due—*See* CHARTER PARTY, 2 M.H.C. 88.

See CONTRACT—BREACH OF CONTRACT, 1 Ind. Jur. N.S. 131.

See CONTRACT—CONDITIONS PRECEDENT, 2 B.L.R. O.C. 127.

Suit for profits of a Jurisdiction—*See* CONTRACT ACT, 1872, s. 265, 8 C. 1011=10 C.L.R. 606.

Suit for damages for collision—Arrest of ship—Deposit of security—Application for arrest in another suit—*See* DAMAGES—DAMAGES, SUIT FOR, 15 B.L.R. App. 3.

Unseaworthiness of—*See* DAMAGES—MISCELLANEOUS, 6 B.L.R. App. 20.

Loss by collision of ships, suit to recover damages for, an action in tort—*See* LIMITATION ACT, arts. 36 and 49, 11 B. 133.

Plaint originally presented against owners of ship, whether could be subsequently amended by joining ship as defendant—*See* PLAINT—AMENDMENT OF PLAINT, 12 B. 237.

Contract by agent on behalf of Captain and owners of ships then in the roads—Liability of agent—See PRINCIPAL AND AGENT—DUTIES AND LIABILITIES OF AGENTS, 7 M.H.C. 82.

Suit by owners for sum realised by sale of ship—Abandonment of French ships to French consul—Principal and agent—*See* RIGHT OF SUIT—MISCELLANEOUS, Bourke O.C. 112.

See SALVAGE, 2 Ind. Jur. N. S. 139, 17 C. 84.

Right to share in, without registered bill of sale—*See* ST. 57 AND 58, VIC., C. 60, 1 M.L.T. 407=29 M. 526.

Vendee of share in—Absence of bill of sale in his favour—Right to be registered as owner—*See* ST. 57 and 58 VIC., C. 60 s. 24, 8 M.L.T. 407.

Right to refund of earnest-money—Agreement for sale of ship—Failure of consideration—*See* VENDOR AND PURCHASER—CONSIDERATION, 2 Ind. Jur. N.S. 13.

Shipments.

(1) *Bills of Lading fraudulently signed.*—The plaintiffs agreed with the defendant K. M. to purchase and ship cotton on account of K. M., and to retain the mate's receipts for the cotton so shipped until the purchase-money should be paid by K. M. Under]this agreement the plaintiffs shipped 609 bales on board the "Teresa." Before the greater part of the 609 bales had been shipped, and before paying for the same K.M., without production of the mate's receipts, induced the master of the ship to sign bills of lading for the said (609 bales, and indorsed over the bills of lading for 310 of such bales to J.C. and Co., *bona fide* indorsees for value, without notice. In a contest between the plaintiffs, holders of the mate's receipts, and J.C. and Co., indorses for value of the bills of lading of the said 310 bales, it was held that the plaintiffs were entitled to the possession of the 310 bales to the exclusion of J. C. and Co. RAJARAM GOVINDRAM AND NARANDAS MULCHAND v. M. B. BROWN, M. DONALD, AND KARSANDAS MADHAVDAS, **7 B.H.C.O.C. 97.**

See CONTRACT—CONSTRUCTION OF CONTRACTS, 17 B. 129.

July, August—Meaning of—*See* CONTRACT—CONSTRUCTION OF CONTRACTS, 13 B. 15.

At monthly intervals — Construction—*See* CONTRACT ACT, s. 39, 18 M. 63=4 M.L.J. 171.

See SALE OF GOODS, 17 B. 62.

Shipping.

See BILL OF LADING, 19 B. 639.

See MERCANTILE LAW, 1 Bom. L.R. 319=23 B. 551.

Shipping Law.

(1)—*Merchant Shipping Act*—17 *and* 18 *Vic.*, *c.* 104, *s.* 207—*Discharge of seaman—Discretion of shipping master.*—The shipping master at Bombay has a discretion in not discharging a seaman shipped from a foreign port although the seaman consents to the discharge, when the articles under which the seaman was engaged had not expired. *In the matter of* GEORGE LEWIS, **6 B.H.C. O.C. 42.**

(2)—*Act* I *of* 1859, *ss.* 201 *&* 202—*Power of local tribunals to suspend or cancel British certificate of Master or Mate—Necessity for confirmation of order by Government.*—The certificate of a Master or Mate granted in Britain under the provisions of the Merchant Shipping Act (17 and 18 Vict., c. 104) could be suspended or cancelled by a tribunal in India constituted under ss. 201 and 202 of Act I of 1859, and no confirmation of the order by the Local Government was necessary. *Ex parte* HURST, **1 M. H C. 270.**

(3)—*Duties of master and pilot—Act* XII *of* 1855, *s.* 12.—It is a moving of a steam vessel within the meaning of s. 12, Act XII of 1855, to take it on a trial trip from Mazgaon to the

Shipping Law—*continued.*

sea and back again and requires the employment of a pilot. Although the pilot has charge of the ship, the owners are most clearly responsible to third persons for the sufficiency of the ship and her equipments, the competency of the master and crew and their obedience to the orders of the pilot in everything that concerns his duty, and under ordinary circumstances, his commands are to be implicitly obeyed. To him belongs the whole conduct of the navigation of the ship to the safety of which it is important that the chief direction should be vested in one only. There may be extraordinary occasions when the master would be justified in disobeying the commands of the pilot. If, from sudden illness or intoxication, he becomes incompetent to command, the supreme authority would revert to the master during the period of the pilot's temporary incapacity. MUHAMMAD YUSUF v. PENINSULAR AND ORIENTAL STEAM NAVIGATION COMPANY, **6 B.H.C. O.C. 98.**

(4)— *Collision — Burden of justifying.* — When a ship under way comes into collision with a vessel at anchor exhibiting a proper light, it is obvious that she has a heavy burden cast on her to justify her conduct. In the case of a vessel at anchor, there is an obligation to keep a competent person on watch and it is his duty, not only to see that the anchor light or lights are properly exhibited, but also to do everything in his power to avert or to minimise a collision. (*The Clara*, 12 Ohio, 200, *R.*) Being placed, entirely by the erroneous conduct of the vessel under way, in a position of difficulty in which an instant step was imperative, a competent sailor is entitled to claim a favourable consideration for the action which he decided to take, even if it should afterwards appear that such action was not the best possible. MARY TUG CO. v. BRITISH INDIA STEAM NAVIGATION CO., **24 C. 627, P C. = 24 I.A. 129 = 1 C.W.N. 329 = 7 Sar. 167.**

(5)—*Shipping Law—Liability of ship for fault of pilot—Port rules*, 1956—*Act* XXII *of* 1855.—The ship H, in charge of a pilot (acting as harbour master), when proceeding across the bow of the ship, I S, which was at anchor, to take up a clear mooring, came into collision with and slightly damaged her, and this suit was for the damage so occasioned. Both sides relied on Act XXII of 1855 and the Port Rules of 1856, the plaintiff contending that the officer in charge was not such officer of the said Act, and Rules referred to; and the defendant that he was. The suit was dismissed with costs. *Held* that a ship is *prima facie* liable for damages occasioned by a collision resulting from an error in judgment of the officer in charge of her. *Held*, also that a vessel is exempted from liability for the fault of a pilot in charge of her, first where a master is authorized to employ a pilot, and is exempted from responsibility if he elects to do so; and, secondly, where the employment of a pilot is compulsory, and the owners of the vessel so employing him are relieved from responsibility for his misconduct;

Shipping Law—*continued.*

that the legislation regarding the employment of pilots and other officers in the port of Calcutta is contained in Act XXII of 1855 and the Port Rules of 1856; that where no special requisition is made by the port authorities, under rules 2 and 7, a ship may move at her discretion in the port; and that it is unlawful, under s. 12 of Act XXII of 1855, to moor a vessel in the port without having a port officer on board to command of the ship. *In the matter of the* "HANOVER," **Bourke, Ad. 15.**

(6)—*Shipments—Collision—Collision in port—Port Rules*, 1856—*Liability of ship for damage.*—The ship T having got adrift in a dark night, in consequence of a collision, the harbour master tried to anchor her, but failing to do so, as her cable jammed, finally brought her up inside the ship A, which was moored off the Howrah side of the Hoogly, this being the only berth the ship T could then secure. The next flood swung both ships, and the T fouled the A, damaging her, and casuing her to part her cables, in consequence of which she suffered further damage from subsequent collisions. The owners of the A sued the T for the whole damage done. The defence was that the promovents, by adopting certain precautions, might have prevented the accident; that the ship T, being in charge of the port authorities, was not liable, and that no care or skill on her part could have prevented the accident. The T did not allege a liability of any of the vessels subsequently collided with. *Held* that the liability for damages occasioned by collision rests, *prima facie*, on the colliding vessel. That a ship in port is bound to be prepared for such exigencies only as might be expected to arise from the circumstances she knew to surround her, that is, a ship is protected by the port rules from liability for damage only when it is due to the acts or omissions of the officials in charge of her. *Held* also, that the ship is liable for all the consequences occasioned by an accident that results from any defect in her equipment, or want of care or skill of her crew, etc. *In the matter of the* "THALATTA" **Bourke Ad. 1.** *Held* on appeal that an accident to the gear of a ship does not of itself alone render her liable for damages for a collision of which it is a remote occasion; and that a ship at anchor in the port should keep a look-out, and be ready to take all reasonable means for her own safety in an emergency. "THALATTA" v. "ANNE," **Bourke A. C. 87.**

(7)—*Shipping Law—Collision from bore in the river — Inevitable accident.* — The ship Thames was lying a mere hulk, waiting for repair when a bore drifted her stern foremost up the river, and she came into collision with another ship. No negligence was proved against the master, and the accident was held to be inevitable, and no costs were decreed on either side. ABDOOLA ROHOMAN MOOSEN v. "THAMES," **Bourke, Ad. 21.**

(8)—*Damage from collision of two vessels both being in fault—Suit by owner of cargo in one vessel against owner of other vessel—Admiralty*

Shipping Law—*continued.*

iurisdiction—Extent of liability for damages and costs.—Plaintiffs who were the owners of goods shipped on board a *patimar* sued the owners of the defendant steamship for damages for the loss of their goods which resulted from a collision which took place at sea between the two vessels. Upon the evidence the Court found that, at the time of collision, the *patimar* carried no lights at all and was consequently at fault, having violated the rules she was bound to obey. It also appeared that the defendant steamship "Savitri" failed to reverse her engines and that, if she had done so when the *patimar* was first sighted, there would have been no collision. In the result, it was found that both the ships were at fault and were therefore to blame for the collision that occured. In a case, like the present one, of a suit by the owners of the cargo on one of the vessels against the owners of the other vessel for damages for loss sustained by the collision of the two vessels, where both are to blame, the rule to be applied has been laid down to be that the plaintiff could recover only half of the amount of damages from the defendant. The Court accordingly ordered that the plaintiffs in this case do recover from the S.S. "Savitri" half the damages sustained by them. Also, with regard to costs, the proper order in such a suit would be that each party should be made to bear their own costs. OOKERDA POONSEY v. THE S.S. "SAVITRI," **10 B. 408.**

(9)—*Rights and remedies which owners of cargo thrown overboard have in a proper case of jettison—Lien on cargo saved in consequence of jettison — Rule of contribution for general average—Default of master—Right of innocent owners—Right of owners of ship.*—Each owner of jettisoned goods becomes a creditor of ship and cargo saved, and has a direct claim against each of the owners of ship and cargo, for a *pro rata* contribution towards his indemnity which he can enforce by direct action. In case of a general ship, the owner of goods, sacrificed for the common benefit, has a lien upon each parcel of goods saved, belonging to a separate consignee, for a due proportion of his individual claim. In the case of the cargo not being in his possession or subject to his control, his right of lien can only be enforced through the ship-master, whom the law of England, following the principles of the Lex Rhodia, regards as his agent for that purpose. In jettison, the rights of those entitled to contribution and the corresponding obligations of the contributors have their origin in the fact of a common danger which threatens to destroy the property of them; and these rights and obligations are mutually perfected whenever the goods of some of the shippers have been advisedly sacrificed, and the property of the others has been thereby preserved. The exceptions to the rule of contribution for general average are two in number :—(*a*) Where the average loss is occasioned by the unseaworthiness of a ship at the commencement of the voyage and (*b*) where contribution is refused to shippers of

Shipping Law—*continued.*

deck-cargo when jettisoned. These exceptions are, in truth, but limitations on the rule, which have been introduced from equitable considerations. Where the jettison of part of the cargo was a consequence of the ship's having grounded through the negligence of her master, the innocent owners of the jettisoned cargo were entitled to general average contribution; but the owners of the ship were not entitled unless their legal relations to the shippers have been varied by special contract. (Principles in *Schloss* v. *Heriot*, 14 C.B. (N.S.), 59—the leading English authority on the exceptions to the rule of contribution on the general average, cited, explained and considered) STRANG STEEL AND CO. v. A. SCOTT AND CO., **17 C. 362=16 I.A. 240, P.C.=5 Sar. 338.**

(10)—*Captain if agent of mortgagee—Maritime law—Loan on bottomry bond for repairs—Compensation from shipowner by owners of cargo.*—The Captain of a ship is not the agent of the mortgagee of the ship, to pledge his credit for moneys required for repairs. Where the Captain cannot raise funds on a bottomry bond for repairs, but has to sell the cargo for that purpose, the owners of the cargo have no maritime lien on the ship. Their only remedy is to obtain compensation from the owner of the ship. MUTHAYA v. MUTHAYA, **5 M. 334.**

(11)—*Shipping law—Authority of captain to bind owners for repairs of ship.*—The authority of the captain of a ship to bind her owners for repairs, and anything incidental thereto, can only exist by reason of his being their special agent for the purpose, which he will be presumed to be only in particular cases of necessity. BAYLEY v. TARUKNAUTH PORAMANIC, **Bourke, O.C. 263.**

(12)—*Shipping law—Lien on ship for repairs in port—Ship in dock.*—A ship in the river cannot be said to be delivered over to the possession of those who execute repairs; consequently, no lien arose for repairs done. *Secus* —If the ship had been under repair in a dock belonging to the plaintiffs. SHIB CHUNDER DASS v. COCHRANE, **Bourke, O.C. 388.**

(13)—*Act I of 1859, ss. 55, 56—Owners' negligence to furnish funds for repair of disabled ship and for wages—Master's right to sue for recovery of wages and passage money.*—A ship which was engaged for a voyage from Singapore to Jeddah and back, was, on the return voyage, found to seek shelter in the Bombay harbour owing to heavy weather. The owner who was in Singapore was addressed very often to furnish funds for repairs, and for the wages, of the mariners and the master of the ship being unable to raise funds, the ship was sold under ss. 55 and 56 of Act I of 1859. The master, who had been engaged in Singapore, sued for recovery from the surplus proceeds of the sale, of wages up to the time when he could return to Singapore and his passage money from Bombay to Singapore. *Held* that he was entitled to recover. *In re* "THE PERSIA" EDWARD GARDNER, **6 B.H.C.O.C. 138.**

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Shipping Law—*concluded.*

(14)—*Shipping law—Master's lien on ship for wages—Act I of 1859, s. 58.*—The master of a ship has by Statute (Act I of 1859, s. 58) a lien upon the ship for the recovery of wages due. *In the matter of the* BARQUE "ANNE," 2 **Hyde 273.**

Shipping, Merchant.

See ACT I OF 1859.

Ships, Native Passenger.

See ACT XXI OF 1858.

See ACT VIII OF 1876.

Shipping Order.

(1)—*Shipping order—Construction of.*—A shipping order authorising the receipt of "300 bales of cotton not exceeding 52 cubic feet measurement at the screw house" was construed to mean that the measurement by whichthe parties were to be bound was a measurement at the screw-house. *Held* also that, if the agent of the defendants passed the bales there, the defendants were estopped from afterwards making an inquiry into the size of the bales. SOHILIZZI AND COMPANY v. COX, STEEL AND COMPANY, **17 W. R. 545.**

(2)—*Ship—Shipping order—"Ready to receive cargo" construction of.*—The question in the present case was what was the true mercantile construction to be put upon the words "ready to receive cargo" in a shipping order. *Held* :—(i) that the object of the shipper in introducing such a stipulation as that contained in this shipping order is the prompt despatch of the goods. (ii) that in order to ensure this prompt despatch, it is requisite that the ship, on the day named in the order, should be ready to receive *i.e.*, not only to take on board, but to take in and stow away cargo, meaning thereby not only the particular *quantum* of cargo mentioned in the shipping order, but a full cargo from, whomsoever offered, (iii) that in order to this end, a ship arriving with a fair inward cargo must, before or by the day named in the order, have discharged some reasonable portion of her inward cargo, (iv) that the best rule for ascertaining what this reasonable portion is that a ship arriving with a fair inward cargo, before she can be properly said to be ready to receive outward cargo under such a shipping order as this, must have discharged all her inward cargo except the quantity required to stiffen her, (v) and that this rule being sufficiently clear and practical and also being one generally understood and acted on in Bombay, it is desirable to establish it as the recognized test of a ship's being ready or not ready to receive cargo, under a shipping order. TAYLOR v. BROOKE, **1 B.H.C. App. 48**

Ships, Registration of.

See ACT X OF 1841.

Shoe.

Suit for damages for assault—Beating with— *See* DAMAGES—DAMAGES, SUIT FOR, 6 C.W. N. 915.

Shops.

Custom of pre-emption on sale of, obtaining in Amritsar—*See* PRE-EMPTION — SUBJECT OF PRE-EMPTION, 113 P.R. 1906=99 P.L.R. 1907.

Pre-emption on sale of—*See* PRE-EMPTION —SUBJECTS OF PRE-EMPTION, 83 P.R. 1901.

"Show Cause," Meaning of.

(1)—*Meaning of "show cause."*—The words "show cause," wherever they occur in the Civ. Pro Code, have been used in their well-understood and technical sense signifying not merely to allege cause, nor even to make out that there is room for argument, but both to allege cause and prove it to the satisfaction of the Court. DANDEKAR v. DANDEKARS, **6 B. 663.**

Shroffs.

Usage of—*See* NEGOTIABLE INSTRUMENTS —HUNDIS—GENERAL, 1 B. 23.

Shrotriemdars.

Alienation by Government of immemorial waste lands — Acquisition of such lands by Government —Respective rights of Shrotriemdars and Mirasidars to compensation money—*See* ACT I OF 1894, s. 30, 26 M. 271.

Shurkayan-i-Shikmi.

Meaning of—Wajib-ul-arz —Construction—*See* PRE-EMPTION — CONSTRUCTION OF WAJIB-UL-ARZ, 5 A.L.J. 52=A.W.N. 1908, 16=30 A. 77.

Side-wall.

Buildings adjoining each other—Right of easement—*See* PRESCRIPTION—EASEMENTS —HOUSES AND OTHER BUILDINGS, 13 B. 79.

Signature.

(1)—*Signature, what is.*—When a party to a contract signs his name, in any part of it, in such a way as to acknowledge that be is the party contracting, that is a sufficient signature. MOHESH LAL v. BUSUNT KUMAREE, **6 C. 340=7 C.L.R. 121.** [*Appl*, 6 M.L J. 209.]

(2)—*Signature, meaning of—Signing of name of illiterate executant by another on his behalf —Transfer of Property Act, s. 59.—Held* that, where the executant of a deed is illiterate, the absence of a mark does not invalidate the execution of the deed, if some other person signs his name on his behalf as executant of the document in his presence and at his request. RAM CHARAN v. BHIKARI LAL, **12 O.C. 257=3 Ind. Cas. 915.** (24 A. 319, 31 B. 381, *R.*)

(3)—*To a settled account.*—An account to be a settled account need not be signed, provided it is submitted to the party sought to be made liable on it and he has by words or conduct acquiesced in its correctness. HAJI ABDUL v. HAJI BIBEE, **7 Bom. L.R. 151.**

Signature—*continued.*

(4)—*Signature of Rajah.*—The signature of a Rajah of the ancient Nuddea family is valid, although without the name of any particular individual. GUNEE BISWAS v. SREEGOPAL PAUL CHOWDRY, **8 W.R. 395.**

(5)—*Limitation Act*, 1908, *s.* 19—*Signature by dictation.*—If the debtor dictates to a writer to write in the books of the creditor what would amount to an acknowledgment, it would save limitation though he did not himself write, sign, seal or mark the acknowledgment. RAM DITTA v. EBRAHIM-UD-DIN, **122 P.R. 1889.** [*R. & D.*, 132 P.R. 1907 ; *R.*, 16 P.R. 1891.]

(6)—*To a negotiable instrument obtained by fraud.*—Proof that a signature to a negotiable instrument has been obtained fraudulently and without negligence on the part of the person putting his signature is a good defence to a suit by a holder in due course. In such a case the person signing never intended to make a negotiable instrument, and did not in fact do so, as he was not aware that he was signing such a contract. (*Foster* v. *MacKinnon*, 4 L.R.C.P. 704, *F.*) T. M. NARAINASWAMY IYER v. AGA RAJABALLI KHORSANEE, **L.B. R. 1893—1900, 412.**

In account books—Effect—*See* ACKNOWLEDGMENT, 7 M.L.T. 84=5 Ind. Cas. 756.

On a memorandum of association, effect of—*See* ACT VI OF 1882, s. 45, 7 Bom. L.R. 291.

See MAD. ACT VIII OF 1865, s. 15, 6 M.L.J. 192.

Arbitration—Omission to fix time for making of award—Of arbitrators — *See* AWARD, 18 M. 22.

Award of arbitrators directing partition, signature of parties by way of assent to—Chargeable as instrument of partition—*See* AWARD, 9 B. 50.

On creditor's accounts—No new cause of action—*See* CAUSE OF ACTION, 2 C.P.L.R. 40.

Of plaint by unauthorized person but subsequently authorized—*See* CIV. PRO. CODE, 1908, s. 85, 25 A. 635=A.W.N. 1903, 189.

See CIV. PRO. CODE, 1908, O. V, rr. 24, 29, 4 B.L.R.O.C. 51.

Person signing memorandum of association of company, statutory liability of, when commences—Signature whether could be withdrawn before registration—*See* COMPANY—ARTICLES OF ASSOCIATION AND LIABILITY OF SHAREHOLDERS, 12 B. 311.

See CONTRACT—ALTERATION OF CONTRACTS, 8 B.L.R. 305.

See DEED—CANCELLATION OF DEEDS, 30 C. 433.

See EVIDENCE—MISCELLANEOUS DOCUMENTS, 9 W.R. 450.

Comparison of—*See* EVIDENCE—MISCELLANEOUS, 1 M.H.C. 164.

Signature—*concluded.*

See LIMITATION ACT, 1908, s. 19, 5 B. 88, 5 B. 89, 145 P.R. 1889, 16 P.R. 1891.

What amounts to signing—*See* LIMITATION ACT, 1908, s. 19, 18 B. 586.

See LIMITATION ACT, 1908, art. 64, 2 C.P. L.R. 40.

Mortgage by illiterate man—Signing of mortgagor's name by scribe—Validity of signature—*See* MORTGAGE—GENERAL, 16 C.P.L.R. 45.

See MORTGAGE—FORECLOSURE, 16 P.R. 1888, 1885 P.R. 1889, F.B., 84 P.R. 1890.

Test of genuineness of—*See* MORTGAGE—REDEMPTION, 3 Ind. Cas. 291.

Plaint presented within time—No—of plaintiff in plaint—Return of plaint and re-presentation within time fixed — Limitation — *See* PLAINT—RETURN OF PLAINT, 6 M.L.J. 213.

Necessity for plaintiff's signature in plaint —*See* PLAINT—VERIFICATION AND SIGNATURE, 16 C.P.L.R. 103.

Appearance of signatures — Neither party applied to have originals transmitted or to have photographs taken of them—Evidence in favour of will—*See* PROBATE AND ADMINISTRATION ACT, 19 C. 65=18 I.A. 132, P. C.

Omission to take signature of person admitting execution of document—Validity of registration—*See* REGISTRATION ACT, 1908, ss. 58, 87, 4 A. 40=A.W.N. 1881, 78.

Receiptsfor rent—Comparison of—Credibility of evidence—*See* SPECIAL OR SECOND APPEAL—GROUNDS OF APPEAL, Marsh, 322=2 Hay 421.

By mark—Attestation—*See* SUCCESSION ACT, 1865, s. 50, 13 B.L.R. 392.

Impression of facsimile of testator's—on will—Validity—*See* SUCCESSION ACT, s. 50, 25 C. 911=2 C.W.N. 642.

See SUCCESSION ACT, 1865, s. 50, 27 C. 169.

Refusal to put, on a summons—*See* SUMMONS, 7 Bom. L.R. 159.

Of mortgagor—Mortgage signed by scribe on behalf of illiterate mortgagor—Such signature invalid—*See* TRANSFER OF PROPERTY ACT, 1882, s. 59, A.W.N. 1899, 196.

What is the meaning of—and how is it to be effected—*See* TRANSFER OF PROPERTY ACT, s. 59, 4 C.L.J. 41=33 C. 861.

Presentation of appeal—Limitation in vakalat—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 67, 96, 97, 26 A. 14=A.W.N. 1903, 177.

Sikhs.

The term "Hindu" includes "Sikhs"—*See* PROBATE AND ADMINISTRATION ACT, 1881, s. 2, 31 C. 11, P.C.=30 I.A. 249=7 C.W.N. 895=5 Bom. L.R. 845=13 M.L.J. 381=84 P. R. 1903=135 P.L.R. 1903.

See WILL—EXECUTION, P.L.R. 1900, p. 251.

Sikhism.

(1) *Marriage—Custom—Jat is a* Sudra—*His marriage with Mahomedan woman converted to Sikhism—Sikhism a proselytising religion—Sikh tenants and customs—Conversion of a born Mahomedan to Sikhism--Status in law—Ceremonies of conversion—Marriage—Strict principles of Hindu Law inapplicable to Sikhs—Presumption of validity of marriage—Burden of proof—Form of* chadar andazi—Arains *when converted become* Sudras—*Intermarriage.*—Sikhism has at all times been a proselytising religion and has sought converts not only from Hinduism but also from "outlandish" religions such as Islamism and Christianity, and such converts are recognized as Sikhs by the Sikh community. There is no *a priori* legal or customary bar to the conversion of a Mahomedan man or woman to the Sikh faith, and such a convert after initiation becomes a Sikh, and even a Singh, provided, in the latter event, that the initiation has been effected by the *pahul* system of baptism instituted by Guru Gobind Singh. In the case of the conversion of a woman to Sikhism, the simple ceremony of initiation as distinguished from the more elaborate one of *pahul*, is sufficient for her adoption of Sikhism, so as to give her the status of lawfully marrying a Sikh or Singh. The Sikhs have no written law, their social institutions being regulated by rules, which are rules of Hindu Law, modified by custom, and *further* their forms of marriage are different from those of Hindus in general. Strict principles of Hindu Law are inapplicable when the Courts have to deal with the validity of marriages among Hindu Jat Sikhs of the Punjab, as the Jat Sikhs hold liberal views upon this question and are disposed to extend recognition, as far as they possibly can, to all permanent unions between a member of their community and a woman of another caste; and marriage between a Jat Sikh male and a Brahman woman, which would undoubtedly be invalid under Hindu Law, and one between a Sik Sodhi Khatri and a woman converted from Islam to Sikhism have been held valid. (50 P.R. 1895, 73 P.R. 1897, 87 P.R. 1898, 50 P. R. 1900, 79 P.R. 1910=115 P.W.R. 1910, 65 P.R. 1911=188 P.W.R. 1911, 72 P.R. 1908=47 P.W.R. 1908, *R.*) Where a Hindu Jat Singh obtains divorce for a Mahomedan woman from her Mahomedan husband with the object of making her his lawful wife, and certain ceremonies of initiation into Sikhism and marriage by *chadar andazi* are solemnized, the woman taking a Sikh name thereafter and living and co-habiting with her new husband up to the time of his death, these facts *per se* raise a presumption of the validity of the marriage, and the burden of proof that the marriage which actually took place was invalid in law is undoubtedly on the party impugning the same. (13 M.I.A. 158, 29 P.R. 1883, *F.*) Formalities are not necessary to constitute a valid marriage between Jats, and the informal ceremony of *chadar andazi* is regarded a well established form of marriage. (88 P.R. 1879, 6 P.R. 1880, 88 P.R. 1896, 73 P.R. 1897, *R.*)

Sikhism—*concluded.*

Arains were originally Hindus; and by his becoming a Hindu or Sikh an *Arain* must be deemed to become *ipso facto* a *Sudra*, and among *Sudras* intermarriage between sub-castes is unquestionably valid. DALIP KAUR v. LAL KAUR, **41 P.W.R. 1913=100 P.L.R. 1913=18 Ind. Cas. 930=99 P.R. 1913.** (36 P.R. 1895, 72 P.R. 1908=47 P.W.R. 1908, 114 P.W.R. 1908=57 P.R. 1909, *R.*)

Sikkim.

Political Agent's Court at—Decree if may be executed in British India—*See* CIV. PRO. CODE, 1908, ss. 43, 45, 15 C.W.N. 992.

Silence.

(1)—*Silence—Inference from.*—In restingon silence as to a particular matter as a legitimate ground of inference regard must be had to the circumstances; it must be considered whether there was any occasion for words, and any reasonable explanation of the silence. CHHABILDAS v. DAYAL MOOWJI, **6 Bom. L.R. 557.**

When operates as estoppel—*See* BEN. ACT VIII OF 1885, s. 171, 6 C.L.J. 601.

No fraud—*See* LIMITATION ACT, 1908, s. 18, art. 10, 73 P.R. 1885.

Silver Bars.

Railway Act—Loss of, in transmission—Declaration, nature of—Liability of Company—*See* RAILWAY COMPANY, 5 M. 208.

Sindh.

Bombay Law—Applicability to Sind—*See* HINDU LAW—INHERITANCE, 2 S.L.R. 59.

Sindh Courts.

See BOM. ACT XII OF 1866.

Sindh Incumbered Estates.

See BOM. ACT XX OF 1881.
See BOM. ACT XX OF 1896.

Sindh Land Revenue Code.

(1) *Land Revenue Code, s. 56—Grant to successors in title of registered owner—Nature—Rights of real owner.*—Where lands nominally forfeited under s. 56, Land Revenue Code, were granted to the appellant on the ground that they were the sons of the last registered owner:—*Held*, that there was no fresh grant to them but only a restoration to those persons who because their father's name appeared as the registered owner, were presumed to have been the owners prior to the forfeiture.—*Held*, also, that, by availing themselves of the position created by the fact of their father being registered as owner, appellants gained an advantage in derogation of the rights of the respondents and must be compelled in equity to forego this advantage and restore the property to the real owners. CHETOMAL RELUMAL v. SIRUMAL BAGCHAND, **2 S.L.R. 88. (30 B. 466, 1 S. L. R. 142, *F.*)**

Sindhu Jats.

(1)—*Sindhu Jats of the Muktsar Tahsil—Gift by childless proprietor to wife's brother—Validity—Custom.*—*Held*, that it was sufficiently established that among Sindhu Jats of the Muktsar Tahsil, a childless proprietor cannot, in the presence of a brother, make a gift of ancestral land to a total stranger such as his wife's brother. BHAN SINGH v. KHAZAN SINGH, **20 P.R. 1880.** (166 P.R. 1879, *R.*) [*Cited*, 120 P.R. 1886.]

Singing.

Exclusive right of—Injunction—*See* INJUNCTION—GENERAL, 7 Ind. Cas. 558=8 M.L.T. 379.

Sirdar.

Decree passed by Political Agent's Court against—Execution against heirs of Sirdar who was dead—Civil Court—Jurisdiction—*See* CIV. PRO. CODE, 1908, ss. 36 and 37, 17 B. 162.

Decree by Court for Sirdars—Execution thereof in Subordinate Judge's Court against heir of sirdar—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 3 B. 42.

Sir Land.

(1)—*Mere entry in Revenue records as seer land, does not make it so—Meaning of seer land.*—The mere entry in the revenue records of land as *seer* will not make it *seer* land. *Seer* land is land which at some time or other has been cultivated by the zemindar himself, and which although he may from time to time for a season demise to shikmees, he designs to retain as resumable for cultivation by himself or his family whenever his requirements or convenience may induce him to resume it. BUDLEY v. BUKHTOO, **3 N.W.P. 203.**

(2)—*Share in estate—Possession*—Seer *land.*—The possession of a share in an estate may or may not be accompanied by the possession of *seer*; as a sharer in an undivided village which is not held *beegahdan* may increase or diminish the extent of *seer* without increasing or diminishing the extent of his additional share; so if he pleases he may give up his *seer* altogether and yet remain in possession of his share in the estate. TOOLSEE RAM v. NAHAR SINGH, **3 N.W.P. 43.**

(3)—*Possession of, by ordinary ryot for long time—Liability to ejectment at will of landlord.*—A ryot whose holding consists entirely of *sir* land cannot, by mere length of possession, acquire any higher status than that of an ordinary tenant liable to be ejected at the will of his landlord. SATYANAND GAONTIA v. BAIRAGI SAHU, **13 C.P.L.R. 71.** (12 C.P.L.R. 141, *Diss.*)

(4)—*Recital in kabuliat that land leased out is sir—Right to adduce proof that it is not sir.*—Though a recital in a kabuliat that the land leased out is *sir*-land may have the force as an admission it does not amount to an estoppel so as to prevent the tenant from proving

Sir Land—*concluded.*

that the land is not *sir*. NARAIN BALKRISHNA GURAO v. YADO RAO, **14 C.P.L.R. 87.** (19 I.A. 203, *R.*)

(5)—*Sale by a proprietor of his share—Acceptance by him of occupancy tenancy from purchaser—Position of such ex-proprietary tenant.*—Where *sir*-land is held severally then each proprietor is the landlord of the land so held by him. If a proprietor sells his share and subsequently becomes an occupancy tenant of the very land held by him his position is that of a tenant from the purchaser and not from the whole proprietary body. DHONDBA v. VISHWANATH, **15 C.P.L.R. 143.**

No express reservation of "Sir" rights—*See* C.P. ACT IX OF 1883, 1 C.P.L.R. 123.

Ryoti land—Continuous occupation for 12 years—Conversion as *sir*-land—Non-occupation—Cessation as *sir*-land—*See* C. P. ACT XVII OF 1889, s. 3 (11) (*b*). 11 C.P.L.R, 20.

Sir-land not included in Rent-roll—Suit for profits of such land—*See* U.P. ACT XVIII OF 1873, s. 14, 1 A. 656.

See U.P. ACT XII OF 1881, s. 7, 8 A. 256.

Sale of—*See* U. P. ACT XII OF 1881, ss. 7, 9, A.W.N. 1888, 128.

See U. P. ACT XII OF 1881, s. 8, 7 A. 586, F.B.=A.W.N. 1885, 134.

Suit for profits of land—Village expenses—*Sir* land held in partnership by plaintiff and defendant—Expenses of cultivation—*See* U. P. ACT XII OF 1881, ss. 93 (*h*), 140, 7 A. 624=A. W.N. 1885, 129.

Question whether plaint property was—of plaintiff—*See* DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 13 A. 17=A.W.N. 1890, 235, F.B.

See JURISDICTION OF CIVIL COURTS, A. W.N. 1881, 56, 7 A. 328=A.W.N. 1885, 31.

Ex-proprietary tenant—Right to trees on—*See* LANDLORD AND TENANT—PROPERTY IN TREES, ETC. ON LEASED PREMISES, 9 A. 88, F.B., 8 A. 467=A.W.N. 1886, 192.

Mortgage—Right of mortgagee to bring to sale entire rights of mortgagor—*See* MORTGAGE, SALE OF MORTGAGED PROPERTY, 11 C.P.L.R. 133.

Mortgage of zemindari and *Sir* lands—Loss by mortgagor of proprietary rights—Mortgage to be effective against exproprietary rights of mortgagor—*See* MORTGAGE—MISCELLANEOUS, 24 A. 538=A.W.N. 1902, 155.

Mortgage—*See* MORTGAGE—MISCELLANEOUS, A.W.N. 1886, 124.

See PRE-EMPTION—CONSTRUCTION OF WAJIB-UL-ARZ, A.W.N. 1884, 103, A.W.N. 1886, 144.

See PRE-EMPTION—MISCELLANEOUS, 7 N. W.P. 334.

See TRESPASSER, 1 A. 448.

See VENDOR AND PURCHASER—CONSIDERATION, 19 A. 35=A.W.N. 1896, 167.

Sister.

Position of, in the line of succession under Mitakshara and Mayukha—*See* HINDU LAW—INHERITANCE, 10 Bom. L.R. 389=32 B. 300.

See HINDU LAW—INHERITANCE, 2 Bom. L R. 721=24 B. 563.

Sister's Son.

See HINDU LAW—ADOPTION, 3 B. 273.

Adoption of—Customary law—Brahmins—*See* HINDU LAW—ADOPTION, 7 M.H.C. 250.

Sivaganga Sanad of 1803.

See RES JUDICATA—MATTERS IN ISSUE, 17 M. 384=21 I.A. 93=4 M.L.J. 139, P.C.

Site of House.

Adverse possession of—Suit in respect of—Limitation—*See* LIMITATION—GENERAL, 7 M.L.T. 309.

Skin.

Suit to recover price of skins of animals—Jurisdiction—*See* CIV. PRO. CODE, 1908, O. XVI, r. 14, 159 P.L.R. 1911.

Slander.

See DEFAMATION.

See LIBEL.

(1)—*Slander—English and Indian Law.*—The artificial rule in England whereby suits for oral defamation are restricted to three classes, *viz.*, where the words impute the commission of a criminal offence, where they impute being subject to contagious disease and where they convey a charge of misconduct in business, does not prevail in India, and in this country the language used by the defendant imputing moral misconduct to the plaintiff is actionable. But in the absence of proof of substantial loss having resulted from such language, the plaintiff can get only nominal damages. SAGAR RAM v. BADU RAM, **1 A.L.J. 102.**

(2)—*Omission of mere courtesy—No slander.*—The omission of a mere courtesy cannot be taken to be equivalent to slandering or libelling a man, and is not an actionable wrong. SRI RAJA SITARAMA KRISHNA RAYADAPPA RANGA RAZ BAHADUR GARU v. SRI RAJA SANYASI RAZU PEDDA BALAYARA SIMHULU BAHADUR GARU, **3 M.H.C. 4.** [*R.*, 10 A. 425.]

(3)—*Slander—Special damage—Words actionable per se.*—While C was giving his evidence in open Court, in a suit of A against B, A, with the object of inducing the Judge to disbelieve C's testimony, said to the witness that he was a drunkard. *Held* that the words were actionable without proof of special damage. SRI KANT ROY v. SATCOWRI SHAHA, **3 C.L.R. 181.** [*F.*, 12 C. 109, 3 C.L.J. 140; *Appr.*, 10 A. 425; *R.*, 26 C. 653, F.B.]

(4)—*Defamation—Mere abusive language whether actionable without proof of special damage—Application of English Common Law*

Slander—*continued.*

in Calcutta—Charter of 1726—*Art.* 25, *Limitation Act*, 1877.—For mental distress caused by an insult, no damages are recoverable. (26 C. 653, *F.*; *Wilkinson* v. *Downton*, (1897), 2 Q. B. 57, *Lynch* v. *Knight* (1861), 9 H.L.C. 577, 598, *R.*) Mere use of slanderous words, imputing unchastity to a woman, is not actionable by itself in Calcutta, without allegation and proof of special damage. (26 C. 653, *F.*; 8 M. 175, *Discussed*; 7 Bom. H.C.A.C. 17, 10 A. 425, 456, 2 C.W.N. 123, *R.*) The Common Law of England, as it prevailed in 1726, applies to natives of India within the limits of Calcutta, except in so far as it has been modified by the Legislature, or, where it is shown to be unsuitable to this country. (9 M.I.A. 387, 426, *R.*). An action for slander is only maintainable in Calcutta by virtue of the introduction of the English Common Law by the Charter of 1726. BHOONI MONEY DOSSEE v. NATOBAR BISWAS, **28 C. 452=5 C.W.N. 659.** (9 M.I.A. 387, *R.*) [*D.*, 34 C. 48=4 C.L.J. 388, 4 C.L.J. 390, U.B.R. 1905, First Quarter, Tort—Defamation, p. 1.]

(5)—*Whether actionable without proof of special damage—Damages, amount of, question of fact—Second appeal.*—Where the abusive language used is such that, having regard to the respectability and position of the person abused, it is calculated to outrage his feelings or lower the estimation in which he is held by persons of his own class and so bring him into disrepute, the slander is actionable without proof of special damage. A charge of adultery against a respectable man is such a slander. The question of the amount of damages is a question of fact and it is not open to the High Court to interfere in second appeal upon a question like that. JOGESWAR SARMA v. DINARAM SARMA, **3 C.L.J. 140.** [*F.*, 4 C.L.J. 388 =34 C. 48; *R.*, 4 C.L.J. 390.]

(6)—*Slander by several persons—Separate suits—Libellous words—Special damage.*—Each person sued for a verbal slander is responsible for only what he himself has uttered, and the plaintiff is not entitled to bring him before the Court while he is proving his case against another defendant for that for which the first defendant is not himself responsible. But in libel, each person is liable for the entire publication, and therefore they may be properly sued together. It is doubtful whether the words "You are a drunkard, thief, cheat and the paramour of your sister-in-law, you bastard" applied to a Brahmin are libellous *per se* without proof of special damage. NILMADHUB MOOKERJEE v. DOOKEERAM KHOTTAH, **15 B.L.R. 161.** [*F.*, 26 C. 653, 4 L.B.R. 50; *R.*, 8 M. 175, 10 A. 425.]

(7)—*Slander—Special damage—Joinder of defendants.*—An action for slander may be brought jointly against several defendants where the words spoken are not actionable *per se*, but only become so by reason of the special damage, which is the result of the conjoint action of all

Slander—*continued.*

the defendants. WOOZEERUNNISSA BIBEE v. SYED MAHOMED HOSSEIN, **15 B.L.R. 166, Note.**

(8)—*Slanderous imputation against wife—Right of husband to sue for damages—Special damage.*—The distinction between slander and defamation, which prevails in English law, is one which has not been adopted by Courts in India. There is no rule of law in force in this country which prevents a husband suing in his own name for damages for a slanderous imputation against his wife's chastity or modesty without proof of actual damage; and an imputation of this kind when published with such particularity and precision, that, having regard to time and place, it may well create a reasonable apprehension in the mind of the husband that his reputation is injured, and thus inflict on him the pain consequent on such a belief, is actionable *per se*. (1 M. 383, *D.*; 8 M. 175, 12 C. 424, 140 P.R. 1882, 22 P.R. 1884, Cr., 33 P.R. 1887 Cr., *R.*) Where a plaint alleged that the 1st defendant made and the 2nd defendant corroborated at the making of a distinct assertion, made deliberately with intent that it should be believed, that the former was in the habit of committing adultery with plaintiff's wife, plaintiff could claim damages from the joint authors of the report even if the plaintiff was not actually put out of caste, or even compelled to put away his wife in order to escape expulsion, as an immediate consequence of the spreading of that report. AJUDHIA PARSHAD v. SHIBBU MAL, **27 P. R. 1889.**

(8-*a*)—*Imputation of unchastity against wife—Her right to sue without proof of actual damage—Slander by one confirmed by another—Liability of both to be sued in one action.*—A wife can sue for slanderous imputation against her character even without proof of actual damage; and where the slander complained of is said to have been uttered by 1st defendant in the presence of the 2nd defendant, and to have been confirmed on the spot by the latter, the repetition of the slander by both defendants is so connected as to make them joint tort-feasors, liable to be sued in one action. MUSSAMMAT CHHATI v. SHIBBA, **27 P.R. 1889, Note.**

(9) — *Whether actionable without special damage—Statement of witness, when privileged—Imputation of unchastity to a woman—Action by her brother, if and when maintainable.*—For a statement, imputing unchastity to plaintiff's sister: *Held*, that a suit by plaintiff for damages for the slander was not maintainable inasmuch as the words were neither defamatory of him nor had they caused him any injury. *Harington, J.*—What a witness says in the course of his examination is privileged even if irrelevant but no witness is entitled to claim privilege for a slanderous statement wantonly made, which is neither an answer to any question addressed to him, in examination or cross-examination nor has any connection at all with

Slander—*continued.*

the case under trial. GIRWAR SINGH v. SIRAMAN SINGH, **9 C.W.N. 847=2 C.L.J. 396=32 C. 1060.** (1 M. 83, 18 M. 250, 1 Agra 264, 11 A. 104, 5 B. 580, *R.*) [*Appl.*, 4 C.L.J. 390.]

(10)—*Slander—Damages—Suit in mofussil between Hindus.*—Where, in a suit for damages for verbal abuse, brought in the mofussil outside the Presidency Town of Bombay, the parties were Hindus, the rule of English law, that no suit will lie for damages for verbal abuse without actual injury or damage, did not apply, and the suit had to be decided according to Reg. IV of 1827, s. 26. KASHIRAM *valad* KRISHNA v. BHADU BAPUJI, **7 B.H.C. A.C. 17.** [*R.*, 8 M. 175, 10 A. 425=A.W.N. 1888, 157, 26 C. 653=3 C.W.N. 551; *D.*, 28 C. 452=5 C.W.N. 659.]

(11)—*Abusive language—Injury to person's feelings—Right to recover damages.*—It was contended, in this appeal against the decree of the Principal Sudder Ameen awarding damages for the abuse of the plaintiff by the defendant, that, as no direct injury resulted, no damages should have been given, but the High Court was of opinion that the question as to the amount of injury inflicted by the abuse was also within the province of the Judge to decide, and that injury might result to a man's feelings such as would entitle him to damages. SHAIKH TUKEE v. SHAIKH KHOSHDEL BISWAS, **6 W.R. 151.** [*F.*, 7 B.H.C. 17, 6 B.L. R. App. 99, 8 M. 175, 12 C. 109; *R.*, 8 W.R. 256, 10 A. 425=6 A.W.N. 157, 26 C. 653, F.B.]

(12)—*Jurisdiction—Civil Court—Suit for damages for mere abuse.*—An action does lie in the Civil Court for damages on the ground of mere abuse. OSSEEMOODDEEN v. FUTTEH MAHOMED, **7 W.R. 259.** [*R.*, 10 A. 425=8 A. W.N. 157, 26 C. 653, F.B.=3 C.W.N. 551.]

(13)—*Suit to recover damages for abuse—Jurisdiction.*—A suit for recovering damages for abuse will lie in the Civil Court. KALI KUMAR MITTER v. RAMGATI BHATTACHARJEE, **6 B.L.R. App. 99=16 W.R. 84, Note.** (1 W.R. 19, 6 W.R. 151, *F.*) [*F.*, 16 W.R. 83, 12 C. 109; *R.*, 10 A. 425, 26 C. 653, F.B., 3 C.W.N. 551.]

(14)—*Abusive language, action whether maintainable for damages for.*—This was a suit for damages, the plaintiff alleging that the defendant abused him, and thereby injured him in character and reputation, as well as in his profession as a *mooktear*. The Judge found that the subject-matter of the plaint did not constitute a cause of action and therefore rejected it under s. 32, Act VIII of 1859. His finding was held to be opposed to the decisions and clearly wrong. The Court, in such a case, should decide upon the extent of injury done to the appellant. It does not follow, because a man's professional position or gains are not injured by the abuse received by him, that his feelings have not been injured and outraged, and an action

Slander—*concluded.*

is therefore maintainable for damages in such a case. GOUR CHUNDER PUTEETUNDEE v. MR. A. L. CLAY, **8 W.R. 256.** [*F.*, 7 B H.C. 17 ; *R.*, 8 M. 175, 12 C. 109, 10 A. 425=A.W. N. 1888, 157, 26 C. 653, F.B.=3 C.W.N. 551.]

(15)—*Tort—Abuse—Damages—Right to sue—Criminal proceedings, absence of.*—Failure on the part of the plaintiff to institute criminal proceeding against the defendant for abusive words used by him, does not deprive him (plaintiff) of his right to bring a suit in the Civil Court for damages. SREENATH MOOKERJEE v. KOMUL KURMOKAR, **16 W.R. 83.** [*R.*, 8 M. 175, 10 A. 425=A.W.N. 1888, 157, 26 C. 653=3 C.W.N. 551.]

(16)—*Words used by Judge whilst trying case in Court—No action for slander maintainable against Judge.*—An action for slander cannot be maintained against a Judge for words used by him whilst trying a case in Court even though such words were alleged to be false, malicious, and without reasonable cause. RAMAN v. SUBRAMANIA AIYAR, **3 M.L.J. 94.**

See DAMAGES—DAMAGES, SUITS FOR, 8 M. 175.

See JURISDICTION OF CIVIL COURT, W.R. 1864, 269, 302, 1 W.R. 19.

See MASTER AND SERVANT, 13 M. 34.

Slander of Title.

(1)—*Slander of title—Cause of action—Damages—Counterfeiting trade mark—Allegation to the Collector of Customs—Detention of goods in consequence by the Collector—Action of Collector, whether a judicial proceeding—Merchandise Marks Act (IV of* 1889).—There were allegations in the plaint, (*a*) that the defendants were interested in putting a stop to the sale of goods imported by the plaintiff, (*b*) that, when the same were in the Calcutta Customs House, the defendants, with intent to injure the plaintiff, had falsely alleged to the Collector of Customs that the marks on those goods were an imitation of somebody else's, (*c*) that the defendants had thereby induced the Collector to detain the goods in the Customs House and had also persuaded and induced the Collector to make an *ex-parte* order that the plaintiff's marks were a fraudulent imitation, and (*d*) that in consequence the plaintiff had suffered special damage. *Held*, that the plaint did disclose a cause of *action* and should not have been rejected. *Maclean, C.J.*—This was virtually a case of slander of title, and in order to succeed, the plaintiff had to show that the statements of the defendants were false, malicious and that he had suffered special damage. Here, though malice had not been specifically pleaded, it was undoubtedly to be implied from the allegations (*a*) and (*b*). In any case, the suit should not have been dismissed on this account, but the plaintiff ought to have been allowed to plead special damage. *Sale, J.*—No question arose in this case as to

Slander of Title—*concluded.*

the legality of the Collector's action. Moreover, the finding of the Collector was not a judicial act, and the plaintiff was entitled to disregard it, so far as his right to sue in the Civil Court was concerned, and he was not bound to move the higher executive authorities to have the finding set aside. NEMI CHAND v. C. W. WALLACE. **10 C.W.N. 107=4 C.L.J. 268.**

See CIV. PRO. CODE, 1908, O. XXI, rr. 66 and 70, 1 Bom. L.R. 220=23 B. 759.

Slaughter-house.

Public slaughter-house—Obligation to take out special license to slaughter animals there—*See* MAD. ACT IV OF 1884, ss. 191, 192, 194 and 195, 2 M.L.J. 206.

See NUISANCE, 106 P.R. 1888.

Slave.

Succession to emancipated slave—*See* MAHOMEDAN LAW—INHERITANCE, 3 B. 422, P.C.=6 I.A. 137=5 C.L.R. 11.

Slavery.

See ACT V OF 1843.

See MAHOMEDAN LAW—INHERITANCE, 3 B. 422, P.C.=6 I.A. 137=5 C.L.R.11.

Slope.

Owner of a, can sue to remove on encroachment on a slope—*See* MAXIM, 2 Bom. L.R. 688.

Small Cause Court.

This circular deals with Small Cause Court Houses, **Cir. No. 28, dated the 25th November 1865, 4 W. R. Civ. Cir. Order, p. 3.**

This circular deals with the inquiry as to the appointment of clerks of the Small Cause Courts and their duties, **Civ. Cir. Memo. No. 5, dated 16th March 1872, 17 W.R.H.C. Rul. & Ors. 3.**

Small Cause nature, suit of—Whether suit for 'begar' is a—*See* C. P. ACT XVIII OF 1881, s. 4 (3), 6 N.L.R. 117=8 Ind. Cas. 276.

Power to make up deficiency of Court-fee—Power of Registrar of, to enlarge time—*See* CIV. PRO. CODE, 1908, ss. 148, 149, 7 Ind. Cas. 578.

Revisional jurisdiction over Small Cause Court (Calcutta)—*See* SANCTION TO PROSECUTE, 14 C.W.N. 806=6 Ind. Cas. 473=37 C. 714.

Lease—Possession not given as per covenant—Suit for recovery of money—Second appeal—*See* LEASE—ZURPESHGI LEASE, 6 Ind. Cas. 704.

Small Cause Court Establishment.

This circular calls for a return showing scale of establishment attached to each Small Cause Court, **Cir. No. 13, dated the 11th April 1867, 7 W.R. Civ. Cir. Orders, p. 7.**

Small Cause Court Judgment.

(1)—*Civ. Pro. Code*, 1882, *ss.* 203 (*O.* XX, *r.* 4), 562 (*O.* XLI, *r.* 23), 647 (*s.* 141, *new Code*) —*Judgment of Small Cause Court—Revision.*—S. 203 will not enable even a Small Cause Court Judge to dispose of a case in a manner which gives neither the points, nor any guarantee that he sufficiently understood the cause. The High Court, on revision, remanded a Small Cause suit for re-trial under the analogy of s. 562 read with s. 647, on the ground that the judgment of the lower Court did not comply with the provisions of s. 203. MALIK RAHMAT v. SHIVA PRASAD, **13 A. 533=A.W.N. 1891. 172.** [*Diss.*, 12 A.W.N. 160 ; *Not F.*, 6 C.L.J. 527 ; *F.*, 57 P.R. 1901.]

Judge of—Duty to record reasons for finding —*See* JUDGMENT—FORM AND CONTENTS, 4 S.L.R. 17=7 Ind. Cas. 591.

What the judgment of a—ought to contain—Findings on issues—*See* JUDGMENT—FORM AND CONTENTS, 8 O.C. 44.

Small Cause Court, Mofussil, Jurisdiction of.

1.—GENERAL.

2.—PRACTICE AND PROCEDURE.

3 —MISCELLANEOUS.

See PROVINCIAL SMALL CAUSE COURTS ACT, 1887.

See RES JUDICATA—COMPETENCY OF COURT.

See SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS.

——1.—General.*

(1)—*Jurisdiction—Suit for damages for malicious prosecution instituted under Act* XI *of* 1865—*Dismissal of suit for default—Readmission after introduction of new Act* IX *of* 1887—*Act applicable to suit.*—Where the question was whether a suit for damages for malicious prosecution originally instituted under the old Small Cause Courts Act XI of 1865 and dismissed for default, would, if re-admitted after the new Act IX of 1887 came into force, be governed by the provisions of the old or the new Act, the Chief Court held that it was governed by the old Act, the suit which had been dismissed for default being only in suspense, till it was revived on plaintiff's application ; and that, as such order was not final, the suit which had been laid under the old Act could not be held to be governed by the provisions of the new Act. SANT RAM v. NIHALA, **52 P.R. 1889.** (11 P.R. 1886, *R.*)

(2)—*Jurisdiction of Court—Actual presence of defendant not necessary.*—The actual presence of the defendant within the jurisdiction

* See the articles in the 1st schedule to the present Provincial Small Cause Courts Act, 1887, as some of the cases that appear under this heading are cases decided under the old Acts, now no longer law.

***Small Cause Cours, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

of the Court is not necessary if he was dwelling there at the commencement of the suit, and a temporary dwelling is sufficient to give jurisdiction to a Small Cause Court. ANANTHA NARAYANA v. PERIYANA KONE, **5 M. H. C. 101.**

(3)—*Act* XI *of* 1865, *s.* 8—*Jurisdiction*—"*Dwell*," *meaning of.*—From the words, "if the defendant at the time of the commencement of the suit shall dwell within the local limits of such Court," as given in s. 8 of Act XI of 1865, it is not to be understood that the personal presence of the defendant within the limits of the Court at the time of the institution of the suit is a necessary condition to make the case cognizable in the Court. If the defendant has not ceased to reside at a certain place, but retains his dwelling-house there at the time of the institution of the suit, he must be held to have been dwelling at that place, although he may have been temporarily absent from his dwelling house. To dwell in a place is to have one's permanent place of abode there. MADHO DOSS v. SITA RAM, **3 N.W.P. 121.**

(4)—*Small Cause Courts Act*, XLII *of* 1860, *s.* 4—"*Dwelling*"—*Residence for temporary purpose not "dwelling" within meaning of Act.*—Mere casual presence or even residence for a temporary purpose within the jurisdiction of a Small Cause Court, without the intention of remaining, was not "dwelling" within the meaning of s. 4 of the Small Cause Courts Act, XLII of 1860. A person who resided at Coimbatore had some cultivation within the jurisdiction of the Court at Ootacamund and he went there to answer a demand against him. *Held* that he could not be said to "dwell" within the jurisdiction of the Court at Ootacamund within the meaning of s. 4 of Act XLII of 1860. SAMINATHA PILLAY & Co. v. VARISAI MAHOMED RAVATTAN, **2 M.H.C. 304.**

(5)—*Act* XI *of* 1865, *s.* 8—*Jurisdiction*—"*Dwelling place.*"—Where the defendant's usual place of residence is not within the limits of a Court's jurisdiction, although he has a family house there in which his father lives and which he occasionally visits, he cannot be held to be dwelling within the local limits of that Court's jurisdiction, within the meaning of s. 8 of Act XI of 1865. GENDU MALHARI v. GOVIND ATMARAM, **10 B.H C. 409.** [*R.*, 2 Bom. L.R. 605.]

(6)—*Mutiny Act*, s. 99—"*Place*," *meaning of*—*Residents of Sinchal and Jallapahar - Darjeeling Small Cause Court—Military Courts of Requests.*—The word "place" in s. 99 of the Mutiny Act is not used in the limited sense of a fortified town or fortress. The Small Cause Court at Darjeeling has no jurisdiction over the residents of Sinchal and Jallapahar who are amenable to the Mutiny Act ; and these two places being localities in India outside the jurisdiction of the Calcutta Small

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1,—General—*continued.*

Cause Court, only the Military Courts of Requests can take cognisance of actions arising in such places. HOSSEINEE v. LIEUTENANT DICKINSON, **9 W.R. 112.**

(7)—*Act* XI *of* 1865, *s.* 8—*Term "residence."*—In s. 8 of Act XI of 1865, it was intended that the suit should be brought at the place where the defendant had his dwelling in the sense of actual residence. PROGASH PARAY v. HACHIM KHANSAMAH, **7 W.R. 417.**

(8)—*Execution of Small Cause Court decree.*—A decree of a Small Cause Court (Mofussil) could be executed by it, at any place within the local limits of the District Court to which it is subordinate. The matter should be dealt with under ch. XIX of the Code of 1877, and s. 648 has no reference to it. BADAN BEBAJEA v. KALA CHEND BEBAJEA, **4 C. 823.**

(9)—*Suits against military men—Indian Army Act* (1881), *ss.* 148, 151—*Value of suit under Rs.* 400—*Jurisdiction.*—When a suit of the kind described in s. 151 (1) of the Army Act, 1881, under Rs. 400 in value, is brought against a defendant being of the class described in that section in a Mofussil Small Cause Court on a cause of action alleged to arise within the territorial limits of that Court, it is sufficient for the plaintiff to aver that the defendant is within the jurisdiction of some Small Cause Court and is not at a place beyond the territorial jurisdiction of any Small Cause Court—and the only valid plea to such a suit founded on the Army Act, 1881, by such a defendant, is that he is, within the meaning of s. 148 (1) of the Army Act, at a place in India beyond the territorial jurisdiction of any Small Cause Court. It is not enough to plead that he is within the territorial jurisdiction of some other Small Cause Court. The expression "within the jurisdiction of any Small Cause Court" in s. 151 (1) of the Army's Act, 1881, refers to the antecedent words 'persons' and not 'action.' **R. NORTON v. MAJOR T. NICHOLLS, 111 P. R. 1887, F.B.** (33 P. R. 1879, *Overruled.*) [*R.*, 1 P.R. 1893 ; *D.*, 110 P.R. 1890.]

(10)—*Person 'working for gain' at a place—Jurisdiction—Small Cause Court.*—Plaintiff sued defendant in the Small Cause Court at Simla for goods supplied to him. Plaintiff stated that though the defendant's head-quarters as a clerk was at Calcutta, yet for a time, which was the time of the institution of the suit, the defendant was employed at Simla. *Held* that, as a person "working for gain" at Simla during the said month, the Simla Small Cause Court had jurisdiction in a suit against the defendant. The defendant remained working for gain for a month, a time quite sufficient to show that he was not a mere passing traveller or a person who could be said to have had during that time a place for permanently working elsewhere. For an appreciable time, the defendant discontinued to work for gain at Calcutta and worked at Simla. ISMAIL RAU v. GRISHI CHUNDER DASS, **92 P.R. 1875.**

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

(11)—*Carrying on of business by defendant.*—The carrying on of business must be personal on the part of a defendant, if it is sought to bring him within the jurisdiction of a Small Cause Court on the ground of carrying on business. CHUNDEE CHURN DUTT v. EDULJEE COWASJEE BIJNEE, **8 C. 678 = 11 C.L.R. 225.**

(12)—*Act* XI *of* 1865, *ss.* 8, *expl.* (*a*), 11—*"Zemindaree business," meaning of — Mookhtears and Kurpurdauzes—"Servant or agent"—Lodging, meaning of—Jurisdiction.*—"Zemindaree business" is not such business as is intended by s. 8, Act XI of 1865. The servant or agent mentioned in s. 11 is a servant or agent as described in s. 8, and mookhtears and kurpurdauzes carrying on what is called "Zemindaree business" are not servants or agents within the meaning of s. 11. [*F.*, 23 W. R. 223; *R.*, 14 C. 256.] Where zemindars occasionally frequent the headquarters of a Small Cause Court for prosecuting and defending suits, settling business with creditors or for special intercourse, etc., and remain in their boat or in the house of their mookhtears and kurpurdauzes, it cannot be said that they have a "lodging" within the meaning of the word as used in Expl. (*a*), s. 8, Act XI of 1865, so as to give the Court jurisdiction over them. NOBIN CHUNDER v. BURODA KANT SHAHA, **19 W.R. 341.**

(13)—*Act* XI *of* 1865, *s.* 8—*Zemindaree Business—Jurisdiction of Small Cause Court.*—Zemindaree business is not business of the kind contemplated by s. 8, Act XI of 1865. ANONYMOUS, **23 W.R. 223.** [*R.*, 14 C. 256, 14 B. 541.]

(14)—*Carrying on business by commission agent—Jurisdiction*—A person who carries on business at a place by a commission agent to whom he only consigns goods, is not a person who can be said to carry on business or personally work for gain within the local limits of a Court where the commission agent resides. GOPEE MOHUN ROY v. PROTAP CHUNDER ROY, **11 W.R. 530.**

(15)—*Suit against wife living under protection of husband, not cognizable by Court within whose local limits husband does not reside.*—Plaintiff sued defendant for costs of board and lodging. Defendant was admittedly living under the protection of her husband who, at the commencement of the suit, did not dwell, nor *personally or through a servant or agent, carry on business or work for gain* within the local limits of the jurisdiction of the Small Cause Court in which the suit was instituted. The Judge returned the plaint for presentation to the proper Court, being of opinion that the suit was not cognizable in his Court because, even if the plaint be amended by making the

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

husband of the defendant a party to the suit, the wife could not be considered as one of two defendants living within the limits of separate jurisdictions. The suit in the amended form would really be one against the defendant's husband alone and would have to be instituted before the Court within the limits of whose jurisdiction he was living. *Held* that the Judge of the Small Cause Court was right. BOWMAN v. MRS. SHAWE, **10 W.R. 240.**

(16)—*Suit against two defendants, one resident within the Court's jurisdiction and the other not so resident—Act* XXIII *of* 1861, *s.* 4.—A suit against two defendants whose liability was joint, but one of whom at the time of filing the plaint is neither resident nor personally working for gain within the limits of the jurisdiction, may be tried by a Small Cause Court within whose jurisdiction the other defendant is resident at the time of the commencement of the suit, provided an order is obtained from the High Court under s. 4 of Act XXIII of 1861. RUNGIAH PILLAI v. CHINNASAMI PILLAI, **3 M.H.C. 374.**

(17)—*Small Cause Court—Defendant residing within jurisdiction but imprisoned in jail beyond jurisdiction—Cognizability of suit by Small Cause Court.*—Confinement in a jail within the jurisdiction of one Court does not cause the defendant to lose his "village residence" within the jurisdiction of another Court, which can therefore take cognizance of a suit against him. PREM SINGH v. JAWAND SINGH, **85 P.R. 1875.** [*R.*, 77 P. R. 1909=124 P.L.R. 1909=125 P. W. R. 1909.]

(18)—*Jurisdiction—Act* XXIII *of* 1861, *s.* 4.—Where one of the defendants resides beyond the jurisdiction of a Court of Small Causes, but the cause of action has arisen within that jurisdiction, the Judge of the Court of Small Causes may apply for sanction, under s. 4 of Act XXIII of 1861, to the High Court, for proceeding with the case. MATHURADAS JAGJIVANDAS v. NATHA BAJA, **6 B.H.C.A.C. 131.**

(19)—*Act* XXIII *of* 1861, *s.* 4—*Jurisdiction—Parties.*—The High Court may, on cause shown, allow a person concerned in a suit who lives within 20 miles of the jurisdiction of a Court of Small Causes, within whose jurisdiction the other parties to the suit reside, to be made a party to that suit. MOHUR RAM MOODEE v. KARBAREE SIRDAR, **18 W.R. 312.**

(20)—*Temporary imprisonment abroad—Commission for examining witnesses.*—Temporary imprisonment beyond the jurisdiction of Court does not bar the jurisdiction of that Court in respect of defendants who formerly resided within its jurisdiction, and whose families continued to reside there, especially where there is nothing to show that the defendants had no intention of not returning to their former place of abode on the termination

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

of their imprisonment. A Magistrate is not bound to execute a commission of a Small Cause Court directing him to take the evidence of prisoners in jail, in a case in which none of the circumstances existed authorizing that Court to issue the commission. GOPAL CHUNDER SIRCAR v. KURNODHAR MOOCHE, **7 W.R. 349.** [*R.*, 7 W.R. 417, 28 M. 28=14 M. L.J. 329.]

(21) *Act* XXIII *of* 1861, *s.* 27—*Suit for money improperly taken away by defendant from Collector—Small Cause suit—Special appeal—Small Cause suit filed as original suit—Appeal—Jurisdiction—Charter Act, s.* 15—*Act* XI *of* 1865, *s.* 6—*Some defendants living outside the jurisdiction of Small Cause Court.*—A suit for the recovery of a certain sum of money below Rs. 500 alleged to have been improperly taken away by the defendants from the Collector who held that money in deposit on account of certain lands taken by Government for public purposes, is a suit cognizable by the Small Cause Court and no special appeal can lie to the High Court under the express provisions of s. 27 of Act XXIII of 1861. Where a suit cognizable by a Small Cause Court was instituted in a Munsif's Court having jurisdiction within the local limits of the jurisdiction of the Small Cause Court, and was tried by the Munsif, and heard in appeal by the District Judge, the High Court, under the powers vested in it by s. 15 of the Charter Act, set aside in special appeal the decision of both the lower Courts as having been passed without jurisdiction. [*R.*, 1 A. 101, F.B.; *Cons.*, 8 P.R. 1883.] Although some of the defendants to a suit are living at a place over which the Small Cause Court has no jurisdiction, if the other defendants are living within the local limits of the jurisdiction assigned to that Court, this fact would be sufficient to bring the suit within the category of "suits cognizable by the Small Cause Court" as described in s. 6 of Act XI of 1865. TARINI CHARAN MOOKERJEE v. RAJA PURNA CHANDRA ROY, **6 B.L.R. 717=15 W.R. 397.**

(22)—*Cause of action—Foreign territory—Residence—Jurisdiction, Small Cause Court—Intricacy of account—Effect of.*—The transactions between the parties took place in foreign territory and plaintiff sued the defendant, who was residing in British territory at the time of the suit, in the Small Cause Court upon an account. *Held* that the Small Cause Court had jurisdiction as the parties at the time of suit were domiciled in British territory, and if the suit was one cognizable by Court of Small Causes, its intricacy made no difference as to jurisdiction. KANIA MULL v. SHEOJI, **55 P.R. 1872.**

(23)—*Small Cause suit—Territorial jurisdiction of Court, reduction of, after decree.*—The mere fact of the diminution of the territorial jurisdiction of a Small Cause Court does not

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

prevent that Court from disposing of cases pending in the Court when the area of its jurisdiction is diminished; and applications for re-trial and for execution of decrees must be held to be proceedings in a suit, or rather part of the proceedings of a suit. When the local jurisdiction of a Court of Small Causes has been diminished after a decree in a suit is passed, applications for new trial and for execution must be disposed of by that Court although the place at which the original cause of action arose has passed from the local jurisdiction of that Court. SAWAN MUL v. SOBHA; JHANDA SINGH v. AMIR SINGH, **95 P.R. 1876**. (36 P.R. 1876, *Overruled.*) [*Appr.*, 95 P.R. 1877; *R.*, 69 P.R. 1899.]

(24)—*Provincial Small Cause Courts (Act* IX *of* 1887)—*Officer invested with powers succeeded by one not so invested—Suit filed after the former left—Regular suit.*—Where an officer invested with the powers of the Small Cause Court ceases to hold jurisdiction over a Court in which such powers may be exercised and is succeeded by an officer not invested with those powers, the Small Cause Court ceases to exist on the date when the first named officer delivers over charge, and suits filed after that date, although of the nature of small causes, must be registered and tried as regular suits. TRIBHUVAN v. SHYAMSUNDER, **11 A.L.J. 360=19 Ind. Cas. 362.**

(25)—*Small Cause Court—Jurisdiction—Chief Court—Merits of case.*—The Chief Court cannot enter to the merits of a case decided by the Small Cause Court, when no question of jurisdiction is involved in it. BOODH SINGH v. HEERA SINGH, **45 P.R. 1866.**

(26)—*Suit against Government—Suit against Government officers—Jurisdiction—Small Cause Court.*—A suit against Government cannot be brought in any Court of Small Causes other than the one having jurisdiction at the seat of Government (Act XI of 1865, s. 8). A suit against a Government officer personally cannot be brought in a Small Cause Court within whose jurisdiction he does not reside. BAHAR SHAH v. BHAWANA, **89 P.R. 1867.**

(27)—*Act* XXIII *of* 1861, *s.* 4—*Small Cause Court—Suit against several persons some of whom not subject to Court's jurisdiction—Sanction of High Court.*—On the reception of a plaint by Court of Small Causes against several persons, some of whom did not reside or personally work for gain within its jurisdiction, it was necessary for the Court to apply to the High Court for an order giving it jurisdiction to hear and decide the suit under s. 4 of Act XXIII of 1861. It was necessary that the application to the High Court should be accompanied by a statement of the circumstances of the particular case. The High Court gave the same operation to s. 21 of Act XLII of 1860 as it might have done if the provisions of Act

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

XXIII of 1861 had actually formed a part of Act VIII of 1859 at the time when it became law. SABHAPATI MUDALI v. MUTHUSWAMI MUDALI, **1 M.H.C. 103.** [*F.*, 3 M.H.C. 374, 14 W.R. 156.]

(28)—*Deed intended to be but not registered, whether created a valid mortgage—Mistake of Small Cause Court in dismissing claim as* res judicata, *not an overstepping of jurisdiction.*—This suit was for possession of land alleged to be mortgaged to the plaintiff. The first Court dismissed the claim stating that the full consideration for the deed had not been received and that any claim for the debt actually due might be separately preferred. This judgment was supported by that of the first appellate Court which observed that the debt might be sued for. On such a suit for the debt having been subsequently brought in the Small Cause Court, that Court erroneously considered that it was prevented by the judgment of the Assistant Commissioner from trying the question of what debt was due. The Chief Court on special appeal in the case refused to interfere with the order of the Small Cause Court, for it could not be said that it was out of jurisdiction. The Small Cause Judge might have been mistaken in having rejected the plaintiff's claim, but such a mistake cannot be regarded as an overstepping of jurisdiction or an undue restriction of it. As, however, the Additional Commissioner has erred in treating the question of the non-receipt of consideration as one not for his decision whereas he could have decided it and, after all that had happened, his was the only Court that could do so, the Chief Court reversed the order of the Additional Commissioner restoring the case to the file and directing him to dispose of the matter of the money claim on the merits. SAHIB DOSS v. ARUR SINGH, **55 P.R. 1857.** [*R.*, 65 P. R. 1886.]

(29)—*Act* IV *of* 1866, *S.* 16—*Power of Chief Court—Small Cause Court acting without jurisdiction—Discretion—Delay—Act* XI *of* 1865, s. 22.—The Chief Court, under the provisions of s. 16, Act IV of 1866, is not bound to call for the record of a case decided by a Small Cause Court, upon the allegation that the Court had no jurisdiction. It is discretionary with the Court to take action or not when the case is before it, as the Act does not compel it to set aside such an order of the Small Cause Court, even if there be ground for thinking that that Court acted without jurisdiction. The remedy for the aggrieved party in such a case is to apply quickly to the Small Cause Court to refer the question of jurisdiction to the Chief Court under s. 22, Act XI of 1865. Where an application was made eight and a half months after the date of the order of the Small Cause Court, the Chief Court declined to consider the question of jurisdiction when no sufficient ground was shown for the great delay in making the application. LUDLAM v. ABDUL GUFUR, **50 P. R. 1876.**

Small Cause Court. Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

(30)—*District Munsif, a Small Cause Court Judge—Madras Act* IV *of* 1863—*Act* XI *of* 1865—A District Munsif is a Small Cause Court Judge under Madras Act IV of 1863 within Act XI of 1865. WUMADAI RAJAH HARAJAI KUMARA VENKATA PERUMALRAJ BAHADUR v. KANNIAPPAH, **4 M H. C. 149.**

(31)—*Claims falling within Small Cause jurisdistion of Munsif—Joinder in one suit in Small Cause Court.*—Several claims, each of which separately is within the Small Cause jurisdiction of a District Munsif, can be joined together and form the basis of a suit in the Small Cause Court. CHOCKALINGA PILLAI v. KUMURA VIRUTHALAM, **4 M.H.C. 334.** [*R.*, 8 M. 147, 14 B. 286, 27 M. 116; *D.*, 17 W.R. 380.]

(32)—*Crim. Pro. Code, s.* 170—*Principal Sadr Amin exercising Small Cause jurisdiction, not subordinate to Civil Court.*—A Principal Sadr Amin exercising Small Cause jurisdiction is not a Court "subordinate" to the Civil Court within the meaning of the term as used in s. 179, Crim. Pro. Code. *Ex parte* MAHALINGAIYAN, **6 M.H.C. 191.**

(33)—*Suit for damages in Small Cause Court—Incidental determination of rights in land—Jurisdiction—Effect of such decision.*—The mere fact that a case which gave rise to an appeal was of a nature cognisable by a Court of Small Causes did not take away from the Appellate Court the jurisdiction vested in it to deal with all questions of civil rights incidentally brought before it in appeal and which it was necessary to adjudicate upon for the purpose of deciding the appeal; only the Court's decision relating to such rights in land, etc., would not be binding on another Court competent to decide such questions when they came before it. JOWALA v. HARI DAS, **78 P. R. 1887.**

(34)—*Act* XIV *of* 1869, *s.* 28 — *Subordinate Judge invested with Small Cause powers—Jurisdiction in respect of counter-claims—Act* IX *of* 1887, *s.* 33.—A Subordinate Judge invested with the powers of a Small Cause Court under Act XIV of 1869 is precluded by s. 33 of Act IX of 1887 from entertaining counter claims exceeding the pecuniary limit of his Small Cause jurisdiction. BAROTE GAGA PARSHOTAM v. SEPOY PANJU RAMJAN, **14 B. 371.** [*Appr.*, 5 Bom. L.R. 398.]

(35)—*Presiding Judge having power up to Rs.* 50 *only—Small Causes above Rs.* 50—*Procedure—Power of District Judge.*—Where a Small Cause Court having jurisdiction up to Rs. 500 is presided over by an officer having power up to Rs. 50 only the suits between Rs. 50 and Rs. 500 must be instituted in such Court and remain pending till a Judge competent to hear them is appointed. But a District Judge can withdraw them under s. 24, Civ. Pro. Code, and transfer them to a Court of competent Judge. ALLA DIN v. MUL CHAND, **74 P.R. 1896.**

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

(36)—*Small Cause Court—Extraordinary jurisdiction—High Court—Hindu law—Deserted wife—Maintenance.*—The High Court can interfere by the exercise of its extraordinary jurisdiction in cases in which there has appeared to be a manifest error of law, entailing manifest hardship on one of the parties to a suit. It will remand a case to the lower Court, though the value of the claim may be under Rs. 500 and the case may be one in which a special appeal is not allowed. The authorities do not show that the relations of a deserted Hindu wife are under a personal liability to maintain her; but they do show that she is entitled to be maintained out of her husband's property in their hands to the extent of one-third of the proceeds of that property. RAMABHAI v. TREMBAK GANESH DESAI, **9 B.H C. 283.** (4 B.H.C. 73, 75, *R.*) [*F.*, 2 B. 573, F.B., 6 A. 617=2 B. 624, F.B., 11 B. 199, 24 B. 386=3 Bom. L.R. 191.]

(37)—*Execution—Transfer to regular Court—Order in execution—Appeal—Second appeal—Civ. Pro. Code, ss.* 244 *and* 586.—Where a Small Cause Court decree was sent for execution to the regular Court of the district, and an order was passed under s. 244, Civ. Pro. Code, by that Court (which was a Court of a Sub-Judge). *Held* that an appeal lay to the Court of the District Judge against such order. But the value of the decree being less than Rs. 500, a second appeal was barred by s. 586, Civ. Pro. Code. PEARY LAL SING v. RADHA NATH SING, **11 C.W.N. 861.**

(38)—*S.* 35—*Small Cause Court suit—Civ. Pro. Code, s.* 25, *transfer of suit under—Appeal—Jurisdiction.*—A suit which was instituted in the Court of a Subordinate Judge, exercising the powers of a Judge of a Court of Small Causes, was transferred by the District Judge under s. 25, Civ. Pro. Code, to a Subordinate Judge who was not invested with the said powers, and who disposed of it. *Held*, that the decree passed by the Subordinate Judge was a decree in a Small Cause Court suit, by reason of the provisions of the last paragraph of s. 25, Civ. Pro. Code, and that the District Judge had no jurisdiction to entertain an appeal from the decree. Even if the suit had been dealt with under s. 35, Act IX of 1887, it would have remained throughout a Small Cause Court suit and would have been subject to the incidents of such a suit. LALTA v. TEJ KISHEN, **2 O.C. 143.** [*Diss.*, 6 O.C. 81.]

(39)—*Act* XXIII *of* 1861, *s.* 4—*Applicability to Court of Small Causes.*—S. 4 of Act XXIII of 1861 applies to a suit brought in a Small Cause Court in the Mofussil. ANPURNABAI v. SAKHARAM JAGANNATH, **6 B.H.C.A.C. 256.**

(40)—*Rate of interest—Penalty—Bond—Small Cause Court Judge.*—A Small Cause

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

Court Judge has no discretion to allow interest at a rate below that stipulated in the bond. *In the matter of the petition of* NOBO COOMAR BOSE, **12 B.L.R. 457, Note=17 W.R. 431.**

(41)—*Jurisdiction of Small Cause Court—Suit for interest due on mortgage—Defence that debt itself was completely paid off.*—In a suit for recovery of interest due on a mortgage of immoveable property, it was pleaded by the defendant that the plaintiff had received the profits of the mortgaged property, and that thus the mortgage-debt had been completely paid off. The suit was tried by the Subordinate Judge in his capacity of a Judge of the Small Cause Court; and he declined to go into the question raised by the defence, *viz.*, whether any part of the principal was due to the plaintiff in respect of which interest was claimable, as being beyond his jurisdiction as a Judge of Small Causes. *Held* by the High Court that the Subordinate Judge was wrong in so declining to determine the question, as the defence virtually was that the debt had been paid off, and that nothing was due to the plaintiff; and that he had therefore, jurisdiction to try the same. BABURAV AMRIT PETHE v. GANPATRAV DAMODAR, **10 B. 69.**

(42)—*Suit on bond for interest amounting to less than Rs. 500—Bond for Rs. 1,000—Small Cause Court, Jurisdiction of—Plea of forgery.*—A Court of Small Causes has jurisdiction to try a suit for interest amounting to less than Rs. 500, due upon a bond for Rs. 1,000, not yet payable, the obligee having a complete and separate cause of action on the bond entitling him to recover the annual interest as it accrues due. The circumstance that forgery of the bond is set up as a defence to the suit makes no difference as respects the question of jurisdiction. ANANTHA NARAIYANAPPAIYAN v. GANAPATY AIYAN, **2 M.H.C. 469.**

(43)—*Suit on bond, maintainability of, in Court having pecuniary jurisdiction for plaint amount.*—When the sum mentioned in a bond as the principal sum, is increased by the addition of interest, the amount to be recovered, under the provision in the bond permitting its recovery without a suit in Court, is the increased amount, and the Court to be resorted to for enforcing payment is the Court in which a suit for such sum could be instituted under the ordinary law of procedure. Also, whatever the amount may be for which the bond might have been passed, if a sum not beyond Rs. 500 only is due, the Small Cause Court may enforce payment of such sum. The ordinary rules applicable to the execution of decrees would have to be followed in such cases so far as such rules can be applied. KESHAB LALL MITTER v. MASABDY MUNDUL, **4 W.R.S.C.C. Ref. 11.**

(44)—*Case determined by Judge of Small Cause Court contingent on opinion of High Court—Interference by successor in office.*—A case

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

was originally determined by a former Judge of the Small Cause Court contingent on the opinion of the High Court upon the question submitted by that Judge. The parties had an opportunity of appearing and being heard in the High Court before the Judges expressed their opinion. *Held* that, when that opinion was expressed, the case was at an end, and it was irregular for the present Judge of the Small Cause Court to express any opinion with reference to the former decision. UMANUND ROY v. LORD H. U. BROWNE, **7 W.R. 352.**

(45)—*Reference by Small Cause Court at request of party—Non-appearance of party before High Court—Costs*—Where a party to a suit requests the reservation of a question by the Small Cause Court for the opinion of the High Court and it is not reserved because the Judges do not entertain any doubts, and the party does not appear in the High Court, the decision must be against him, whether security has been given for the costs of the reference and the amount of the judgment or not, and he must pay the costs of the reference. WILLIAMSON BROTHERS v. ARAB ISMAIL KHAN, **11 B. L. R. 415=20 W. R. 349.**

(46)—*Reference—Question not arising on trial of suit—Validity of reference.—Debt due by soldier's wife—Soldier not a party—Jurisdiction.*—It is only when a question arises on the trial of a suit that a case can be referred for the opinion of the High Court under s. 22, Act XI of 1865, and the High Court cannot give any judicial opinion upon a question not so arising. The question whether a European soldier is not amenable in an action of debt to the Small Cause Court established under s. 6 of Act XXII of 1864, does not arise in a suit against the wife alone and to which the soldier was not made a party. DENIS KEEFEE v. LISET CHRISTIE, **5 W. R. S. C. C. Ref. 21.**

(47)—*Act XI of 1865, s. 21—Construction of—Review of judgment—Small Cause Court.*—Act XI of 1865 does not give any power to a Judge of a Court of Small Causes to review his judgment, except as provided by s. 21 of that enactment. TADIR HOSSEIN KHONDKAR v. KESHUT CHUNDER BANERJEE, **14 W. R. 442.**

(48)—*Suit in Small Cause Court*—Ex-parte *decree—Review—Act XI of 1865, s. 21.*—In a suit in a Small Cause Court on a specially registered bond, the plaintiff got an *ex-parte* decree without any summons served on the defendants, and soon after applied for execution. The judgment-debtors appeared within 30 days of the decree and applied for stay of execution on the ground that the bond was a forgery, and execution was stayed on security being given; the judgment-debtors having, subsequently, also applied for a review of the judgment, a re-hearing was granted in the presence of both the parties, at which the original decree was set aside, and a fresh decree given

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued*.

dismissing the suit. *Held*, that although the particular procedure laid down by s. 21 of the Small Cause Court Act was not altogether applicable to the case, the procedure so far as it was applicable, had been followed, and in that state of facts it could not be said that the Small Cause Court had no jurisdiction to allow a review, and to grant, after such review, a fresh decree. *In the matter of* MOHUN SAHOO, **11 W. R. 245.**

(49)—*Act* XI *of* 1865, *s.* 21—*Notice of new trial—Holidays intervening.*—Under the terms of the latter portion of s. 21, Act XI of 1865, notice of an application for new trial, which the law requires to be given within 7 days from the date of the decision, is in time when the seventh day and the following days are authorized holidays, but the notice is given on the first open day after such notice. GRIJA BHOOSHUN HALDAR v. OBHOY NIKAREE, **13 W. R. 105.**

(50)—*Suit for confirmation of possession, under bill of sale—Onus of proof—Practice—Court's duty first to try plaintiff's case.*—The plaintiff sued for confirmation of possession over certain lands under a bill of sale, by setting aside a bond in favour of one R, and a sale in execution of a decree of the Small Cause Court on that bond. The first Court found that the bill of sale was fraudulent and the plaintiff was not in possession and dismissed suit. On appeal, the Judge, on an objection taken for the first time orally in his Court, *held* that the Small Cause Court had no jurisdiction to try the suit on a bond in which land was hypothecated as security, and without going into the plaintiff's case, gave him a decree. *Held*, that the Judge ought to have tried the plaintiff's case first and not the defendant's, that the plaintiff was first bound to prove his possession, and the genuineness of the bill of sale upon which his cause of action arose, and it was only after he had proved these, that the question of the jurisdiction of the Small Cause Court could arise. RASH BEHAREE ROY v. SHAIKH FAZUD BUKSH, **11 W.R. 276.**

(51)—*Small Cause Court—Enforcement of judgment against debtor's immoveable property—Grant of certificate therefor.*—A Small Cause Court is a Court of limited jurisdiction which is to be determined by the precise words of the Act which created it and the provisions regulating its procedure. Under s. 11 of Act XLII of 1860, a Court of Small Causes should have satisfied itself that such moveable property of the judgment-debtor as was within its jurisdiction had been sold in execution, before it granted the copy of judgment and the certificate required for enforcing any portion of the judgment by execution against the debtor's immoveable property. CHINNASWAMI HAWALDAR v. ANONYMOUS, **1 M.H.C. 191.** [*R.*, 2 M.H.C. 39.]

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued*.

(52)—*Small Cause Courts Act* (XI *of* 1865), *procedure under, in executing decree against immoveable property.*—By s. 19 of Act XI of 1865 (Small Cause Courts) in execution of a decree, process may first issue out either against the person or personal property, either general or specified, within the local limits of the Court's jurisdiction. If, after such process, the decree remains unsatisfied and the holder of it desires to proceed against any immoveable property, then the Court, on the application of the decree-holder, can, under s. 20, grant him a certificate of the sum remaining due and, on presentation of the same to any Civil Court having original jurisdiction in the place in which the immoveable property of the judgment debtor is situated, such Court shall proceed to enforce the decree against the immoveable property within its jurisdiction. *Semble*—Moveable property beyond the limits of the Small Cause Court which has passed the decree is not liable to be taken in execution. REFERENCE FROM REGISTRAR OF HIGH COURT, DATED 28TH APRIL 1865, **2 W.R.S.C.C. Ref. 5.**

(53)—*Jurisdiction—Small Cause Court suit—Act* IX *of* 1887, *s.* 23, *sch. ii, cl.* (11)—*Suit depending on determination of right to immoveable property.*—The fact that a suit for money depends for its proper decision on the determination of a right to immoveable property does not make that suit a suit for the determination of such right; consequently such a suit is cognizable by a Court of Small Causes. CHHIDDU v. MUSAHIB JAN, **A.W.N. 1898, 159.** (A.W.N. 1888, 193, *R.*)

(54)—*Small Causes Courts—Incidental questions of title.*—Small Cause Courts have jurisdiction to try questions of title which incidentally arise in suits cognizable by them. RAGHU RAM BUWAR v. RAM CHANDRA DOBEEY, **B.L.R. Sup. Vol. 34 = W.R. F.B. 127.** [*Appr.*, 12 W.R. 29, 15 W.R. 556; *R.*, 17 W.R. 88, 18 W.R. 194.]

(55)—*Question of right to land arising incidentaly—Jurisdiction—Small Cause Court—Special appeal.*—This was a second appeal filed by the plaintiff against the lower Court's decision dismissing his suit for the price of certain trees on the ground that he was not entitled to claim the price of such trees. It was objected that, as the suit was one in its nature cognizable by Small Cause Court, no second appeal would lie. The objection was accepted by the High Court which held that the jurisdiction of the Small Cause Court was not affected by the circumstance that it had to enquire into a question of title to lend as incident to the question of the value of trees taken off the land. SHUMBHOO CHOWDHRY v. MR. R. COMBS, **2 W.R. 179.**

(56)—*Suit for rent of a Small Cause nature—Incidental determination of title therein*—Res judicata.—The incidental decision on a question of title in a suit for rent of a Small

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

Cause nature is not *res judicata* when the same question arises in a subsequent suit on title. INAYAT KHAN v. RAHMAT BIBI, **2 A. 97.** [*F.*, A.W.N. 1907, 218=4 A L J. 517.]

(57)—*Jurisdiction — Small Cause Court — Question of title.*—A Court of Small Causes may try incidental questions of title which are indispensable to the decision of the claim before it, as for instance, a right to cut trees depending on the right to the land, which decision is not conclusive except as regards the claim in that suit. RADHA CHURN GANGOOLY v. GUDADHUR BAHADOOR, **15 W.R. 166.**

(58)—*Claim for produce—Question of title —Jurisdiction of Small Cause Court.*—In a suit for value of produce, carried away by defendants, brought in a Small Cause Court, the Court has jurisdiction to decide a question of title, incidentally to the main question in the suit—the right to the produce claimed. DARMA AIYAN v. RAJAPPAIYAN, **2 M. 181.** [*F.*, 17 C. 707.]

(59)—*Small Cause Jurisdiction.*— A Small Cause Court may decide a question of title to land, which arises incidentally. ALAGIRISAMI NAIKER v. INNASI UDAYAN, **3 M. 127, F.B.** [*F.*, 15 B. 400.]

(60)—*Small Cause Court—Nature of suit cognizable by Court of Small Causes—Denial of plaintiff's right or title by defendant—Cessation of jurisdiction.*—Where the cause of suit, as stated by plaintiff, appears to be within the jurisdiction of a Small Cause Court, the mere denial of the plaintiff's right or title on the part of the defendant is not sufficient to oust the jurisdiction of the Court to hear the case. It is for the Judge to consider whether a *bona fide* question of right, which it is not within the jurisdiction of Small Cause Courts to decide, is fairly raised in the suit, and when that reasonably appears, and not before, his jurisdiction in the matter ceases. AMMALU AMMAL v. SUBBU VADIYAR, **2 M H C. 184.** [*R.*, 5 M.H.C. 64, 5 M.H.C. 172.]

(61)—*Deeds of gift and sale—Small Cause Court—Jurisdiction.*—A suit in which questions as to the validity or otherwise of a deed of gift or of sale are involved, is cognizable by a Small Cause Court. GRISH CHUNDER ROY v. GOBIND SINGH, **17 W.R. 88.**

(62)—**Instances of Small Causes Court held to have jurisdiction—Act* XI *of* 1865, *s.* 6—*"Damages," meaning of—Jurisdiction of Small Cause Court.*—The term "damages" in s. 6 of Act XI of 1865 includes damage to crops. Therefore a suit for the recovery of damages for the wrongful reaping of the produce in certain fields is cognizable by a Court of Small Causes. DAUR SINHA v. RUGHUNUNDUN SINHA, **3 N.W.P. 101.** [*R.*, 17 C. 707.]

(63)—*Act* XI *of* 1865, *s.* 6—*'Damages,' meaning of—Suit by mortgagee for loss of profits owing to mortgagor resuming possession of mortgaged land—Jurisdiction.*—The word 'damages' mentioned in s. 6 of Act XI of 1865, is not restricted to damages to personal property, but is wide enough to include damages for any wrongful act. So, a suit by a mortgagee to recover from the mortgagor the value of the landlord's share for six years, on the ground that the mortgagor had taken possession of the mortgaged land and had it cultivated by his own tenants and taken the landlord's share for six years, was held to be cognizable by the Small Cause Court under s. 6 of Act XI of 1865, it being a suit for damages for loss of profits owing to the defendant resuming possession of the land. SARDAR PARTAB SINGH v. SARDAR THAKAR SINGH, **100 P.R. 1888.**

(64)—*House property acquired by Government under Land Acquisition Act—Suit for recovery of compensation amount—Jurisdiction of Small Cause Court.*—Plaintiff a nephew of the deceased sued for possession of a house alleging that he was a preferential heir to the daughter of the deceased. But the house itself had been acquired by Government under the Land Acquisition Act prior to the institution of the suit. The lower appellate Court treated the suit as an inheritance suit for the cash sum representing the value of the house and as such dependent solely on the law or custom of inheritance. *Held* that, whatever the nature of the suit might have been prior to the acquisition of the house by the Government, the suit must now be regarded as one to enforce the liability of the defendant who had received compensation under the Act to pay the same to the plaintiff who was entitled to it, and, as such, the claim notwithstanding that the question of title might incidentally have to be enquired into, must be regarded as one for damages within the meaning of s. 6 of the Small Cause Courts Act, and the amount in the case being less than Rs. 500 in value, no second appeal lay. GURUMUKH SINGH v. RAM NARAIN, **5 P.R. 1886.** (8 P.R. 1883, F.B., *R.*)

(65) — *Compensation awarded for land acquired—Suit for share therein—Small Cause Court suit.*—A suit for the plaintiff's share of money awarded as compensation for land acquired under the Land Acquisition Act, which has been received by defendant, is one for money had and received for the plaintiff's use, and is cognisable by a Small Cause Court. UMRAI v. RAM LAL, **7 A. 384=A W.N. 1885, 65.** (6 A. 449, *F.*)

(66)—*Suit to recover compensation awarded to defendant under Act* X *of* 1870—*Jurisdiction.*

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*Some of the cases appearing under this heading were cases decided under the old Acts. Reference, therefore, to the First Schedule to the present Provincial Small Causes Courts Act, IX of 1887, has to be made.

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

—*Small Cause Court—Nature of suit—Act* XI *of* 1865, *s.* 6.—A suit to enforce the liability of a person who has received compensation awarded under Act X of 1870 for house property taken up for public purposes, to pay the same to the person lawfully entitled thereto (see s. 40 of the Act) is not a suit founded upon a contract within the meaning of s. 6 of the Small Cause Courts Act, that section applying only to cases of true contract, whether express or implied, to the exclusion of obligations *quasi ex contractu*. But though not founded upon a contract, the suit is cognizable by the Small Cause Court, as being a suit for damages within the meaning of the same section. MUSSAMUT NURBHARI v. ANWAR ALI, **8 P.R. 1883, F.B.** (73 P.R. 1875, *Over.*; 90 P.R. 1875, F.B., 109 P.R. 1876, 57 P.R. 1877, 73 P.R. 1877, *Appr.*) [*R.*, 5 P.R. 1886, 79 P.R. 1883.]

(67)—*Land acquired by Government—Suit for recovering compensation—Suit for damages of nature cognizable by Small Cause Court.*—The preliminary objection taken in this case, that the suit being of a nature cognizable in Courts of Small Causes and the amount claimed being under Rs. 500, the second appeal could not be maintained, was accepted by the Chief Court as well founded. The suit was one for compensation for land alleged to have been taken possession of by Government; in other words, it was a suit for damages, and, as such, was of a kind cognizable by a Small Cause Court. BANSI LAL v. THE SECRETARY OF STATE IN COUNCIL, **59 P.R. 1881.** [*R.*, 15 P.R. 1895, 38 P.R. 1882.] (*See* art. 14, Act IX of 1887.)

(68)—*Suit for damages—Personal injury—Jurisdiction of Courts of Small Causes.*—If actual pecuniary damages have resulted from an alleged personal injury, then the suit for damages, not in part, but as a whole, will lie in the Small Cause Court. GUNGA NARAIN MOYTRO v. GUDADHUR CHOWDHRY, **13 W.R. 434.** [*F.*, 22 W.R. 395; *R.*, 3 A. 747, 10 A. 49=7 A.W.N. 268.]

(69)—*Act* XI *of* 1865, *s.* 6, *cl.* 3—*Act* VIII *of* 1859, *s.* 7—*Damages for malicious prosecution, suit for—Inclusion of claim for injury to character—Small Cause Court- Jurisdiction.*—A Small Cause Court can properly take jurisdiction in a suit for damages for malicious prosecution when damages actually resulting from the injury are combined with damages for injury to character, as a claim arising out of the same cause of action cannot be split up under s. 7 of Act VIII of 1859. SUBAH v. GUJUR, **86 P.R. 1874.** [*Diss.*, 35 P.R. 1875; *R.*, 11 P.R. 1886.]

(70)—*Suit of small causes nature—Suit for damages for malicious prosecution—Compensation for personal injury — Actual pecuniary damage — Act* XI *of* 1865, *s.* 6 (3).— Suit for damages for malicious prosecution brought in a Small Cause Court, wherein plaintiff claimed

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

a certain amount on account of actual pecuniary damage and another amount for injury to reputation and feelings, and obtained a decree. An application for revision on the ground that the suit was not cognizable in a Court of Small Causes was disallowed by the High Court. UDIT v. RANJIT KUAR, **A.W.N. 1882, 185.** (3 A. 747, *F.*)

(71)—*Small Cause Court — Damages for malicious prosecution—Allegation of special pecuniary loss—Jurisdiction.*—Where a suit is brought alleging a malicious prosecution and special pecuniary loss resulting from that prosecution, such a suit may be sustained in a Court of Small Causes. SITARAMAN v. SUSA PILLAI, **2 M.H.C. 254.**

(72)—*Suit for damages for malicious prosecution—Actual loss—Jurisdiction of Small Cause Court.*—Where, in a suit for damages for malicious prosecution, the plaint alleged, in addition to general damages, actual pecuniary damage also, such as loss of pay, service, etc., *held* that the suit was of the nature cognisable by a Small Cause Court under s. 6, cl. 3 of the Small Cause Courts Act. BAISHNO DASS v. RUP CHAND, **11 P.R. 1886.** (35 P.R 1875, *Disappr.*; 86 P.R. 1874, 143 P.R. 1884. *R.*) [*R.*, 30 P.R. 1889, 52 P.R. 1889; *D.*, 43 P.R. 1887.]

(73)—*Art.* 3, *sch.* II, *Provincial Small Cause Court Act* (IX *of* 1887).—A suit against the Secretary of State for compensation for damages for injury done to an article of the plaintiff, while it was being carried by a State Railway, does not come within art. 3. sch II, Act IX of 1887, and is cognisable by a Small Cause Court. BUNWARI LAL MOOKERJEE v. THE SECRETARY OF STATE FOR INDIA, **17 C. 290.** [*F.*, 97 P.R. 1894; *D.*, 5 O.C. 403; *R.*, 1 C.L.J. 355=9 C.W.N. 495.]

(74)—*Illegal removal of crops—Suit for damages—Jurisdiction—Special appeal—Title.*—A suit for the recovery of damages under Rs. 500 sustained by illegal removal of crops under a false pretence of legal distraint, is a suit of a Small Cause nature and no special appeal will lie in such a case. If, in a Small Cause suit, for the purpose of deciding whether plaintiff is entitled to the recovery of damages sustained by illegal removal of crops, it is necessary to go into the question of title to the land, the Court should not decline jurisdiction, but should decide the question although the decree would be only good and binding *quoad* the subject-matter of suit, *viz.*, the value of the crops. RAM JEEBUN KOYEE v. SHAHAZADEE BEGUM, **9 W.R. 336.**

(75)—*Forcible cutting away of reeds—Suit for damages—Cognizability—Co-sharers—Profits of immoveable property.*—A suit for compensation against strangers for forcibly cutting and carrying away the reeds on his land is cognizable by

Small Cause Court, Mofussil, Jurisdiction of--continued.

——1.—General—*continued.*

a Civil Court of Small Causes, though the plaintiffs co-sharers might have been added as nominal defendants in such suit. Such a suit is one for damages for the wrongful removal of the produce of immoveable property and not for the enforcement of any right to or interest in immoveable property and is not excluded from the jurisdiction of a Small Cause Court as being 'one for profits of immoveable property' under art. 11 of Act IX of 1887. In a suit for profits of immoveable property, the test is not so much whether the defendant has received the profits under 'some claim of title' as whether he has received them as a person in wrongful possession, it being immaterial whether he had a *bona fide* claim of title to the land or not. NAZAM v. JOTI MAL, **119 P.R. 1894.** [*Disappr.*, 35 P.R. 1902, F.B.=84 P. L.R. 1902; *R. & Commented on*, 94 P.R. 1900; *F.*, 52 P.R. 1910.]

(76)—*Suit for value of trees cut and taken from plaintiff's lands — Jurisdiction—Small Cause Court—Question of title being incidentally decided—Effect—S. 27, Act XXIII of 1861.* —*Held* that a suit for Rs. 100, being the value of trees cut and removed from lands alleged to be the lands of the plaintiffs, was a suit of a Small Cause nature, and that a special appeal was barred by s. 27 of Act XXIII of 1861, though a question of title had been incidentally decided. UMAR AND FATTA v. KARIM BAKSH AND NUR, **75 P. R. 1877.** [*R.*, 38 P.R. 1882, 4 P. R. 1893.]

(77)—*Suit for value of trees cut and appropriated by defendant— Jurisdiction — Small Cause Court—Act XI of 1865, s. 6, cl. 4.*—A suit by a landlord, for the value of trees cut and appropriated by his tenant, is one cognizable by a Small Cause Court under cl. 4 of s. 6 of Act XI of 1865. ALLAHDAD v. BAHADAR, **13 P.R. 1888.** (43 P. R. 1872, *Diss.*; 88 P. R. 1877, 28 P.R. 1881, 5 P.R. 1882, 4 P.R. 1883, 26 P. R. 1883, *F.*) [*F.*, 4 P.R. 1889.]

(77-a)—*Suit for value of fruit appropriated by defendant—Jurisdiction—Small Cause Court.* —A suit for the value of fruit of a tree which had been wrongfully appropriated by the defendant is one clearly for the value of moveable property, and is of a nature cognizable by the Small Cause Court. ALLA BAKHSH v. KURA, **13 P.R. 1888, Note.**

(78)—*Act XI of 1865—Suit for value of trees illegally cut — Whether cognizable by Small Cause Court.*—A suit based on the allegation that the defendant has illegally cut and appropriated certain trees and the leaves of other trees that belong to the plaintiff and not to the defendant, the claim for the value being within the pecuniary jurisdiction of a Small Cause Court, is clearly one of the nature cognizable by that Court; and in the absence of any allegation of distress, the suit does not fall under the class of suits for replevin, which were cognisable by a Revenue Court at the time of the passing of Act XI of 1865, such kind of suits being brought against the distrainer of goods. DEVI SINGH v. CHANDAN, **4 P.R. 1889.** (13 P. R. 1888, *Rel.*)

(79)—*Act XI of 1865 (Mofussil Small Cause Courts Act), ss. 2, 6, 12—Suits cognizable under —Change in procedure—Effect—Act XIV of 1869 (Bombay Civil Courts Act), s. 28—Jurisdiction—Suit of Small Cause nature—Appeal.* —A suit taken cognizance of under ss. 2, 6 or 12 of Act XI of 1865 (Mofussil Small Cause Courts Act) does not cease to be a suit tried under the Act, because of some divergence from its procedure. Though s. 28 Act XIV of 1869 (Bombay Civil Courts Act) does not, when jurisdiction is given under it, necessarily divide the Court into two separate Courts, it still creates an additional and distinct jurisdiction. Under Act IX of 1887, s. 33, the Court is to be regarded as two Courts in such cases. A cut and illegally carried away a tree standing on a piece of land belonging to B. The latter instituted a suit for recovering Rs. 5 as damages in the Court of a Second-class Subordinate Judge, who was invested with the jurisdiction of the Judge of a Court of Small Causes under s. 28 of the Bombay Civil Courts Act (XIV of 1869). The Sub-Judge rejected the claim having tried the suit as an ordinary suit according to the ordinary rules of Civil Procedure and came to a finding that the tree in question did not belong to the plaintiff. On appeal to the District Court, the District Judge awarded the claim. Thereupon the defendant made an application to the High Court under s. 622 of the Civ. Pro. Code, and urged that no appeal lay to the District Court from the decision of the Subordinate Judge, the decision having been given in a suit of a Small Cause nature. *Held*, that no appeal lay to the District Court, although the Subordinate Judge did not use the procedure of Act XI of 1865. Although the suit was filed in a Court having a double jurisdiction, the jurisdiction under which cognizance could be taken of the claim was one and one only. Having the Small Cause Court jurisdiction, the Subordinate Judge must be considered to have dealt with the case under that jurisdiction, even if he was not quite alive to it at the time. PITAMBER VAJIRSHET v. DHONDU NAVAPA, **12 B. 486.** [*R.*, 5 Bom. L.R. 393, U.B. R. 1907, 2nd Qr., P.S.C.C. Act 16, 11 Bom. L. R. 817=33 B. 664.]

(80)—*Suit for value of trees—Jurisdiction—Small Cause Court—Effect of question of title being incidentally raised by defendant—Further appeal—Act XI of 1865, s. 6 and Act XVII of 1877, s. (9), proviso—Appeal presented out of time—Reasons.—Held* that a suit for Rs. 15 being half the value of certain trees in which the plaintiff claimed to have half a share, and which, it was alleged, the defendant had cut and carried away without the plaintiff's permission, was a suit for the value of personal

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

property and as such cognizable by a Small Cause Court under s. 6 of Act XI of 1865, notwithstanding that the defendant's plea might have raised a question of title (a circumstance which would not alter the original character of the suit) and that a further appeal was therefore barred under the proviso to the last clause of s. 39 of Act XVII of 1877. [*R.*, 8 P.R. 1885, Note, 13 P.R. 1888 Note, 13 P.R. 1888, 188 P.R. 1880.] Whenever an appellate Court is asked to extend the ordinary period for filing an appeal, it should record its reasons for being satisfied that "sufficient cause" existed for the appellant not presenting the appeal within time. SARDARNI RAJ KOUR v. NEHAL SINGH, **4 P.R. 1883.** (75 P.R. 1877, 5 P.R. 1882, *F.*)

(81)—*Fruit growing upon trees—Whether moveable or immoveable property—Act* XI *of* 1865 (*Mofussil Small Cause Courts*), *s.* 6—*Registration Act*, 1877, *s.* 3.—Fruit growing upon trees is moveable property, and a suit for damages for the wrongful taking of such fruit is one of a nature cognizable by a Small Cause Court. *In the matter of the petition of* NASIR KHAN v. KARAMAT KHAN, **3 A. 168.** [*Cons.*, 11 M. 193; *R.*, 5 A. 564, F.B.]

(82)—*Suit of Small Cause nature—Damages for wrongfully taking fruits of trees.*—A suit to recover damages for the wrongful taking of the fruits of certain trees is a suit cognizable by a Court of Small Causes. If the case involved the question of title to immoveable property as incidental to the adjudication of the claim, the Small Cause Court would still have jurisdiction to enquire into the title so far as might be necessary for the proper adjudication of the claim for damages. SUBARAN SINGH v. RAMPARBHAT SINGH, **A.W.N. 1882, 158.** (7 W.R. 73, 10 W.R. 272, *R.*) [*R.*, 5 A.L.J. 69, Note.]

(83)—*Suit for value of fruit alleged to have been wrongfully taken—Plea raising question as to exclusive right of plaintiffs to trees—Jurisdiction—Small Cause Court—Act* XI *of* 1865, *s.* 6, *cl.* 4—*Second appeal.*—Where, in a suit by the plaintiffs to recover the value of certain fruit alleged to have been wrongfully taken by the defendants from certain beri trees, the property of the plaintiffs, the defendants contended that the beri trees were on *shamilat* land of which they were joint owners with the plaintiffs and that the trees also were joint property, *held*, that the suit was one for damages, and being for an amount below Rs. 500, was cognizable by Courts of Small Causes and as such no second appeal lay to the Chief Court: and that the fact that the plea of the defendants raised a question incidentally as to the exclusive right of the plaintiffs, did not affect the nature of the suit. *Held*, also that the plaintiffs' claim was one which, at the time of passing of the Small Cause Courts Act, would have been heard in the ordinary Civil Courts of the province and not by the Revenue Officers of Government,

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

and that therefore it did not fall within the provisions of s. 6, cl. 4 of Act XI of 1865. JHANDOO v. KARIM BAKSH, **5 P.R. 1882.** [*R.*, 4 P.R. 1883, 13 P.R. 1888.]

(84)—*Moveable property—Fruit severed and removed from tree—Suit for fruit—Jurisdiction—Small Cause Court.*—This suit brought by the plaintiff claiming to be entitled to take the entire produce of a tree did not amount to a suit for rent, and as the fruit had been severed and removed, it must be treated as moveable property, and on the principle of the decision in 88 P.R. 1877, the suit was held cognizable by a Small Cause Court. CHANDU v. BUNWARI DAS, **28 P R. 1881.** (88 P.R. 1877, *F.*). [*R.*, 13 P.R. 1888.]

(85)—*Act* IX *of* 1887—*Sch.* II, *arts.* 31 *and* 11—*Suit cognizable by Court of Small Causes—Jurisdiction.*—In a suit for the recovery of Rs. 200, the value of 200 maunds of jack fruit forcibly and unlawfully taken, it was *held*, that the suit was clearly one for damages, and as such was cognizable by the Court of Small Causes. (17 C. 707, *R.*) *Held*, that such a suit did not fall within the meaning of the last part of art. 31 of sch. II to Act IX of 1887, nor under art. 11, as it was not one for the determination or enforcement of a right to, or interest in, immoveable property. DILDAR KHAN v. GULAB KHAN, **2 O.C. 256.** (A.W.N. 1898, 10, 23 C. 884, *R.*) [*Cited*, 4 O.C. 89.]

(86)—*Landlord and tenant—Notice to quit suit for damages—Small Cause Court—Jurisdiction.*—A Small Cause Court has jurisdiction to entertain a suit for damages against a person, who refused, on being required by notice, either to quit the land of the plaintiff or to pay rent. BHOOBUN MOHUN BOSE v. CHUNDERNATH BANERJEE, **17 W.R. 69.**

(87)—*Suit to recover* baluta hak—*Jurisdiction of Small Cause Court.*—A suit by a village servant to recover his *baluta hak* or share due to him as such servant is not for an interest in land, but for a share in produce severed from the land, and as such is cognizable by the Court of Small Causes. NARU PIRA v. NARO SHIDHESHVAR, **3 B. 28.** [*Expl.*, 6 B. 512.]

(88)—*Small Cause Court—Suit for rent—Denial of plaintiff's title by defendant—Power of Court to decide question of renting.*—In a suit for rent, the jurisdiction of a Court of Small Causes is not ousted by the mere fact of the defendant denying the title of the plaintiff to the property alleged to have been rented. Notwithstanding such denial of title, it is competent to the Court to consider and decide the question whether or not there has been a renting of the property. SUBBIRAMANIYA AYYAN v. VELAYUDA DEVAR, **1 M.H C. 212.** [*R.*, 5 M.H.C. 64.]

(89)—*Suits for rent—Cognizability of Small Cause Courts.*—Suits for rent, when there is

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

a contract between the parties, or even when such a patta has been tendered as the defendant was bound to accept, are maintainable in Courts of Small Causes; and the mere denial of the plaintiff's title is not sufficient to oust the jurisdiction of the Court. BODI RAMAYYA v. PERMA JANAKIRAMUDU, **5 M.H.C. 172.**

(90)—*Provincial Small Cause Courts Act, arts. 4, 11 and 35 of the schedule—Damages for use and occupation, Suit for.*—A suit for damages for use and occupation of land is one cognisable by a Mofussil Small Cause Court. It does not fall within either of the arts. 4, 11 or 35 of the schedule, Provincial Small Cause Courts Act. MAKHANLALL DATTA v. GORIBULLAH SARDAR, **17 C. 541.** [*Appl.*, 22 M. 149; *R.*, 119 P.R. 1894, 23 C. 884, F.B.; *D.*, 18 C. 316, 1 P.R. 1894.]

(91)—*Provincial Small Cause Courts Act*, IX *of* 1887, *sch.* II, *art.* 7—*Damages for use and occupation—Jurisdiction.*—A suit for damages for use and occupation is not excluded from the jurisdiction of the Small Cause Court. VIRA PILLAI v. RANGASAMI PILLAI, **22 M. 149.**

(92)—*S.* 586, *Civ. Pro. Code*, 1882—*S.* 23, *Provincial Small Cause Courts Act* (IX *of* 1887)—*Suit for compensation for use and occupation—Value less than Rs.* 500—*Effect of return of plaint—Second appeal.*—No second appeal lies in a suit for compensation for use and occupation of land valued at less than Rs. 500, the same being a suit of the nature of small causes, notwithstanding the act that the plaint was returned by the Small Cause Court to be filed in a Court of original jurisdiction, under s. 23, Act IX of 1887, on the ground that the suit involved a question of title. KALI KRISHNA TAGORE v. IZZATENNISSA KHATUN, **24 C. 557.** (2 C. 470, *F.*; 15 M. 98, *R.*) [*F.*, 20 A. 480=A.W.N. 1898, 129, 25 B. 625, 6 C. W. N. 637; *R.*, 23 M. 547, F.B.]

(93)—*Use of land—Suit for rent—Jurisdiction of Small Cause Courts.*—Where the plaintiff sued for rent, or rather hire of land which the defendant used and caused to be used for passing and re-passing to and from his steamer, *held* that, if there was no express hiring, the defendant ought to be sued for damages for trespassing upon the plaintiff's land; that if he agreed to pay for the use of a way across the land it would not be rent; and that, in either case, the Small Cause Court was competent to entertain the suit. BRICE v. TOOGOOD, **5 W. R S.C C.R. 18.**

(94)—*Suit by proprietor against cultivator, cognisable in Small Cause Court when cultivator is mere servant — Suit against cultivating tenant for non-fulfilment of contract with landlord, maintainable under Act* X.—Where the cultivator is a mere servant of the landlord, a suit for non-fulfilment of the contract by the former will lie against him in the Small Cause Court. If, however, the cultivator is a

Small Cause, Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

tenant to whom the landlord has sub-let the land, then, the provisions of Act X will apply to a suit for non-fulfilment, by the tenant, of his contract. In ordinary cases of tenancy of land, the use of the land as a means of production is that for which a consideration is agreed to be paid. That consideration is none the less *rent*, whether paid in a fixed sum of money or in a portion of the crop, the quantity of which varies with the quantity of the entire crop produced. The fact of the remuneration for the use of the natural agent being fixed or variable—being payable in money or in kind—does not take the remuneration out of the category of rent. SREENATH DUTT v. DWARY DHALLIE, **2 W.R,S.C.C Ref. 2.**

(95)—*Suit for rent of land in abadi—Jurisdiction—Small Cause Court—Act* XI *of* 1865, *s.* 6, *cl.* 4.—The words 'for which a suit may *now* be brought before a Revenue Officer' in s. 6, cl. 4 of Act XI of 1865 apply to suits for 'rent of the land.' A suit for the rent of land occupied by a house in the *abadi*, within the Municipal limit of Delhi, was not cognisable by a Revenue Court at the passing of Act XI of 1865, and was therefore not excluded from the jurisdiction of the Small Cause Court by cl. 4 of s. 6 of that Act. KIDAR NATH v. MUSSAMMUT MANBHARI AND PARBHUDIAL, **80 P.R. 1877.** [*R.*, 177 P.R. 1882.]

(96)—*Suit for rent of land in—Lahore—Jurisdiction—Small Cause Courts Act*, XI *of* 1865, *s.* 6, *cl.* 4.—The words "for which a suit may now be brought before a Revenue Officer" apply to suits "for the rent of land." A suit for the rent of land occupied by a house in Lahore City has never been hearable in the Revenue Courts during British rule, and is therefore cognizable by the Small Cause Court. MUSSUMAT UZMI v. KHURSHED ALAM, **80 P.R. 1877, Note.**

(97)—"*Kudhi Kamini,*" *meaning of—Suit for* Kudhi Kamini—*Jurisdiction—Act* XI *of* 1865, *s.* 6.—The phrase 'Kudhi Kamini' signifies house or ground rent paid by non-proprietary residents in a village, and a suit for such due is cognisable by a Small Cause Court under s. 6 of Act XI of 1865, it not being a suit which might have been brought before a Revenue Officer when that Act was passed. NATHA v. JAIRAM, **21 P.R. 1888.** (74 P.R. 1879, 177 P. R. 1872, 33 P.R. 1887, 103 P.R. 1887, *R.*)

(98)—*Action to recover share of malikana—Small Cause Court—Damages—Jurisdiction—Act* XXIII *of* 1861, *s.* 27—*Special appeal.*—An action for the recovery of the plaintiff's share of *malikana* which the defendant had realized from the Collector, is a suit to recover a certain sum of money, and is therefore cognizable by the Small Cause Court, the fact that a question of right was incidentally raised in the case not affecting the jurisdiction. The provisions of

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

s. 27, Act XXIII of 1861, bar a special appeal from a judgment passed in appeal in such an action. LASMANI DEBIA v. MAHOMED HAFEZULLA, **3 B.L.R. App. 96=12 W.R. 29.** [*Expl.*, 8 P.R. 1883]

(99)—*Small Cause Court — Jurisdiction—Right to collect* birt, *determination of—Suit for* birt *money wrongfully kept back.*—The jurisdiction of a Court rests on the immediate form of relief prayed for, and not on the real point of law or fact on which the dispute ultimately rests. A suit for money wrongfully kept back from a person who was entitled to a share in the *birt* collected from the *jujmans* according to the arrangement between the parties, being merely a suit for damages, is cognizable by a Court of Small Causes under s. 6, Act XI of 1865. MUSSAMUT INDAR KOUR v. TEKA, **8 P.R. 1883, Note.** (38 P.R. 1882, 4 P.R. 1883, *R.*) [*F.*, 188 P.R. 1888.]

(100)—*Jurisdiction—Suit for rent of homestead land—Bastoo land—Agricultural land.*—A Small Cause Court has jurisdiction to try a suit for rent of land, where the principal subject of the entire occupation is bastoo land, the residue (if any) of the holding being merely subordinate. But, where the principal subject of the entire occupation is agricultural land, the building or buildings being mere accessories thereto, a Small Cause Court will not have jurisdiction. MUSSAMMAT RANEE CHUNDESSUREE v. GHEENAH PANDEY, **24 W.R. 152.**

(101)—*Provincial Small Cause Courts Act* (IX *of* 1887), *sch.* II, *cl.* (13)—Jodi, *Suit for.*—*Jodi* is not a cess or due of the kind referred to in sch. II, cl. (13) of the Provincial Small Cause Courts Act. The word "dues" in that article must be taken to be dues similar in kind to the special dues mentioned in the article. A suit for *jodi* is therefore cognizable by a Small Cause Court. RAJA VELUGOTI v. VENKATA RAO, **8 M.L.J. 83.**

(102)—*Suit for* jarib *rent—Cognisability—Want of jurisdiction to try suit—Return of plaint—Proper course.*—A suit for *jarib* rent is cognisable by a Court of Small Causes. In the case of a suit, to try which a Court has no jurisdiction, the Court should not dismiss the suit, but return the plaint for presentation in the proper Court. VENKATADRI APPA ROW BAHADUR GARU v. PAMIDIPARTI VENKATA RATNAM, **7 M.L.T. 350=6 Ind. Cas. 702.** (4 M.H.C. 393, *R.*)

(103)—*Payment of rent by under-tenant under assignment from tenant—Recovery of rent by landlord from tenant after payment—Tenant's recovery of rent by suit against under-tenant—Suit by under-tenant—Jurisdiction—Set-off.*—G who held a *jote jumma* as tenant within the zemindary of H, requested D, an under-tenant under him, to pay the zemindar a certain sum of money for rent of some years

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

due by him. The zemindar, after receipt of the money from the under-tenant, recovered the rent from the tenant by suit, and there was no plea of payment raised by the latter, who subsequently recovered his dues from the under-tenant in the Revenue Court. The under-tenant then sued the zemindar and the tenant in the Munsiff's Court to recover the money paid by him under assignment from the tenant, and obtained a decree which was however reversed by the District Court, on the ground that the suit was one cognizable by the Small Cause Court. The plaintiff then resorted to the Small Cause Court. The Judge made a reference to the High Court stating his opinion that no action for money had and received lay against the zemindar, and that no action was maintainable against the tenant as it was *res judicata* by the Collector. *Held* that the opinion of the Small Cause Court Judge that the under-tenant could not recover from the zemindar was correct, but that, as the Collector had no jurisdiction to try whether the tenant owed the under-tenant (for money paid by him for his use), a sum equal to the rent due by him, when the latter had not been authorized to set it off or to deduct it from the rent, the Judge of the Small Cause Court was competent to try whether the under-tenant did pay money for the use of the tenant at his request, and, if it be found in the affirmative, to decree the suit in his (under-tenant's) favour. DEANUT MUNDUL v. BUSSUNT MOYEE DOSSIA, **12 W.R. 190.**

(104)—*Suit for share of produce wrongfully withheld by co-sharer — Jurisdiction—Small Cause Court—Act* XVIII *of* 1884, *s.* 45, *cl.* (i), *scope of.*—A suit by a co-sharer, of a holding against another co-sharer, to recover his (plaintiff's) share of the produce, alleged to have been wrongfully withheld by the defendant, is not cognizable by the Revenue Court under s. 45 (i) of the Punjab Courts Act (XVIII of 1884), but is cognizable by the Small Cause Court, notwithstanding the fact that the decision of the case involves a question of title. S. 45, cl. (i) of Act XVIII of 1884, applies only to cases in which a person in his capacity of co-sharer in a village sues the lambardar or the remaining co-sharers for his share in the profits of an estate after payment of revenue and cesses. It is especially intended to apply to those cases in which, after the profits of a village have been calculated, and the revenue and cesses have been paid, a dispute arises as to whether the division has been rightly made, and one co-sharer claims that certain profits have not been taken into account, or that certain payments have been made out of the common fund which the lambardar or the other co-sharers ought to have paid from their private resources. BUTA v. MUSSUMAT RAHMATI, **34 P.R. 1888.** (74 P.R. 1886, *D.*) [*D.*, 106 P.R. 1890.]

(105)—*Consideration for lease*—Nuzzar — Salami—*Abwab.*—Money payable by a lessee in

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

consideration of a lease granted, whether called "*Nazzur*" or "*Salami*" cannot be looked upon as rent, but is simply a debt due upon a contract, and is recoverable in a Small Cause Court. DINANATH MOOKERJEE v. DEBNATH MULLICK, **5 B.L.R. App. 1=13 W.R. 307.**

(106)—*Suit to recover dues wrongly collected and kept back—Suit of nature cognisable by Court of Small Causes.*—A suit brought on the allegation that under the Revenue Rules, plaintiff as lambardar was entitled to levy from the Khewatdars revenue and a certain due called 'Inam,' and the defendant, another lambardar, had wrongly collected this inam and refused to pay it over to the plaintiff, is one for damages for money which the defendant was said to have wrongfully refused to pay over to the plaintiff and consequently is of a nature cognisable by a Court of Small Causes. POHLA v. PERTAP SINGH, **2 P.R. 1887.** (50 P.R. 1886, *D.*) [*R.*, 24 P.R. 1905=42 P.L.R.; *D.*, 2 P.R. 1900.]

(107)—*Marriage cess, suit to levy—Small Cause Court—Jurisdiction—Second appeal to Commissioner's Court.*—A suit by landlords against a *tarkhan* claiming Rs. 5 as the amount due from him by custom as rent of his house on a marriage taking place in his family, is one of a nature cognizable by a Court of Small Causes; and no second appeal lies to the Commissioner's Court. GHULAM ALI v. MUHAMIDI, **76 P.R. 1885** (177 P.R. 1882, 166 P.R. 1883, *F.*) [*R.*, 33 P.R. 1887.]

(108)—"*Sufficient cause*" *within meaning of s. 5—Limitation Act* (XV *of* 1877)*—Application for review of judgment—Delay in appeal.—Suit for marriage dues—Cognisability by Small Cause Court.*—The fact of an application for review having been made is "sufficient cause" for excusing delay in appealing, only when the appeal is preferred as speedily as may be after the application has been disposed of. Where, upwards of two months had elapsed between the date when copy of the order passed on review was obtained and that when the appeal was filed, it was held that the fact of the application for review of judgment was not "sufficient cause" within the meaning of s. 5 of the Limitation Act, XV of 1877 (22 W. R. 79, 89 P. R. 1882, *Appl.*) [*F.*, 3 C.L.J. 545; *Cons.*, 183 P. R. 1888, F.B.]. Where marriage dues claimed by a landlord are payable by the tenants by way of ground-rent, a suit for the same is one of the nature cognizable by a Small Cause Court. SAHIBU v. HIRA, **166 P.R. 1883.** [*F.*, 75 P.R. 1885; *R.*, 33 P. R. 1887, F.B.]

(109)—*Suit on pro-note against agriculturist—Ch.* XXXIX, *Civ. Pro. Code—Deccan Agriculturists' Relief Act.*—Where the suit is for a sum under Rs. 1,000 based on a promissory note, and the defendant is an agriculturist, the provisions of Ch. XXXIX, Civ. Pro. Code, are not applicable, because he is entitled to the procedure and benefits prescribed by the Deccan Agriculturists' Relief Act. The suit lies in the Small Cause Court. THAOOMAL MANGHANMAL v. GUL MAHOMED JOHURAK, **1 S.L.R. 243.**

(110)—*Suit for damages for wrongful grazing—Suit of nature cognizable by Small Cause Court—Act* XI *of* 1865, *s.* 6*—No further appeal.*—Suit for damages for grazing cattle on waste land originally common, but which the plaintiff alleged had fallen to him under a partition. Defendants pleaded that the land was common and that they had the grazing rights over it; they denied any knowledge of the partition and stated that, even if it had been made, it would not affect their right of grazing. *Held*, that the suit was simply one for damages and was therefore *prima facie* one of the nature cognizable by a Small Cause Court under s. 6 of Act XI of 1865, and that there was, therefore, no further appeal in the case. Though issues of title had been raised in this case, the decree was for damages only in accordance with the plaintiff's claim, and the decree of the appellate Court had simply reversed that of the first Court and dismissed the suit. It could not be said that the suit which, as laid, was one of a Small Cause nature had been altered into one of a different character. BABU KHAN v. GAHI, **38 P.R. 1882.** (75 P.R. 1877, 59 P.R. 1881, *R.*) [*F.*, 8 P. R. 1885; *R.*, 8 P.R. 1885, Note.]

(111)—*Government parade ground—Suit by lessee of, for grazing fees—Cognizability—Art.* 13, *Provincial Small Cause Courts Act.*—A suit by a lessee of Government parade ground, which is not an estate as defined in s. 3, Punjab Land Revenue Act, 1887, for money due on account of grazing dues otherwise than under an agreement, is cognizable by a Civil Court of Small Causes under art. 13 of Act IX of 1887. KHUDA BAKHSH v. DANA, **13 P.R. 1895.**

(112)—*Suit to recover money illegally exacted as grazing fees—Question of title raised by defendant—Small Cause Court—Jurisdiction—Special appeal.*—A suit to recover money paid by the plaintiff to the defendant under coercion, is a suit cognizable by a Small Cause Court, as it is capable of being technically described as a suit "for money received by the defendant to the use of the plaintiff" and no special appeal lies in such a case. GHULAM MUHAMMAD KHAN v. SHADI KHAN, **109 P.R. 1876.** [*F.*, 73 P.R. 1877; *Appr.*, 8 P.R. 1883, F.B.]

(113)—*Suit on bond for arrears of rent.*—A suit upon a bond given for arrears of rent is cognizable in the Court of Small Causes. GOVIND VISHNU KUKDE v. MAROTI NARAYAN JOSHI, **15 C.P.L.R. 52.** (2 W.R. S.C.C. Ref. 5, *F.*)

(114)—*Instalment bond executed for arrears of rent, suit maintainable on, in Small Cause Court.*—This was a suit on a *kistbundee* executed to the plaintiff for arrears of rent payable to

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

him by defendant up to the date of the bond. *Held* that the obligation on a *kistbundee* or instalment-bond constitutes a mere debt which may be sued for in the Small Cause Court. The new contract based on the consideration of the forbearance by the landlord to use his remedies to enforce arrears of rent is in the same situation as any other civil contract and is enforceable by the same procedure. RAJAH SHUTT CHURN GHOSAL v. MAHOMED ALLY, **2 W.R.S.C.C. Ref. 5.**

(115)—*Act* XI *of* 1865 (*Small Cause Courts Act*), *s.* 6—"*Rent*"—*Rent due on contract.*—In s. 6 of the Small Cause Courts Act, 1865, the term "rent" is not limited in meaning to rent due on contract, but includes money claimable in respect of premises of the plaintiff used and occupied by the defendant without a contract. There is no reason for supposing that the term "rent" has the more limited meaning, and no violence is done to the term by holding that it is susceptible of the wider meaning. CHUNNI LAL v. MUSSAMUT SHAHZADA KHANAM, **158 P.R. 1884.** [*R.*, 86 P.R. 1887.]

(116)—*Land for building purposes—Suit for rent of—Small Cause Court—Jurisdiction.*—A Court of Small Causes in the mofussil has jurisdiction to entertain a suit for rent of land used for building purposes. PEAREE BEWAH v. NOKOOR KURMOKAR, **19 W.R. 308.** [*F.*, 21 W.R. 5.]

(117)—*Provincial Small Cause Courts Act, sch.* II, *cl.* 8—*Stall in market — Whether a house or part of a house within the meaning of the Act—Suit to recover rent of stall—Cognizability by Small Cause Court.*—A stall in a market is a house or part of a house, and a suit to recover stall-rent is a suit to recover house rent within the meaning of cl. 8, sch. II, of Provincial Small Cause Courts Act, and is one cognizable by a Small Cause Court. NGA KAN v. MI MYA, **U.B.R. 1909, 2nd Quarter, Provincial Small Cause Courts, 5.**

(118)—*Jurisdiction of Small Cause Court—Suit for rent of land.*—A suit for rent of land in a village in the interior of a district, and used partially for building purposes is cognizable by a Small Cause Court. GOKUL CHUND CHATTERJEE v. MOSAHROO KANDOO, **21 W.R. 5.**

(119)—*Ground rent—Jursidiction—Decree—Execution—Appeal.*—A suit for the ground rent of a piece of land on which a *golah* stood was held to be cognisable, not by a Revenue Court, but by the Small Causes Court, whose decree the Judge must execute, and an appeal will lie from his refusal. DALAWUR ALI v. DABEE PERSHAD, **11 W.R. 203.** (9 W.R. 52, *F.*)

(120)—*Suit for ground rent under Rs.* 50—*Jurisdiction—Small Cause Court — Act* XI *of* 1865, *s.* 6—*Further appeal—Act* XVII *of* 1877, *s.* 39.—A suit for ground rent for houses in a village site does not fall within any of the classes of suits enumerated as cognizable by Revenue Courts in the Financial Commissioner's Book Circular No. XLVI of 1860 in which it has been expressly laid down that "suits regarding the village site or zemindars' houses lie in the Civil Court." The first ground taken in the appeal, that no further appeal lay to the Commissioner, the suit being one of the nature cognizable by a Court of Small Causes and the claim being under Rs. 50 by reason of s. 39 of the Punjab Courts Act was accepted by the Chief Court. On the further question which was raised whether a second appeal lay to the Chief Court, as the suit, if of a Small Cause nature, was one a second appeal in which would be barred by s. 586; of the Civ. Pro. Code, the Chief Court held that the appeal to it was barred by s. 586; but, as the Commissioner had no jurisdiction to hear the appeal to his Court, the appellant was allowed to complete the stamp for an application for revision and it was directed that, on his doing so, an order would issue setting aside the Commissioner's decree under s. 622, Civ. Pro. Code, for want of jurisdiction. SHADI KHAN v. FAKIR MUHAMMAD KHAN, **177 P.R. 1882.** [*F.*, 166 P. R. 1883, 75 P.R. 1885; *R.*, 83 P.R. 1887, 21 P.R. 1888.]

(121)—*Suit for mesne profits—Jurisdiction.*—A suit for mesne profits only, no other question arising, is cognisable by a Small Cause Court, such a suit being a suit for damages. SUNGRAM SINGH v. JUGGUN SINGH, **2 N.W.P. 18.** (10 W.R. 375, *F.*) [*Cons.*, 18 C. 316; *R.*, 17 C. 707.]

(122)—*Suits of Small Cause nature — Suit for speculative mesne profits.*—Where the plaintiff, who had obtained a decree for her share of her father's estate, alleged that the defendant, according to that decree, should have surrendered to her a fourth share of certain *sir* land, and that, instead of doing so, he remained wrongfully in possession thereof and cultivated the same whereby the plaintiff lost the benefit of the produce and sued for recovery of Rs. 99-12-10, the value of such produce by way of—damages, *held* that the suit was entertainable by a Court of Small Causes. KATWARI BIBI v. SUBAI KHAN, **A.W.N. 1881, 109.**

(123)—*Provincial Small Cause Courts Act,* IX *of* 1887, *sch.* II, *art.* 31—*Suit for mesne profits—Jurisdiction.*—A suit for mesne profits for less than Rs. 500 is cognizable by a Court of Small Causes. SESHAGIRI AYYAR v. MARAKATHAMMAL, **22 M. 196.** [*Not F.*, 16 C.P.L.R. 1; *F.*, 84 P.L.R. 1902, 340=35 P.R. 1902; *R.*, 24 M. 118, 39 P.L.R. 1901, 116=94; P.R. 1900.]

(124)—*Jurisdiction—Rent—Damages—Mesne profits—Suit of Small Cause nature.*—A suit to recover the value of produce of certain lands on the allegation that the second defendant, who was but a creature and menial servant of the

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

first defendant, forcibly carried off the crops of the land which the first defendant forcibly, and without the consent of the plaintiff, cultivated, *held* to be a suit of the nature of a Small Cause Court suit, being virtually a suit for damages, and not for rent. KAROO KAHAR v. NAUBOO SINGH, **24 W.R. 380.**

(125)—*Act* XI *of* 1865, *s.* 6—*Jurisdiction—Suit for specific performance or alternative damages.*—Where the plaint asked either that defendant might be ordered to fill up an excavation at his expense, or that plaintiff might have 25 rupees as damages, and the latter was what he was entitled to, the suit was *held* to be one for damages cognizable by a Small Cause Court which cannot be ousted of jurisdiction merely because plaintiff asked for an alternative relief to which he was not entitled. NANDA KUMAR BANERJEE v. ISHAN CHUNDER BANERJEE, **1 B.L.R. A.C. 91=10 W.R. 130.** [*Appr.*, 8 B. 31, U.B.R. 1903, 3rd quarter, Pro. S.C. C. 3. 4; *Cons.*, 15 W.R. 556; *D.*, 24 C. 661=1 C.W.N. 556.]

(126)—*Provincial Small Cause Courts Act* (IX *of* 1887), *s.* 27—*Art.* 35, *cl.* (*i*)—*Suit for damages to plaintiff's wall—Suit if cognizable by Small Cause Court—Small Cause Court Judge returning plaint to be presented in Civil Court—Successor of Judge cannot register plaint unless order set aside by High Court.*—A suit to recover from the defendant Rs. 150 as damages owing to certain tortious acts of the defendants in preventing the water of the plaintiff's house from going in a certain cess-pit, and thereby causing damage to the plaintiff's wall and house was held to be one cognizable by a Court of Small Causes. Also *held* that the fact of the injury being caused by diversion of a water-course or obstruction of an easement was an accidental circumstance which could not bring the plaint within the exceptions of art. 35 (i) of the Provincial Small Cause Courts Act, 1887. Where a plaint had been returned by a Small Cause Court Judge to the plaintiff to be presented on the original side, and a successor of the Judge is of opinion that it is to be disposed of on the small cause side, he cannot have the plaint registered under s. 27 of the Provincial Small Cause Courts Act whilst the former order returning the plaint is in existence and has not been set aside by the High Court. *In re* HAISAMBHAI ABDULABHAI, **20 B. 283.** [*F.*, 10 M.L.J. 318.]

(127)—*Interference with water cut, suit for damage for--Question of title--Small Cause Court—Jurisdiction--Second appeal.*—Where, in a suit for damages for interference with plaintiff's water cut by the defendant, the question as to whom the right belonged has been put in issue and definitely decided, no second appeal lies to the Chief Court, the suit laid being cognizable by

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

the Small Cause Court. SHAH MUHAMMAD v. ASLAM KHAN, **8 P. R. 1883.** (33 P. R. 1882, *F.*) [*D.*, 2 P.R. 1900=1900 P.L.R. p. 127.]

(128)—*Act* XI *of* 1865, *s.* 6—*Small Cause Court—Jurisdiction—Suit for damages for being kept out of land.*—Plaintiffs purchased certain land and sued defendants on the ground that they prevented them from cultivating the land they had bought and for which they had paid, and so kept them out of the use of their purchase money. *Held* this was a claim for damages, the rate of interest being used as the measure of the damage inflicted on the plaintiffs by being tortiously kept out of the use of the land, and was therefore of the nature of suits cognizable by a Small Cause Court under s. 6, Act XI of 1865. BOORA v. ELAHEE BUKSH, **29 P. R. 1870.**

(129)—*Provincial Small Cause Courts Act,* IX *of* 1887, *sch.* II, *art.* 31—*Suit for damages—Wrongful obstruction to possession of immoveable property—Jurisdiction.*—A suit for damages for wrongful obstruction by defendant to plaintiff's possession of plaint land is cognizable by a Court of Small Causes, art. 31, sch. II of the Provincial Small Courts Act not being applicable to a suit of this nature. LINGAYYA AYYAVARU v. MALLIKARJUNA AYYAVARU, **22 M. 197, Note.** [*F.*, 22 M. 196.]

(130)—*Trespass to immoveable property—Jurisdiction of Small Cause Court.*—A suit merely to recover damages for trespass to certain immoveable property, proved to have been in the possession of the plaintiff, is not a suit for recovery of immoveable property, nor one for determination of any other right to or interest in immoveable property, and is therefore cognizable by the Calcutta Court of Small Causes, no question of title being raised or determined therein. PEARY MOHUN GHOSAUL v. HARRAN CHUNDER GANGOOLY, **11 C. 261.** [*D.*, 31 C. 340=8 C.W.N. 246; *R.*, 29 C. 498, 31 M. 490=18 M.L.J. 480.]

(131)—*Jurisdiction of Small Cause Courts—Suit for damages.*—The plaintiff sued to recover damages by reason of a wrongful act of the defendant in breaking down a wall and carrying away the bricks belonging to the plaintiff. The defence set up was that the bricks belonged to the defendant, he having purchased them from a party lawfully in possession of the property before the plaintiff. *Held* that the suit was cognizable by a Court of Small Causes. SHUMBHOO CHUNDER MOWLICK v. PRAN KRISTO MOWLICK, **13 W. R. 105.**

(132)—*Suit for damages—Small Cause Court suit—Wrongful attachment of property in execution of decree.*—Where a decree-holder attached money in the hands of a third person as due to the judgment-debtor, and the attachment was removed in consequence of a false and wrongful objection by such person that the

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

money had been paid away before the attachment, *held*, that a suit by the decree-holder under these circumstances against such third person for the amount of such money and the costs of an attachment, was a suit for damages, cognizable by a Small Cause Court, and that, when the amount of the suit did not exceed Rs. 500, no second appeal would lie in the case. KALIAN SINGH v. CHUNNI LAL, **6 A. 10 = A.W.N. 1883, 172.**

(133)—*Breach of contract—Suit for damages, Cognizable by.*—A suit for damages for breach of contract where plaintiff claims expenses actually incurred is cognizable by Small Cause Court. The mere fact of a claim for actual expenses being mixed up with a claim for damages for injured feeling is not a ground for dismissing both. If the plaintiff is willing to abandon his claim for damages for injured feelings, the plaintiff should be amended so as to limit it to actual expenses alone. **8 P.R. 1866, Civ. Ref.**

(134)—*Agreement to sell Kunkar—Suit for damages.*—Where defendants agreed to sell plaintiff all Kunkar in their village and sold it to another, held that a suit for damages by plaintiff would lie in a Small Cause Court. *In re* A REFERENCE BY THE JUDGE, SMALL CAUSE COURT, LUDHIANA, **2 P.R. 1886, Civ. Ref.**

(135)—*Small Cause Courts Act*, XI *of* 1865, *s.* 6—*Suit for money paid for defendant.*—A suit for recovery of a sum of rupees which the plaintiff had paid for the defendant was held to be in the nature of a suit for damages as described in s. 6 of the Small Cause Courts Act. GOPAL SURNOKAR v. GOYARAM SIRCAR, **13 W.R. 273.**

(136)—*Jurisdiction—Payment made towards decree—Omission to certify—Suit for damages.*—A Small Cause Court has jurisdiction to entertain a suit for damages sustained in consequence of a decree-holder fraudulently omitting to certify to the Court the payments made by the plaintiff. BHUGOBAN TANTEE v. GOBIND CHUNDER ROY, **9 W.R. 210.** [*R.*, 5 M. 397; *D.*, 13 W.R. 147.]

(137)—*Suit to recover value of fishing nets wrongfully taken by defendants and for damages for loss of work consequent on it—Small Cause Court.*—The Small Cause Court has jurisdiction to entertain a suit to recover the value of certain fishing nets wrongfully taken by the defendants from the possession of the plaintiffs and not restored, and for damages for loss sustained by the plaintiffs through their inability to follow their pursuit as fishermen in consequence of the said wrongful act of the defendants in taking away their nets. MADUTHAN v. SUBBIER, **6 M.H.C. 34.**

(138)—*Act* VIII *of* 1851, *ss.* 81, 88—*Attachment under—Suit for damages—Small Cause Court—Compensation.*—A suit to recover damages after the dismissal of a suit wherein certain moveable properties, fishing nets, etc., had been attached under s. 81, Act VIII of 1859, is cognizable by a Small Cause Court. If a defendant applies for compensation, any award that may be granted will bar a regular suit. GOBURDHUN MAJHEE v. BANEE CHUNDER DOSS, **21 W.R. 375.** [*R.*, 16 C.W.N. 540 = 11 Ind. Cas. 729 = 14 C.L.J. 515.]

(139)—*Provincial Small Cause Courts Act*, IX *of* 1887, *sch.* II, *art.* 3—*Suit against karnam in settled Zemindari—Jurisdiction.*—A karnam in a settled zamindari is not an "officer of Government" within the meaning of art. 3, sch. II of the Small Cause Courts Act, and a suit to recover damages sustained by reason of the karnam's default in keeping certain accounts, is cognizable by a Court of Small Causes. ORR v. NEELAMEGAM PILLAI, **18 M. 395.**

(140)—*Jurisdiction—Small Cause Court—Suit to recover money paid to a mooktear under a fraudulent concealment of fact—Suit for damages.*—A suit to recover a sum of money which the defendant had fraudulently obtained from the plaintiff's karpurdaz by concealing from the plaintiff the fact that he had been engaged as mookhtear for the opposite party, inducing her to appoint him (the defendant) her mookhtear, and giving her to understand that he was conducting the case for her, is substantially a suit to recover damages for the injury that she had sustained by reason of the fraudulent concealment and misrepresentation, and the suit is cognizable by a Court of Small Causes. FATIMA BEGUM v. SYED MOOSA, **18 W.R. 128.**

(141)—*Act* XI *of* 1865, *s.* 6—*Suit for money in defendant's hands—Money collected under document creating charge on land—Defendant not party to document—Jurisdiction—Small Cause Court.*—Suit for money from defendant personally. The money claimed had been collected from an estate under an instrument to which the defendant was not a party and which had been charged on the estate by the instrument. No decree was sought against the estate. *Held*, that the suit was one for damages within the meaning of s. 6 of Act XI of 1865 and was cognizable by a Court of Small Causes. BHUGOBUTTY CHURN RAJPAYE v. SHARODA PERSHAD SOOKUL, **22 W.R. 298.**

(142)—*Act* XXIII *of* 1861, *s.* 27—*Suits of Small Cause nature—Question of title—Special appeal.*—The plaintiffs claiming, as hereditary Mahars of village, the right to carry away dead animals, sued for the recovery of the price of the skin and flesh of a dead ox. *Held* that the suit being a claim for damages, was cognizable by a Court of Small Causes, although a question of title had to be incidentally enquired into, and no special appeal

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

would lie under s. 27 of Act XXIII of 1861, and a decision in such a suit would not be a bar to the plaintiffs' bringing a suit for a general declaration of their title. KHANDU KERU v. TATIA VITHOBA, **8 B.H.C.A.C. 23.** [*R.*, 15 B. 400 ; *D.*, 25 B. 95.]

(143)—*Custom—Appropriation of dead cattle by chamars—Suit for value of hide and flesh of dead buffalo, cognisable by Small Cause Court—Act* XI *of* 1865, *s.* 6, *cl.* 4—*Suit not cognizable by Revenue Officer as perquisites of village officer.*—Plaintiffs brought this suit as chamars of a Taraf in Panipat to recover the hide and flesh of a dead buffalo, valued at Rs.10. Having found that by custom the chamars in the Taraf were entitled to appropriate the dead animals irrespective of any services rendered, the Court of first instance gave a decree for the hide. On appeal by the defendants it was urged that the lower appellate Court had no jurisdiction to hear the appeal, and that if it had, the suit itself was not maintainable. *Held*, that the suit was one for personal property of value less than Rs. 50 and, unless it could be shown that it was not of the nature cognisable by a Small Cause Court, the further appeal would be barred by s. 39 of the Punjab Courts Act XVII of 1877. *Held* also that the mere circumstance that the right of the chamars to the hides of dead animals was provided for in the Administration paper, could not constitute them village officers so that the suit should be brought before a Revenue officer as one for the perquisites of a village office, excluding thus the jurisdiction of the Small Cause Court under s. 6, cl. 4 of Act XI of 1865. HARGO LAL v. GUMANI, **28 P.R. 1882,** [*R.*, 34 P. R. 1887.]

(144)—*Right to carcases of dead cattle—Suit for damages for non-delivery of—Suit of Small cause nature—Second appeal—Civ. Pro. Code*, s.586.—The plaintiff's claim in this case was one for damages for the non-delivery of an one-fourth share in the carcases of dead cattle in accordance with the Administration paper of the village agreed to by both parties. *Held* that such a suit was of the nature cognizable by a Court of Small Causes and that a second appeal was therefore barred by s. 586, Civ. Pro. Code, the value of the claim being under Rs. 500. MOHNA v. LALMAN, **28 P. R. 1882, Note.** (28 P. R. 1882, *F.*)

(145)—*Jurisdiction—Suit for value of skins—Defendants claiming them by custom—Small Cause—Appeal.*—Plaintiff, a non-proprietor in the village, sued the defendants one of whom was a lambardar and the other a proprietor, for the value of the skins of certain animals which had belonged to plaintiff and had died in the village. The defendants pleaded that, according to the custom of the village, they were authorised to secure the skins for the moochis and the chamars of the village. The appeal by the plaintiff was heard by the Divisional

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

Judge. *Held*, that since the plaintiff, claiming as owner, simply sued for the value of the skins, the suit was a Small Cause Court suit and the appeal lay to the Subordinate Judge and not to the Divisional Judge, although, had the lambardars or the mochis sued to enforce the custom, the case would have been different according to 28 P. R. 1882. RAHMAT KHAN v. BUDHA, **34 P. R. 1887.** (28 P.R. 1882, *R.*)

(146)—*Small Cause Court—Jurisdiction—Suit for damages—Right to add claim not cognisable by Small Cause Court—Special appeal.*—In a suit for damages cognizable by a Court of Small Causes, the plaintiff could add another claim for damages, which by itself was not cognizable by a Small Cause Court. There is no special appeal in such a case if the amount sued for does not exceed Rs. 500. MANSING LALUNG v. THERAM DOLOYE, **22 W. R. 395.**

(147)—*Execution—Payment to prevent sale—Purchaser, suit by, for damages—Small Cause Court—Jurisdiction—Appeal*—A Small Cause Court has jurisdiction to entertain a suit for recovering money as damages, measuring the loss to which the plaintiff was put by having to pay on behalf of the defendant money which the defendant had agreed to pay out of the purchase-money in order to prevent an estate, which plaintiff had purchased from him, from being sold in execution of a decree. No special appeal lies from a decree passed in such a suit. RAMGUTTY GANGOOLY v. KURALEE PERSHAD GANGOOLY, **17 W. R. 446.**

(148)—*Jurisdiction—Small Cause Court—Suit to recover assessment wrongfully levied—Act* XXIII *of* 1861, *s.* 27—*Special appeal.—Trial of suit—Delegation—Practice.*—A suit to recover the assessment wrongfully levied by Government from the plaintiff is of the nature cognizable in a Court of Small Causes under Act XI of 1865, when the damage or demand is under Rs. 500. In such suits, therefore, no second appeal lies under s. 27 of Act XXIII of 1861. [*F.*, 8 B. 188 ; *R.*, 10 B.H.C. 308.] Such suits should ordinarily be tried by District Judges when brought in the District Courts, without their trial being delegated to their Assistants. RAMACHANDRA BHIKAJ v. COLLECTOR OF RATNAGIRI, **10 B.H.C. 305.**

(149)—*Suit for value of moveable property attached and sold—Jurisdiction—Small Cause Court.*—A suit to recover the value of salt attached and sold in execution of decree, on the ground that the salt was the property of the plaintiff and not of the judgment-debtor, is a suit for damages, and when the amount claimed Rs. 300 is within the pecuniary jurisdiction of a Small Cause Court, such suit is cognizable by that Court only. SHUGAN CHAND v. BAKSHA, **97 P.R. 1883.** (22 P.R. 1880, *D.*) [*R.*, 91 P.R. 1896 ; *D.*, 80 P.R. 1896.]

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

(150)—*Jurisdiction—Small Cause Courts—Suit for a share of earnings in ferry.*—The plaintiffs sued the defendants alleging that they had a right to ply boats in the Sagian Ferry and had so plied them and that the defendants had received all the earnings and retained the share of the plaintiffs therein. *Held*, that the suit was not for an account but for money received by the defendants to the plaintiffs' use and was therefore cognizable by a Court of Small Causes. DINA v. FAIZ BAKHSH, **51 P.R. 1887.**

(151)—*Suit for recovering share in the produce of immoveable property is cognizable by the Court of Small Causes—Practice—Procedure—Civ. Pro. Code* (V *of* 1908), *s.* 1.—A suit for recovering a share in the produce of immoveable property lawfully collected by the defendant is not a suit for possession of immoveable property, or for recovery of interest in such property, but it is a suit for moneys had and received to the plaintiff's use, and, as such, it is cognizable by the Court of Small Causes. MAHARANA SHRI DAVLATSINGHJI v. KHACHAR HAMIR MON, **11 Bom. L.R. 1330=34 B. 171=4 Ind. Cas. 830.** (17 B. 42, *F.*)

(152)—*Suits cognizable by Court of Small Causes—Suit for share of debt of amount less than Rs.* 500.—The plaintiff and the defendants, the legal representatives of a deceased person had executed an *ikrarnamah* by which 3 annas 4 pies was assigned to the plaintiff and the remaining 12 annas 8 pies to the defendants. The plaintiff alleging that the defendants 2 to 4 drew the whole amount deposited by a debtor of the estate, brought a suit for the recovery of their portions which was less than Rs. 500. *Held* that the suit was clearly cognizable by the Court of Small Causes. KUMRUNNISSA v. SUJAN, **10 C.L.R. 31.**

(153)—*Suit to recover money paid for costs payable by defendant—Indian Contract Act, s.*69—Quasi *contract—Jurisdiction of Small Cause Court.*—This suit was for money due to the plaintiffs which they had paid for the defendants and which the latter along with the former were bound by law to pay by way of the costs in a suit. By s. 69 of the Contract Act, the plaintiffs were entitled to be re-imbursed, there being an implied obligation under the circumstances there stated. This relation has been entitled in ch. V of the Indian Contract Act as a "relation resembling the relation created by contract." The Chief Court was of opinion that the use of the above quoted terms by way of a title to ch. V of the Contract Act could not render that which was a contract when Act XI of 1865 was passed no longer a contract within the meaning of that Act, and accordingly concurred in the opinion that the Small Cause Court had jurisdiction to entertain the suit. NABHI BAKSH v. MALI, **90 P. R. 1878, F.B.** [*F.*, 57 P.R. 1877; *R.*, 8 P.R. 1883.]

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

(154)—*Payment under compulsion of money payable by another—Suit for amount paid—Small Cause Court—Jurisdiction.*—A suit to recover arrears of revenue which the plaintiff was compelled to pay by the Revenue authorities, but which the defendant was liable to pay is cognizable by a Court of Small Causes. PARASURAMA CHEDUMBRAIYAN v. KRISTNAIYAN, **5 M.H.C. 452.**

(155)—*Act* IX *of* 1887, *sch.* II, *cls.* 4, 31—*Small Cause Court—Jurisdiction.*—Where the plaintiffs sued to recover their one-fifteenth share of the profits of two inam villages which had been collected by the defendant as the representative of the eldest branch of the family of inamdars, and as manager of the property for the several sharers, *held* that the suit, as brought, was cognizable by a Court of Small Causes, that the suit was one for money had and received to the plaintiff's use and did not fall under cl. 4 of sch. II of Act IX of 1887, as it was not a suit for the possession of immoveable property, or for the recovery of an interest in such property, the only relief claimed being the payment of money. If the plaintiffs had alleged that the defendant had "wrongfully received" the plaintiff's share of profits, then, no doubt, the suit would have fallen under cl. 31 of sch. II. But the plaintiff's allegation was that the defendant rightfully received, but wrongfully retained, the profits. To such a suit, cl. 31 has no application. DAMODAR GOPAL DIKSHIT v. CHINTAMAN BALKRISHNA KARVE, **17 B. 42.** [*F.*, 23 A. 437=21 A.W.N. 128, 9 Bom L.R. 207; *N.F.*, 32 B. 560=10 Bom. L.R. 733, 11 Bom. L.R 1330=34 B. 171; *Appr.*, 21 B. 248; *Expl.*, 25 B. 85; *R.*, 2 O.C. 276, 137 P.L.R. 1901=13 P.R. 1901, 1 L.B.R. 335, 98 P.L.R. 1904, 14 M.L J. 396, 18 M.L. J. 88.]

(156)—*Contract to cultivate—Jurisdiction—Act* X *of* 1859, *s.* 10.—Where, on the allegation that defendant had sub-let land to him for the purpose of raising crops under a contract to share the produce between them, plaintiff sought to recover the value of his share of the crop which defendant had appropriated, the High Court were of opinion that the claim was not for a sum exacted in excess of rent within the meaning of s. 10, Act X of 1859, and that, if proved, it might be enforced by the Small Cause Court. GARIBULLA PARAMANIK v. FAKIR MAHAMED KOLU, **1 B L.R S N. 13-a =10 W.R. 203.**

(157)—*Act* XI *of* 1865, *s.* 6—*Contract, meaning of—Suit for plaintiff's share of money received by defendant — Implied contract.—Small Cause Court—Special appeal—Question of title.*—The word "contract" in s. 6, Act XI of 1865, was intended to include a suit to recover money which the plaintiff says the defendant has received, and which the plaintiff is entitled to a share of, the claim in fact being founded upon this, that the defendant, with regard to

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

a portion of the money which belonged to the plaintiff, received it for, and on behalf of, the plaintiff and the right to recover it being founded upon what has always been regarded as an implied contract to pay it over to the person for whom it was received. [*F.*, 6 C. 284=7 C. L.R. 94.] When a suit is one of the nature cognizable in a Court of Small Causes, there is no right of special appeal, although a question of title is incidentally raised, as the finding of the Small Cause Court is not conclusive, and is only for the purpose of determining the suit brought in that Court. SUNKUR LALL PATUCK GYAWAL v. MUSSAMMAT RAM KALEE DHAMIN, **18 W.R. 104.** [*F.*, 10 B.H.C. 21; *R.*, 5 N.W.R. 24, 6 A. 449=4 A.W.N. 179.]

(158)—*Suit for money received by defendant to plaintiff's use—Jurisdiction—Small Cause Court—Question of title incidentally raised, effect of.*—The plaintiff, averring that he was Motawalli of a certain shrine, sued the defendant to recover Rs. 200, which plaintiff alleged that defendant had realized by falsely representing himself to be the Motawalli. The defendant admitted that he had received the money, but averred that he was entitled to receive it as Motwalli. *Held* that the suit was one "for money received by the defendant to the use of the plaintiff" and as such was cognizable by a Small Cause Court, and the fact that the defendant raised a question of title by disputing, in his answer, the plaintiff's *title* as Motawalli, did not affect the jurisdiction of the Court. HOSSEIN SHAH v. HABIBULLA SHAH, **73 P. R. 1877.** [*Appl.*, 8 P.R. 1883, 74 P.R. 1886.]

(159)—*Offerings of shrine, right to share in—Whether cognizable by Small Cause Court.*—A suit brought to try the question of a person's right to a share in the offerings of a shrine, is not one of a nature cognizable by a Small Cause Court. BISHEN SINGH v. HARBHAGGAT SINGH, **71 P.R 1876.** (41 P.R. 1872, *F.*) [*D.*, 73 P.R. 1877, 74 P.R. 1886.]

(160)—*Jurisdiction—Act* XI *of* 1865—*Suit for value of share of offerings of temple, alleged to be in defendant's possession—Count for money had and received—Jurisdiction—Small Cause Court—Question of title raised by defendant, effect of, on jurisdiction.*—A suit brought before the introduction of Act IX of 1887 against the manager, distributing Darogah and the Pujaris of a Shrine, for Rs. 30, being the value of the plaintiff's share of the offerings of the shrine, alleged to have come into the defendants' possession, was held to be a suit for money based on the ordinary count for "money had and received," and as such cognisable by the Small Cause Court under Act XI of 1865, notwithstanding that the Pujari defendants, by contending that the money claimed was not due to plaintiff as of right, raised a question of title, inasmuch as that circumstance would not alter the original character of the suit, the

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

jurisdiction of a Court depending upon the immediate form of a suit as embodied in the plaint, and not on the collateral questions of law or fact which may be raised by the pleadings. ATRA v. JOWALA SINGH, **188 P.R. 1888.** [*F.*, 20 P.R. 1911=93 P.L.R. 1911=9 Ind. Cas. 579; *R.*, 84 P.R. 1892.]

(161)—*Share of offerings—Suit for, Nature of.*—A suit by the rightful successors to the former incumbent against the Manager of temple and rival claimants for a share of offerings received at a shrine is of a small cause nature. JOWAHIR SINGH v. SARDAR MAN SINGH **84 P.R. 1892.**

(162)—*Act* IX *of* 1887, *sch.* II, *art.* 12—*Mahabrahmani dues, suit for—jurisdiction—Court of Small Causes—Second Civil appeal.*—In a suit for recovery of a share of the *Mahabrahmani* dues, the District Judge having reduced the decree of the Court of first instance to Rs. 60, the question before the Court of Judicial Commissioner was whether s. 586, Civ. Pro. Code, barred a second appeal in a suit of the nature. *Held*, that the suit could not be considered to be a suit for the possession of a hereditary office, or of the interest in such an office, or to be a suit to establish an exclusive or periodically recurring right to discharge the functions of an office within the meaning of art. 12, sch. II of Act IX of 1887, the only relief claimed being the payment of money had and received by the defendant to the plaintiff's use. *Held*, therefore, that the suit was not excluded from the cognizance of a Court of Small Causes, and that the second appeal was barred by the provisions of s. 586, Civ. Pro. Code. GHIRAO v. SHEO PRASHADA, **2 O C 276.** [*R.*, 4 O. C. 89.]

(163)—*Provincial Small Cause Courts Act* (IX *of* 1887), *sch.* II, *cls.* 4 *and* 13—*Claim for hereditary allowance—Suit for immoveable property.*—This was an application under s. 25 of the Provincial Small Cause Courts Act. The suit was for recovery of Rs. 400 for arrears, alleged to be due and payable to the plaintiffs under an agreement by the defendant's father to pay Rs. 150 per annum to the plaintiffs' father, of which Rs. 50 were for the maintenance of the plaintiffs' mother and the residue was to be applied towards defraying the expenses of a temple. The terms of the agreement showed that it was intended that the payment of the expenses of the temple should be continued in perpetuity. The Small Cause Court dismissed the suit on the grounds that, the claim being for an hereditary allowance, which was immoveable property, it had no jurisdiction, and that the suit-agreement was inadmissible in evidence at it was unregistered. The High Court set aside the decree of the Small Cause Court holding that the suit was not one for possession of immoveable property or for the recovery of an interest in such property within the meaning of art. 4 of sch. II to the Act, nor one coming

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

within the purview of art. 13 and that it was not a suit exempted from the cognizance of the Small Cause Court. Nor was the document one requiring registration since it was not an instrument, purporting or operating to create or declare an interest in immoveable property within the meaning of s. 17 of the Registration Act. VISHNU GANESH JOSHI v. YESHAVANTRAO, **21 B. 387.** [*R.*, 2 O. C. 276.]

(164)—*Jurisdiction—Small Cause Court—Suit for share of varshasan—Implied contract—Act* XI *of* 1865, *s.* 6—A suit to recover a share in a *varshasan* payable by the Gaekwar's Government and received by the defendant who is the eldest member of the family of the original grantee is cognizable by a Small Cause Court. It is money received by the defendant to the use of the plaintiff—a state of circumstances involving an obligation amounting to an implied contract on the part of the recipient to pay over the money so received to the person on whose behalf it was received. The words "other contract" in s. 6 of Act XI of 1865 include implied contracts. RATAN SHANKAR REVASHANKER v. GULABSHANKAR LALSHANKER, **10 B. H. C. 21.** (3 B.H.C. 75, *Overruled*; 18 W. R. 104, *F.*) [*F.*, 4 B. 321; *R.*, 11 B. H. C. 194, 6 B. 292, 13 B. 650, 656.]

(165)—*Jurisdiction—Suit to recover arrears of* varshasan—*Allowance paid by foreign power—Lower Court's refusal to exercise jurisdiction—Revision.*—A Munsif's Court has jurisdiction to entertain a suit brought to recover a third-share of *arrears* of *varshasan* or annual allowance granted by the Gaikwar of Baroda to the defendant and in which the plaintiff is entitled to a third share. In such a case the question to be determined is, whether the money which was received by the defendant from the Gaikwad was received on the plaintiff's account. If, in determining it, it becomes necessary incidentally to try the question of title to the money, that would not deprive the Court of jurisdiction. The suit is one of a small cause nature. [*D.*, 23 B. 22, 122 P.R. 1908.] Where the lower appellate Court wrongly reverses the decree of the Court of first instance for want of jurisdiction, the High Court should exercise its extraordinary power, and correct the error, although no special appeal lies in the case. RATNASHANKAR RAVASHANKAR v. GULABSHANKAR LALSHANKAR, **4 B.H.C.A.C. 173.**

(166)—*Small Cause Courts, Jurisdiction of—Jurisdiction—Small Cause Court—Suit to recover money paid as bribe.*—A suit to recover a sum of money from the defendants, who are Police Officers, which it was alleged was the amount of a bribe extorted by them, to induce them to restrain from searching the house of the plaintiff and so putting him to shame, lies in the Small Cause Court; such a suit does not fall within the second schedule to the Provincial Small Cause Courts Act. RAHIMUDDIN AHMED v. NAIMULLAH, **9 Ind. Cas. 623.**

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

(167)—*Permission to use path across another's land—Sum agreed to be paid—Suit to recover—Jurisdiction—Revenue Court — Small Cause Court.*—What was sued for, in this case was not the rent of land but merely the stipulated sum made payable by the contract to the owner of the land for the leave granted by him to the defendants to use a path across his land, and such a suit, not being one of the description made cognizable by Collectors of land revenue, was held to lie within the jurisdiction of the Small Cause Court. WOOMAPERSHAD SHAW v. SHUMSHER SIRDAR MEHTER, **4 W. R.S.C.C. Rg. 10.**

(168)—*Act* XXIII *of* 1861, *s.* 27—*Suit for refund of money—Small Cause nature—Special appeal.*—Suit for refund of money under the following circumstances:—Plaintiff took a lease from the defendant, the latter giving the former a *bakijaee* setting forth a certain sum as being due from the tenants by way of rent. Plaintiff having paid the amount to the defendant sued the ryots to recover the sums due according to the *bakijaee*, but was met by the ryots with pleas either of payment to the defendant or of payments by assignment for the defendant's debts. Hence the suit by the plaintiff to recover from the defendant the amount paid by him. *Held* that, as the suit was of a small cause nature, and the amount claimed was less than Rs. 500, no special appeal lay from the decision in the case. WUZEER MULLICK SIRCAR v. NITUMBINEE DEBEE, **18 W.R. 484.**

(169)—*Decree under Act* X *of* 1859, *money paid for but not applied in satisfaction of, suit for recovery of—Jurisdiction of Small Cause Court.*—Plaintiff was judgment-debtor in a case decreed in favour of defendant, decree-holder, under Act X of 1859, and instituted the present suit for the return of certain money which he had paid in liquidation of the decree but which had not been so carried to his credit. On a reference made by the Judge of the Court of Small Causes under Act XLII of 1860, the High Court expressed its opinion that there was nothing in the enactments to prevent the plaintiff from bringing the suit in the Small Cause Court to recover from the defendant money which had received to the plaintiff's use—*viz.*, the money which he received to be applied in reduction of the decree-debt, and had not so applied. TARINEE CHURN ROY v. GOPAL KISTO ROY, **2 W. R. S. C. C. Ref. 5.**

(170)—*Arts.* 2 *and* 35, *cl.* (*j*), *sch.* II, *Act* IX *of* 1887 (*Prov. Small Cause Courts*)—*Immoveable property, sale of—Non-saleable interest of judgment-debtor—Purchase-money, suit for refund of.*—A suit by an execution-purchaser of immoveable property for recovery of his purchase-money, on the ground that the judgment-debtor had no saleable interest therein, and the purchaser, for that reason, had been deprived of it, is entertainable in a Small Cause Court.

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

Neither art. 2, nor art. 35, cl. (*j*), sch. II, Act IX of 1887, excludes such a suit from the cognizance of the Small Cause Courts. PRASANNA KUMAR KHAN v. UMA CHARAN HAZRA, **1 C. W.N. 140.** [*R.*, 8 Bom.L.R. 369.]

(171)—*Contract for sale of land—Purchase money paid—Failure to register sale-deed—Suit for refund—Jurisdiction.*—A suit to recover the purchase-money owing to the failure of the vendor to complete the bargain, as agreed upon, by getting the deed of sale duly registered, is maintainable in a Court of Small Causes. It is substantially a suit for breach of contract for sale of land. CHAROO KHAN v. DOORGA MONEE, **9 W.R. 498.** [*R. & Expl.*, 10 B.H. C. 21.]

(172)—*Jurisdiction—Small Cause Court—Suit to recover purchase-money on sale set aside—Money had and received.*—A suit to recover purchase money on a sale of occupancy rights being set aside, is one for 'money had and received,' and as such is cognizable by a Small Cause Court. RADHA KISHEN v. SIRDAR ISHAR SINGH, **50 P.R. 1887.**

(173)—*Act* XI *of* 1865—*Jurisdiction—S.* 295, *Civ. Pro. Code—Suit for refund of assets paid in execution of decree.*—A suit, under the penultimate clause of s. 295 of the Code of Civil Procedure, to compel the refund of assets paid to a person not entitled to receive the same, is cognizable by a Court of Small Causes. HARI HARA v. SUBRAMANYA, **9 M. 250.** (7 A. 378, *Diss.*) [*R.*, 11 M. 269.]

(174)—*Moster and servant—Money borrowed by servant spent for benefit of master—Debt—Act* XI *of* 1865, *s.* 6—*Special appeal.*—The plaintiff, who was a servant of the defendant, borrowed a certain sum of money and spent a portion of it in satisfaction of the debt of the defendant, and the rest was taken and spent for the defendant's own private business. No re-payment of the money was made by the defendant to the plaintiff, and a decree was taken out by lenders of the money against the plaintiff. After this decree, plaintiff sued his master for the re-payment of the money which he had borrowed and spent and made over for the defendant's purposes. *Held* that it must be legally supposed that the money was borrowed and paid on account of the defendant upon an understanding that it would be repaid and that the suit was one for a debt within the meaning of s. 6 of Act XI of 1865 and no special appeal lies. RASH MONEE DEBIA v. RAJAH RAM SIRCAR, **15 W.R. 83.** (7 W.R. 377, *D.*)

(175)—*Suit to recover two sums of money, one for money lent and the other for goods sold and delivered—Total claim cognizable by Small Cause Court—Claim in each case cognizable by District Munsif on Small Cause side—Jurisdiction of Small Cause Court.*—Where a suit was brought in the Small Cause Court to recover

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

two sums of money, one cause of action being for money lent and the other for goods sold and delivered, and the amount of both claims was within the jurisdiction of the Small Cause Court, but the pecuniary claim in each case was cognizable by the District Munsif on the Small Cause side, *held* that the Small Cause Court had jurisdiction to entertain the suit. ARUNACHELLAM CHETTY v. GANGATHARAM AIYAN, **5 M.H.C. 287.**

(176)—*Suit for debt alleged to have accrued due under contract—Small Cause Court.*—A suit for a debt alleged to have accrued due under a contract is cognizable by a Small Cause Court. CHETU NARAYANA PILLAY v. AYAMPERUMAL AMBALOM, **4 M.H.C. 447.**

(177)—*Jurisdiction—Small Cause Court—Money paid by mistake.*—A suit for money paid by mistake is one of the nature cognizable in a Court of Small Causes. CHAMRU v. HARDAT, **A.W.N. 1883, 128.**

(178)—*Suit cognizable by Small Cause Court—Quasi-contract—N.W.P. Rent Act,* XVIII *of* 1873, *s* 93.—A suit on a *quasi*-contract, for money had and received by the defendant for the use of the plaintiff is cognizable by a Court of Small Causes, and does not fall within cl. (*h*) of s. 93 of the Rent Act, 1873. RAM LAL v. MUTTRA DAS, **A.W.N. 1881, 109.**

(179)—*Act* XXIII *of* 1861, *s.* 13—*Razinamah for payment of debt into Court by instalments prolonged beyond one week enforceable in Small Cause Court.*—The provisions of s. 13 of Act XXIII of 1861, which superseded s. 10 of Act XLII of 1860, were merely directory. A razinamah containing stipulations for the payment of a debt into Court by periodical instalments prolonged beyond one week, could, therefore, be received and enforced in a Small Cause Court. CHINNAN AYYAPPA v. SHEKH PIR AHMAD, **1 M.H.C. 459.** [*R.*, 4 M.H.C. 183.]

(180)—*Suit for money had and received for the plaintiff's use—Implied contract—Suit of a Small Cause nature—Zamindari due.*—A suit by a tenant for the recovery of money wrongfully collected from him by the zamindar as a zamindari due, is one for money had and received, and is therefore of a nature cognizable by a Small Cause Court. THE COLLECTOR OF CAWNPORE v. KEDARI, **4 A. 19=A. W. N. 1881, 108.** (4 A. 6, *F.*)

(181)—*Suit for money had and received for the plaintiff's use—Suit of a Small Cause nature.*—A suit for money which has come into the hands of the defendant under such circumstances that he must be taken to hold it to the use of the plaintiff, and to be under an implied contract to pay it to him, is a suit for money had and received by the defendant for the use of the plaintiff, and is one of a nature cognizable by a Small Cause Court. LACHMAN PRASAD v. CHAMMI LAL, **4 A. 6=A.W.N. 1881, 96.** [*F.*, 4 A. 19; *Appr.*, 6 A. 449.]

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

(182)—*Execution money paid to rival decree-holder—Suit to recover on ground of plaintiff's priority of attachment—Jurisdiction—Small Cause Court.*—Where, in the course of execution of a decree, a decree-holder has been paid away money by the Small Cause Court, and a rival decree-holder claimed the same under s. 270 of the Civ. Pro. Code, on the ground that he had first attached the property sold, a suit between the rival decree-holders regarding such money will lie in the Small Cause Court as for the recovery of money illegally paid to the defendant. DEVI SAHAI v. JAMASJI AND CO., **22 P.R. 1875.**

(183)—*Small Cause Court—Action for recovery of costs incurred in suit to compel registration of document, sustainability of.*—A person can recover in a Small Cause Court the costs incurred by him in a suit to compel registration of a document. CHENGALVARAYA MUDALI v. THANGATCHI AMMAL, **6 M.H C. 192.** [*R.*, 1 B. 467, 8 A. 452, U.B.R. 1904, C.P.C., 283, U.B.R. 1905, C. P. C. 283.]

(184)—*Claim for money due on bond—Security by mortgage of land—Small Cause Court, jurisdiction of.*—A Judge of the Small Cause Court is competent, when a suit is brought on a bond, the payment of which has been secured by the hypothecation of land, to try whether any debt is due upon the bond or not; but he cannot declare whether or not the particular land mentioned in the bond is charged for the payment of the debt, nor can he attach the land in execution of the decree. RAM SHEWUCK SAHOO v. FUTTO ROY, **12 W.R. 184.** [*Appr.*, 12 W.R. 367, 10 B. 69; *Not F.*, 13 W.R. 120.]

(185)—*Bond hypothecating land — Small Cause Court, jurisdiction of—Sale in execution of decree—Mortgage by Hindu Guardian—Legal necessity.*—A Small Cause Court has jurisdiction to entertain a suit on a bond hypothecating landed property, and to give a simple money decree. (12 W.R. 184, *F.*) A sale in execution of such decree, if duly made by the Civil Court, and if there was no irregularity in conducting it, cannot be set aside for want of jurisdiction in the Court that passed the decree. Though it is incumbent on a Hindu mother who is guardian to her minor son, to provide for his investiture, still where the family property is small, she is not justified in borrowing a large sum by mortgaging the property. (*Glover, J.*) DOORHYAR ROY v. DULSINGAR SINGH, **12 W. R. 367.**

(186)—*Quasi-contract—Contract Act, ss. 69, 70—Suit of a small cause nature—Small Cause Court Act* (XI *of* 1865), *s.* 6— *Second Appeal—Civ. Pro. Code*, 1877, *s.* 586.—A suit for recovery of money paid by the plaintiff for the revenue payable by defendant, between whom and plaintiff, the relation of co-sharer and Lambardar never existed being one for money lawfully paid, and not intended to be gratuitously paid by one person for another who enjoys the benefit of it is one based upon an implied contract under ss. 69, 70 of the Contract Act, and is cognizable by a Small Cause Court and is not open to second appeal if its value does not exceed Rs. 500. NATH PRASAD v. BAIJ NATH, **3 A. 66, F B.** [*Diss.*, 9 C. 395; *Not F.*, 7 C. 605; *F.*, 4 A. 134, 4 A. 152; *Appr.*, 15 C. 652, F.B.; *R.*, 12 C. 213; *D.*, 8 C. 113.]

(187)—*Small Cause Court, Jurisdiction of.*—A Small Cause Court has jurisdiction to entertain a suit for a portion of grain in the nature of net rent which has fallen due, that amount being within its jurisdiction, although the whole amount payable from first to last under the agreement would be in excess of that jurisdiction. NARASIDAVUR v. MARANA KAUNDAN, **2 M.H C. 440.**

(188)—*Act* XI *of* 1865, *s.* 6—*Joint property in decree—Suit to recover share of money.*—A suit against a co-sharer, for a share of money realized upon a decree which was joint property of the parties, is cognizable by a Small Cause Court and no special appeal lies in such suit. HURO MOHUN ROY v. KHETTRO MONEE, **12 W.R. 372.** [*F.*, 6 C. 284; *Appl.*, 6 A. 449=4 A.W.N. 179.]

(189)—*Water-cess—Payment by landholder—Right of land holder to be reimbursed.*—Where a landholder pays to Government the water-cess due, which his tenants are bound to pay, he is entitled to claim from them reimbursement, in virtue of either an implied contract, or a right to compensation. A Small Cause Court constituted under Act XI of 1865 has jurisdiction to decide such a suit. VENKATARAMAYA v. VIRAYA, **8 M. 4.**

(190)—*Suit for recovery of revenue paid by one person for another—Suit of a small cause nature.*—A suit by the proprietor of one village who is by mistake compelled to pay the revenue due by the proprietor of another village, for recovery of the same from the latter, is, when the amount does not exceed Rs. 500, a suit of a nature cognizable by a mofussil Small Cause Court. QUTUB HUSAIN v. ABDUL HASAN, **4 A. 134=A.W.N. 1881, 141.** (3 A. 66, F.B., *F.*) [*D.*, 9 A. 591.]

(191)—*Revenue paid by one co-sharer in estate on account of another—Suit for contribution—Jurisdiction of Small Cause Court—Special appeal—Act* XXIII *of* 1861, *s.* 27.—This was a suit for a sum of money paid as revenue by one partner in an estate on account of another partner, based on the rights of one sharer to recover from his co-sharer any portion of the total jumma which he was obliged to pay on their behalf to Government to save the whole estate from sale. Such a claim is one for money due under implied contract and is therefore cognizable by the Courts of Small Causes, and the High Court can have no jurisdiction to entertain a special appeal in such a case, by

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

reason of s. 27 of Act XXIII of 1861. RAM MONEY DOSSIA v. PEAREE MOHUN MOZOOMDAR, **6 W.R. 325.** [*Disappr.*, 7 W.R. 377.]

(192)—*Civ. Pro. Code*, s. 586—*Suit of the nature cognizable by a Court of Small Causes—Act* IX *of* 1887 (*Provincial Small Cause Courts*), *sch.* II, *arts.* 39, 41.—A and B were originally co-sharers in the same *mahal*. By a perfect partition, which took effect from the 1st of July, 1895, the shares of the two were divided and formed into two separate *mahals*. A was compelled to pay an instalment of Government revenue due for a period subsequent to the partition and legally payable by B. A sued B to recover from her the revenue so paid. In this suit, A was not claiming as lambardar. *Held*, that this was a suit of the nature cognizable in Courts of Small Causes within the meaning of s. 586 of the Code of Civil Procedure. MUMTAZUNISSA BEGAM v. SAADAT WALI KHAN, **A.W.N. 1898, 113.**

(193) -*Suit for recovery of land revenue paid by one person for another—Suit of a Small Cause nature— Quasi-contract—Indian Contract Act*, *ss.* 69, 70—*Act* XI *of* 1865, *s.* 6—A suit by a person for the recovery of land revenue paid by him for another is a suit on an implied contract, and, therefore, of a nature cognizable by a Small Cause Court. *In the matter of the petition of* ALI MAZHAR v. GOPINATH, **4 A. 152 = A.W.N. 1881, 167.** (3 A. 66, F.B., *F.*)

(194) —*Joint creditors—Payment to one—Small Cause Court suit—Act* XI *of* 1865, *s.* 6.—When one of two or more joint creditors receives full payment of the debt, he does so under the implied contract that he will deliver their shares to the other joint-creditors; and such implied contract falls under the purview of s. 6 of the Mofussil Small Cause Courts Act. SOHAN v. MATHURA DAS, **6 A. 449 = A.W.N. 1884, 179.** (4 A. 6, 12 W.R. 372, 18 W.R. 104, *R.*) [*F.*, 7 A. 384.]

(195)—*Suits of Small Cause nature—Suit for contribution.*—A suit for contribution by two judgment-debtors against a third, for sums paid on account of arrears of maintenance payable by them all jointly and severally under a decree of Court, is cognizable in a Court of Small Causes. KISHEN GOBIND v. BALGOBIND, **A.W.N. 1882, 2.**

(196)—*Suits of Small Cause nature—Suits for contribution.*—The plaintiffs and the defendants were sued for compensation for wrongful occupation of certain land and a decree was passed against them. The plaintiffs paid the amount of the decree being compelled to do so, and filed a suit on the original side in the Munsiff's Court; the suit was dismissed. On appeal the District Judge confirmed the decree. *Held* that the suit was in the nature of a small cause suit, and the proceedings of the lower Courts should be set aside as they had no jurisdiction. DALJIT SINGH v. JOKHU, **A.W.N. 1882, 54.**

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

(197)—*Suit for costs paid by one of two persons jointly liable—Jurisdiction of Provincial Small Cause Court.*—A suit for costs paid by one of two persons jointly liable does not come under arts. 2, 41, 42, or 44 of Act IX of 1887 and is cognizable by the Small Cause Court. The suits for contribution, which that Court has no jurisdiction to try, are those specified in arts. 41 and 42, or which might come under art. 44. BISWA NATH SHAHA v. NABAKUMAR CHOWDHARY, **15 C. 713.** [*F.*, A.W.N. 1906, 6 = 3 A.L.J. 6 = 28 A. 292.]

(198)—*Decree for rent obtained against one debtor—Suit for contribution between co-debtors, cognizable by Small Cause Court—Act* XI *of* 1865, *s.* 6.—One of several debtors, against whom a decree for rent has been obtained can sue his co-debtors for contribution in a Court of Small Causes. An obligation to contribute is a contractual obligation within the meaning of s. 6, Act XI of 1865. GOVINDA MUNEYA TIRUYAN v. BAPU, **5 M.H.C. 200.** [*Not F.*, 7 C. 605; *F.*, 5 M.H.C. 462, 4 B. 321, 6 M. 424, 9 M. 250; *Con.*, 11 M. 269; *R.*, 2 B. 624, F.B., 4 M. 236, 6 M. 277, 10 M. 518; *D.*, 3 A. 66.]

(199)—*Act* IX *of* 1887 (*Provincial Small Cause Courts Act*), *s.* 15, *sch.* II, *art.* 41.—A suit to recover from the defendant a sum of money being his share of the cost of repairing a channel which is the joint property of the plaintiff and defendant is one cognizable by a Court of Small Causes. FISCHER v. TURNER, **15 M. 155.**

(200)—*Act* XI *of* 1865, *s.* 6—*Suit for contribution between co-sureties, cognizability of, by Small Cause Court.*—In the case of sureties bound by the same instrument as the principal debtor, a suit brought by one of the sureties against his co-surety for contribution of the amount which the former was compelled to pay on default of payment by the principal debtor, is to be regarded as a suit on an implied contract so as to come within the jurisdiction of a Court of Small Causes. HARI TRIMBAK AKOLKAR v. ABASAHEB, **4 B. 321.** [*R.*, 6 B. 292.]

(201)—*Act* XXIII *of* 1861, *s.* 27—*Contract to deliver rice—Suit to recover rice or value—Small Cause Court—Jurisdiction.*—Where the defendant contracted to deliver a certain quantity of rice to the plaintiff in return for the paddy received by him, a suit to recover the rice or its value was cognisable by a Court of Small Causes under s. 27, Act XXIII of 1861. DOM KUMAR v. SORJO DUTT SURMAH, **22 W.R. 259.**

(202)—*Suit for recovery of bond—Jurisdiction—Small Cause Court—Valuation of claim.*—Plaintiff sued to recover possession of bonds executed in his favour by third parties which had been entrusted to defendant as plaintiff's agent. *Held* that the Small Cause Court had jurisdiction to decree such a claim for 'personal

Small Cause Court, Mofussil, Jurisdiction of—continued.

——**1.—General**—*continued.*

property' under s. 6 of Act XI of 1865, as bonds or securities for money not exceeding in value the pecuniary limit of the Court's jurisdiction. As bonds have a value in themselves as forming additional security for rights they should be held to be property. They must not be valued as so many pieces of paper or manuscript. They must have their actual value stated in the plaint and that could be nothing less than the amounts for which they were held as securities. Hence a suit for the bonds must be valued according to the amount secured by them, and no suit could be brought for more than Rs. 500 in a Court of Small Causes. CHET SINGH v. MUL SINGH, **10 P.R. 1871.**

(203)—*Small Cause Courts Act* (XI *of* 1865), *s.* 6—*Suit for recovery of title deed whether cognizable by Court of Small Causes.*—Suit to recover the title deed of a house at Lahore valued at Rs. 235, on the ground that plaintiffs had purchased it through defendant who retained the sale-deed against their will. *Held* that the suit, being one for the recovery of specific *moveable* property was cognizable by the Court of Small Causes and as such no special appeal lay from it. MALWA MAL *and* SOHAWA MAL v. DALA MAL, **64 P. R. 1878.**

(204)—*Suit to recover moveable property—Pledge—Jurisdiction—Small Cause Court—Act* XI *of* 1865, *s.* 6.—A suit by the pledgee for the possession of moveable property pledged or for its money value would lie in a Small Cause Court under s. 6, Act XI of 1865. SOHAN LALL v. KULA MAL, **18 P. R. 1873.**

(205)—*Jurisdiction—Small Cause Court—Mortgage of moveable property—Redemption—Tender.*—A suit for redemption of moveable property pledged as security for a loan in a mortgage-bond will not lie in a Small Cause Court. But if the amount due on the mortgage has been, before the commencement of the suit, tendered and declined, then the mortgagor's suit for possession of the mortgaged moveable property will lie in the Small Cause Court. BHUBOTARINEE GHOSAMY v. JUGGERNATH TEWARY, **16 W.R. 58.** (9 W.R. 136, *R.*)

(206)—*Suit for enforcement of lien on moveable property—Cognizability by Small Cause Court.*—A suit for the enforcement of a lien on moveable property does not fall within art. 19 of second schedule of the Act and is cognizable by a Court of Small Causes. UPASHIA v. NARSHINGH LODHI, **10 C.P.L.R. 80.** (4 C.P. L.R. 31, *Diss.*)

(207)—*Small Cause Court—Jurisdiction—Contract pledging moveable property.*—A Small Cause Court has jurisdiction to enforce a contract pledging moveable property. APPAVU PILLAI v. SUBRAYA MUPPEN, **2 M H.C. 474.** [*Diss.*, 10 A. 20.]

(208—210)—*Provincial Small Cause Courts Act*, IX *of* 1887, *sch.* II, *art.* 35 (*j*)—*Suit for*

Small Cause Court, Mofussil, Jurisdiction of—continued.

——**1.—General**—*continued.*

value of property unlawfully retained—Jurisdiction.—A suit for the value of moveable properties retained by the defendant though he had been ordered to restore them to plaintiff by an order of the Revenue Court setting aside the distraint of the said properties, does not fall within the scope of art. 35 (*j*) of Act IX of 1887, and is triable by a Small Cause Court. CHAKRADHARUDU v. VENKATARAMAYYA, **22 M. 457.** [*D.*, 25 M. 540.]

(211)—*Act* XI *of* 1865, *s.* 6, *Excep.* 2—*Suits cognizable by Court of Small Causes.*—Where, subsequent to a decree declaring that the plaintiff was entitled to inherit the whole estate of a deceased person in preference to the defendant, the plaintiff sued for the recovery of certain personal property left by the deceased but unlawfully detained by the defendant, *held* that the suit was cognizable by a Court of Small Causes and did not come within the second exception to s. 6 of Act XI of 1865. MOHESHUR MONDUL v. KOILASH NATH MUNDUL, **7 C.L.R. 71.** [*F.*, 27 A. 622=2 A. L.J. 388=A.W.N. 1905, 134.]

(212)—*Jurisdiction—Mofussil Court of Small Causes—Suit by plaintiff as owner to recover moveable property valued less than Rs.* 500—*Civ. Pro. Code*, 1859, *s.* 246—*Civ. Pro. Code*, 1877.—The Mofussil Court of Small Causes can take cognizance of a suit to recover possession of moveable property under Rs. 500 in value and attached in execution of a decree, brought by the owner thereof under the latter part of s. 246 of the Civ. Pro. Code (Act VIII of 1859), his application for the release of the said property under the former part of the section having been rejected. [*Expl.*, 8 C. 399; *D.*, 4 B. 503; *R.*, 7 A. 152.] Whether the Civ. Pro. Code (Act X of 1877) allowed such a suit as the above to be brought in a Court of Small Causes, was left undecided. NATHU GANESH v. KALIDAS UMED, **2 B. 365.** [*R.*, 7 A. 152.]

(213)—*Act* XI *of* 1865, *ss.* 6, 19—*Huts—Moveable or personal property.*—Huts are not immoveable property under s. 19 of the Small Causes Court Act. The word "moveable" does not comprehend everything which a judgment-debtor has a right to remove, but means property which is capable of being moved in an existent state. RAJ CHANDRA BOSE v. DHARMACHANDRA BOSE, **2 B.L.R. A.C. 77=10 W.R. 416.** [*F.*, 17 W.R. 309, 4 C. 665; *D.*, 14 B.L.R. O.C. 201.]

(214)—*Small Cause Court—Suit to recover thatch—Moveable property—Question of title.*—The thatch of a house is moveable property, more especially when such thatch has been severed from the house. A suit for recovery of the thatch is therefore a suit for recovery of moveable property cognizable by a Court of Small Causes, if the value of the subject-matter is less than Rs. 500. In determining such a

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

suit, the Court has power to adjudicate upon a question of title incidental thereto. RAJKUMAR MOOKERJEE v. PRANNATH MOOKERJEE, **7 B.L.R. App. 41=15 W.R. 499.**

(215)—*Suit for cattle or their value, Court competent to entertain.*—No action for cattle or the value of the same can lie in the Civil Court having jurisdiction within the local limits of the jurisdiction of a Court of Small Causes. RESOLUTION OF THE HIGH COURT AT FORT WILLIAM DATED 17TH APRIL, 1865, **2 W. R. S.C.C. Ref. 5.**

(216)—*Civ. Pro. Code, s. 246—Suit to recover personal property or its value—Suit for declaration of right—Small Cause Court—Jurisdiction.*—Suit by A against B to recover certain personal property or its value. The property had been attached by B in execution of his decree against C, and A's claim to the property had been rejected. The suit being one not for a declaratory decree but for personal property or its value, was held cognizable by a Small Cause Court. Where the suit is not by the owner of the property attached but by the decree-holder to establish his right to attach certain property as being the property of his judgment-debtor and not of the claimant to whom the property has been released, the Small Cause Court has no jurisdiction. JEEWA v. KULLOO, **84 P.R. 1870.** [*F.*, 80 P.R. 1886; *Appr.*, 91 P.R. 1886.]

(217)—*Execution of decree—Attachment of goods—Suit by person to be owner—Jurisdiction—Small Cause Court—Further appeal—Punjab Courts Act, s. 39.*—A suit brought by a person claiming to be the owner of goods attached in execution of a decree against another, the property being personal property within the meaning of s. 6 of the Small Cause Courts Act, and under Rs. 50 in value, was one of the nature of a suit cognizable by a Small Cause Court, so that s. 39 of the Punjab Courts Act would preclude a further appeal. JOWALA SINGH v. DEVIA, **167 P.R. 1882.** [*R.*, 80 P.R. 1886, 91 P.R. 1886.]

(218)—*Act* XXIII *of* 1861, *s.* 4—*Suit to recover moveable property wrongly sold in execution of decree against another party—Suit cognizable by Small Cause Court.*—Where plaintiff's sheep had been attached and sold in satisfaction of a decree against a third party, and one of the defendants was the purchaser of the sheep at the Court sale, a suit merely to recover the sheep or its value was cognizable by a Small Cause Court. K. N. BOOCHE NAIDOO v. R. LUCHMEEPATHY NAIDOO, **8 M. H.C. 36.** [*Diss.*, 7 A. 152, F.B.; *R.*, 2 B. 365.]

(219)—*Civ. Pro. Code (Act X of 1877), ss. 283, 57 (a)—Act* XI *of* 1865, *s.* 12—*Court of Small Causes—Jurisdiction.*—A suit by a defeated claimant, under s. 283 of Act X of 1877, to establish his right to, and to recover possession of, certain moveable property attached in execution of a decree of a Small Cause Court, is cognizable by, and must, therefore, under Act XI of 1865, s. 12, be instituted in a Small Cause Court. GORDHAN PEMA v. KASANADAS BALMUKUNDAS, **3 B. 179.** [*D.*, 4 B. 503, 7 A. 152, F.B.=4 A.W.N. 349.]

(220)—*Jurisdiction—Small Causes Court—Attachment by decree-holder of moveable properties—Claim—Release of attachment—Suit to establish right.*—A suit instituted for the purpose of proving that certain moveable property, consisting of gold and silver ornaments, and brass and copper pots and clothes, is the property of his judgment-debtors and therefore liable to attachment in execution of the decree obtained by the plaintiff, is maintainable in a Small Cause Court. JETHABHAI BHAICHAND v. BAI LAKHU; **6 B.H.C.A.C. 27.** [*R.*, 4 B. 503; *D.*, 2 B. 365.]

(221)—*Suit for recovery of debt on pledge—Jurisdiction—Small Cause Court.*—A suit by an unsuccessful intervenor for the recovery of a debt of Rs. 94 on the pledge of 2 ekka which had been attached and sold in execution of a decree against the principal debtors, the object of the suit being to obtain a decree against the latter and also to have the plaintiff's lien declared against the ekkas in the hands of the auction-purchaser, is one for the recovery of moveable property or its value, and as such is cognizable by a Small Cause Court. MASTA v. RADHA KISHEN, **5 P. R. 1889.** (91 P. R. 1886, *Appr.*)

(222)—*Jurisdiction—Small Causes Court—Moveable property—Dispossession by attachment order.*—A suit brought by an owner to recover moveable property, of which he has been dispossessed by an attachment order, may, when the value of the property is less than Rs. 500, be maintained in a Court of Small Causes. RADHA KISHEN v. CHOTEY LALL, **3 N.W. P. 155.** (3 N.W.P. 156, Note, *R.*) [*Diss.*, 7 A. 152, F.B.]

(223)—*Rejection of claim preferred to attached property—Suit to establish right to property and recover its value less than Rs. 500, maintainable only in the Small Cause Court.*—After the plaintiff's claim preferred in respect of some bricks which had been sold in execution of a decree was refused, he brought the present suit to establish his right to the bricks and to recover their value. Holding that the plaintiff ought to have sued in the Small Cause Court, the Sudder Ameen dismissed the suit. The contention on second appeal that there was a question of right in the case which could only be established in a regular suit, was not upheld by the High Court which decided that since the bricks were personal property and in value less than Rs. 500, the suit relating thereto would properly lie only in the Small Cause Court. WOOMESH CHUNDER BOSE v. MUDDUN MOHUN SIRCAR, **2 W.R. 43.** [*Appr.*, 2 B. 365; *Expl.*, 7 C. 608=9 C.L.R. 8; *R.*, 18 W.R. 337; *D.*, 7 A. 152, F.B.=A.W.N. 1884, 349.]

Small Cause Court, Mofussil, Jurisdiction of—continued.

——**1.—General**—*continued.*

(224)—*Mofussil Small Cause Courts Act*, 1865—*Recovery of moveables attached under Act* VIII *of* 1865.—The defendant attached the moveables belonging to the plaintiff under Act VIII of 1865. Plaintiff sued to recover the moveables or their value. The plaintiff's success therein involved a cancellation of the attachment without a decree for that relief. *Held*, that a Small Causes Court had jurisdiction. DAVUD BEG v. KULLAPPA, **11 M. 264.** [*D.*, 5 O.C. 190.]

(225)—*Suit by decree-holder to establish judgment-debtor's title to property attached, not cognizable by Small Cause Court.*—A suit brought by the claimant *as owner* of the attached property, for the recovery thereof, can be regarded as a suit 'for personal property' within the meaning of s. 6 of Act XI of 1865; but a suit by a decree-holder, to establish his right to attach and sell certain property as belonging to his judgment-debtor, cannot amount to a suit for personal property so as to be cognizable by a Court of Small Causes. CHHAGANLAL NAGARDAS v. JESHAN RAV DALSUKHRAM, **4 B. 503.** (6 B.H.C.A.C. 27, *R.*) [*Diss.*, 7 A. 152, F.B.=4 A.W.N. 349; *F.*, 8 B. 259.]

(226)—*Suit for declaration of ownership of attached moveable property, jurisdiction of Small Cause Court to entertain.*—Where a certain buffalo belonging to the plaintiff had been wrongly attached by the defendant, a revenue farmer, for the arrears of revenue due from a third person, the suit brought by the plaintiff for a declaration that the buffalo was not liable to be attached was regarded as a suit brought for recovery of personal property by the owner thereof, so as to be cognizable by a Court of Small Causes. PAGI PARTAB HAMIR v. VARAJILAL MULCHAND, **3 B. 259.**

(227)—*Suit for restoration of moveable property wrongfully taken—Suit of Small Cause nature—Act* XI *of* 1865—*Small Cause suit instituted and dealt with in ordinary Court—Civ. Pro. Code, s.* 586—*Second appeal.*—Where possession has been wrongfully taken, and the suit is for restoration, either to the plaintiff directly, or to some one wholly or partly as agent for him, it is a suit for property within the meaning of the Small Cause Court Act. If the property is moveable and of less than Rs. 500 in value, the suit is then a small cause. The plaintiffs in this case, who were co-members of a division of a caste along with the defendants, and as such tenants-in-common with them of certain cooking vessels, alleged that they were excluded by the defendants from the common possession and common use of those vessels, and sought to have the vessels given over by the defendants to a person who should hold them to the use of the plaintiffs as well as of the defendants. It was contended, on the question whether

Small Cause Court, Mofussil, Jurisdiction of—continued.

——**1.—General**—*continued.*

this second appeal lay, that, though actually a "small cause" the present suit having been instituted and dealt with in the ordinary Court, that circumstance involved the consequence that a second appeal would lie, but it was held that a small cause is such wherever instituted, and a second appeal in such a cause is excluded by s. 586, Civ. Pro. Code. KALIAN DAYAL v. KALIAN NARER, **9 B. 259.** [*F.*, 26 A. 358=A.W.N. 1904, 50.]

(228)—*Madras Act*, VIII *of* 1865, *ss.* 27, 75, *suit under—Power of Small Cause Court Act*, XI *of* 1865, *ss.* 6, 8—*Who may sue—Mode of exercising jurisdiction.*—It is competent to the Munsiff's Court on its Small Cause side to entertain, under s. 27 of Madras Act VIII of 1865, a suit for the recovery of the value of goods distrained for rent under the above Act and forcibly carried away from the person distraining. The general words of s. 27 of Act VIII of 1865 admit of the institution of the proceeding under it by either the landord or the person authorized to distrain. A petition and summons and an order of the Court after duly hearing the parties and their evidence appear to be the fitting mode of exercising the jurisdiction. VADAMALAI TIRUVANA TEVAR v. CARUPPEN SERVAI, **4 M.H.C. 401.** [*R.*, 13 M. 248.]

(229)—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 586—*Second appeal—Suit of the nature cognizable in Small Cause Courts—Provincial Small Cause Courts Acts* (IX *of* 1887), *sch.* II, *cl.* 35 (*j*)—*Illegal distress—Payment under pressure of issue of distress warrant.*—Where certain new rates were imposed upon the plaintiff by a Municipality, and the plaintiff at first refused to pay on the ground that they were illegally imposed, but, under the pressure of the issue of a distress warrant, did eventually pay and bring a suit for the recovery of the amount levied and damages: *Held*, that, as there was no distress, the suit was not one in tort, but for money had and received, and was cognizable by the Small Cause Court; that the mere fact that payment was made under pressure of the issue of a distress warrant did not bring the case within art. 35, cl. (*j*) of sch. II of the Provincial Small Cause Courts Act; and that, as the claim was below Rs. 500, no second appeal lay under s. 586, Civ. Pro. Code, 1882. CHAIRMAN OF SANTIPUR MUNICIPALITY v. BEPIN BEHARY SEN, **3 Ind. Cas. 429.**

(230)—*Municipal Commissioners, suit against—Jurisdiction of Small Cause Court—Reference to High Court—Act* XI *of* 1865, *ss.* 9 *and* 22.—S. 9 of Act XI of 1865 does not prohibit the institution of a suit against the Municipal Commissioners in a Small Cause Court. Under s. 22 of Act XI of 1865, a Small Cause Court ought not to make a reference upon a simple point, merely on the application of the parties,

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

unless it entertains a doubt upon the question. HARISH CHUNDER TALAPATTUR v. MR. W. P. O'BRIEN, **14 W.R. 248.**

(231)—*S. 2, arts. 8 and 13, Provincial Small Cause Courts Act, 1887—Municipal taxes.*—A suit for recovery of Municipal taxes by the proprietor of a *bustee* land from the owner of a hut in the *bustee*, is cognizable by the Provincial Small Cause Court. BROJONATH MITRA v. GOPI SHAKRANI, **23 C. 835.** [*R.*, 11 C.W.N 57 =5 C.L.J. 19.]

(232)—*Municipal tax—District Municipalities Act* (IV *of* 1884), *ss.* 49, 50, 53, 101—*Wrongful assessment—Suit to recover money illegally levied — Small Cause Court — Jurisdiction.*—When profession tax has once been paid in one Municipality and subsequently for the same period the tax is collected under protest a second time by another Municipality, the tax-payer is entitled to sue the latter Municipality for a refund of the money wrongfully collected from him. The suit will lie in the Civil Courts, and if the amount is within the pecuniary limits of a Small Cause Court, such a suit will lie in the Small Cause Court. TUTICORIN MUNICIPALITY v. SOUTH INDIAN RAILWAY, **13 M. 78.** [*R.*, 24 M. 205; *D.*, 19 M. 10.]

(233)—*Gumastah employed in collection of rent—Suit to recover excess expenses incurred in collection—Suits of Small Cause nature.*—Where a *goomastha* employed in the collection of rents sued to recover the excess expenses incurred over and above the collection of rents, *held* that the suit was maintainable in a Court of Small Causes and it would be quite an immaterial consideration that the nature of the defence rendered it necessary to investigate the accounts of the *Mehal*. PROSUNNO CHUNDER ROY v. SREENATH SREEMONEE, **7 W.R. 422.**

(234)—*Jurisdiction of Small Cause Courts.*—Where the only point in dispute in a suit was, whether the defendant had paid to the plaintiff the sum of money which the former had admittedly received on her behalf and as her agent, *held* that, if the defendant acted as agent of the plaintiff, there was a true contract implied between them, that the defendant would recover the sums due to the plaintiff and pay them over or account for them to her; and that the suit therefore was within the jurisdiction of the Court of Small Causes. SHUMBHOONATH MOZOOMDAR v. KASHEESUREE DEBEE, **13 W.R. 100.**

(235)—*Jurisdiction—Small Cause Courts—Parties—Officer of Government—Local Government, meaning of—Act* XI *of* 1865, *ss.* 1, 9.—A suit (if within the pecuniary and the other limits prescribed for Courts of Small Causes) in which an officer of Government is a party, may be entertained by a Court of Small Causes in the Mofussil. (10 B.H.C. 305, *R.*) The phrase "Local Government" used in s. 9 and defined in s. 1 of Act XI of 1865, does not apply to the Collector of a District, but rather to Governors or Lieutenant-Governors of Presidencies or Commissioners of Provinces. DESALJI MANAJI v. HEMADALLI IMAM HAIDARBAKSHA, **10 B H C. 308.**

(236)—*Small cause suit—Suit for money due on delivery, whether suit for account—Agency—Jurisdiction—Defendants residing at time of suit within jurisdiction—Mercantile dealings—Interest.* — The mere fact that there were dealings between plaintiff and defendant in respect of which a balance is due does not oust the jurisdiction of the Small Cause Court to entertain a suit for the recovery of that amount, if it is otherwise competent to try it, on the ground that it is a suit for account. A suit may be instituted within the jurisdiction of the Court where, at the time of the institution, the defendant actually and voluntarily resides, though such residence may be temporary. Mercantile dealings generally carry interest. A. S. KADAR ROWTHER v. M. L. VENCATACHELLAPATHY CHETTY, **14 Ind. Cas. 573.** (10 Ind. Cas. 883, *D.*)

(237)—*Suit on village accounts triable by.*—A suit on village or other accounts (not being partnership accounts) is amenable to the jurisdiction of a Small Cause Court. **3 P.R. 1866, Civ. Ref.**

(238)—*Act* XI *of* 1865—*Act* XL *of* 1858, *s.* 3—*Right of relative of minor to institute or defend suit—Certificate of administration.*—A Court of Small Causes instituted under Act XI of 1865 is competent under s. 3 of Act XL of 1858 to allow any relative of a minor to institute or defend a suit in his behalf (though a certificate of administration has not been granted to such relative) in any case in which such Court has jurisdiction in relation to the subject-matter of the suit. KANTO BEWAH v. NUND RAM NATH, **15 W.R. 369.**

(239)—*Contract—Liability of representative—Small Cause Court—Jurisdiction—Act* XI *of* 1865—*Debt contracted by mother—Liability of son—Estate inherited from mother.*—A Small Cause Court has jurisdiction to try a suit against a person as a representative of his mother who had made a contract, as the liability of a representative is classified under contracts in the Contract Act, and it is thus enforceable as a contract within the meaning of s. 6 of Act XI of 1865. Under Hindu law, a son, if he takes an estate by inheritance from his mother becomes her representative, and is liable for her debts to the extent of the property inherited. BISHEN DASS v. SIRDAR DIAL SINGH, **9 P.R. 1873.**

(240)—*Suit to recover specific sum of money—Jurisdiction—Small Cause Court.*—A suit by persons holding three shares in a tea garden against the representative of a fourth co-sharer, for a specific sum of money, under Rs. 500,

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

found due by the fourth co-sharer to the others who were alleged to have spent the money on the garden, such specific sum being settled and agreed to by the original fourth sharer in his life-time, as shown by a written agreement, is clearly one of the nature of a "small cause" under Act XI of 1865, which is still applicable, the suit being instituted before 1st July 1887. An appeal from such suit lies to the District Court and not to the Divisional Court. PAM SINGH v. DALIP SINGH, **28 P.R. 1889.**

(241)—*Small Cause Court—Jurisdiction—Implied contract—Contract of indemnity—Contract Act, IX of 1872, ss. 9, 70.*—If A buys a tenure at a public auction benamee in the name of B, he impliedly contracts to indemnify B against the claims of the superior landlord; and a suit by B against A to recover the amount of a decree obtained against him by the superior landlord will lie in a Small Cause Court. KADARESSUR MOOKERJEA v. GOOROO CHURN MOOKERJEA, **2 C.L.R. 388.** [*D.*, 9 A. 591.]

(242)—*Reg. IV of 1816, s. 5—Suits for sums not exceeding Rs. 10, if cognizable by Village Munsif's Court—Concurrent jurisdiction of Small Cause Court.*—A Small Cause Court has concurrent jurisdiction to try suits for a sum not exceeding Rs. 10, cognizable by a Village Munsif under s. 5, Reg. IV of 1816. PARASOORAMA PILLAY v. RAMASAMY *alias* C. RAMASAMY, **5 M.H.C. 45.** [*R.*, 13 M. 145.]

(243)—*Civ. Pro. Code, s. 15—Madras Act, I of 1889—Small Cause Court—Village Munsiff—Concurrent jurisdiction.*—The term "Court of the lowest grade" in s. 15, Civ. Pro. Code, refers only to Courts to which the Code of Civil Procedure is applicable, and the Court of a Village Munsiff not being such a Court, a suit cognizable by such a Court may be instituted in a Small Cause Court. MIRKHAN v. KADARSA, **13 M. 145.**

(244)—*Suit in District Munsiff's Court—Suit filed in Small Cause Court on the same day—Election.*—A suit, brought in a District Munsiff's Court, filed on the same day as a suit for the same amount brought on the same cause of action in the Small Cause Court, is no bar to the maintenance of the small cause suit, but the plaintiff must elect between the two. SUBRAMANYIAN v. GANAPATHI, **2 M. 123.**

(245)—*Agent, remuneration of, by share of profits—Partnership—Contract Act, s. 239—Suit against agent for balance due—Small Cause Court — Jurisdiction.*—Partnership according to the Contract Act (IX of 1872) is a relation which subsists between persons who have agreed to combine their property, labour and skill on some business, and to share the profits thereof between them. When a person supplies goods and employs another as his agent to sell them, remunerating him by half the profits,

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

there is no partnership between the two, as there is no combination of joint property or joint labour, and none of the essential elements of partnership; and suits arising out of such transaction are consequently cognizable by the Small Cause Court. CHIRAG ALI v. SIRDAR SHAH, **74 P.R. 1880.**

(246)—*Small Cause Courts Act—Suit for return of jewels pledged for partnership debt—Plea of non-dissolution of partnership—Jurisdiction.*—Plaintiff brought a suit for return of certain jewels alleging that the plaintiff and defendant originally constituted a partnership, that the plaintiff's jewels in dispute were pledged by the defendant for the payment of a partnership debt, and that the defendant had since retired from the partnership promising to return the jewels, but failed to do so. The defendant's plea was that the partnership was not dissolved and that the jewels were really mortgaged by the plaintiff. *Held* on the allegations in the plaint that the Small Cause Court had jurisdiction over such a suit, and that the defendant's plea denying the dissolution of partnership did not convert the suit into a partnership one so as to oust the jurisdiction of the Small Cause Court. KHADIM HOSSEIN v. ABDUL GHANI, **35 P.R. 1886.**

(247)—*Money promised as consideration for retirement of partner, suit for—Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), sch. II, art. 29 (c).*—Plaintiff alleged that he was once a member of a partnership, from which he retired under an agreement that the surviving partners would thereafter pay him a certain sum for his interest in the business, that that sum was never paid and was now due to him. It was contended on appeal that such suit was not cognizable by a Court of Small Causes by reason of cl. 29 (*c*) of the second schedule to Act IX of 1887, but it was *held* that the suit was not covered by that clause so as to be exempted from the jurisdiction of the Small Cause Court. That clause referred merely to a suit to ascertain the profits and loss of a business and to have a balance of a partnership account struck, and could not be regarded as intended to extend to the recovery of a mere debt due to a retired partner of the firm. FAUJI LAL v. CHANGA MAL, **19 A. 513 = A.W.N. 1897, 136.**

(248)—*Partnership—Servant remunerated by share of profits—Jurisdiction—Debt.*—Where the defendant was plaintiff's servant in charge of his shop, and was to be remunerated by a small share of the profits instead of fixed wages, a suit to recover the amount which the plaintiff found ought to have been in defendant's hands after deduction of the amount coming to him for his remuneration, is a suit for a debt or demand recoverable in the Small Cause Court. The mere fact that the defendant was to receiv

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

a certain portion of the profits of the shop cannot convert the suit into a suit for balance of partnership account. RAM KANAYA SHAHA v. BYKUNTNATH SHAHA, **15 W.R. 89.**

(249)—*Execution of decree—Jurisdiction—Civil suit.*—A civil suit having been taken up by a Tehseeldar and a decree passed, the whole proceedings were quashed as being without jurisdiction, and the Small Cause Court was directed to proceed with the case. **P.R. 1866, S.C.C. Rul. No. 1.**

(250)—*Registration Act* (XX *of* 1866), *s.* 53, *suits under—Jurisdiction—Small Cause Court.*—Mofussil Small Cause Courts have jurisdiction to entertain suits brought under s. 53 of the Registration Act, XX of 1866. SREEMUNT SEN v. GORAI GAZEE, **18 W.R. 199.**

(251)—*Decree upon bond specially registered under s. 53 of Act* XX *of* 1866—*Mofussil Small Cause Court, cognizability by—Second appeal from order in execution.*—A suit upon a bond, specially registered under s. 53 of Act XX of 1866, for less than Rs. 500, is cognisable by a mofussil Small Cause Court; and no second appeal lies, under s. 596, Civ. Pro. Code, against an order passed upon an execution application in respect of a decree made in such a suit. 14 W.R. 478 (=6 B.L.R. 177) does not govern Small Cause Courts in the mofussil. *Quære*:—Whether an appeal lies at all against such an order in execution proceedings in respect of such a decree? *Note*.—There is a difference of opinion on the question between the Calcutta High Court and those at Bombay and Allahabad. SRI BULLOV BHATTACHARJI v. BABURAM CHATTAPADHY, **11 C. 169.** [*Appr.*, 18 A. 481=16 A.W.N. 160, F.B.; *R.*, 12 C.P.L.R. 12.]

(252)—*Suit against the son also for the father's debt—Jurisdiction of the Court—Act* XI *of* 1865.—A suit against a Hindu father and son for a debt contracted by the father alone as manager and for necessary purposes, lies on the small cause side, under Act XI of 1865. KARUPPANA v. VIRABADRA, **6 M. 277.**

(253)—*Hindu Law—Father's debt—Liability of the son—Immorality.*—The fact that the son questions his liability to the debt of his father, on the ground of its being immoral or illegal, does not affect the jurisdiction of the Small Cause Court. GOPAL KRISHNA SASTRI v. RAMAYYANGAR, **4 M. 236.** [*F.*, 9 M. 250.]

(254)—*Suit against members of Hindu joint family for debt contracted by managing member for purpose binding on family—Small Cause Courts Act, sch.* II, *cl.* 19.—A Small Cause Court has jurisdiction to try a suit against the members of a joint Hindu family to recover a debt contracted by the managing member for a purpose binding on the family. (12 M. 349, *D.*) Cl. 19, sch. II, of the Small Cause Courts Act applies only to suits for a declaratory

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

decree properly so called, and not to a suit in which the declaration is merely introductory to the real relief sought for. REVUR SUBBA ROW v. PAPI REDDY, **8 M.L.J. 149.** (12 B. 578, *R.*)

(255)—*Mufassal Small Cause Court Act* (IX *of* 1887), *sch.* II, *art.* 38—*Family arrangement—Suit for maintenance—Jurisdiction.*—A Mufassal Small Cause Court has jurisdiction to entertain a suit for maintenance based on a family arrangement. KOMU v. KRISHNA, **11 M. 134.** [*D.*, 16 B. 267, 20 M. 29.]

(256)—*Decree for maintenance—Subsequent suit for arrears, cognisability of, by Small Cause Court.*—Where a person has obtained in the Civil Court a decree against the defendant for the right to claim maintenance, a Small Cause Court has jurisdiction to try and determine a suit for arrears of such maintenance. The defendant in the present suit had, in his defence in a previous suit in the Civil Court, agreed to give plaintiff maintenance and a decree for the right to maintenance at a certain rate *per mensem* was passed in plaintiff's favour against the defendant. There was thus in fact a contract on the part of the defendants followed by a decree to pay the plaintiff a monthly stipend, and the present suit for arrears of such maintenance therefore came indisputably within the jurisdiction of the Small Cause Court. MILAWA MUL v. MUSSAMMAT MOHNI, **138 P.R. 1879.**

(257)—*Jurisdiction—Suit for maintenance—Small Cause suit.*—A suit for maintenance by a Hindu widow lies in a Court of Small Causes in the Mofussil. JUDAL KOM RANCHAOD MULJI v. HIRA MULJI, **4 B.H.C.A.C. 75.** [*Not F.*, 24 W.R. 474; *D.*, 9 B.H.C. 283; *Cons.*, 12 B.H.C. 69, 1 C. 365; *R.*, 7 N.W.P. 261, F.B., 12 M. 260, F.B., 2 B. 494, 573, F.B., 624, F.B.]

(258)—*Agreement to pay maintenance in kind—Small Cause Court—Jurisdiction.*—A Small Cause Court has jurisdiction to entertain a suit for the breach of an agreement by which a person has agreed in writing with his brother's widow to deliver to her every year a specified quantity of paddy by way of maintenance. Y. PAUPAMMA v. CHINNA REDDY, **5 M.H.C. 432.**

(259)—*Provincial Small Cause Courts Act* (IX *of* 1887), *s.* 38—*Agreement for maintenance—Cognizability of suit.*—A, B, and two others, minors, were brothers. By a partition deed among them it was agreed that the minor's shares should be with A, and the minors should be under B's protection, and that A should pay B a certain amount every year for their maintenance. In a suit by B against A to recover arrears of maintenance under the above agreement, *held* that the suit did not fall within art. 38, sch. II, Act IX of 1887, and that the

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Advocate High Court

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

suit was, therefore, cognizable by a Small Cause Court. MOHIDIN VAVA RAVUTHAN v. MOOSA NAINA RAVUTHAN, **6 M.L.J. 137.**

(260)—*Provincial Small Cause Courts Act*, IX *of* 1887, *s.* 25 — *Sister making over property to brother—Allowance to be paid to sister out of her poperty — Suit to recover allowance due maintainable on small cause side.*—Where a sister made over to her brother her own property, and an allowance was to be paid to her out of the income of that property, a suit by her to recover the allowance thus payable by her brother was cognizable by a Court of Small Causes, inasmuch as the claim is in the nature of an annuity. SAMINATHA PANDARAM v. KUPPU UDAYAN, **13 M.L.J. 471.**

(261)—*Jurisdiction — Small Cause Court—Deferred dower.*—A suit for deferred dower payable upon the dissolution of marriage by divorce or death, is cognizable by a Court of Small Causes. HAYATUNNISSA BIBEE v. SHAIKH ASIROODDEEN, **18 W.R. 304.**

(262)—*Small Cause Court — Jurisdiction of —Claim for dower on contract.*—A claim for dower based on an express contract is cognizable in a Small Cause Court. FAZAL DIN v. MUSST. BASSA BIBI, **85 P.R. 1883.** (85 P. R. 1883, Note, *F.*)

(263)—*Suit on contract for dower—Jurisdiction—Small Cause Court.*—A claim based on a contract for dower, which has been reduced to writing, is within the jurisdiction of Small Cause Court. MAHIA v. MUSSAMAT IMAM BIBI, **85 P.R. 1883, Note.** [*R.*, 85 P.R. 1883.]

(264)—*Mahomedan Law—"Exigible dower," suit for—If congizable by Small Cause Court —Act* XI *of* 1865, *s.* 6 — *Court's decision on collateral matters.*—A Small Cause Court has jurisdiction, under s. 6, Act XI of 1865, to entertain a suit for "*muajjal*" of exigible dower due to the plaintiff under a kabinamah executed to her by her husband, although questions of considerable difficulty may be raised in it collaterally with regard to the validity of the marriage. The Court must investigate them in the best way it can; and its decision on such collateral matters has not the same effect as the decision of the Court which had jurisdiction to determine them in a suit regularly brought for the purpose. HALA KHOORY BIBEE v. SHAIKH HASOO KOSHYE, **17 W. R. 512.** [*R.*, 1 A. 377.]

(265)—*Act* IX of 1887 (*Small Cause Courts*), *ss.* 15 *and* 25, *sch.* II, *arts.* 38 *and* 41—*Jurisdiction—Suit cognizable by a Court of Small Causes.*—The members of the family of a deceased Muhammadan entered upon a private arbitration resulting in an award under which it was provided that the four sons of the deceased should contribute each an equal sum monthly towards the maintenance of certain female members of the family. The award also provided that the said sums were to paid to one of the brothers (the plaintiff) to be distributed by him, and that, in case of default, the plaintiff should have a right to realize the amounts from his brothers or their property. On default being made, the plaintiff filed a suit in the Court of Small Causes for Rs. 67-as. 8 principal, and Rs. 4, pies 9 interest, as arrears due to him for maintenance paid under the award and obtained a decree for the principal sum, *viz.*, Rs. 67 as. 8. The defendant then applied to the High Court for revision under s. 25 of Act IX of 1887 mainly on the plea of want of jurisdiction. *Held*, that the suit in question was a suit congizable by a Court of Small Causes, being a suit on award, and was not a suit within the purview of either art. 38 or art. 41 of sch. II of the Small Cause Courts Act. MUSAM ALI v. MOHSIN ALI, **A.W.N. 1890, 201.** [*Ap.*, 13 A. 277; *R.*, 14 A. 413.]

(266)—*Suit for money payable under an award—Suit for money wrongfully realized.*—*Held* that a suit for a sum (under Rs. 500) due under an award of arbitrators is a suit based on a contract and is cogoziable by a Small Cause Court. GANESHA v. DYALA, **57 P.R. 1877.** (90 P.R. 1875, *F.*)

(267)—*Civ. Pro. Code*, s. 327—*Award—Jurisdiction—Small Cause Court.*—A Small Cause Court has power to file, under s. 327 of the Civ. Pro. Code, an award for a sum not exceeding Rs. 500, if the defendants reside within its jurisdiction. GEORGE BRIDGE v. EDALJI MANCHARJI, **10 B.H.C. 54.**

(268)—*Act* VIII *of* 1859, *s.* 327—*Private arbitration award—Small Cause Court—Jurisdiction.*—A Small Cause Court has jurisdiction, under Act VIII of 1859, s. 327, to entertain an application to file a private arbitration-award relating to a debt not exceeding the amount cognizable by such Court, if the defendant resides within its jurisdiction. ELAM PARAMANICK v. SOJAITULLAH SHEIKH, **1 B. L.R. A.C. 43=10 W.R. 85.** [*F.*, 13 W. R. 233= 4 B.L.R. App. 82, 10 B.H.C. 54.]

(269)—*Suits on contracts and* quasi *contracts —Jurisdiction of Small Cause Court.*—Actions on *quasi* contracts as well as those on contracts, where the sum is less than Rs. 500, are cognizable by Small Cause Courts. (90 P.R. 1875, F.B., *F.*) A suit to recover a sum of money payable by the defendant to the plaintiff under an award of arbitrators appointed by the parties, is a suit on a contract in the strict sense of the term, and is cognizable by the Small Cause Court. A suit to recover a sum of money on the ground that the defendant, in violation of the terms of an award which awarded the plaintiff and the defendant each half of a certain debt, wrongfully realized the plaintiff's half as well as his own, is not a suit on a contract, but is an action for money had and received—an action on a *quasi*-contract, and

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

as such is cognizable by the Small Cause Court. GANESHA v. DYALLA, **57 P.R. 1877.** [*R.*, 73 P.R. 1877, 8 P.R. 1883, F.B.]

(270)—*Soldier—Army schoolmaster—Cantonment Court of Small Causes—Jurisdiction.*—A European soldier, not doing duty as a soldier, but in civil employ as schoolmaster, in the army, not being liable to a Court of Requests, is not exempted from liability to a Cantonment Court of Small Causes. The fact of being a soldier is no bar to an action and the basis of a valid plea to the jurisdiction. MARWADY BEEJARAJOO v. HAYNES, **6 M.H.C. 83.**

(271)—*Act* V *of* 1869, *Part* III—*Suits against sepoys—Protection from arrest or attachment.*—*Held* that the Cantonment Small Cause Court had jurisdiction to decree claims against Sepoys, and although all attested persons were free from arrest, and regimental necessaries, pay, &c., could not be attached, a decree was obtainable as of right by the claimant who proved his case. There were no doubt, restrictions as to the mode of realizing a decree, but that is no reason why a decree should not be passed. CASE REFERRED BY CANTONMENT SMALL CAUSE COURT JUDGE, MEEAN-MEER, **43 P.R. 1871.**

(272)—*Act* XXII *of* 1864, *ss.* 6, 7, 9—*Act* XI *of* 1865, *s.* 12—*Small Cause Court in Cantonment—Small Cause Court powers of Cantonment Magistrate—Absence of Cantonment Magistrate on leave—Appointment of Assistant Cantonment Magistrate—Jurisdiction.*—By a notification published by the Punjab Government under authority conferred by s. 6 of Act XXII of 1864, a Court of Small Causes was established within the cantonment of Jalandhar, with jurisdiction up to Rs. 500. Subsequently one M was appointed Magistrate invested with first-class powers under s. 20 of the Crim. Pro. Code, within the limits of the Cantonment. M then proceeded on leave for 3 months, and during his absence B was appointed to officiate as Magistrate with second-class powers, and was also empowered to try Small Cause suits in the Cantonment up to Rs. 50. *Held* that M who was invested with the powers of a first Class Magistrate became, under s. 6 of Act XXII of 1864, *ex officio* Judge of the Small Cause Court in the Cantonment with jurisdiction up to Rs. 500 in value; that as B was invested with powers of a Second Class Magistrate only under s. 20, Crim. Pro. Code, and with power under s. 9 of Act XXII of 1864, to try Small Cause suits up to Rs. 50, he was not a Cantonment Magistrate within the meaning of s. 6 of Act XXII of 1864, but only an Assistant Cantonment Magistrate, and could not try suits above Rs. 50; that the notification appointing B did not either purport or operate to reduce the pecuniary limit of the jurisdiction of the Jalandhar Small Cause Court from Rs. 500 to Rs. 50; that the absence on leave of M did not affect the jurisdiction of the Court as regards

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

suits between Rs. 50 and Rs. 500, and that, consequently, the jurisdiction of Ordinary Civil Courts to entertain such suits during M's absence was barred by s. 12 of the Small Cause Courts Act, 1865, which in this respect applies to Cantonment Small Cause Courts under s. 7 of Act XXII of 1864. HULAS RAI v. REHMATULLA, **95 P.R. 1877.** [*R.*, 17 P.R. 1878, Cr., 80 P.R. 1887.]

(273)—*Non-commissioned officer in civil employment—Jurisdiction of Civil Court—Decree, execution of.*—Any soldier or non-commissioned officer, so long as he is not serving in the army, but has a civil employment and resides beyond Military Cantonments, is within the jurisdiction of Civil Courts even in cases below £ 30. It is in conformity with law to allow execution of a decree against the civil pay of such officer. MR. M. A. COHEN v. MR. MCCARTHY, **14 W.R. 231.**

(274)—*S.* 99, *Mutiny act—Action of debt against Military officers—Small Cause Court—Jurisdiction.*—An action of debt exceeding Rs. 400 in amount and less than Rs. 500, against a Military officer residing within the jurisdiction of the Small Cause Court of Ferozepur was *held* cognizaable by the Small Cause Court at Amritsar where the cause of action arose. S. 99 of the Mutiny Act does not exclude the jurisdiction of the Amritsar Small Cause Court to try such suit. MESSRS. E. BYRAMJI AND CO. v. CAPTAIN E. R. IVES, **8 P.R. 1880.**

(275)—*Jurisdiction—Small Cause Court—Defendant not residing within jurisdiction.*—*Held*, that a Court of Small Causes has jurisdiction to entertain a suit against a military officer not residing within the jurisdiction of such Court when the cause of action arose within such jurisdiction. 1 P.R. 1893, F.B. has become obsolete by the repeal of s. 151 of the Army Act, 1881. PHELPS & CO. v. CAPTAIN H. S. HAMMOND, **37 P.L.R. 1901=93 P.R. 1900.**

(276)—*Act* XI *of* 1865, *s.* 12—*Mofussil Small Cause Court—Wages under Rs.* 50.—There is nothing in s. 12, Act XI of 1865, to lead to the inference that suits for wages under Rs. 50 against European British Subjects cannot be tried in a Small Cause Court, though it may preserve the jurisdiction of Magistrates in such cases, which was created by the 53 Geo. III, c. 155, s. 106 MIRZA RAMZAN BEG v. J. COOK, **6 B.L.R. App. 91=14 W.R. 428.**

(277)—*Army Discipline and Regulation Act*, 1879—*Soldier in active military employ—Suit below value thirty pounds—Jurisdiction of Small Cause Court—Lahore Fort, within Municipal limits and Territorial jurisdiction of the Lahore Small Cause Court.*—Where the Small Cause Court has jurisdiction over a suit in other respects, the mere circumstance that the defendant was a soldier of Her Majesty's Regular Forces in active military employ would not of itself oust

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

the Court of its jurisdiction. Soldiers of the regular forces are amenable to be sued in the ordinary Civil Courts, after notice in writing has been given to them or left at their quarters, irrespective of the amount of the claim, but they cannot be *taken out of the service*, or *compelled to appear in person*, where the debt does not exceed thirty pounds, and, in carrying out execution, the exemptions embodied in proviso 1 of s. 138 of the Army Discipline and Regulation Act of 1879, must be observed. As the Fort of Lahore lay within the geographical area defined by notifications as constituting the boundaries of the Municipality of Lahore, the Fort must be held to be within "Municipal limits" and, therefore, within the Territorial jurisdiction of the Court of Small Causes, Lahore. PIARE LAL v. SERGT. W. C. KERR, **125 P.R. 1881.**

(278)—*Sargeant of the Regular forces in the Barrack Department—Army Act.*—A sargeant of the Regular forces in the Barrack Department, at Meean Meer, does not come under s. 151 of Army Act and a suit against him can be tried by a Small Cause Court. DINSHAW AND CO. v. SERGEANT STOCKEY, **48 P.R. 1893.**

(279)—*Act* XI *of* 1865, *s.* 5—*Jurisdiction.*—S. an officer in a Regiment stationed at V, while absent on leave on medical certificate at Madras, rented K's house at Madras. In a suit by K against S for the recovery of the rent, in the Small Cause Court of V, where it appeared that S was residing at Madras at the time of the institution of the suit but returned to V previous to the hearing of the suit, *held* that there was nothing in point of law to prevent the Judge of the Small Cause Court of V from affirming his jurisdiction. D. KISSUN SINGH v. LIEUT. R.L.N. STURT, **5 M.H.C. 471.**

(280)—*Cases where Small Cause Courts held to have no jurisdiction—Question of right.*—A Small Cause Court has no power to determine finally a question of right. PORAN SOOKH CHUNDER v. PORBUTTY DOSSEE, **3 C. 612=1 C.L.R. 404.** [*R.*, 8 C. 483=11 C.L.R. 57, F. B., 2 M.L.J. 36.]

(281)—*Small Cause suit—Questions of title by inheritance.*—Where the plaintiff, in a suit otherwise cognizable by a Court of Small Causes, bases his claim on his right of inheritance, directly, not incidentally, raising a question of title such as could not properly be disposed of in such Court, the ordinary Courts have jurisdiction. MUHAMMAD ISHARAT ALI v. GHULAM HUSAIN, **A.W.N. 1881, 162.**

(282)—*Jurisdiction of Small Cause Court—Suit for declaration and consequential relief.*—A suit by the plaintiff for a declaration of his title as heir to a deceased person, and for consequential relief, is not cognizable by a Small cause Court. KOLA AHEER v. MUSUMMAT SAJNA AHIMUR, **3 N.W.P. 105.**

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

(283)—*Declaratory decree — Jurisdiction of Small Cause Court—Determination of co-parcener's rights in moveable property—Small Cause Court.*—A Small Cause Court cannot entertain a suit for a declaratory decree. A Small Cause Court is competent to determine and adjudicate upon the co-parcenary rights of the parties in respect of moveable property; but it cannot make a declaratory decree of the relative rights of the parties. AKBAR ALI v. JEZUDDIN, **8 C. 399.** [*Cons.*, 7 A. 152.]

(284)—*Small Cause Court—Jurisdiction—Equity and justice.*—A case which is not one of damages or of breach of contract is not cognisable by a Court of Small Causes, if the defendant's liability arose out of the general principles of equity and justice. ITCHA MOYEE DASSEE v. BAMA SOONDURREE DOSSEE, **25 W.R. 73.**

(285)—*Suits of Small Cause nature—Question of title.*—The plaintiff sued in a Court of Small Causes for recovery of Rs. 40, the value of certain trees which the defendant had cut down and removed. The claim was based on the plaintiff's right to the cultivation of the land on which such trees stood. The defendant alleged that the cultivation of such land had belonged to him, and the plaintiff had wrongfully planted such trees on the land. *Held* that the suit involved a question of title and was not cognizable by a Court of Small Causes. DHUMAN v. SHANKAR, **A.W.N. 1882, 27.**

(286)—*Jurisdiction—Small Cause Court—Suit to set aside order under s. 246 of Act* VIII *of* 1859.—A suit to set aside a miscellaneous order passed under s. 246 of Act VIII of 1859 and to establish the title of the judgment-debtor to the property attached, is not cognisable by a Court of Small Causes. BALMOKUND v. LEKHRAJ, **3 N.W.P. 156, Note, F.B.** [*F.*, 3 N.W.P. 208, F.B.; *R.*, 3 N.W.P. 155, 7 A. 152, F.B.]

(287)—*Act* IX *of* 1850, *ss.* 91, 98—*Jurisdiction—Court of Small Causes.*—A Small Cause Court (Madras) has no jurisdiction under ss. 91, 98 of Act IX of 1850 to try questions of doubtful title *bona fide* raised by the persons in possession. MUHAMMAD ESUF SAHIB v. GEORGE AND JANE, **4 M. 385, F.B.**

(288)—*Act* VIII *of* 1859, *s.* 246—*Act* XI *of* 1865, *s.* 6—*Jurisdiction.*—A Small Cause Court had no jurisdiction to entertain a suit by the decree-holder to establish his judgment-debtor's title to the property, which had been released from the attachment on the application of a claimant. RAMDHUN BISWAS v. KEFAL BISWAS, **1 B.L.R.S N. 10=10 W.R. 141.**

(289)—*Suit for damages—Small Cause nature—Second appeal—Small Cause Court—Question of title—Jurisdiction*—Res judicata—*Title tried in Small Cause Court.*—A suit for damages amounting to less than Rs. 500, being in its nature a small cause, does not admit of a second

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

appeal, even though a question of title to land has incidentally to be tried and the suit is brought in the District Munsiff's Court. The question has reference to the mode of adjudication and not to the forum. [*R.*, 17 C. 707, 23 M. 547.] A Small Cause Court is not ousted of jurisdiction by its having to try incidentally a *bona fide* question of title. In such a case the Court may properly grant an adjournment so that the question may be tried and determined by the proper tribunal. A Small Cause Court should not proceed with a case, when it appears that the substantial object of the suit is to try the title under cover of a small cause claim. [*F.*, 15 B. 400.] The decree is the only final decision and the incidental decision upon the question of title by a Small Cause Court cannot, in any subsequent proceeding, be *res judicata* under the language of the Civ. Pro. Code.—*Per Muthusami Ayyar, J.*—If the matter adjudicated on in a suit, is only incidentally in issue or cognizable, the adjudication is final, whether by a Court of concurrent or limited jurisdiction only for the proper purpose and object of that suit. MANAPPA MUDALI v. S.J. MCCARTHY, **3 M. 192, F.B.** [*F.*, 1 M.L.J. 313, 2 M.L.J. 36; *R.*, 13 M. 287.]

(290)—*Subordinate Judge with Small Cause Court powers—Extent of original jurisdiction wider than that of Small Cause jurisdiction—Transfer of Small Cause decree to original side, how effected.*—A Subordinate Judge invested with Small Cause Court powers has generally to follow the procedure prescribed in the Civ. Pro. Code, both in trial and execution whether the suit is a Small Cause or not. If the two jurisdictions assigned to the Subordinate Judge's Court and to the Subordinate Judge personally are locally co-extensive, there is no distinction of sides or branches. But where, as in some cases, the ordinary jurisdiction is wider locally than the Small Cause jurisdiction, the Court is, in that part of its territory which lies outside the Small Cause Court jurisdiction, to be regarded as a separate Court so far that a decree in a Small Cause should not generally be executed on property beyond the Small Cause Court jurisdiction without a transfer, *i.e.*, a dealing with the execution as in a suit tried in the usual way, for reasons to be recorded in writing. DHARAMDAS SANTIDAS v. VAMAN GOVIND, **9 B. 237.**

(291)—*Suit for debt secured by mortgage without asking for enforcement of lien—Jurisdiction—Small Cause Court.*—Suits for money, whether arising out of a mortgage or other contract, are cognizable by the Small Cause Court where the relief sought is merely a decree for money; but, the Small Cause Court has no power to hear a suit where the relief sought is the enforcement of any right against immoveable property, or where the prayer is that the decree may specify that the money awarded is to be recovered from specific immoveable property. JEHANGIR KHAN v. HOOKMA MAL, **30 P.R. 1875.** [*R.*, 73 P.R. 1876.]

(292)—*Mortgagee dispossessed of mortgaged property—Suit to recover mortgage-money—Prayer for other relief—Suit of small cause nature.*—Plaintiff alleged that he was the representative of the mortgagee and that he was forcibly dispossessed of the mortgaged property by the defendant, the mortgagor. The prayer in the plaint was that a decree be given him for the amount due under the mortgage and that any other relief to which he may be entitled be granted to him. The suit was held to be not one of a small cause nature. The plaint and the prayer in it showed that the suit, as instituted, was not one cognizable by a Small Cause Court. There was no specific prayer for recovery of possession of the mortgaged property, but the above prayer was sufficient to cover that relief if the circumstances proved showed that the Court could grant it and the Court in which the suit was instituted was one competent to decree possession. ISHAR SINGH v. BALBHADDAR DAS, **24 P.R. 1890.** [*D.*, 1 P.R. 1900.]

(293)—*Small Cause suit—Suit for declaration of lien on mortgaged property—Jurisdiction.*—A suit which is not only for the recovery of the money due upon a bond, but also for a declaration of the plaintiff's lien on the property mortgaged by it, is not one cognizable by a Small Cause Court. RAM NARAYAN MOOKERJEE v. SRIMATI SARADA DEBI, **6 B.L.R. App. 39.**

(294)—*Suit on hypothecation bond for money due—Small Cause Court — Jurisdiction.*—A mortgagee cannot enforce in the Small Cause Court his lien on the land, but he may sue in such Court for the debt, abandoning his claim over the land. If, however, the trial and decision of the case should eventually be found to involve an account of the profits of the land, the jurisdiction would be barred. AMICHAND v. BOODAH, **71 P.R. 1867.**

(295)—*Mortgage—Suit by mortgagor against mortgagee for account of profits and settling amount payable on mortgage security—Small Cause Court suit—Jurisdiction.*—A suit by a mortgagor against a mortgagee, who is rightfully in possession, for an account of the profits and to settle the amount payable on the mortgage security after the whole account had been taken, is not one of the nature cognizable in a Small Cause Court. THE COLLECTOR OF SHAHJAHANPUR v. MEHTAB KUNWAR, **A.W.N. 1885, 174.**

(296)—*Mortgage bond—Right of mortgagee, nature of.*—The right which accrues to a lender of money under a mortgage-bond which provides that the amount borrowed thereunder should be re-paid on a specified date, is to have his mortgage lien on the land declared, and the property sold in satisfaction of his debt, and, if

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

the proceeds be insufficient to satisfy the debt, to proceed against the debtor for any balance of the claim. A suit on such a bond as the above is not cognizable by the Small Cause Court, because the Court could not give to the plaintiff such a decree as the one mentioned above, or the remedy which alone he is entitled to. LLOYD'S BANK v. RINCHIDIN, **14 W.R. 214.**

(297)—*Suit by mortgagee to compel mortgagor to repay Government assessment—Jurisdiction—Mofussil law.*—A suit, the subject matter of which is an obligation in equity on the mortgagor to repay what another has been obliged to pay for him, should be tried by the Principal Sadar Amin and is not cognizable by a Small Cause Court. VITHOBA v. SHABAJIRAV, **5 B.H.C.A.C. 122.**

(298)—*Jurisdiction—Small Cause Court—Enforcement of mortgage decree.*—When the claim was not for a debt, or for damages or for the recovery of property, but to obtain an order from the Court, that the amount of certain decrees should be enforced against the defendant's person and property, because he had, by removing a house which was the subject-matter of the plaintiff's mortgage, deprived the plaintiff of the lien upon that house to which he was entitled—when the claim was for such an order, the Court of Small Causes has no jurisdiction to pass such an order. MOULVIE OMER KURIM v. LALA SHEWAN LALL, **4 C.L.R. 291.**

(299)—*Dispossession in execution of decree—Decree set aside on appeal—Suit to recover mesne profits—Provincial Small Cause Courts Act* (IX *of* 1887), *sch.* II, *art.* 31.—A suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant and who dispossessed the plaintiff in execution of a decree afterwards set aside on appeal is not cognizable by a Court of Small Causes, even when the amount claimed does not exceed Rs. 500. SAVARIMUTHU v. AITHURUSU ROWTHAR, **25 M. 103, F.B.=11 M.L J. 428.** (24 M. 118, 22 M. 196, 23 C. 884, *Cons.*) [*F.*, 13 M.L.J. 136, 7 O.C. 202.]

(300)—*Provincial Small Cause Courts Act*, IX *of* 1887—*Suit to recover mesne profits—Jurisdiction of Court of Small Causes.*—A suit to recover mesne profits is not cognizable by a Court of Small Causes. INNASI MUTHU AND THOMASU v. SAVUTHIA PILLAI, **13 M.L.J. 136.** [*R.*, 8 Ind. Cas. 270; *D.*, 7 Ind. Cas. 390.]

(301)—*Suit for mesne profits—Cognizability by Small Cause Court.*—A Court of Small Causes cannot take cognizance of a suit for mesne profits. LACHMAN RAO v. WAMAN RAO, **16 C.P.L.R. 1.** (23 A. 437, 25 B. 85, 23 C. 884, 24 M. 118, *Not F.*)

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

(302)—*Provincial Small Cause Courts Act*, 1887, *sch.* II, *cl.* 35 (*i*)—*Obstruction of water course—Diversion.*—Where a person wrongfully obstructs the flow of water, he diverts the water, and a suit for compensation therefor in a Small Cause Court is barred by sub-cl. 1, cl. 35 of Act IX of 1887. PERIAKARUPPAN v. PALANIYANDI, **18 M. 28.** [*F.*, 18 P.L.R. 1907 =134 P.R. 1906.]

(303)—*Jurisdiction—Revenue, Small Cause and Civil Courts—Suit by owner of canal for share of produce of land cultivated under it.*—The plaintiff, a superior landlord, by virtue of his being the owner of a certain canal which irrigated the defendant tenant's land, claimed a certain share of the produce of such land; in addition to the 'abaina' or water rate as compensation for his cleaning out and repairing the canal year by year. *Held* that such a suit being a claim for a special charge levied by the plaintiff for clearing the canal, cannot be said to be a revenue suit as described in s. 45, cl. (*f*) of the Punjab Courts Act since the payment cannot in any sense of the term be said to be a 'rent' which was always paid to the inferior landlord; nor could the suit be said to be one of a Small Cause nature, since it was not based upon any alleged covenant between the parties. Such a suit was in fact a claim to enforce a special kind of customary payment in connection with a peculiar local custom of canal irrigation, and was therefore cognisable by a Civil Court. SHAJAWAL v. GHOLAM KHADIR KHAN, **103 P.R. 1887.**

(304)—*Art.* 35, *cl.* (*j*), *Provincial Small Cause Courts Act—Suit for money paid in consequence of distress and for damages—Civ. Pro. Code*, 1882, *s.* 586—*Second appeal.*—A suit by a claimant, whose crops were distrained for arrears of rent due by another, to recover back money paid to redeem the crops, and for damages caused by the distraint falls, (so far as the claim relates to damages), within art. 35, Provincial Small Cause Court Act. So such a suit is not entirely cognizable by a Small Cause Court. [*F.*, 21 M. 239=8 M.L.J. 165, 4 N.L. R. 49.] A second appeal lies in such a suit. DEWAN ROZ v. SUNDAR TEWARY, **24 C. 163.**

(305)—*Suit for value of grain as wages for agricultural service—Jurisdiction—Small Cause Court.*—Plaintiff's claim was for the value of grain due to him from the defendants as wages for service rendered as an agricultural or farm sweeper. *Held* that, as the suit was one virtually for a share of the produce of the land, it was not within the jurisdiction of a Small Couse Court. GANDA v. GANGOO, **68 P.R. 1873.** [*D.*, 28 P.R. 1882.]

(306)—*Suit for arrears of grazing dues—Small Cause Court—Jurisdiction.*—A suit by the lessee from a grantee of waste land for arrears of grazing rent, where there is no contract express or implied between lessee and the

Small Cause Court, Mofussil, Jurisdiction of—continued.

—1.—General—*continued.*

villagers, was held not to lie in the Small Cause Court against a villager using the land for grazing purposes. DITTOO SHAH v. NANUCK, **11 P.R. 1872.** [*R.*, 63 P.R. 1877.]

(307)—*Suit for grazing dues—Jurisdiction—Act* XI *of* 1865, *s.* 6, *proviso* 4.—A suit for grazing dues, though founded on a contract within the meaning of s. 6 of Act XI of 1865, was held to be excluded from the cognizance of a Small Cause Court, under cl. 4 of the proviso to that section, as it was a claim for which, under Financial Commissioner's Book Circular No. 46 of 1860, a suit might have been brought before a Revenue Officer at the time when Act XI of 1865 was passed. HAKAM v. SHANKAR DASS, **63 P.R. 1877.**

(308)—*Act* XI *of* 1865, *s.* 6—"*Rent*," *meaning of—Power of Small Cause Court.*—The word "rent" in s. 6 of Act XI of 1865 was intended to be understood in the ordinary sense of a return in money or kind for the enjoyment of specific property held by one person from or under another. So a Court of Small Causes has no jurisdiction to entertain a suit to recover the amount of a trade impost alleged to be leviable from the defendant in common with all other persons carrying on the trade of weaving within a particular district. THE JAGHIRDAR OF ARNEE v. PERYAANNA MUDELY, **5 M.H.C. 317.**

(309)—*Civ. Pro. Code*, 1882, *s.* 586—*Provincial Small Cause Courts Act*, IX *of* 1887, *s.* 15, *sch.* II, *art.* 8, *proviso—Suit for rent.*—By s. 15 of the Provincial Small Cause Courts Act, suits for rent other than house-rent are excluded from the cognizance of Small Cause Courts. A notification by the local Government under the proviso to art. 8 in the second schedule of the Act, investing Judges of Small Cause Courts with authority to try such suits within a certain pecuniary limit on the small cause side, does not bring all such suits under the category of "suits of the nature cognisable by Small Cause Courts" within the meaning of s. 586 of the Civ. Pro. Code. A second appeal, therefore, lies in a suit for rent other than house-rent, though the value of the original suit does not exceed Rs. 500. VEDACHALA MUDALI v. RAMASAMI RAJA, **22 M. 229.** [*Overruled*, 23 M. 547, F.B.]

(310)—*Jurisdiction—Small Cause Court—Suit for damages on account of rent—Proper remedy.*—Where there is no contract, express or implied, between the plaintiff and the defendant, no suit would lie for use and occupation. Where, therefore, the plaintiff sues for damages on account of rent, alleging that the defendant had removed a lock placed by her on her house and taken possession of it, it is to be regarded as an action for trespass brought to try a question of title. A Small Cause Court has no jurisdiction to try a suit of this nature; and the proper remedy to the plaintiff is by an action of ejectment in the ordinary Civil Courts, to which, if he chooses, he may add a claim for mesne profits for the period during which the defendant has been in occupation. JAMNADAS v. BAI SHIVKOR, **5 B. 572.** [*F.*, 31 C. 340=8 C.W.N. 246; *R.*, 6 B. 79, 25 B. 85, 31 C. 1001; *D.*, 5 B. 400, 23 C. 884.]

(311)—*Mofussil Small Cause Courts Act*, XI *of* 1865.—A suit for rent is cognizable by a Small Cause Court only when the claim is founded on contract. A claim by a landlord against a sub-tenant is not cognisable as on an implied contract. MANISHA ERADI v. SIYALI KOYA, **11 M. 220, F.B.** [*D.*, 22 M. 149.]

(312)—*Provincial Small Cause Courts Act*, IX *of* 1887, *sch.* II, *cl.* 31—*Suit for melvaram wrongfully taken away—Jurisdiction of Small Cause Court.*—A suit for melvaram wrongfully taken away is a suit for the profits of immoveable property wrongfully received within the meaning of cl. 31 of sch. II of Act IX of 1887 and is not cognizable by a Court of Small Causes. MUTHUKARUPPA CHETTY v. SAKKARA THEVAN, **5 M.L.J. 232.**

(313)—*Arrears of rent and assessment, suit for—Small Cause Court — Jurisdiction.*—A Small Cause Court has no jurisdiction to entertain a suit for arrears of rent, and for assessment of rate, in respect of land for which no rent has ever been paid. GOPEE NATH GHOSE v. KEDAR NATH CHUCKERBUTTY, **23 W.R. 426.**

(314)—*Suit for rent—Defendant bona fide setting up title in others—Small Cause Court—Jurisdiction.*—A Small Cause Court has no jurisdiction to try a suit for rent where the defendant *bona fide* sets up by way of defence that the title to the land in respect of which the rent was claimed has passed from the plaintiff to others, since the creation of tenancy between the plaintiff and defendant, and that the rent claimed has accrued due after the determination of the plaintiff's title as landlord. D. VENKATACHALAM v. THIMMA NAIKAN, **5 M.H.C. 64.**

(315)—*Rent suit—Title—Small Cause Courts—Jurisdiction.*—Where plaintiff brings a rent suit for land owned in virtue of a sale-certificate in execution of a decree, defendant urging that the holding is expressly excluded from the certificate, *held* that the material issue was as to the alleged agreement and that, if the plaintiff failed to prove it, the issue would be as to whether the land belonged to him or to the defendant, and would require to be settled in the Civil Court. KHUDEERAM BISWAS v. KORAL BUDONEE DOSSEE, **21 W.R. 379.**

(316)—*Provincial Small Cause Courts Act* (IX *of* 1887), *sch.* II, *cl* 8—*Jurisdiction—Suit for rent of land.*—A Small Cause Court has no jurisdiction to entertain a suit for arrears of rent of land under cl. 8 of sch. II of

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

the Provincial Small Cause Courts Act, and the Court could not have jurisdiction to try such a suit merely because no objection was taken by the parties. SHEIK KADIR BAX v. SHEIK ISMAIL MISTRY, **4 Ind Cas. 493.**

(317)—*Suit by tenant for recovery of excess rent—Small Cause Court—Jurisdiction—Act* XI *of* 1865, s. 6, *proviso* 4.—A suit by a tenant against his landlord for exaction of rent in excess of the amount rightly payable in respect of land cultivated by him could have been brought before a Revenue Officer at the time of passing of Act XI of 1865. A Small Cause Court had therefore, no jurisdiction to try such a suit under the provision of proviso 4 to s. 6 of Act XI of 1865. RAM SARN v. MASAHIB, **87 P.R. 1883.**

(318)—*Act* X *of* 1859—*Decree for abatement of rent—Suit to recover excess rent levied—Jurisdiction.*—Where a lessee having obtained a decree for abatement of rent under Act X of 1859, on the ground that the land fell short of the quantity specified in the lease, brought a suit in the Small Cause Court to recover the excess rent levied from him between the date of taking possession, and of the Act X decree, *held* that the Small Cause Court had no jurisdiction in the case; and that, if the suit did lie at all, it would be a suit for an illegal exaction of rent, and such suit must, according to Act X of 1859, be brought in the Revenue Court and not elsewhere. SURBO CHUNDER DOSS v. WOOMANUND ROY, **11 W.R. 412** [*Rel. on*, 3 C.L.J. 143; *D.*, 16 W R. 173.]

(319)—*Increased rent, suit to assess—Land in town—Erection of building—Small Cause Court—Jurisdiction—Act* XI *of* 1865, *s.* 6.—A Small Cause Court has no jurisdiction to entertain a suit to assess increased rent in respect of land in a town upon which either a house or a shop stands, such a suit not being one for rent within the meaning of s. 6, Act XI of 1865. JOY KISHORE CHOWDRAIN v. NUBEE BUKSH, **17 W.R. 178.** [*Expl. & D.*, 19 W.R. 308]

(320)—*Suit for rent—No ascertained contract between parties—Suit not cognizable by Small Cause Court.*—A suit by a zemindar against a ryot for arrears of rent is not cognizable by a Court of Small Causes, when there is no contract between the parties for the payment of the rent sued for. KUMARA VENKATACHALA REDDIAR v. NARAYANA REDDY, **4 M.H.C. 393.** [*R.*, 5 M.H.C. 172, 3 M. 192, F.B., 11 M. 220, F.B.; *D.*, 7 M.L.T. 350.]

(321)—*S.* 3, *cl.* 5, *Act* VIII *of* 1885 (*Bengal Tenancy*)—*Suit for rent in kind or its money value*—*S.* 159, *art.* (3), *Act* IX *of* 1887 (*Provincial Small Cause Courts*)—*Rent—Damages for breach of contract.*—A suit for rent in kind or its money value is a suit for rent and not one for damages, and is not cognizable by a Provincial Small Cause Court. SHOMA MEHTA v. RAJANI BISWAS, **1 C.W.N. 55.** (1 A. 217, F. B., *F.*; 11 W.R. 151, 25 W.R. 140, *R.*)

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

(322)—*Agricultural land—Suit for rent—Jurisdiction—Revenue and Small Cause Courts.*—A suit for damages for use and occupation of agricultural land paying revenue to Government (there being no trespass) is of the nature of a rent suit, and is therefore cognisable by the Revenue Court under s. 45, Act XVIII of 1884, and so is excluded from the cognizance of a Small Cause Court under proviso (6), s. 6, Act XI of 1865. RATTAN CHAND v. UMAR DIN, **83 P.R. 1887.**

(323)—*Act* XI *of* 1865, *s.* 6, *Proviso* (4)—*Suit for rent of cultivated land—Whether cognizable by a Small Cause Court.*—A suit for the rent of cultivated land is not cognizable by a Court of Small Causes by virtue of proviso 4, s. 6 of Act XI of 1865. MAHOMED DIN v. BANKA, **44 P.R. 1878.**

(324)—*Suit for rent of homestead or* bustoo *land—Jurisdiction—Act* IX *of* 1887 (*Provincial S. Cause Courts*), *cls.* 7 *and* 8.—A suit for the rent of homestead or *bustoo* land is not cognizable by a Court of Small Causes under Act IX of 1887. Under ss. 7 and 8 of the sch. II to the Act, the jurisdiction of Small Cause Courts, with reference to claims for rents, is limited to cases in which the rent is claimed in respect of houses, the property of the person seeking to recover the rent. UMACHURN MUNDLE v. BIJARI BEWAH, **15 C. 174.** [*R.*, 3 L.B.R. 47.]

(325)—*Act* XI *of* 1865—*Suit to recover arrears of rent due on* tahood-kistbundee—*Jurisdiction.*—A suit was instituted in the Court of a Munsif to recover rent due on a *tahood-kistbundee* from the defendant who had been appointed *tahsildar* to collect rent from the ryots. The plaint was returned for presentation to the proper Court on the ground that the suit was of a Small Cause nature. *Held* that the money which the defendant contracted to pay to the plaintiff was rent and as such, could not be sued for under Act XI of 1865. The Small Cause Court was therefore ordered to return the plaint to the plaintiff for presentation to the Munsif, with the opinion of the High Court. PEAREE MOHUN ROY CHOWDHRY v. ASSAD KHAN, **18 W.R. 444.**

(326)—*Suit for* phulkur *rents—Small Cause Court—Jurisdiction—Act* X *of* 1859—*Act* VIII *of* 1869 (*B.C.*).—A suit for arrears of rent of the description known as *phulkur*, being of a nature which could be entertained by a Revenue Court when Act X of 1859 was in force, can, after the passing of Act VIII of 1869 (B.C.), be brought before a Munsif. Such a suit is not cognisable by a Small Cause Court. Act VIII of 1869 (B.C.) merely abolished the peculiar judicial powers which the former Act (X of 1859) conferred upon Revenue Officers, and handed over the cases formerly triable by them to the ordinary Civil Courts. GOBIND SOOKOOL v. GOKOOL BHUKUT, **23 W.R. 304.** [*R.*, 7 C.L.J. 152.]

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

(327)—*Small Cause Court—Jurisdiction—Suit on* tumussue—*Bond for arrears of rent—Bond securing payment of future rent.*—The instrument on which this suit was brought was described in the body of it as '*tummussuk*' or bond. But it did not secure money due upon a past transaction or rent previously accrued due before the execution of it. No money was due at the time when it was written, but it related to rent prospectively to become due. *Held* that the Small Cause Court had no jurisdiction in the case. DYA v. WUZEERA, **42 P. R. 1871.** [*R.*, 80 P. R. 1877.]

(328)—*Suit for proprietary dues—Inamdar.*—Suits for proprietary dues, to which the Inamdar, as the owner of the village, lays claim, are not cognizable by a Court of Small Causes. They are not paid as rent, nor are they claimed under any contract. SUBRAMANIAN CHETTI v. THE PRINCE OF ARCOT, **2 M. 146.**

(329)—*Suit for Russum or Proprietary dues, whether a small cause.*—A suit is not of a small cause nature, in which proprietary dues are claimed neither as rent, nor under a contract, but by custom, and as payable by persons in the occupation of land as cultivators, whether they be proprietors or ryots. IBRAHIM SAHIB v. NAGASWAMI GURUKAL, **3 M. 9.**

(330)—*Suit for birt—Jurisdiction—Small Cause Court.*—The Small Cause Court has no jurisdiction to entertain a suit for birt. Such suit must be instituted only in the ordinary Civil Court. NATHU v. TEKA, **32 P. R. 1877.**

(331)—*Suit for Zamindari cesses, not Small Cause Suits.*—Suits for *huqui-chaharam*, or other Zamindari cesses, do not fall within any of the classes of suits cognizable by Small Cause Courts. The cesses are dues customarily payable. A claim for such a cess is not a claim for money due on contract, nor for personal property or the value thereof, not for damages. NANKU v. BOARD OF REVENUE, **1 A. 444, F.B.** [*R.*, 2 A. 358; *F.*, 2 A. 905, 18 A. 430=16 A.W.N. 140.]

(332)—*Mufassal Small Cause Courts Act* (XI *of* 1865)—*Suit for malikana charged on land, not cognisable by Small Cause Court.*—A suit for recovering the arrears of malikana agreed to be paid in respect of certain land, is one affecting proprietary interest in immoveable property, and so falling without the scope of the Small Cause Court. The liability of the defendant arises out of the fact that he is the person who is in possession of the property charged with the payment. On a proper construction of the mufassal Small Cause Courts Act (XI of 1865), intention of the legislature is clear that suits directly involving questions of title to immoveable property are not cognisable by the Small Cause Courts. In the case of such suits, s. 586 of the Code of Civil Procedure can have no

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

application, and a second appeal would therefore be maintainable. CHURAMAN v. BALLI, **9 A. 591=A.W.N. 1887, 121.** (N.W.P. 1869, 205, A.W.N. 1882, 114, 5 B. 463, 4 A. 184, 2 C.L.R. 288, *D.*)

(333)—*Suit for* hak malikana—*Customary dues—Jurisdiction.*—The plaintiff sued for a certain sum alleging that by custom all the residents of a certain Basti, except the descendants of the founder, were liable, on certain occasions of which marriage was one, to pay proprietary dues (*hak malikana*) to the plaintiffs, descendants of the founder. *Held* that the suit was not of a nature cognisable by a Small Cause Court. ATA MUHAMMAD v. IBRAHIM, **125 P. R. 1888.** (33 P. R. 1887, *F.*)

(334)—Malikana *allowance, Suit for—Jurisdiction—Mofussal Small Cause Courts Act* (XI *of* 1865), s. 6.—A *malikana* allowance is that which comes to a proprietor of land in respect of his ownership, and as a mode of enjoying the ownership. A suit for *malikana* allowance concerns the proprietary right in land, and so is not cognizable either by a Revenue or by a Small Cause Court, although the allowance is as to its amount fixed by contract, and ordinarily a claim arising under a contract would be cognizable by a Small Cause Court. MAHOMED KARAMUT-OOLLAH v. ABDOOL MAJEED, **1 N.W.P. 288.** [*F.*, 9 A. 591=7 A.W.N. 121.]

(335)—Seer *land, what is—Proof—Demise to tenant—Alteration in status.*—*Seer* land is land which at some time or other has been cultivated by the zemindar himself, and which, although he may from time to time for a season demise it to *shikmees*, he designs to retain as resumable for cultivation by himself or his family whenever his requirements or convenience may induce him to resume it. The mere entry of land in the revenue papers as *seer* will not make it *seer* land. Even assuming that the zemindar was at liberty to convert land into *seer* by the mere process of recording it as such, he could not demise it to a tenant as an ordinary cultivator, and by an entry to which the cultivator is not a party, effect a material alteration in the status of the cultivator. BUDLEY v. BUKHTOO, **3 N.W.P. 203.**

(336)—*Suit for "Atrafi" dues—Jurisdiction—Small Cause Court—'Atrafi due,' nature of.*—A suit for 'Atrafi' dues is not one of a nature cognizable by a Small Cause Court (103 P.R. 1887, *F.*) An 'Atrafi' due is a customary due levied by village proprietors from *Kamins* and other artisans residing and carrying on their trade in the village. ILAHIA v. SIRDAR DEVA SINGH, **81 P.R. 1888.** [*R.*, 19 P.R. 1891.]

(337)—*Suit for* atrafi *dues — Jurisdiction —Small Cause Court.* — Though the right to impose the *atrafi* dues—*i.e.*, dues levied by village proprietors from the *artizans*, no doubt originated in the fact that the body imposing it were owners of land and could prevent any one

Small Cause Court, Mofussil, Jurisdiction—continued.

1.—General—*continued.*

from settling on it, it now rested only on custom. Such dues must now be regarded simply as customary dues. A suit for such dues is therefore not cognizable by a Court of Small Causes. DASUNDHI RAM v. PIR SINGH, **108 P.R. 1887.** [*F.*, 81 P.R. 1888; *R.*, 21 P.R. 1888, 49 P.R. 1891.]

(338)—*Claim for "dharat"—Whether cognizable by Small Cause Court.*—A claim brought by the lambardars of a village for "dharat" is cognizable by a Small Cause Court, when such claim is based on a settlement entry. RAM SINGH v. SIKANDAR, **29 P.R. 1889.** (33 P. R. 1887, *Appl.*) [*D.*, 120 P. R. 1912=18 Ind. Cas. 532.]

(339)—*Act* XI *of* 1865, *s.* 6, *para* 4—*Suit for Lumberdari dues—Jurisdiction—Court of Small Causes.*—A claim for the remuneration of a Lumberdar, being that proportion of the percentage on revenue from the village which is payable by an individual Ciswadar, is not cognisable by a Court of Small Causes under the express prohibition of para 4, s. 6 of Act XI of 1865, which prohibits the hearing in those Courts of claims for which a suit could be brought before a Revenue officer at the time of the passing of the Act. The words in the above para 4 must be held to exclude all claims which, under the general revenue system of India, were held to be connected with and to arise out of revenue collections; and there is nothing in Act XIX of 1865 that could be deemed to have transferred cases arising out of the collection of land revenue to Courts of Small Causes from which they had been excluded by s. 6 of Act XI of 1865. KUZANA AND JODHA v. DYALA, **25 P. R. 1869.**

(340)—*Suit for 'Haq Tora' —Rent of land —Customary dues—Act* XI *of* 1865, *s.* 6—*Punjab Courts Act*, 1884, *ss.* 3, 45.—In a suit for 'Haq Tora' payable on occasions of betrothal and marriage, where the claim was based chiefly upon a provision in the Administration paper, as evidence of a general custom, and the dues were described as payable by non-proprietary residents in the village to the proprietors, by reason of their being owners of the village rite, on specified occasions of uncertain occurrence and not periodically, and not in respect of occupation of any definite holding or plot of land, *held*, that such occasional payments, by residents in a given area, in acknowledgment or recognition ot the territorial title of the payee over that area, were not ne cessarily 'rent,' within the meaning of s. 6 of the Small Cause Courts Act of 1865 or s. 45 of the Punjab Courts Act of 1884, but might be properly treated as merely customary dues; and that even, if the sum claimed could be regarded as rent, sums overdue could not be treated as arrears of rent for land, within the meaning of s. 3 of the Punjab Courts Act, 1884, there being no ground for holding that the dues are payable by a tenant of agricultural land as such tenant merely. MUHAMMAD AKBAR KHAN v. SAYED ALAM, **33 P.R. 1887, F.B.** (65 P.R. 1880, F.B., 177 P.R. 1882, 166 P.R. 1883, 75 P.R. 1885, *R.*) [*F.*, 125 P.R. 1888; *R.*, 21 P.R. 1888, 29 P.R. 1889, 49 P.R. 1891.]

Small Cause Court, Mofussil, Jurisdiction of—continued.

1.—General—*continued.*

(341)—*Suit by ferry contractor for tolls—Suit not founded on contract—Jurisdiction.*—A suit by a ferry contractor to recover a certain sum from the defendant as toll, on the ground that the defendant with his followers and cattle had habitually used the ferry generally without paying the toll, of which the plaintiff kept an account which showed the amount claimed at the end of the year, was held to be a suit not cognizable by the Court of Small Causes, as there was no allegation in the plaint of an express or implied contract, there being no assertion that the defendant had been allowed to pass without payment on any promise to pay afterwards, or that any contract for a fixed payment had been made. PAIRA RAM IMAM BAKHSH, **173 P.R. 1888.** (18 P.R. 1871, *R.*)

(342)—*Suit for profits of common land—Revenue Court, jurisdiction of—Special appeal —Partition suit.*—A suit for a share in the profits of common land of a village, brought by one proprietor against another would, prior to the passing of Act XIX of 1865, and at the time of the passing of Act XI of 1865, have been cognisable by Revenue Court in the Punjab, and a special appeal would lie in such a case. But as all the co-sharers are necessary parties to a suit of that nature, a suit will not lie by each co-sharer for his share against the individuals who have realised the proceeds of a particular portion of the *shamilat* (common land) and that the Small Causes Court had no jurisdiction. JAFIR KHAN v. FIROZ KHAN, **110 P.R. 1876.**

(343)—*Act* XI *of* 1865, *s.* 6, *proviso* 4—*Suit for accessory rights in landed property—Manure—Whether cognizable by Small Cause Court.*—A suit for a share in some manure heaps on account of the plaintiff's ancestral rights in the land of a patti, being a claim relating to accessory rights in landed property, was not cognizable by a Small Cause Court as such suit would have been cognizable by a Revenue Court before the passing of Act XI of 1865, LAKPAT v. THANA, **87 P.R. 1883, Note.**

(344)—*Reg.* VI *of* 1831, *s.* 3—*Suit to recover damages claimed in respect of profits which the plaintiffs would have derived from Service Inam lands—Small Cause Court—Jurisdiction.*—A Small Cause Court has no jurisdiction, by reason of s. 3 of Reg. VI of 1831, to entertain a suit to recover damages claimed in respect of the profits which the plaintiff would have derived from Service Inam lands. TOPPYA PILLAY v. PEDDOO PILLAY, **5 M.H. C. 383.**

(345)—*Act* IX *of* 1887, *sch.* II, *art.* 13—*Suit for* nankar *allowance—Small Cause Court—Jurisdiction.*—A suit for the recovery of money

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

on account of *nankar* allowance in a suit to enforce the payment of fees known as "*hakh*" described in art. 13 of sch. II, of Act IX of 1887; and it is not necessary in such a case, in order to render art. 13 applicable, that the money should be payable "by reason of an interest in immoveable property or in an hereditary office." GOPI SINGH v. BHAROSA SINGH, **A.W.N. 1894, 113.**

(346)—*Small Cause Court—Suit for share in* hakwartana *allowance—Jurisdiction.*—A suit to recover the plaintiff's share of *hakwartana* allowance belonging to the *deshpande watan* of the joint family from the defendant, who had obtained the same from Government, was not cognisable by a Court of Small Causes. VENKAJI LAKSHMAN DESHPANDE v. YAMUNABAI, **7 B.H.C.A.C. 114.** [*R.*, 20 P.R. 1911.]

(347)—*Suit for damages for withholding receipt of rent—Small Cause Court—Jurisdiction—Special appeal—Act* XXIII *of* 1861, s. 27—A Court of Small Causes has no jurisdiction to entertain a suit for damages for withholding a receipt for rent, and special appeal will lie to the High Court such a suit not coming within the purview of s. 27, Act XXIII of 1861. SHOYLENDRO GEER SUNNYASEE v. PATOO DOSS BUSANEA, **23 W.R. 304.**

(348)—*Act* XI *of* 1865, *s.* 6—*Small Cause Court—Jurisdiction—Suit for money paid to ijardar for rent, but misapplied—Act* VIII *(B.C.) of* 1869, *s.* 11.—A suit for the recovery of money alleged to have been paid by the plaintiff to the ijardar on account of arrears of rent, where the same has not been applied to the purpose for which it was given, or a receipt withheld from the plaintiff, the only course left to the plaintiff is to seek redress in the Court of the Munsiff under s. 11 of Act VIII (B.C.) of 1869. A claim of this nature cannot be entertained by a Court of Small Causes, as it does not fall under any description of cases cognizable by the Small Cause Court, as laid down under s. 6, Act XI of 1865. BROJONATH DEY v. SHUMBHOO CHUNDER CHATTERJEE, **18 W.R. 25.** [*F.*, 23 W.R. 304.]

(349)—*Jurisdiction—Small Cause Court—Revenue Court—Suit for arrears of cess—Act* X *of* 1859.—A suit brought to recover a cess does not fall within any of the classes of suits made cognizable by Small Cause Courts. A suit for arrears of a cess, which is not in the nature of rent, cannot be brought under Act X of 1859 in the Revenue Court. KASIM ALI v. SHADEE, **3 N.W.P. 21.**

(350)—*Suit for compensation for land acquired, wrongly paid to another—Jurisdiction—Small Cause Court—Act* XXIII *of* 1861, *s.* 27—*Settlement record impugned—Title.*—A suit for compensation money in respect of plaintiff's land acquired for public purposes, wrongly paid over to defendant, is not cognizable by a Small Cause Court. [*Overruled*, 8 P.R. 1893, F.B.]

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

Where the plaintiff claimed as proprietor, but the correctness of the settlement record which supported plaintiff's claim was impugned by the defendant, the Court ought not to have proceeded solely on the record, but should have decided the question of plaintiff's title independently of such record. SITAL SINGH v. DALIP SINGH, **73 P.R. 1875.**

(351)—*Decree declaring title to house—Suit for compensation for use and occupation, whether maintainable in Court of Small Causes.*—The plaintiff in this case held a decree merely declaring him to be the owner of a house. The decree was not one in ejectment importing a right in the plaintiff to immediate possession. In the present suit brought by him as for damages on account of rent, it was *held* that assuming (though it was doubtful), that the present action was maintainable in the proper Court, it was certainly not maintainable in a Court of Small Causes which should not be used as a medium for ejecting, by indirect means, a person in possession of immoveable property, resulting in the plaintiff's obtaining, to the detriment of the public revenue, all the advantages which he could derive from a suit in ejectment. KALIDAS v. VALLABHDAS, **6 B. 79.** [*R.*, 31 C. 340=8 C.W.N. 246; *D.*, 15 B. 400.]

(352)—*Execution of decree—Settlement out of Court—Decree-holder ignoring settlement—Execution—No attachment.*—In virtue of a settlement between a decree-holder and the judgment-debtor made out of Court, the judgment-debtor handed over to the decree-holder certain property, the latter undertaking to release the former from all liability under the decree. Subsequently, the decree-holder, ignoring the settlement, proceeded to take out execution against the judgment-debtor, but did not attach or sell any of his property or arrest his person or otherwise endamage him in any way, and the execution case was struck off for default. *Held*, that, as the judgment-debtor had not been endamaged by the act of the decree-holder, the judgment-debtor had no cause of action to sue for the recovery of the amount of the property transferred to the decree-holder. MOHIM MUNDUL v. KALA CHAND NAEK **13 W.R. 147.** (6 W.R. 20, 9 W.R. 210, *D.*)

(353)—*Suit for recovery of amount due under arrangement made by Court—Jurisdiction—Small Cause Court.*—A suit to recover from the defendants a sum of money which they were made liable to pay under an arrangement made by the Civil Court in satisfaction of a decree against the judgment-debtor whose lands the defendants had taken over, is not one of the nature cognisable by a Court of Small Causes, as the liability of the defendants cannot be said to have arisen under any arrangement *between the parties.* REWATI RAM v. CHAJJU, **74 P.R. 1887.**

(354)—*Decree of Small Cause Court, suit to set aside—Jurisdiction—Fraud.*—A

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

Small Cause Court has no jurisdiction to entertain a suit to set aside a former decree on the ground of its having been passed without jurisdiction, where such want of jurisdiction is not apparent on the proceedings of the suit, but has to be established by fresh evidence, and there is no reason to suppose that the decree has been obtained by fraud or other improper means. BAMA SOONDUREE DEBEE v. KAMINEE BEWA, **10 W.R. 352.**

(355)—*Suit to recover balance of decree—Jurisdiction—Small Cause Court.*—A suit cannot be maintained in a Small Cause Court in the Mofussil to recover the unsatisfied balance of a decree of such Court. SANDES v. JOMIR SHAIKH. **9 W.R. 399.** [*R.*, 2 N.W.P. 382, 2 B. 624.]

(356)—*Revenue Court's decree under Act X, suit not maintainable in Civil Court to enforce—Agreement to pay by instalments—Stipulation as to mode of enforcement.*—As a general rule, a suit cannot be brought in the Civil Courts to enforce a decree of the Revenue Court under Act X of 1859. These decrees can be enforced only by execution, and the limitation for proceedings to execute them is prescribed by the Act itself. In the present case, however, there was the further question whether there was a new contract between the parties enabling the plaintiff to enforce his decree by suit in the Civil Court. By the terms of the contract by which the defendant agreed to pay the decree amount by instalments, it was also specified and pointed out that the remedy for the enforcement of the contract in the event of the defendant making default was the execution of the decree and not a suit in the Civil Courts. Under these circumstances, the High Court held that a suit was not maintainable in the Small Cause Court to recover the amount of the instalments. AGHORE CHUNDER MOOKERJEE v. WOOMA SOONDEREE DEBEA, **7 W.R. 216.** [*D.*, 11 W.R. 86; *R.*, 13 W.R. 151.]

(357)—*Jurisdiction of, to award compensation for erroneous attachment before judgment*, s. 491—*Civ. Pro. Code.*—By sch. II of the Civ. Pro. Code, Ch. XXXIV of the Code, relating to arrest and attachment before judgment, is extended to the Provincial Courts of Small Causes except as regards immoveable property. This exception prohibits the Small Cause Court not only from ordering attachment of immoveable property, but also from determining the question of compensation, in case an attachment is ordered by mistake. That Court has, therefore, no power to allow compensation under s. 491 of the Code, and its order so far is *ultra vires*. Such a case is not one of compensation for improper attachment provided for by s. 491, but one for an attachment, which the Court had no power to order. BARU MAL v. MUNIR KHAN, **77 P.R. 1907=50 P.W.R. 1907=30 P.L.R. 1908.**

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

(358)—*Execution of Small Cause decree—Attachment—Claim—Order, if final—Rugular suit—Suit for declaration.*—An order passed in execution of a decree of a Small Cause Court with respect to the liability of property to attachment and sale, is not final, but may be questioned in a regular suit in the same manner as a like order might be questioned when passed in execution of a decree of an ordinary Civil Court. A suit by the plaintiff for a declaration of his right to bring certain property to sale as the property of his judgment-debtor cannot be entertained by a Small Cause Court. RAMESHUR KULWAR v. BEHAREE SETH, **3 N.W.P. 208.**

(359)—*Decree against husband—Husband and wife dispossessed by actual seizure in execution of decree—Suit to establish woman's right to exclusive possession of personal property—Small Cause Court—Jurisdiction.*—A suit to establish a woman's right to the exclusive possession of personal property of which she and her husband had been dispossessed by actual seizure in execution of a decree against the husband is not cognizable by a Small Cause Court. JANAKIAMMAL v. VITHENADIEN, **5 M.H.C. 191.** [*Diss.*, 7 A. 152, F.B.; *F.*, 11 M. 264; *Appr.*, 2 B. 365; *R.*, 8 M.H.C. 36.]

(360)—*Jurisdiction—Suit to recover money realised in execution and deposited with defendant for subsequent distribution—Cause of action—Misjoinder.*—It is beyond the competence of the Court of Small Causes to try a suit for the recovery of the money realised in execution of a decree, and left in deposit with first defendant with a view to subsequent distribution in which the questions involved are (1) whether the money which the plaintiff seeks to recover is in the hands of the first defendant under the circumstances stated, (2) if it is, how much of that money are the plaintiffs entitled to as between them and the second defendant. In such a case, the plaintiffs should not be obliged to resort to two separate suits to obtain an adjudication which might conveniently be obtained in one. MOHESH CHUNDER PAL CHOWDHRY v. TRILOCHUN CHUCKERBUTTY, **20 W. R. 304.**

(361)—*Suit for release of moveable property from attachment—SmallCauseCourt—Jurisdiction.*—*Held*, that a Small Cause Court had no jurisdiction to entertain a suit for release of moveable property from attachment. CHOWDRI NARAIN DASS v. AHMED, **22 P. R. 1880.** (10 W. R. 141, *F.*) [*F.*, 91 P. R. 1886; *D.*, 97 P. R. 1883.]

(362)—*Civ. Pro. Code*, s. 283—*Suit for release of moveable property from attachment—Jurisdiction—Small Cause Court.*—A suit by a person whose objection to the attachment of moveable property under s. 278, Civ. Pro. Code, praying for the release of that property from attachment has been disallowed is not cogzinable by a-

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

Court of Small Causes, as it is a suit to establish a right claimed by the plaintiff. (22 P.R. 1880, *F.*) (But a suit to recover personal property or the value thereof, if it had been sold away, is cognizable by a Small Cause Court) SULTAN MAHOMED v. KANSHI RAM, **91 P. R. 1886.** [*R.*, 5 P. R. 1889, 51 P. R. 1890.]

(363)—*Suit for release of moveable property from attachment—Jurisdiction—Court of Small Causes.*—A suit for the release of property from attachment is not one of the nature cognisable by a Court of Small Causes. SUBA v. GHANDA SINGH, **91 P.R. 1886, Note (a).**

(364)—*Claim for release of cart attached in execution of decree—Jurisdiction—Small Cause Court barred*—SAHIB DITTA v. WARAYAMAN, **91 P.R. 1886, Note (b).** *See, also,* RAM SINGH v. LALU, **91 P.R. 1886, Note (c).**

(365)—*Jurisdiction—Suit to declare moveable property not liable to attachment.*—Where a person's moveable property has been attached in execution of a decree against a stranger, and his claim has been disallowed, he may, under s. 283, Civ. Pro. Code, sue for a declaration that the property is not liable to be sold for the judgment-debt of the stranger without seeking recovery of possession and the Small Causes Court has no jurisdiction. MAHOMED KOYA v. KASMI, **9 M. 206.** [*R.*, 1 O.C. 272.]

(366)—*Attachment of moveable property in execution—Suit to establish right—Small cause suit—Jurisdiction—Civ. Pro. Code*, s. 283.—A suit to establish the plaintiff's right to moveable property, attached in execution of a decree and for its recovery by removal of the attachment, is not one cognisable by a Court of Small Causes. ILAHI BAKHSH v. SITA, **3 A. 462.**

(367)—*Small Cause Court suit—Suit for personal property and to set aside order disallowing objection to its attachment—Jurisdiction—Act XI of 1865, s. 6.*—A suit for the possession of personal property, which contains an additional prayer for the setting aside of an order in execution disallowing plaintiff's objection to the attachment of such property, is not cognizable by a Small Cause Court. MAKUND LAL v. NASIR-UD-DIN, **4 A. 416 = A.W.N. 1882, 93.**

(368)—*Act* VIII *of* 1859, *s.* 7—*Cause of action—Suit for value of property wrongfully seized—Suit for damages for detention—Jurisdiction—Small Causes Court—Execution—Unsuccessful claimant—Damages, measure of.*—S. 7 of Act VIII of 1859 bars a suit for damages for wrongful detention of property seized in execution of a decree when a decree has already been obtained in a former suit for the recovery of the value of the same property. The case in 13 W.R. 99 is not an authority for extending to a claim for damages for wrongful detention of property, the rule

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

laid down in 10 W.R. 141, relative to the jurisdiction of the Small Cause Court in suits by unsuccessful claimants under s. 246 of Act VIII of 1859. In ascertaining damages for wrongful detention of property seized in execution of a decree, the Judge should take into consideration all the circumstances of each case so far as they may reasonably be presumed to be within the knowledge of the defendant at the time when he committed the act which forms the cause of action, and allow for their natural and immediate consequences. SHAIKH PUNJU v. SHAIKH OODOY, **18 W.R. 337.**

(369)—*Act* XI *of* 1865, *s.* 6—*Act* XXIII *of* 1861, *s.* 27—*Jurisdiction—Appeal.*—A suit for the materials, bamboos, post, verandah, etc., appertaining to four thatched huts, wherein plaintiff sought a decree to break up and remove them, or to obtain their value to the extent of Rs. 29-as 4 was held to come under s. 6, Act XI of 1865, and to be a case in which by s. 27, Act XXIII of 1861, no special appeal would lie. KASI CHANDRA DUTT v. JADU NATH CHUCKERBUTTY, **8 B.L.R. 512, Note = 10 W. R. 29.** [*Overruled*, 8 B.L.R. 508, F.B. = 17 W.R. 309.]

(370)—*Jurisdiction—Suit to recover huts or their value.*—Where a judgment-creditor purchases huts sold in execution of his decree and not being allowed to remove them sues to recover the huts or their value, his suit is not cognizable by a Small Cause Court. RAHINI KANT GHOSE v. MAHABHARAT NAG, **8 B.L. R. 514, Note = 10 W.R. 258.** [*Expl.*, 8 B.L.R. 508, F.B. = 17 W.R. 309 ; *D.*, 25 W.R. 252.]

(371)—*Jurisdiction—Suit to recover huts or their value.*—Where a judgment-creditor purchases huts sold in execution of his decree, and, not being allowed to remove them, sues to recover the huts or their value, his suit is no cognizable by a Small Cause Court. ROHINIKANT GHOSE v. MAHA BHARAT, **1 B.L. R.S.N. 19-b.**

(372)—*Act* XI *of* 1865, *ss.* 6, 19—*Huts—Moveable or personal property—"Personal property."*—Huts are not moveable property within the meaning of s. 19 of the Small Cause Courts Act, and cannot be seized in execution. The word "moveable" does not comprehend everything which a judgment-debtor has a right to remove, but means property which is capable of being moved in its existent state. [*F.*, 4 C. 665 = 2 C.L.R. 526; *Appr.*, 8 B.L.R. 508, F.B. = 17 W.R. 309 ; *D.*, 14 B.L.R. 201.] The words "personal property" in s. 6, Act XI of 1865, are used in the sense of moveable property, for, as regards Hindus and Mahomedans, there is no distinction between real and personal property but between moveable and immoveable. RAJCHANDRA BOSE v. DHARMO CHANDER BOSE, **8 B.L.R. 510, Note = 10 W.R. 416.**

(373)—*Act* XI *of* 1865, *s.* 19—*Hut—Moveable property—Small Cause Courts—Jurisdiction—*

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

Sale of hut in execution of Small Cause decree —Purchaser.—Huts are not moveable property within the meaning of s. 19, Act XI of 1865. [*F.*, 4 C. 665=2 C.L.R. 526; *Appr.*, 20 W.R. 8; *R.*, 4 C. 946=4 C.L.R. 460; *D.*, 14 B.L.R. 201.] A purchaser acquires no title to the huts by a sale in execution of a decree of a Small Cause Court, such Court having no jurisdiction to deal with immoveable property. NATTUMIAH v. NAND RANI, **8 B.L.R. 508, F.B.=17 W.R. 309.**

(374)—*Act* XI *of* 1865, *ss.* 19, 20 — *Growing crops.*— Crops which have not been severed from the ground are not moveable property within the meaning of the term as used in s. 19, Act XI of 1865. MUHAMMAD SILEMAN v. SATU HARJI, **5 B.H.C.A.C. 90.**

(375)—*Act* XI *of* 1865, *s.* 19 — *Immoveable property—Moveable property — Growing crops.* —Growing crops come within the category of immoveable property, notwithstanding that, for the purpose of the Registration Act, they have been dealt with as though they constituted moveable property. Execution of the decree of a Small Cause Court cannot, therefore, be had against them. GOPAL CHANDRA BISWAS v. RAMJAN SIRDAR, **5 B.L.R. 194=13 W.R. 275.** [*R.*, 22 C. 877.]

(376)—*Suit to establish right to standing crops alleging title to land.*— A suit to establish right to standing crops on the basis of title to land, on which they are grown is not cognizable by a Small Causes Court. DAKHYANI DEBEA v. DOLEGOBIND CHOWDHRY, **21 C. 430.** (7 A. 142, 7 C. 608, *Rel.*)

(377)—*Pleadings — Claim petition — Suit to establish title — Right of claimant to set out irregularities in execution—Trees and growing crops—Moveable property.*—Where, on a claim being allowed, the decree-holder sues to establish the title of the judgment-debtor to the property released from attachment, the defendant therein has no right to set up any irregularity in the execution as an answer to the decree-holder's claim of title. Trees and growing crops are not moveable property. TOFAIL AHMUD v. BANEE MADHUB MOOKERJEE, **24 W.R. 394.** [*F.*, 4 C. 665, 11 C. 164; *R.*, 22 C. 877.]

(378)—*Suit by a sharer for value of trees cut and sold by co-sharer—Jurisdiction—Small Cause Court—Special appeal—Act* XI *of* 1865, *s.* 6—*Act* XXIII *of* 1861, *s.* 27.—A suit by a sharer to recover the value of his share in trees alleged to have been cut and sold by a co-sharer, is a suit of a nature cognizable by the Court of Small Causes, and does not fall under the fourth proviso to s. 6 of Act XI of 1865, and by s. 27 of Act XXIII of 1861, no special appeal lies from the decision in such suit. TIRATH MAL v. HIDAYAT, **88 P.R. 1877.** (43 P.R. 1872, *Overruled*). [*F.*, 28 P.R. 1881, 13 P.R. 888.]

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

(379)—*Suit for possession of tree—Small Causes Court.*—A Small Causes Court cannot entertain a suit for the possession of a tree nor for the annual delivery of the produce so long as the tree should be productive. But a suit for a definite quantity of the produce of a tree, or the value thereof, may be entertained by a Small Causes Court, if the value be within the prescribed limit. SHANTI LAKSHMINARASAMMA v. VEPA VENKATARAMADAS, **3 M.H.C. 237.**

(380)—*Landlord and tenant—Suit for value of trees—Jurisdiction of Small Cause Court—Act* XI *of* 1865, *s.* 6, *cl.* 4.—A suit by a landlord for the value of trees cut and appropriated by his tenant, is not cognisable by a Small Cause Court under cl. 4 of s. 6 of Act XI of 1865. NUTHA SINGH v. AHMED, **43 P.R. 1872.** [*Overruled*, 88 P.R. 1877; *Diss.*, 13 P. R. 1888.]

(381)—*Timber washed on to an estate—Right to timber—Suit for damages and for declaration —Jurisdiction—Evidence—Proof of right.*— Where the plaintiff sued the Government and sought to recover damages for some timber which was taken away by the Government and he claimed that property, not as being the original owner of it, but by reason of its being property of some unknown person which had been washed away by a river and floated on to his zemindaree, and also asked to have his right declared as against Government to all timber that in the future might be washed on to his estate under similar circumstances: *Held* that if the plaintiff had sued merely for the value of the timber, the case would have been one of a nature cognizable by a Small Cause Court; but a suit to have a right of this nature declared was not one cognizable by a Small Cause Court. *Held* that a right to property of this description need not necessarily be proved by documentary evidence or by some decree of decision of a competent authority establishing the custom. CHUTTER LALL SINGH v. THE GOVERNMENT, **9 W.R. 97.**

(382)—*Standing timber, whether moveable or immoveable property—Mofussil Small Cause Courts Act* (XI *of* 1865), *s.* 19—*Registration Act* (III *of* 1877), *s.* 3—*Transfer of Property Act* (IV *of* 1882), *s.* 3—*General Clauses Act* (I *of* 1868), *s.* 2 (5), (6).—For the purposes of the Mofussil Small Cause Courts Act, standing timber must be classed as immoveable property. A Small Cause Court, therefore, cannot direct execution of its decree against standing timber. UMED RAM v. DAULAT RAM, **5 A. 564, F.B.=A.W.N. 1883, 148.** (3 A. 168, *R.*) [*F.*, 11 M. 193; *R.*, 10 A. 159.]

(383)—*Suit to recover price of bricks carried away by defendant—Prayer for declaration of title to half the property—Suit not cognizable by Small Cause Court.*—Plaintiff sued for the price of certain bricks carried away by defendant to be awarded to him after declaration of

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

his title to half the property and obtained a decree in the first Court, which, however, was set aside by the lower appellate Court on the ground that the suit could be brought in the Small Cause Court only, and did not lie in the Court of the Munsiff in which the plaintiff had brought it. The High Court *held* that the present suit was one directly seeking to establish a title to real property and to obtain a declaration thereof, and that the Munsiff's Court had therefore jurisdiction, and remanded the case to the lower appellate Court for trial on the merits. MOTHUR NATH GOSHWAMI v. GOBIND MOY GOSHWAMI, **4 W. R. 58.**

(384)—*Suit to declare lien over moveable property not cognizable by Small Cause Court.*—A suit to declare a mortgage lien over moveable property is not cognizable by a Court of Small Causes. ABDUL AZIZ v. SAMRATH MAL, **4 C. P.L.R. 31.** [*R.*, 10 C.P.L.R. 80.]

(385)—*Act* XI *of* 1865, *s.* 6—*Suit to recover property pledged under* ikrar—*Jurisdiction.*—A purchased certain buffaloes with money belonging to B and he pledged them to B under an *ikrar* stipulating not to alienate his rights in the buffaloes till the sum borrowed was repaid. B sued A for the loan and obtained a decree and in execution thereof attached the buffaloes. After the date of the said *ikrar*, A sold the buffaloes to a third party and at his instance the said attachment was set aside. B sued the purchaser (making A a party) praying for the realization of the amount due to him by the sale of the pledged buffaloes—failing which—from the purchaser, inasmuch as the latter purchased and appropriated them to his own use. *Held* that the suit was not a suit to recover personal property or the value of personal property, but that it was a suit to ascertain what was due to the plaintiff on the pledge bond, and to have it declared that the plaintiff had a right of lien on the buffaloes to that extent, and to make the buffaloes available for realizing that amount, and that the suit was, therefore, not cognizable by the Small Cause Court under s. 6 of the Small Cause Courts Act, XI of 1865. RAMGOPAL SHAH v. RAM GOPAL SHAH, **9 W. R. 136.** [*Appl.*, 16 W. R. 58, 10 A. 20=7 A.W.N. 270; *R.*, 7 A. 152, F.B.=4 A.W.N. 349, 7 A. 855=5 A.W.N. 289; *D.*, 2 B. 865.]

(386)—*Jurisdiction of Small Cause Court.*—A suit on the part of an unsuccessful claimant to establish his rights to the personal property set forth in the plaint and to recover the value of the same, is not a suit cognizable by a Small Cause Court. MOOZDEEN GAZEE v. DINOBUNDHOO GOSSAMEE, **13 W.R. 99** [*Diss.*, 18 W.R. 337; *R.*, 2 B. 365, 7 C. 608=9 C L.R. 8; *D.*, 21 W.R. 413.]

(387)—Choongee *tax—Suit for recovery of—Small Cause Court—Jurisdiction.*—A *choongee* tax is not money due under a contract express or implied. A suit for its recovery will not therefore lie in the Court of Samll Causes. PEER BUKSH v. KHUDA BUKSH, **58 P.R. 1868.**

(388)—*Jurisdiction — Small Cause Court—Claim for drawback*—Choongee *contractor.*—*Held* that the Judge of the Small Cause Court was right in considering that a claim by an exporter for drawback from a *choongee* contractor was not cognisable by a Small Cause Court under s. 6 of Act XI of 1865. There is no contract, express or implied, between the exporter and the contractor, nor can the claim be strictly regarded as one for damages. GOOR SAHIE v. GUNGA RAM, **18 P.R. 1871.**

(389)—*Act* IX *of* 1887, *sch.* II, *art.* 38—*Suit for arrears of maintenance—Jurisdiction.*—A suit for arrears of "maintenance" payable under a written agreement is a suit "relating to maintenance" within the meaning of art. 38, sch. II, Act IX of 1887, and does not lie in the Provincial Small Cause Court. SEWAK RAM v. SARJU DEI. **1 O.C. 93.**

(390)—*Provincial Small Cause Courts Act*, IX *of* 1887, *sch.* II, *arts.* 11, 38—*Karar among members of Malabar tarwad—Suit by junior members to enforce right to joint enjoyment in accordance with terms of karar—Suit not cognizable by Small Cause Court.*—A suit brought by the junior members of a tarwad against the karnavan to enforce their right to participate in the joint enjoyment of the tarwad property in accordance with the terms of a family karar, is not "a suit relating to maintenance" within the meaning of art. 38 of sch. II of Act IX of of 1887, but is, within the meaning of art. 11 of the same schedule, "a suit for the enforcement of a right to or interest in immoveable property" of the tarwad, and is not cognizable by a Court of Small Causes. ACHUTAN NAIR v. KUNJUNNI NAIR, **13 M.L.J. 499.**

(391)—*Suit not cognizable by Small Cause Court—Provincial Small Cause Courts Act* (IX *of* 1887), *sch.* II, *cl.* (38).—A preliminary objection was taken to the hearing of the second appeal in this case on the ground that the suit was of the nature cognizable in a Court of Small Causes, and that the appeal was barred by the provisions of s. 586 of the Civ. Pro. Code. This objection was overruled as untenable on the ground that the claim being one for arrears of maintenance, the suit regarding it was one relating to maintenance which, under cl. (38) of sch. II of Act IX of 1887, was excluded from the cognizance of the Small Cause Court. BALDEO SAHAI v. JUMNA KUNWAR, **23 A. 495=A.W.N. 1901, 155.** [*F.*, 23 A.W.N. 226.]

(392)—*Act* XI *of* 1865, *s.* 6—*Maintenance fixed by award—Suit for arrears not a suit of Small Cause nature — Award passed* ultra vires, *suit not maintainable on.*—This was a suit to recover arrears of maintenance payable under an award of arbitrators at the rate

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

ascertained by the award. Preliminary objection was taken on special appeal that this suit was of a nature cognizable by a Court of Small Causes and that, consequently, no special appeal lay. The High Court overruled the objection and proceeded to dispose of the appeal. The suit was, however, held to be bad on the ground that the determination by the arbitrators of a specific sum as maintenance was *ultra vires* as the question as to the amount of maintenance to which the respondent would be entitled, was not a question which could have judicially come before the Settlement Officer who appointed the arbitrators, who, therefore, exceeded their powers in having fixed the amount of maintenance. DURJAN SINGH v. MUSSAMAT SIBIA, **7 N.W.P. 329.**

(393)—*Jurisdiction—Suit for maintenance under decree—Hindu widow.*—Plaintiff sued for arrears of her maintenance fixed by a decree of a Munsif. Defendant pleaded non-liability on the ground that the property of plaintiff's husband that was in defendant's hands, and which, in fact, was the cause of the decree for maintenance, was all exhausted, and that the defendant had already brought an action in the Court of then Munsif for release from his liability to support her which suit was then pending in appeal before the District Judge. *Held* that the suit was not cognizable by a Small Cause Court. KAMINEE DOSSEE v. BISHONATH SHAHA, **9 W R. 214.** [*F.*, 6 N. W.P. 91, 24 W.R. 474; *R.*, 2 B. 624, F.B.]

(394)—*Provincial Small Cause Court Act* (IX *of* 1887), *sch.* II, *cl.* 38—*Maintenance due under a bond or agreement—Jurisdiction.*—The Legislature has, in cl. 38 of the second schedule to Act IX of 1887, used language wide enough to exclude from the jurisdiction of Courts of Small Causes any suit relating to maintenance. Therefore, a suit to recover arrears of maintenance due under an agreement is not cognizable by a Provincial Small Cause Court. BHAGVANT RAO v. GANPAT RAO, **16 B. 267.** [*R.*, 20 M. 29, 23 A. 495.]

(395)—*Suit for maintenance—Jurisdiction.*—A suit for maintenance is not cognizable by a Small Cause Court. It makes no difference that the case does not involve intricate questions of law or fact. NOBIN KALEE DABEA v. BINDODBASHINEE DEBEA, **5 W.R S C.C.R. 5.** [*F.*, 6 N.W.P. 91; *Expl.*, 24 W.R. 474, 2 B. 624.]

(396)—*Costs incurred by mother in maintaining child, suit against father to recover—Obligation on father independent of contract—Suit not cognizable by Court of Small Causes.*—A Muhammadan father's obligation, to recoup the mother for costs incurred by her in maintaining, and, to provide money for the future maintenance of his child by its mother whom he has divorced during her pregnancy, is an obligation which, if it subsists, does not arise from contract, but is imposed on the father by the law, without any bargain or assent on his part, and, consequently, a suit brought by the mother against the father to enforce such an obligation is not one cognizable by a Court of Small Causes. NURBIBI v. HUSEN LAL, **7 B. 537.** [*R.*, 6 A. 329, 16 B. 267; *D.*, 20 M. 29.]

(397)—*Suit to recover arrears of maintenance—Whether cognizable by Court of Small Causes.*—A suit to recover arrears of maintenance to which the right has already been determined by decree, is not one cognizable by a Court of Small Causes. PAHLUD SINGH v. AHLUD SINGH, **6 N.W.P. 91.** [*F.*, 5 A. 389 = A.W.N. 1883, 73.]

(398)—*Determination of right to receive maintenance—Jurisdiction—Small Cause Court—Maintenance for Hindu widow, principles regulating award of.*—The question in this case was as regards the liability of the defendant, the brother of the deceased husband of the plaintiff, to support her. The High Court laid down the following principles to regulate the award of maintenance for a widow in the position of the plaintiff. The brother of the husband may be liable to maintain her in case of his having obtained from his father any property yielding him an income. And the amount of maintenance in such a case must be fixed with reference to the amount of such income and not solely on the necessities of the plaintiff. In case of the defendant's income from ancestral property, or in case of his personal liability, his personal property, being small, the Court will have to take into consideration the greater convenience of the defendant in maintaining the plaintiff if she should live in his house, than if she were separate. The reasons of the lower appellate Court for allowing a small amount of maintenance to the plaintiff in this case were not in accordance with the above principles and the High Court remanded the case with directions to the lower appellate Court to retry it, and fix an amount suitable to the income of the defendant BHUGWAN CHUNDER BOSE v. BINDOO BASHINEE DOSSEE, **6 W.R. 285.** [*Not F.*, 6 N W.P. 91; *Cons.*, 24 W.R. 474; *R.*, 2 B. 624, F.B.]

(399)—*Provincial Small Cause Courts Act*, IX *of* 1887, *sch.* II, *art.* 38—*Suit for arrears of maintenance due under written agreement.*—A suit to recover maintenance due under a written agreement in a "suit relating to maintenance," and hence excluded from the jurisdiction of a Small Cause Court by art. 38 of sch. II of Act IX of 1887. Under the former Act, XI of 1865, it had been held that suits for maintenance on a special bond or contract were cognisable by Small Cause Courts, and that suits to determine the amount of maintenance were not so cognisable. There is no such distinction possible under the present Act. SAMINATHA AYYAN v. MANGALATHAMMAL, **20 M. 29.** [*F.*, 1 O.C. 93.]

Small Cause Court, Mofussil, Jurisdiction of—continued.

——**1.—General**—*continued.*

(400)—*Suit for the arrears of fixed maintenance—Jurisdiction of Small Cause Court—Act* IX *of* 1887 (*Provl. S. C. Court*), *cl.* 38.—A "suit for arrears of fixed maintenance" is a "suit relating to maintenance" specified in cl. 38, Act IX of 1887, and is therefore a suit excepted from the cognizance of a Court of Small Causes. AMRITOMOYEE DASIA v. BHOGIRUTH CHUNDRA, **15 C. 164.** [*R.*, 16 B. 267.]

(401)—*Act* XI *of* 1865, *ss.* 6, 12—*Small Cause Court—Jurisdiction—Suit for contribution.*—A suit for contribution will not lie in the Small Cause Court in the absence of an implied joint contract for contribution. SREEPUTTY ROY v. LOHARAM ROY, **B.L.R. Sup. Vol. 687=7 W. R. 384.** [*F.*, 7 B. L. R. App. 40, 8 C. 113, 19 A. 462=A.W.N. 1897, 107; *R.*, B.L.R. Sup. Vol. 675=2 Ind. Jur. N. S. 155=7 W. R. 377, 14 W. R. 154, 5 C. 720=6 C.L.R. 62, 5 C. W. N. 393; *D.*, 20 W.R. 235, 13 C. 300.]

(402)—*Act* XI *of* 1865, *s.* 6—*Contract Act, s.* 70—*Suit based on—Small Cause Court—Jurisdiction.*—The widow who with authority to mortgage the land in which she takes a widow's estate makes an incumbrance binding against the heirs of her husband. But those heirs do not contract to pay the mortgage-debt. If, without paying the mortgage money, they cannot obtain the land from the mortgagee, the most that can be said is that, (in the absence of express contract on their part), by obtaining the land before payment they perhaps may enter into such a relation as is described in ch. V, s. 70 of the Indian Contract Act. No suit founded on such a relation falls within the classes of suits cognisable by a Court of Small Causes under Act XI of 1865. SHER SINGH v. SHIB SINGH, **69 P. R. 1874.**

(403)—*Contribution, Suit for—Small Cause Court—Jurisdiction.*—A Small Cause Court has no jurisdiction to try a suit for contribution. TAMIZUDDIN MIRDHA v. GAFFUR KHAN, **7 B.L.R. Ap. 40.**

(404)—*Small Cause Courts Act, s.* 6—*Jurisdiction—Contract—Suit for contribution.*—Under s. 6 of the Small Cause Court Act, such Courts have not jurisdiction in suits for contribution between parties who are not co-contractors in any sense. KIRPA RAM v. JASWANT, **37 P. R. 1886.** [*R.*, 118 P.R. 1888.]

(405)—*Money paid in excess of plaintiff's share of rent for co-tenant—Suit for contribution—Proof—Jurisdiction of Small Cause Court.*—In a suit to recover money alleged to have been paid in excess of plaintiff's share of rent on account of his co-tenant, the Small Cause Court was held to have no jurisdiction, as the suit was a suit for contribution. In a suit for contribution in which a joint decree cannot be passed, the specific liability of each co-sharer must not only be alleged, but must be clearly established. PITAMBUR CHUCKERBUTTY v. SHYRUBNATH PALIT, **16 W. R. 52.**

Small Cause Court, Mofussil, Jurisdiction of—continued.

——**1.—General**—*continued.*

(406)—*Property obtained in execution of decree—Property successfully claimed by third party—Suit for value of property lost—Act* XXIII *of* 1861, *s.* 11—*Act* XI *of* 1865, *s.* 6—*Jurisdiction.*—Subsequent to the execution of a decree in a partition suit, the party who had obtained property in execution was deprived of it, by a third party claiming it, and he sued the judgment-debtor for contribution. *Held* that the suit was in fact one for equitable contribution and depended upon facts arising out of a claim by a third party after execution of the decree had taken place, and was therefore not barred by s. 11 of Act XXIII of 1861, for the question between the parties did not relate solely to the execution of the decree and could not be determined by the mere order of the Court executing the decree, without evidence. Nor was it of the nature of claims cognizable by a Small Cause Court. HURPERSHAD v. HEERA LALL, **66 P.R. 1871.**

(407)—*Contract, joint and several—Completion of contract—By one contractor—Suit against co-contractor—Jurisdiction—Small Cause Court,*—Two persons entered into a joint and several contract with Government to erect a certain embankment, gave security, and left in the hands of Government a certain percentage upon the worth of work done by them to meet certain contingencies. The work was completed by one of the contractors to whom Government paid the money in their hands on obtaining a joint receipt from him. *Held* that the other contractor was entitled to recover from him his share of the amount. A suit to recover from a co-contractor money which he had received on the completion of the contract, and which had been held back to meet the contingency of expenses in case of failure, is not a suit for money due on a contract, and is therefore not a suit which is cognizable by the Small Cause Courts. COOMAR NARAIN DASS v. RAM COOMAR MYTEE, **15 W.R. 513.**

(408)—*Decree against several persons jointly—Suit for contribution—Second appeal.*—A suit for contribution not arising out of contract, but in respect of money due under a decree making both the plaintiff and the defendants jointly liable, is not one cognizable by a Court of Small Causes, which cannot deal with questions of equity, and a second appeal will lie in such a suit. FUTTEH ALI v. GUNGANATH ROY, **8 C. 113=10 C.L R. 20.** (7 W.R. 377, *F.*; 3 A. 66, *D.*)

(409)—*Act* XI *of* 1865, *s.* 6, *Small Cause Court—Jurisdiction—Suit on implied contract—Contribution.*—If a man request another to pay money for him, there is an implied contract to repay the amount, for which an action will lie in the Small Cause Court, if it does not exceed Rs. 500. A suit for contribution, not founded on any contract, is not cognizable by-

Small Cause Court, Mofussil, Jurisdiction of—continued.

——**1.—General**—*continued.*

the Small Cause Court. SHABOO MAJEE v. NOORAI MOLLA, **B.L.R. Sup. Vol. 691 = 7 W.R. 386.** [*F.*, 7 C. 605=9 C.L.R. 90, 9 C. 395 =12 C.L.R. 314.]

(410)—*Money paid under joint decree—Contribution—Jurisdiction of Small Cause Court.*—A suit for contribution for money paid in satisfaction of a joint decree cannot be entertained by a Small Cause Court. RAMJOY SURMA v. JOYNATH SURMA, **9 C. 395=12 C.L.R 314.** (B.L.R. Sup. Vol. 675=7 W.R. 377, B.L.R. Sup. Vol. 691, *F.*; 3 A. 66, *Diss.*)

(411)—*Suit for contribution between co-sharers.*—A suit for contribution between co-sharers in an estate paying revenue to Government, or between co-parceners in a *jama*, will not lie in a Small Cause Court. NOBIN KRISHNA CHAKRAVARTI v. RAM KUMAR CHAKRAVARTI, **7 C. 605=9 C. L.R. 90.** (B.L.R. Sup. Vol. 675=7 W.R. 377, *F.*) [*R.*, 9 C. 395.]

(412)—*Small Cause Court, Mofussil—Jurisdiction—Suit for contribution by co-sharer who had paid whole Government revenue.*—Where one of several co-sharers in an estate paying revenue to Government has paid the revenue due upon the whole estate to prevent it from being sold, a Small Cause Court has no jurisdiction to entertain a suit brought by him against the other co-sharers for contribution. RAMBUX CHITTANGEO v. MODHOOSOODUN PAUL CHOWDHRY, **B.L.R. Sup. Vol. 675=2 Ind. Jur. N.S. 155=7 W.R. 377.**

(413)—*Small Cause Court—Jurisdiction—Payment of arrears of revenue by co-sharer—Suit for contribution.*—Where arrears of revenue were paid by a co-sharer to save the entire-estate from sale, a suit by him for contribution in respect of the amount paid by him in excess of his quota was not cognizable by a Court of Small Causes. BROMMOROOP GOSWAMEE v. PRANNATH CHOWDHRY, **7 W.R. 17.** [*R.*, 7 W.R. 377= B.L.R. Sup. Vol. 675=2 Ind. Jur. N.S. 155.]

(414)—*Small Cause Court—Payment by co-sharer of Government revenue in excess of his quota—Suit to recover sum paid in excess—Jurisdiction.*—A joint proprietor who pays into the Collectorate more than his own share of Government revenue, and thus saves the joint estate from sale by paying what is due by his co-sharer, cannot afterwards sue his co-sharer in the Small Cause Court for the recovery of excess amount of revenue paid by him, as the extent of the share in respect of which contribution is sought cannot be determined without deciding the question of title. KALEENATH ROY v. NILARAM PURAMANICK, **7 W.R. 32.**

(415)—*Provincial Small Cause Courts Act* (IX *of* 1887), *sch.* II, *art.* 41—*Decree for rent against joint tenants—Decree satisfied by one judgment-debtor—Suit for contribution whether lies in Small Cause Court—Jurisdiction.*—The parties to the suit were joint tenants of a certain holding. A decree was obtained against them for arrears of rent. The plaintiff paid the entire amount of decree in execution. In a suit for contribution: *Held*, that the suit was excluded from the cognizance of the Court of Small Causes by art. 41, sch. II of the Provincial Small Cause Courts Act, IX of 1887. The Subordinate Judge had, therefore, jurisdiction to try the suit. THAKUR JAWAHIR SINGH v. THAKUR JAI KARAN SINGH, **4 Ind. Cas. 59.**

(416)—*Suit against co-suitor for contribution towards costs — Nature of obligation — Jurisdiction—Act* XI *of* 1865, *s.* 6.— Where a plaintiff sues for contribution from defendant towards the expenses of a former suit in which both parties were co-suitors, the nature of the obligation sought to be enforced is, in the absence of an express contract providing for payment of contribution, can be said to arise only out of a relation resembling that created by contract and to fall under one of the sections of ch. V of the Contract Act. A suit of this character cannot be said to be founded on contract in the true sense of the term, and cannot therefore be deemed to be a suit cognizable by a Small Cause Court. AZMAT v. GURMUKH, **118 P.R. 1888.** (37 P.R. 1886, *Appl.*)

(417)—*Suit to recover money paid to prevent land being sold for arrears of rent—Allegation that no rent was due—Suit not cognizable by Small Cause Court.*—The Small Cause Court has no jurisdiction to entertain a suit by A against B to recover money paid in order to prevent his land from being sold at the instance of B for non-payment of arrears of rent under Mad. Act VIII of 1865, A's allegation being that no rent was due to B; because such a suit is cognizable before a Revenue Officer. The circumstance that, at the actual period of bringing the suit, it could no longer be prosecuted with success in the Revenue Court, because the period of limitation, there a shorter one, had expired, could make no difference. The right to institute it once existed and barred the jurisdiction of the Small Cause Court by the express provisions of the Act which created it. SHANKARA SUBBIEN v. VELLAYAN CHETTY, **5 M.H.C. 179.** [*R.*, 12 M. 467.]

(418)—*Sale of tenure for arrears of rent—Surplus sale proceeds—Suit by one co sharer against other—Suit for share of proceeds of immoveable property—Jurisdiction of Small Causes Court.*—Where a tenure belonging to two co-owners was sold in execution of a decree for rent against one co-sharer, and the sale proceeds, after satisfying the decree, were taken by such co-sharer, *held*, a suit by the other co-sharer to recover his moiety of the sale proceeds would lie against the former. The value of immoveable property is not within the purview

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

of s. 6, Act XI of 1865; such a suit is not cognizable by a Small Cause Court, and a second appeal will lie. RAM COOMAR SEN v. RAM COMUL SEN, **10 C. 388.**

(419)—*Jurisdiction—Act* XI *of* 1865, *s.* 6—*Suit to declare bond satisfied.*—A claim for money on a bond as specified in s. 6, Act XI of 1865, does not include a suit for declaration that the bond has been satisfied and is inoperative. A suit of that description must be brought in the regular Court. AGUR MULLICK MUNDUL v. DEBNATH CHATTERJEE, **24 W.R. 190.**

(420)—*Suit for return of bond—Jurisdiction—Small Cause Court—Act* I *of* 1877, *s.* 39.—A suit for the return of a bond on the allegation that Rs. 25 had already been paid towards it and the balance that was offered was refused, is one for a declaratory decree with consequential relief within the meaning of s. 39 of Act I of 1877 and is therefore not cognizable by a Court of Small Causes. GOPAL v. LALU RAM, **69 P.R. 1886.** (8 P.R. 1869, *F.*)

(421)—*Special appeal—Bond suit — Pledged property made liable—Jurisdiction.*—A special appeal lies in a suit for money due under a bond for less than Rs. 500, if the property pledged under the bond is made liable for the amount of the decree. TRIPOORA SOONDUREE v. KOYLASH CHUNDER BOSE, **15 W. R. 265.**

(422)—*Cancellation of document, suit for—Jurisdiction—Small Cause Court.*—Where the gist of the claim is for cancellation of a document and not for property or the value of property, a Small Cause Court has no jurisdiction. SYUD MAHOMED v. ZUREEF, **1 P.R. 1869.** [*R.*, 10 P.R. 1871.]

(423)—*Mistake—Sale deed—Rectification—Proper remedy—Small Cause Court's jurisdiction.*—The plaintiff sold to the defendant a field containing a well. By some mistake, there was an omission in the deed of sale to provide for the payment of the tax upon the well by the defendant. *Held* that the only remedy open to the plaintiff is to bring a suit, praying that the deed should be reformed so as to accord with the actual agreement between the parties at the time of the sale to the defendant. A Small Cause Court has no jurisdiction to entertain a suit for the reformation of a deed. GULABHAI MONDAS v. DAYABHAI GOVARDHANDAS, **10 B.H.C 51.** [*R.*, L.B.R. 1872—1892, 588.]

(424)—*Civ. Pro. Code* (*Act* X *of* 1877), *s.* 268—*Attachment and sale of bonds—Court of Small Causes.*—Under the provisions of s. 268, Civ. Pro. Code, bonds cannot be sold till the end of 6 months from the date of attachment. A Court of Small Causes cannot appoint a receiver, and, therefore, any bonds on which recovery will be time-barred before the date on

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

which a sale can legally be made, cannot be made available for satisfaction of the judgment-creditor's debt. NURSINGDAS RAGHUNATHDAS v. TULSIRAM BIN DOULATRAM, **2 B. 558.**

(425)—*Jurisdiction—Small Cause Court—Breach of contract.*—Plaintiffs and defendants entered into a contract by which the defendants, for a certain consideration therein mentioned, agreed to give to the plaintiffs credit against the interest due on a bond, to pay them a certain amount in cash to pay a certain amount to their landlords. The defendants failed in the engagement. *Held* that a suit could be brought against the defendants for the recovery of the money in the Small Cause Court. Such a suit cannot be brought anywhere else. NOBIN CHUNDER VODRO v. KEDAR NATH CHUCKERBUTTY, **16 W.R. 228.**

(426)—*Jurisdiction—Small Cause Court—Suit for specific performance—Execution of bond.*—A suit to enforce execution of a bond for money received or in the alternative, for recovery of the money with interest, is not cognizable by a Court of Small Causes. NARESH SINGH v. JAIPAL SINGH, **A.W.N. 1883, 147.**

(427)—*Of District or Small Cause Court—Claim for recovery of debt after cancelling an agreement to forego debt—Mofussil Small Cause Court Act* (IX *of* 1887), *arts.* 15 *and* 16 *of* 2*nd Schedule—Return of plaint.*—L claimed recovery of a debt after cancelling an instrument foregoing the debt in consideration of payment of eight annas in the rupee. The Court of first instance returned the plaint, on the ground the claim was cognizable by the Small Cause Court, Lahore. The Divisional Court *held*, the Small Cause Court had no jurisdiction to try the case. The Chief Court *upheld* the order of the Divisional Court. POHU MAL v. SETH LALJI, **30 P.W.R. 1907.**

(428)—*Suit for balance of* Nikasee *papers—Jurisdiction.*—A Court of Small Causes cannot entertain a suit for the recovery of the balance of *nikasee* papers, furnished by the defendant in his capacity of Tahsildar, where there is an allegation in the plaint that the defendant verbally promised to pay part of the sum claimed under certain circumstances stated therein. SRISHTEEDAR BOSE v. SHAMA CHURN GHOSE, **14 W.R. 53.**

(429)—*Mahomedan law—Exigible dower, suit for—Whether cognizable by Small Cause Court—Special appeal.*—According to the Mahomedan law, the exigible partition of a married woman's dower is demandable whether divorce has taken place or not; and a suit for such dower by a Mahomedan wife, being founded on the status of marriage, is not of the nature cognizable by Small Cause Courts, and a special appeal is admissible in such suit. MUSSAMUT HALIMAN v. KHWAJA, **71 P.R. 1874.**

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

(430)—*Suit for share in property under* waqf *endowment—Small Cause Courts Act* (IX *of* 1887), *sch.* ii, *cl.* 18—*Want of jurisdiction—High Court's power of revision.*—A suit in which the plaintiff seeks to obtain the share in the property of an endowment to which he is entitled under the object and the terms of a *waqf* deed, is to be regarded as a suit coming within cl. 18 of the second schedule of the Small Cause Courts Act (IX of 1887), excluding suit relating to a trust, and is therefore not a suit cognizable by a Small Cause Court. As to the powers exercisable by the High Court as a Court of revision it was *held* that unless facts ousting jurisdiction are patent from the records of the pleadings of the parties and the findings of the Court, the High Court must not interfere by way of revision. MIHR ALI SHAH v. MUHAMMAD HUSEN, **14 A. 413 = A.W.N. 1892, 79.**

(431)—*Jurisdiction—Mahomedan heirs—Suit for rent—Small Cause Court.*—Where the heirs of a deceased Mahomedan take equal shares of 14 annas of his estate, and allot 2 annas to *rehalallah* under the management of one of their members, and, on his death, three of the heirs sued his tenant for their proportion of rent and on account of *rehalallah*, and the remaining heirs opposed the claim in regard to *rehalallah* which, they said, plaintiffs had no right to collect, and which could only be collected by the mutwallee appointed by the deceased manager: *Held* that a Small Cause Court had no jurisdiction to entertain the suit. SHAIKH KOREEM BUX v. NOMEERO, **20 W.R. 349.**

(432)—*Army Annual Act*, 1888—*Effect on Provincial Small Cause Courts Act.*—A Provincial Small Cause Court has no jurisdiction over a suit instituted after coming into force of the Army Annual Act, 1888, against a person coming under s. 151 of the Army Act, 1881. GILLOW AND CO v. WHITE, **1 P.R. 1893, F.B.** (110 P. R. 1890, *F.*; 18 C. 144, 372, *N.F.*) [*R.*, 93 P. R. 1900.]

(433)—*Suit against military officer—Jurisdiction—Small Cause Court—Residence—Date of institution.*—So long as a Military officer resided in a cantonment, no civil Court (except a Small Cause Court if there was one) had jurisdiction in a claim against such officer for a sum under Rs. 400. In such cases, jurisdiction was not given by the cause of action, but by the residence of the Military officer at the date of the institution of suit. INDURJEET v. MORGAN, **58 P.R. 1872.**

(434)—*Army Act of* 1888, *s.* 7, *amending s.* 151 *of Act of* 1881—*Jurisdiction of Small Cause Court against military officers.*—The Judge of the Small Cause Court, Umballa, held in this case that he had no jurisdiction by reason of s. 151 of the Army Act, 1881, as amended by s. 7 of the Army (Annual) Act, 1888, to try a suit instituted in his Court at Umballa on February

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

15th, 1890, for Rs. 443-8-0 against a military officer resident in Allahabad, the circumstance that the cause of action arose in Umballa notwithstanding. *Held* that the above view was correct. By s. 7 of the Act of 1888, the first clause of s. 151 of the Army Act, 1881, was amended by substituting the words 'when the persons' so subject are resident within "the local jurisdiction" for the words "within the jurisdiction." As the effect of the said alteration, a person within the purview of the section is not liable to be sued in a Small Cause Court within the local limits of whose jurisdiction he does not reside. PHUL CHAND v. MULLINS, **110 P.R. 1890.** [*F.*, 1 P.R. 1893, F.B.; *R.*, 48 P.R. 1893.]

(435)—*Jurisdiction — Courts of Requests—Small Cause Courts—Decree against Military officer—Execution—Civ. Pro. Code, s.* 288.—A decree for Rs. 53-9 0 was passed by a District civil Court against an Officer in Her Majesty's army. An application for execution of this decree was refused by the Small Cause Court at Peshawar to which the application was made, on the ground that on the face of it, the decree was one passed by a Court having no jurisdiction. *Held* that under s. 288 of the Civ. Pro. Code, 1859, the Small Cause Court was right in refusing to execute the decree; for in respect of suits for amounts within Rs. 400, either Small Cause Courts to the extent of their powers, or Courts of Requests alone, have jurisdiction when the suit is brought against persons amenable to the Mutiny Act. JAMSETJEE AND CO. v. LIEUTENANT NELSON, **1 P.R. 1871.**

(436)—*Action against Military officer in Military Cantonment, where a Court of Requests is established—Small Cause Court.*—A Court of Small Causes has no jurisdiction to try an action against a Military Officer in a Military Cantonment, where a Court of Requests is established. ABOO SAIT AND CO. v. ARNOTT AND DALE, **2 M.H.C. 439.**

(437)—*Jurisdiction—Small Cause suit against Military officer at Murree—Act* XVIII *of* 1884, *s.* 30—*Army Act of* 1881, *s.* 148—*Court of Requests.*—Where the Extra Judicial Assistant Commissioner at Murree returned the plaint in a Small Cause suit against a Military officer on the ground that he had no jurisdiction, *held* that the plaint was properly returned, as there existed no Small Cause Court at Murree established by the Governor-General, to which under s. 148, Army Act of 1881, a Military Officer would be liable, and, as the Assistant Commissioner at Murree was not invested by the Local Government under s. 30 of Act XVIII of 1884, with the powers of a Judge of Small Causes, so as to exclude the jurisdiction of the Court of Requests. BUTA v. MAJOR GORE, **21 P.R. 1887.**

(438)—*Stat.* 30 *and* 31, *Vict., C.* 13, *ss.* 2 *and* 99—*Native Camp followers—Small Cause Court—Jurisdiction.*—The Mutiny Act extends to Her

Small Cause Court, Mofussil, Jurisdiction of—continued.

——**1.—General**—*continued.*

Majesty's Indian Forces, and it would be a great anomaly to suppose that a Native Camp follower attached to a Native Regiment would be exempt under the Mutiny Act, and that a Native Camp follower attached to a European Regiment would not. The defendant, a native of India, attached to the Mess of a European regiment, was held, under the Mutiny Act, ss. 2 and 99, to be exempt from the jurisdiction of the civil Courts. NASIRUDDIN v. KHODABUKSH, **2 B.L.R.S.N. 7=10 W.R. 386.**

(439)—*Jurisdiction to entertain a suit on foreign judgment.*—A Small Cause Court has no jurisdiction to entertain a suit on a foreign judgment. KRISHNAN v. PILO, **6 M. 191.**

(440)—*Suit on foreign judgment—Jurisdiction—Act* XI *of* 1865, *s.* 6.—A foreign judgment may be a cause of action and when a suit is maintainable on a foreign judgment, it is maintainable in the ordinary civil Courts, and not in a Small Cause Court, it not being a suit of any of the kinds specified in s. 6 of Act XI of 1865. KANHYA LAL v. ALLA DITTA. **97 P.R. 1888.** (4 P.R. 1874, *R.*) [*F.*, 37 P.R. 1889.]

(441)—*Civ. Pro. Code*, 1882, *s.* 2—*Punjab Courts* (*Act* XVIII *of* 1884), *s.* 67—*Suit on judgment of foreign Court—Whether cognizable by Small Cause Court—Mother of minor being made party, effect of—Limitation—Act* XV *of* 1877, *sch.* II, *art.* 117.—A suit on the judgment of a foreign Court as defined in s. 2, Civ. Pro. Code will lie, but not in a Small Cause Court; and an appeal lies in that case under s. 67 of the Punjab Courts Act to the Chief Court. (97 P.R. 1888, *F.*) Where a person sued on a judgment obtained against the father, erroneously making the mother of the minor son as defendant (as the father was dead), instead of making the minor the defendant under the guardianship of his mother, the Chief Court held that it was useless to make any order amending the record as to the parties to the suit, as the suit would *prima facie* have to be dismissed, as against the minor as being barred by limitation, the period under art. 117, sch. II, Limitation Act XV of 1877 having expired already. UDE RAM v. MUSSAMMAT DYAN, **37 P.R. 1889.**

(442)—*Award—Construction—Oral evidence — Admissibility — Liability under award — Small Cause nature—Special appeal.*— The construction of an award must be determined, not by the oral evidence subsequently given by the arbitrators of their intention, but by looking to the language of the award itself. A liability arising under an award does not appear to be one of such a nature as to fall within the terms used in the Small Cause Court Act to denote the claims cognizable by such Courts. Therefore, a special appeal lies to the High Court. MUSSUMAT GUNESHEE v. CHOTAY LAL, **3 N.W.P. 117.** [*F.*, 7 N.W.P. 329.]

(443)—*Act* XI *of* 1865, *s.* 6—*Suit cognisable by a Court of Small Causes.*—A suit to enforce a liability arising under an award was not cognizable in a Court of Small Causes. MADHO PRASAD v. LALTA PRASAD, **A.W.N. 1881, 159.**

(444)—*Sale in execution—Suit for refund of sale-proceeds—Civ. Pro. Code, s.* 295—*Small Cause Court suit.*—A suit for the refund of the proceeds of an execution-sale wrongfully received by the defendant, and to set aside the order of the Court executing the decree, which directed the payment of the proceeds to him, being one that could be brought in a Civil Court under the provisions of s. 295 of the Civ. Pro. Code, cannot be considered as one cognizable by a Court of Small Causes. SHAHI RAM v. SHIB LAL, **7 A. 378=A.W.N. 1885, 63.** [*Diss.*, 9 M. 250.]

(445)—*Suit for refund of moneys paid under order of Court.*—A suit for the refund of moneys paid under an order of Court is not cognizable by a Small Cause Court. GRISH CHUNDER MUNDUL v. DOORGA DOSS, **5 C. 494.**

(446)—*Suit for refund of rent voluntarily paid to a wrong person—Mofussil Small Cause Court, jurisdiction of—Act* XI *of* 1865, *s.* 6.—Where it is found that certain money, as rent, was paid to a wrong person voluntarily, not under a mistake as to the title of such person to receive it, but with the object of defrauding an intermediate tenure-holder, *held*, Mofussil Small Cause Court could not entertain a suit for refund of such money. RAM CHAND DUTT v. MOSAI SANTAL. **11 C. 738.**

(447)—*Civ. Pro. Code, ss.* 313, 315, 586—*Suit to recover purchase-money—Auction-purchase—Not of Small Cause nature—Order not final.*—An auction-purchaser applied under s. 313, Civ. Pro. Code, to set aside the sale and to refund the deposited amount, *viz.*, Rs. 75, to him; but the application was rejected. The sale was completed but was set aside on a suit by a third party. Now the auction-purchaser sued to get his purchase-money and interest. The Munsif gave a decree, but the Judge reversed it on the ground that the Munsif's order on the application under s. 313 was final, as it was not appealed against and as this suit was barred. *Held*, that orders under this section are not final, and that a suit was maintainable. Regarding a preliminary objection that there was no second appeal as the suit was one of a Small cause nature, *held*, that it was not one of that nature and that a second appeal lay to the High Court. PACHYAPPAN v. NARAYANA, **11 M. 269.** [*F.*, 12 C.P.L.R. 49, 5 C.W.N. 240; *R.*, 16 M. 361, 19 M. 315; *D.*, 12 M. 454.]

(448)—*Suit to recover Municipal tax—Small Cause Court — Jurisdiction.* — A suit by Municipal Commissioners for the recovery of Municipal tax is not one cognizable by a Court of Small Causes. LOGAN v. KUNJI, **9 M. 110**

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

(449)—*Betrothal contract, suit for damages for breach of—Jurisdiction—Small Cause Court—Act* XI *of* 1865, *s.* 6, *cl.* 3.—A Small Cause Court cannot take cognizance of a suit for damages made up partly of actual pecuniary loss sustained and partly of general damages for injury to feelings arising from the same cause of action. Under cl. 3, s. 6, of the Small Cause Courts Act, XI of 1865, jurisdiction can be taken in respect of the former, but not in respect of the latter. KARIM BAKSH v. HABIBULLA, **35 P.R. 1875.** (53 P.R. 1868, *F.*) [*Disappr.*, 11 P.R. 1886; *R.*, 43 P.R. 1887.]

(450)—*Jurisdiction—Small Cause Court—Suit for damages for breach of betrothal contract.*—A suit claiming damages for breach of a betrothal contract, consisting in part of damages for injured affections and in part of damages for actual expenditure, is not a Small Cause suit within the meaning of the Punjab Courts Act, 1884, s. 2 (3) and s. 39, nor a suit of a nature cognizable by a Court of Small Causes constituted under Act XI of 1865. MT. TABI v. BUR SINGH, **43 P.R. 1887.** (35 P.R. 1875, F.B., *F.*; 53 P.R. 1868, 11 P.R. 1886, *R.*) [*R.*, 1 L.B.R. 101.]

(451)—*Breach of contract of marriage—Suit for actual pecuniary damages—Jurisdiction—Act* IX *of* 1887 (*Provincial Small Cause Courts*), *art.* 35(*g*).—A suit for compensation for breach of contract of marriage comes within art. 35 (*g*), sch. II of the Small Cause Court Act (IX of 1887) and is excluded from the jurisdiction of the Small Cause Court. The terms of the Act must be taken with reference to the conditions of society in India. KALISUNKUR DASS v. KOYLASH CHUNDER DASS, **15 C. 833.**

(452)—*Suit for damages—False charge of mischief—Personal injury—Special appeal.*—A suit for damages occasioned to plaintiff by the defendant having brought a false and malicious charge of mischief by fire against the plaintiff in a Criminal Court is not cognizable by a Court of Small Causes, and a special appeal will lie to the High Court, although the damages claimed are below Rs. 500. PRANKRISHNA BANERJEE v. NADIAR CHAND CHATTERJEE, **4 B.L.R. A.C. 35, Note=10 W.R. 115.** [*F.*, 4 B.L.R. A.C. 31=12 W.R. 477.]

(453)—*Suit for recovery of expenses in prosecution for defamation — Jurisdiction—Small Cause Court—Act* XI *of* 1865, *s.* 6, *proviso* 3—"*Pecuniary damage.*"—When the only "actual pecuniary damage" claimed in a suit for damages on account of defamation is compensation for outlay upon a criminal prosecution of the defendant for the same matter, the suit does not come within the saving clause of the 3rd proviso to s. 6 of Act XI of 1865, and is therefore not maintainable in a Small Cause Court. MARTIN v. ALEXANDER, **143 P.R. 1884.** [*F.*, 98 P.R. 1888; *D.*, 11 P.R. 1886.]

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

(454)—*Suits for damages—Jurisdiction of Mofussil Small Cause Courts—Act* XI *of* 1865, *s.* 6.—It is only those suits for damages (*e.g.*, suits for defamation) where no actual pecuniary damage has been sustained by the plaintiff and where the measure of damages is often a question of some nicety that are excluded from the jurisdiction of Mofussil Small Cause Courts, s. 6, of Act XI of 1865, does not exclude suits for actual damages merely because the plaintiff sues, in addition to the actual pecuniary loss sustained, for damages for some indefinite injury also. DURGA PERSHAD v. ASA JOLAHA, **5 C. 925=6 C.L.R. 487.**

(455)—*Suit for damages — Defamation of character—Claim for expenses of criminal proceeding against defendant—Jurisdiction—Small Cause Court—'Actual pecuniary damage'—Act* XI *of* 1855, *s.* 6, *proviso* 3.—In a suit to recover a certain sum on account of damages for defamation of character, where a portion of the sum was claimed on account of plaintiff's injured feelings, while the remainder was for expenses incurred by the plaintiff in a previous criminal proceeding which he brought against the same defendant, under ss. 352, 504, I.P.C., arising out of the same act as that for which the present suit was brought: *Held* that, the action in the form in which it was instituted was not one of the nature cognizable by the Small Cause Court with reference to the provisions of proviso 3, s. 6 of Act XI of 1865, as the expenses which the plaintiff incurred in the criminal proceedings referred to, and which he sought to recover in the present suit, could not be legitimately considered as pecuniary damage resulting from the injury complained of but only a remote consequence of it. PUNNA MAL v. KHUSALA MAL, **98 P.R. 1888.** (143 P.R. 1884, *F.*)

(456)—*Jurisdiction of Small Cause Court—Incompetency of another Court to hear Small Cause—S.* 16 *of Act* IX *of* 1887—*Claim for a share in the offerings of Mandar Baba Kalu.*—*Held*, that a Munsif, whose Court is situate within the local limits of another Munsif invested with powers of a Small Cause Court to try all small causes of a certain value, has no jurisdiction to hear and determine any Small Cause up to the extent of that value. The claim for recovery of an amount as a share in the offerings of a shrine is cognizable by a Court of Small Causes. TABA v. MIHAN, **92 P.W.R. 1911=11 Ind. Cas. 410.** (84 P.R. 1892, *F.*)

(457)—*Act* IX *of* 1887, *art.* 12, *sch. ii—Jurisdiction—Court of Small Causes—Suit to discharge* Mahabrahmani *functions.*—*Held* that a suit to establish an exclusive or periodically recurring right to discharge the function of an office, such as that of a *Mahabrahman*, is not cognizable by a Court of Small Causes under art. 12, sch. ii, Act IX of 1887. MADHO v. BHAGWAT PARSHAD, **2 O. C. 62.** [*R.*, 2 O. C. 276.]

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

(458)—*Small Cause suit—Suit for fees of office as per agreement—Second appeal.*—A suit for the recovery of fees for the office of *stanacharya* in a certain temple, the liability of which was fixed by an agreement, is not cognizable by the Court of Small Causes. VENKATA CHINNAYA RAU v. KRISHNA CHARYALU, **8 M.L.J. 228.**

(459)—*Suit by hereditary village mahars for recovering "aya" not cognizable by mofussil Small Cause Courts.*—Between the *haks* belonging to hereditary officiating village mahars and those appendant to the hereditary offices of a village joshi or temple priest, there is no difference in principle. The latter have been held to constitute immoveable property and there is no reason, therefore, to regard the former as personal property. A Small Cause Court in the mofussil has no jurisdiction to entertain a suit to recover "balute" or "aya," which is a claim in respect of a *hak* belonging to, and forming the emoluments of, the hereditary office of a village mahar, and is, therefore, a claim in respect of immoveable *nibandha*, and not moveable or personal property. APPANA v. NAGIA, **6 B. 512, F B.**

(460)—*Suit involving taking of accounts—Partnership—Joint property—Court of Small Causes—Jurisdiction.*—In reference to the jurisdiction of Small Cause Courts, there does not appear to be any distinction between partnership and part ownership, where the claims arising between partners involve the taking of accounts of the part ownership property. In the present suit brought in a Small Cause Court, plaintiff claimed the excess rent collected by his co-proprietors, and also arrears of rent from the tenants. *Held*, that the suit cannot proceed in the Small Cause Court (1) on the ground of misjoinder of parties and causes of action, and (2) because it involved the taking of accounts between co-proprietors. BUDROODEEN v. RAMDYAL, **66 P.R. 1868.**

(461)—*Money wrongfully taken from one partner by another—Suit for account—Suit not cognizable by Small Cause Court.*—This was a suit by one partner to recover from another partner and a servant of the concern certain sums alleged to have been realized from certain debtors which they did not make over to the plaintiff. *Held* that the only mode in which plaintiff could get redress for any sums which had been wrongly taken by his partner, was by a suit for an account, and such a suit was not one that could be disposed of by the Small Cause Court. SHURRUT CHUNDER KUR v. RAM SHUNKUR SURMAH, **10 W.R. 214.**

(462)—*Suit on partnership contract—Jurisdiction—Small Cause Court—Act* XI *of* 1865, *s.* 6, *cl.* 1—*Jurisdiction—Difference of opinion—Reference to Chief Court.*—Plaintiffs and defendants agreed that if any one or more of them took up a certain contract, they would share profit and loss equally. Plaintiffs now

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

claimed a certain amount as their share of the profits from the defendants. *Held* that this was practically a suit for a partnership account, and no balance of account having been struck, it was not cognizable by a Small Cause Court. In this case, the District Court had refused jurisdiction, and the Small Cause Court also refused to take up the case as beyond its jurisdiction. *Held* under these circumstances, that the Small Cause Court was bound to make a reference to the Chief Court. PEER BUX v. PEERADITTA, **71 P. R. 1870.**

(463)—*Company—Winding up—Call upon share of shareholder—Contributory—Suit by liquidator for call—Jurisdiction—Small Cause Court—Act* X *of* 1866 (*Indian Companies*), *s.* 98—*Debt—Money due on contract—Act* XI *of* 1865, *s.* 66.—A Small Cause Court in the Mofussil is not competent to entertain a suit by the liquidator of a company registered and being voluntarily wound up under Act X of 1866, against a shareholder, who is a contributory, for a call upon his share. The money due as a call is money which is, by statute, to be deemed a debt, but this is not synonymous with "money due on contract." The jurisdiction of Mofussil Small Cause Courts does not extend to debts generally (as does the jurisdiction of Small Cause Courts in Presidency towns under Act IX of 1850), but to "money due on contract," and therefore 'does' not extend to money due as a call which cannot be described as money due on contract in view of the statutory description of such money in the Indian Companies Act, 1866. NUND KISHORE v. KIRKPATRICK, **97 P.R. 1881.**

(464)—*Suit for share of rent—Partnership account—Jurisdiction of Small Cause Court.*—Where, in a suit against a co-proprietor of land for the plaintiff's share of rent, which the defendant had received from the tenants, the defendant pleaded that the money had been expended for the benefit of the joint estate and that the plaintiff had received the rent of other joint lands, it was held that the suit was not cognizable by a Small Cause Court, as it involved questions of partnership account. RAMTONU ACHARJEE v. PEARY MOHUN ACHARJEE, **6 C. 551=7 C L.R. 557.**

(465)—*Principal and agent—Suit for adjustment of accounts—Jurisdiction.*—A suit by principal against agent for adjustment and investigation of disputed items of account, is not triable by the Small Cause Court. KRISHNA KINKUR ROY v. MADHUB CHUNDER CHUCKERBUTTY, **21 W. R. 283.** [*Cons.*, 24 W. R. 478; *R.*, 6 C. 284.]

(466)—*Suit against Agent to Governor-General, to be brought in Court having jurisdiction at seat of Government—Act* XI *of* 1865, *s.* 9.—Plaintiff alleged that he was in Government employ holding an office under the Agent of the Governor-General of India at Moorshidabad, He

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

instituted the present suit against the Government in the Small Cause Court at Moorshidabad for recovering his salary due for a specified period. It was contended for the defendant that since, under the provisions of s. 9 of Act XI of 1865, suits against the Local Government or against the Government of India have to be brought in the Court having jurisdiction at the place which is the seat of such Government. and Moorshidabad is not the seat of Government, the Small Cause Court, at that place had no jurisdiction. *Held*, on a reference by the Judge of a Small Cause Court, that the suit was substantially a suit against the Government and not one against the Agent individually, and that therefore the decision of the Small Cause Judge dismissing the plaintiff's suit for want of jurisdiction was correct. ROOPUN TEWAREE v. MR. W. B. BUCKLE, **10 W. R. 142.**

(467)—*Intestacy, share under—Suit to recover money—Jurisdiction of Small Cause Court.*—A Small Cause Court has no jurisdiction to entertain a suit to recover money as personal property in respect of a share under an intestacy. GRISH CHUNDER SINGH v. AUNA DOSSEE, **17 W. R. 46.**

(468)—*Suit for share under intestacy—Small Cause Court—Jurisdiction—Act* XI *of* 1865, *s.* 6, *cl.* 2.—A former suit instituted by T, as heir of his late mother M, against R for recovering certain moveables deposited with R by M, alleging the same to be the streedhun of M, was decreed. In the present suit, S, the grandson of M, sued T for the property, alleging that it was ancestral property and not streedhun of M, and also pleaded collusion between T and R. *Held* that the suit was in effect one "for a share, or part of a share, under an intestacy" and was not, under the exception in cl. 2, s. 6, Act XI of 1865, cognizable by a Small Cause Court. But, considering the time that had elapsed, and that the parties had made no application to the High Court, the High Court refused to interfere with the decision in the former suit. NOBIN CHUNDER GOSSAMEE v. DRIBO MOYEE DEBEE, **17 W.R. 520.**

(469)—*Matter determined by Collector under Reg.* V *of* 1822—*Small Cause Court, jurisdiction of.*—A suit cannot be brought in a Court of Small Causes on a matter already determined by a Collector under Reg. V of 1822. SRI RAJA UPPALAPATI GANAKAYA GARU v. BALAVI RAMUDU, **2 M.H.C. 475.**

(470)—*Suits for damages for infringement of copyright—Jurisdiction of Mofussil Small Cause Courts.*—The jurisdiction that had been transferred, in suits for damages for infringement of copyright, from the Mofussil District Courts to Small Cause Courts (on an analogy with the exclusive jurisdiction of the Presidency Small Cause Courts in such cases) was re-transferred to the District Courts by

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—General—*continued.*

Act XII of 1876 amending Act XX of 1847. HAMEEDOOLAH v. MAHOMED ASHGUR HOSSEIN, **6 C. 499=7 C.L.R. 471.**

(471)—*Civ. Pro. Code, s.* 586—*Suit impleading sons of living debtor, not one of a Small Cause nature.*—A suit impleading the sons of a living Hindu debtor as defendants along with him was held to be not one of a small cause nature so far as it related to the sons. NARASINGA v. SUBBA, **12 M. 139, F.B.**

(472)—*Suit by minor—Position of guardian—Jurisdiction.*—A suit by a minor, on attaining majority, against his guardian for an account of his management during the former's minority, is not cognizable by a Court of Small Causes, as the guardian holds the minor's property as a trustee, and is accountable as such. RAM JOY MOJOOMDAR v. KOOMAR KEDAR NARAIN ROY, **25 W.R. 75.**

(473)—*Costs incurred in defending criminal prosecution, No suit maintainable for—Act* IX *of* 1887 (*Provincial Small Cause Courts*), *sch.* II, *cl.* 35 (*c*).—There is no cause of action arising by reason of costs having been incurred in defending a criminal prosecution, and no suit is, therefore, maintainable to recover such costs, except in the form of damages or compensation in a suit for malicious prosecution, which is a suit excluded from the jurisdiction of a Small Cause Court. MAHOMED ALI v. BAYAMA, **14 B. 100.**

(474)—*Resistance of process of Small Cause Court—Jurisdiction to punish.*—A Small Cause Court in the mofussil has no jurisdiction to punish for resistance of a process which it has issued; but such resistance being an offence under s. 186 of the Penal Code, it may, with reference to s. 171, Crim. Pro. Code (XXV of 1861), send the accused before a Magistrate to be dealt with according to law. *In the matter of* MANI CHANDRA DAS, **2 B.L.R. A.C. 188=11 W.R. 62.** (8 W.R. 32, *R*).

(475)—*Suit for salvage—Jurisdiction—Evidence—Judge, a witness.*—A Court of Small Causes has no jurisdiction to entertain a suit for salvage, even when the salved property had been abandoned by those in charge of it. When a Judge gives evidence, he should be sworn like other witnesses. KISHORE SINGH v. GUNESH MOOKERJEE, **9 W.R. 252.**

(476)—*Act* IX *of* 1850, *s.* 28—*Act* XXVI *of* 1864, *s.* 2—*Small Cause Court—Jurisdiction—Sum added for purposes of.*—Having regard to the provisions of s. 28, Act IX of 1850, and s. 2, Act XXVI of 1864, the Small Cause Court at Calcutta has no jurisdiction in a case in which the plaintiff, in order to give jurisdiction to the Small Cause Court, claims as damages sums which by law he cannot recover, which he cannot be entitled to at all, and adds them to his claim for that purpose. BONOMALLY NAWN v. CAMPBELL, **10 B.L.R. 193=19 W.R. 20.** (1 Hyde, 272, *D.*) [*R.*, 24. C. 661= 1 C.W.N. 556.]

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

(477)—*Jurisdiction to declare old valuations to be still in force.*—The Small Cause Court had no power or jurisdiction to make any order binding on Corporation, declaring that the assessments under the previous valuations are still in operation and must remain in force for a further term of years. THE CORPORATION OF CALCUTTA, v. I. J. COHEN, **6 C.W.N. 480.**

(478)—*Small Cause Court—Suit cognizable only as against all defendants—Jurisdiction.*—Where, as against some of the defendants only in a suit but not as against others, a suit happens to be triable by a Subordinate Judge in his Small Cause jurisdiction, it cannot be deemed to be a suit cognizable by a Small Cause Court and the Subordinate Judge must, therefore, try it in his original jurisdiction. PARSHOTAM v. PEMA HARJI, **21 B. 121.**

Of Settlement Officer to entertain application to settle rent of land made by party concerned and not by Government—*See* BEN. ACT VIII OF 1885, ss. 101 to 107, 9 C.W.N. 504=1 C. L.J. 239=32 C. 518.

See BOM. ACT V OF 1879, s. 87, 8 B. 188.

See BOM. ACT XVII OF 1879, ss. 2 (2), 11, 4 B. 360.

See U.P. ACT XII OF 1881, ss. 3 (2), 93 (*a*), A.W.N. 1881, 162.

Power to make reference in a case under s. 23 (3), Civ. Pro. Code, 1908—*See* CIV. PRO. CODE, 1908, s. 23, cl. 3, 77 P.L.R. 1909.

Judge of, not bound to fully set out the reasons for his findings—*See* CIV. PRO. CODE, 1908, s. 47, 6 C.L.J. 527.

Suit of nature cognizable by, and valued at below Rs. 500—Execution of decree—Second appeal—*See* CIV. PRO. CODE, 1908, ss. 47, 102, 10 Ind. Cas. 412.

See CIV. PRO. CODE, 1908, s. 73, 20 B. 377.

Suit for recovery of rent of less than Rs. 500 and for declaration—*See* CIV. PRO. CODE, 1908, s. 102, 16 M.L.J. 432.

Suit of nature cognisable by—Second appeal—*See* CIV. PRO. CODE, 1908, s. 102, 6 Ind. Cas. 415.

See CIV. PRO. CODE, 1908, O. XXI, rr. 4, 5, ss. 38, 39, 41 and 136, 2 B. 560.

Over a suit by an unsuccessful claimant for recovery of money as price of his property sold in execution—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 58, 63, 8 O.C. 281.

See CIV. PRO. CODE, 1908, O. XXI, rr. 61, 63, 5 O.C. 190.

See CIV. PRO. CODE, 1908, O. XXI, r. 63, 7 C. 608=9 C.L.R. 8.

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——1.—General—*continued.*

Maintainability of suit by auction-purchaser for refund of purchase-money—*See* CIV. PRO. CODE, 1908, O. XXI, r. 93, 114 P.R. 1908.

Of Judge of Small Cause Court to review an order by his predecessor refusing an application for review—*See* CIV. PRO. CODE, 1908. O. XLVII, rr. 2, 7, 9, 63 P.R. 1905=104 P.L.R. 1905.

See CONTRIBUTION, SUIT FOR—PAYMENT OF JOINT DEBT BY ONE DEBTOR, 6 M. 424.

See CO-SHARERS—SUIT BY CO-SHARERS, B.L.R. Sup. Vol., 675, F.B.=7 W.R. 377=2 Ind. Jur. N.S. 120.

See COSTS—SPECIAL CASES, 1 Ind. Jur. N.S. 95.

Power of Registrar of, to make order under s. 148, Civ. Pro. Code, 1908—*See* COURT-FEES, 13 C.L.J. 78.

See DAMAGES—DAMAGES, SUITS FOR, 8 W.R. 88.

See DECREE—ALTERATION OR AMENDMENT OF DECREE, 1 N.W.P. 198.

See EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 18 B. 61=P.J. 1893, 258, 14 W.R. 396.

See FISHERY, 20 W.R. 362.

See HINDU LAW—MAINTENANCE, 2 B. 632, F.B., 4 B.H.C. A.C. 73, A.W.N. 1902, 226, 24 W.R. 474.

See JURISDICTION—QUESTION OF JURISDICTION, 13 B. 650.

See JURISDICTION OF CIVIL COURTS, 50 P.R. 1886.

Jurisdiction—Munsif—Small Cause Court—*See* JURISDICTION OF MUNSIF'S COURT, A.W.N. 1894, 128.

Plaintiff's decree against defendant's landlord—Attachment of rent due to landlord—Suit for rent by plaintiff—Jurisdiction—*See* LANDLORD AND TENANT—GENERAL, 10 Ind. Cas. 569.

See LIMITATION ACT, 1908, s. 4, 3 W.R. 46.

Suit for compensation for improper attachment—Not excluded from jurisdiction of Presidency Small Cause Courts — Excluded from jurisdiction of Provincial Small Cause Courts. *See* LIMITATION ACT, 1908, art. 29, 4 N. L. R. 49.

See PROFITS, SUIT FOR, 5 O.C. 130.

Jurisdiction conferred on Small Cause Court after notice issued to objectors—Civ. Pro. Code, 1882, s. 360—Notification conferring jurisdiction after repealing the section—Effect of—*See* PROVINCIAL INSOLVENCY ACT, 1907, s. 3, cl. (1), 6 A.L.J. 483=2 Ind. Cas. 223.

Small Cause Court, Mofussil, Jurisdiction of—continued.

——1.—**General**—*concluded.*

Rent suit, nature of—*See* RENT, 12 Ind. Cas. 855.

See RES JUDICATA — COMPETENCY OF COURT, 41 P.R. 1872, A.W.N. 1886, 44.

Suit to recover money collected as subscriptions for building dehera — Person collecting subscriptions, trustee for community—Suit for recovery of subscriptions— Suit entertainable by Subordinate Judge's Court and not on Small Cause side—*See* RIGHT OF SUIT—SUBSCRIPTION, 22 B. 729.

Failure of consideration — Suit by auction-purchaser for refund of purchase-money — Jurisdiction of. *See* SALE—SALE IN EXECUTION OF DECREE— MISCELLANEOUS, 12 Bom. L. R. 723=7 Ind. Cas. 955.

Offence committed before—*See* SANCTION TO PROSECUTE, 13 C. W. N. 1038=4 Ind. Cas. 6=10 Cr. L.J. 454=37 C. 13.

See SET-OFF, 12 B. 31.

Jurisdiction of—Suit to recover money due under a contract—No claim for damages for breach of contract—Suit for specific performance. *See* SPECIFIC PERFORMANCE, 5 M.L.T. 296.

See ST. 44 and 45 VIC., C. 58, s. 144, PROVISO, 10 B. 218.

See ST. 44 and 45 VIC., C. 58, s. 151, 13 C. 143.

Trespass—Suit for damages — Jurisdiction. —*See* TRESPASS, 10 C.L.J. 198=1 Ind. Cas. 592.

——2.—**Practice and Procedure.**

See PRACTICE and PROCEDURE.

(1)—*Mofussil Courts of Small Causes—Act* XI *of* 1865—*New trials.*—Where the Court, on the application of a plaintiff whose suit was dismissed for non-production of witnesses on the date of hearing, orders a re-trial and passes a decree in his favour on hearing evidence, it is also open to the same Court to grant a second re-trial on the application of the defendant after decree, but on grounds sufficient and distinct from those on which the first re-trial was granted. There cannot be successive re-trials, if trials are held *bona fide* and without gross negligence. ASSOOL SHAIKH v. HUBEEBOOLA, **13 P.R. 1868.**

(2)— *Small Cause Court — Cross suits—Conditional order for new trial—Whether proper.* —One of two cross-suits in a Small Cause Court having been decreed and the other dismissed on the same date, the plaintiff in the latter suit applied for a new trial and the Court gave him leave to renew his suit if the order in the first case were reversed. That order having been reversed, the plaintiff sued a second time. *Held* that, as the order of the Judge on the application for re-trial was merely an order staying proceedings in the original suit until the happening of a certain event which had afterwards happened, it was not an order confirming the dismissal of the original suit; and that the plaintiff was entitled to have his cases tried on the merits, as on a re-trial. SOUDAGAR v. SAINA, **88 P.R. 1876.**

(3)—*Mofussil Small Cause Courts—Act* XI *of* 1865, *s.* 21—*New trial.*—S. 21 of Act XI of 1865 is still in force, notwithstanding the right of review given to Mofussil Small Cause Courts by s. 623 of the Civ. Pro. Code, and an application for a new trial, where the circumstances admit of it, is governed by the section. MODON MOHUN PODDAR v. PURNO CHUNDER PURBOT, **10 C. 297.**

(4)—*New trial by Mofussil Small Cause Judge.*—A Mofussil Small Cause Judge had jurisdiction to direct a new trial of a case tried by his predecessor (s. 21 of Act XI of 1865). *Per Garth, C.J.*—In such cases regard should be had to the rule in s. 624 of the Civ. Pro. Code. SHUMSHER ALLY v. KURKUT SHAH, **6 C. 236 =6 C L.R. 549.**

(5)—*S.* 17, *Provincial Small Cause Courts Act* (IX *of* 1887)—*Deposit of decree amount or tender of security—Condition precedent to grant of new trial.*—Under the provisions of s. 17, Provincial Small Cause Courts Act, the deposit of the decretal amount or the tender of sufficient security for payment thereof is a condition precedent to the grant of a new trial. JOGI AHIR v. BISHEN DAYAL SINGH, **18 C. 83.** (13 M. 178, *Diss.*) [*F.*, 3 A.L.J. 318=28 A. 470=A.W.N. 1906, 69, 9 Bom. L.R. 883; *Doubted*, 3 O.C. 296; *D.*, 1 C.L.J. 43=32 C. 339.]

(6)—*Mofussil Small Cause Courts Act* (XI *of* 1865), *s.* 21—*Notice—New trial—Review—Civ. Pro. Code*, 1877, *s.* 623.—The notice-clause in s.21 of Act XI of 1865 is applicable only to those cases where a new trial cannot be applied for within seven days after the judgment, in consequence of there being no sitting of the Court; where the application itself is made within seven days the notice is unnecessary. [*F.*, 10 C. 297.] If the grounds upon which the new trial is moved are proper grounds for granting a review, the applicant can proceed under s. 623 of the Code, instead of Act XI of 1865. RATAN KRISHEN PODDAR v. RAGHOO NATH SHAHA, 8 **C. 287=10 C.L.R. 275.** [*F.*, 10 C. 297.]

(7)—*Alteration of Small Cause Court's judgment—New trial.*—When a judgment of a Small Cause Court in the Mofussil is called in question by one of the parties on a point of law, a motion cannot be received to alter or reduce the amount of the judgment; but a new trial must be applied for within the period allowed by s. 21, Act XI of 1865. Upon granting a new trial, the Judge need not re-open the

Small Cause Court, Mofussil, Jurisdiction of—continued.

——2.—**Practice and Procedure**—*continued.*

whole case, but may lay down any issue or issues of law and fact, having reference to the grounds on which the judgment is impeached. ISAN CHANDRA SINGH v. HARAN SIRDAR, **3 B.L.R. A.C. 135=11 W.R. 525.**

(8)—*New trial—Act* XI *of* 1865, *s.* 21, *notice under—Deposit—Next sitting of Court—Construction.*—Where notice of application for a new trial under the latter provision of s. 21, Act XI of 1865, is given without a deposit of the amount of the decree which has been passed against the applicant, a subsequent deposit made within seven days will not entitle him to ask for a new trial. The words "next sitting of the Court" in the same proviso mean the next sitting after the decision complained of, and apply where the sittings of the Small Cause Court are not held consecutively, but the same Judge sits in more than one Court. KAILAS CHANDRA SANNEL v. DAWLAT SHEIKH, **5 B.L.R. App. 57=14 W.R. 42.**

(9)—*Act* XI *of* 1865, *s.* 21—*Dismissal of suit—Application for re-trial—Computation of limitation—Exclusion of date of dismissal—Summons to witnesses—Wrong date in summons—Dismissal of suit—Sufficient cause for restoration.*—In computing the period of limitation prescribed for an application for a re-trial under s. 21 of Act XI of 1865, the date on which the suit was dismissed had to be excluded. Where, in consequence of a wrong date having been noted in summonses to witnesses, the plaintiff was absent on the day fixed for the hearing and the suit was dismissed for default, there was sufficient cause for non-attendance of the plaintiff on the date fixed for hearing. BIJOY GOBIND DEB v. MUDDUN RAM PAL, **18 W.R. 454.**

(10)—*Act* XI *of* 1865, *s.* 21—*Questions to be submitted to High Court—New trial—Notice of application for review—Speculative questions.*—What the Judge of Small Cause Courts should send up to the High Court are only questions that arise in a suit, and not speculative ones. In calculating the period within which a notice of new trial is to be given, the date of the decision should be excluded. An application for a review of judgment of a Mofussil Small Cause Court cannot be entertained where one of the provisions of s. 21 of Act XI of 1865 is not complied with, as, for instance, where the notice of an intention to apply at the next sitting of the Court for a new trial was not given. *In the matter of the petition of* PITAMBAR SADHU KHAN, **6 B.L.R. 390, Note=12 W.R. 17.** [*R.*, 14 W.R. 442=6 B.L.R. 388.]

(11)—*Act* XI *of* 1865, *s.* 21—*Application for new trial—Deposit of costs.*—A plaintiff applying for a new trial under s. 21 of Act XI of 1865 was not required to deposit with his notice of application the costs of the defendant. MOHIMA CHUNDER ROY v. HURNATH CHUNGO, **18 W.R. 446.**

Small Cause Court, Moofussil, Jurisdiction of—continued.

——2.—**Practice and Procedure**—*continued.*

(12)—*Act* XI *of* 1865, *s.* 21—*Application for new trial.*—A third application for a new trial is not admissible under s. 21, Act XI of 1865. DHUNNOO CHOWDHRY v. BUKSHUN, **12 W.R. 266.** [*R.*, 15 W.R. 402.]

(13)—*Fraud and false personation—Confession by judgment—Grant of new trial.*—A new trial can be granted in a case where, owing to fraud and false personation, judgment has been passed on confession. *In the matter of* HURO MONEE DOSSEE, **17 W.R. 48.**

(14)—*Act* XI *of* 1865, *s.* 21—*Review—Small Cause Court—New trial.*—The circumstances of the debt having been ordered to be paid by instalments does not except the case from the operation of the proviso in s. 21 of Act XI of 1865; and, if the application for a review of judgment be in the nature of an application for a new trial, the amount of the decree must be deposited. NAVROJI PESTANJI v. MANSUKH JAYACHAND, **5 B.H.C.A.C. 70.** [*R.*, 2 N.L.R. 23.]

(15)—*Alteration of Small Cause Court's judgment—New trial—Evidence — Act* X *of* 1867, *s.* 1—*Act* XI *of* 1865, *s.* 22—*New trial.*—When a judgment of a Small Cause Court in the Mofussil is called in question by one of the parties on a point of law, a motion cannot be received to alter or reduce the amount of the judgment; but a new trial must be applied for within the period allowed by s. 21, Act XI of 1865. Upon granting a new trial, the Judge need not re-open the whole case, but may lay down any issue or issues of law and fact, having reference to the grounds on which the judgment is impeached. A party using the statement of another against him must put the whole statement in evidence, but the Judge is not bound to believe it all. For instance, if the Judge, on the evidence, really believes that the payment credited in a plaintiff's books were made, although he disbelieves the entry as to the amount of the debts, there is nothing inequitable in his giving the defendant the benefit of the payments. The Judge is bound to look at the whole of the entries, giving credit to such as he believes to be true, and discrediting those which he believes to be false. The hearing for a new trial is a hearing within s. 22, Act XI of 1865. An application for a new trial is a point in the proceedings previous to the hearing. A Small Cause Court Judge can ask the opinion of the High Court on a question of law upon such an application. ISAN CHANDRA SINGH v. HARAN SIRDAR, **3 B.L.R. A.C. 135=11 W.R. 525.** [*Cons.*, 15 M. 179.]

(16)—Ex parte *decree—Application for new trial—Notice—Small Cause Court's decree—Act* XI *of* 1865, *s.* 21.—Where a judgment-debtor arrested in execution of an *ex parte* decree of a Court of Small Causes gives notice under s. 21 of Act XI of 1865 of her intention to apply for a new trial on the first Court day, and her application is in fact made on the day following

Small Cause Court, Mofussil, Jurisdiction of—continued.

——2.—Practice and Procedure—*continued.*

the next Court day, the Judge is right in proceeding to hear the application, instead of going through the formality of telling her to first give notice and apply again. LOUISA VAUGHAN v. LALL CHAND GHOSE, **15 W.R. 281.**

(17) —*Jurisdiction—Small Cause Court*—Ex parte *decree — Application by one of several defendants to set aside decree.*—It is competent to a Judge of the Small Cause Court, on hearing the objections by one of several defendants, to set aside an *ex parte* decree as to all, if justice seems to require it ; as for instance, if the objection is one which is common to the case of all ; but he is by no means bound, because the decree is set aside as to one of several defendants, interfere with the decision already pronounced against others who do not object, and in fact may have no ground for objecting to the decree. DOOKHEE KHAN v. RAJESSUREE RANEE, **15 W.R. 371.** [*Expl.*, 20 W.R. 286 ; *R.*, 25 C. 155=1 C.W.N. 652, 24 A. 383=22 A.W.N. 76, 6 C.L.J. 226.]

(18)—*Act* XI *of* 1865, *s.* 21—Ex parte *decree —Application to set aside.*—An application to set aside an *ex-parte* decree passed on the 14th March was made on the 25th May, when no process had been executed for enforcing the decree. *Held* that it ought to be admitted and fell within the first of the two provisions in s. 21 of Act XI of 1865. SHOJONEE DOSSIA v. DHURONEE DHUR GHOSE, **16 W.R. 226.**

(19)—*Act* XI *of* 1865, *s.* 21—Ex parte *decree —First application to set aside decree rejected—Second application.*—An application to set aside an *ex parte* decree having been made to a Small Cause Court, the Judge found, on looking at the record of the case, that the defendant had been personally served with summons. He requested the pleader to tell his client to be present three days after to be examined touching the matters referred to therein ; but as neither he nor his pleader was present on that date, the Judge, without causing notice to be issued calling on the opposite party to show cause, rejected the application. A second application was then made under s. 21 of Act XI of 1865. *Held* that the communication to the pleader was an informal proceeding, that the Judge ought not to have proceeded in the absence of the party and his vakil and that the Judge was bound to hear the second application if it was within time. GOPAL CHUNDER ROY v. ARMAN SHAIKH, **15 W.R. 402.** [*D.*, 16 W.R. 277.]

(20)—Ex parte *decree, suit to set aside—Act* XI *of* 1865, *s.* 21.—An application under the first part of s. 21 of Act XI of 1865 (Mofussil Small Cause Court Act) is not limited to the first occasion of a defendant's appearance in a suit. So, where a defendant is prevented by sufficient cause from appearing on any date, later than that fixed in the summons, to which a case is adjourned, he may, under the first part of s. 21, apply to set aside any *ex parte* decree, passed against him in default of his appearance. DOYAL MISTREE v. KUPOOR CHUND, **4 C. 318=3 C.L.R. 482.** (6 B.L.R. 688, *R.*) [*Not F.*, 11 C.L.R. 537.]

(21)—*Small Cause Courts Act, s.* 17—*Deposit of costs.*—The provision as to deposit of costs on an application for review, contained in s. 17 of the Small Cause Courts Act, is merely directory. RAMASAMI v. KURISU, **13 M. 178.** [*Diss.*, 18 C. 83, 2 N.L.R. 23, 28 A. 470=3 A.L.J. 318=A.W.N. 1906 at p. 93, 9 Bom. L.R. 883; *R.*, 3 O.C. 296.]

(22)—*Mofussil Small Cause Court—Review of judgment.*—A Mofussil Small Cause Judge may entertain an application for a review of judgment under the Code of Civil Procedure. ISAN CHUNDER BANERJEE v. LUCHUN GOPE ; KEMP v. PREM NARAYAN SINGH, **5 C. 699=5 C.L.R. 559.**

(23)—*Small Cause Court—Act* XI *of* 1865, *s.* 22—*Act* X *of* 1867.—Where a Deputy Collector calls on a Small Cause Court to attach the right and interest of a judgment-creditor, and the Judge, entertaining doubts as tothe validity of the attachment, refers the question to the High Court, held that there is no authority for making or entertaining the reference which does not arise, either under Act XI of 1865, s. 22, or under Act X of 1867. KAMINEE SOONDUREE CHOWDHRAIN v. MUDHOO SOODUN MOOKERJEE, **21 W.R. 376.**

(24)—*Act* XI *of* 1865, *s.* 22—*Reference by Small Cause Court—Inference of fact—Priority of contract.*—What a Judge of a Court of Small Causes is required to submit under s. 22, Act XI of 1865, is some question of law or usage having the force of law, or some question as to the construction of a document, which construction may affect the merits of the decision, and not whether upon the evidence given in the case which the Judge has sent up, he was right in coming to the conclusion which he has come to. The only question which the High Court can consider is, whether upon the facts stated, the Judge of the Small Cause Court was capable, under the law, of drawing an inference which he has drawn (as for instance, that there was no privity of contract between the plaintiff and the defendant). The propriety of the inference is a question of fact, not a question which the High Court can deal with in a reference like this. GUJENDRO MOHUN SHAHA v. THE EASTERN BENGAL RAILWAY COMPANY, **18 W.R. 145.**

(25)—*Agent—Principal— Suit — Municipal Commissioners, Suit against—Jurisdiction of Small Cause Court—Reference to High Court—Act* XI *of* 1865, *ss.* 9 *and* 22.—According to the established principles of law, a suit against an agent is bad in law. The principal only must

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——2.—Practiee and Procedure—*continued.*

be sued. S. 9 of Act XI of 1865 does not prohibit the institution of a suit against the Municipal Commissioners in a Small Cause Court. Under s. 22 of Act XI of 1865, a Small Couse Court ought not to make a reference upon a simple point, merely on the application of the parties, unless it entertains a doubt upon the question. HURISH CHUNDER TALAPATTUR v. MR. W.P. O'BRIEN, **14 W R. 248.**

(26)—*Reference of question not arising in course of trial of suit—Power of High Court.*—The High Court has no power to express any judicial opinion upon a question submitted to it, if it does not arise in the course of the trial of a suit. SUROOP CHUNDER PATRE v. JADOO MOYTEE, **5 W.R.S.C.C.R. 7.**

(27)— *Execution of decree — Transfer of jurisdiction —Civ. Pro. Code, ss.* 285, 286—*Procedure.* — When the Court that passed a decree is in existence, it can receive an application for execution of that decree under s. 207 of the Code although the debtor's place of abode has been transferred to the jurisdiction of a different Court since the passing of the decree. The decree may be executed at any place within the jurisdiction of that Court. If it be desired to execute the decree against property out of the present jurisdiction of the Court, the course prescribed by ss. 285 and 286 must be pursued. KODOO MUNDUL v. SHUSHEE SHIKHUR SIRCAR, **16 W.R. 227.**

(28)—*Plaint presented to Small Couse Court without jurisdiction—Procedure—Suit not to be transferred.*—When a plaint is presented to a Small Cause Court which has no jurisdiction, it can either dismiss the suit for want of jurisdiction, or return the plaint, for presentation to the proper Court ; and it has no power to transfer the suit. NATHU v. C. MOODY ; MUHUMMED BAKSH v. C. MOODY ; VASAKHI RAM v. C. MOODY, **74 P.R. 1876.**

(29)—*Jurisdiction—Small Couse Court—Execution against property outside jurisdiction—Act* XXIII *of* 1861, *s.* 4.—No execution can be issued by a Small Cause Court against the moveable property of the judgment-debtor which may be found out of the jurisdiction of that Court, although the suit has been tried under the authority of the High Court against two defendants, one of whom resided at the commencement of the suit within, and another without, the local limits of the juriadiction of the Court. GRISH CHUNDER KUR v. KRISTO CHUNDER GHOSE, **18 W.R. 123.**

(30)—*Court of Small Causes—Execution of decrees against property beyond local jurisdiction.*—Small Cause Courts, in the mofussil, are not at liberty to execute decrees against property beyond their local jurisdiction. MUNSUK MOSUNDAS v. SHIVRAM DEVISING, **2 B. 532.** [*Expl.*, 6 A. 243, F.B.]

(31)—*Act* XI *of* 1865, *s.* 20—*Small Causes decree of Subordinate Judge — Transfer to Munsiff's Court and execution—Sale—Certificate not filed—Validity of sale.*—Where a Small cause decree of a Subordinate Judge has been transferred by the District Court to a Munsiff's Court for execution, and the lands of the judgment-debtor were then regularly attached and sold, the sale does not beceme void because the preliminary procedure required by s. 20 of Act XI of 1865, has not been observed. NAGI REDDI v. RAMANNA, **7 M. 592.**

(33)—*Execution of decree—Attachment of salary—Small Cause Court—Civ. Pro. Code, ss.* 223, 268.—A Small Cause Court must follow the procedure prescribed in s 223, Civ. Pro.Code, in all cases where execution is sought against persons or property outside its local jurisdiction. It cannot, therefore, attach, under s. 269, the salary of a person which is disbursed outside its local jurisdiction. PARBATI CHARAN v. PANCHANAND, **6 A. 243. F.B** (3 C.L.R. 30, *F.*) [*F.*, 30 C. 713 ; *R.*, 11 C.P L.R. 148, 28 B. 198.]

(34)—*Investiture of Small Cause Court Judges with Subordinate Judge's powers — Legality —Act* XI *of* 1865, *ss.* 45 *and* 51.—Although the occasional investiture of Small Cause Court Judges, by name and from time to time, with the powers of Subordinate Judges, may have been the mode of procedure contemplated by the Legislature as the one likely to be ordinarily adopted, Government cannot be said to have exceeded its power or contravened the law by permanently investing them with such powers. CROSTHWAITE v. HAMILTON, **1 A. 87.** (N.W.P. 1873, 55, *Impugned.*)

(35)—*Decree of a Small Cause Court—Execution of such decree against immoveable property.*—The Judge of a Small Cause Court, when duly invested with the powers of a Subordinate Judge, has, in the exercise of such powers, general jurisdiction. He is, therefore, competent to order the sale of immoveable property within his jurisdiction, in execution of a decree passed by him on the Small Cause side. GOPAL v. NANKU, **1 A. 624.** [*Expl.*, 8 M. 8.]

(36)—*Civ. Pro. Code (Act* X *of* 1877), *s.* 5, *ch.* XX, *ss.* (344 *to* 360), *and sch.* II—*Jurisdiction—Small Cause Court—Insolvency.*—The

Small Cause Court, Mofussil, Jurisdiction—continued.

——2.—**Practice and Procedure**—*continued.*

effect of s. 5 of the Civ. Pro. Code, 1877, coupled with sch. II to that Act, was to render the whole of ch. XX of the Code, including s. 360, inapplicable to Courts of Small Causes, notwithstanding the words "any Court other than a District Court" and "any Court situate in his District" which occur in that section. The consequence of this construction of the Code is, that Government resolution No. 2133 of 3rd April 1878, which invested the Judge of the Court of Small Causes, at Ahmedabad with the powers enferred on a District Court byss. 344 to 359 of the Code, was *ultra vires* and invalid. LALLU GANESH v. RANCHHOD KAHANDAS, **2 B. 641**. [*Appr.*, 9 M. 112.]

(37)—*Small Cause suit—Institution of suit in the Court of a Judge having Small Cause powers—The Judge on leave—Registering the suit and its trial as a regular suit—Appeal—Practice and procedure.*—A Small Cause suit was filed in the Court of a Subordinate Judge who had Small Cause Court powers. At the date when the suit was instituted, the permanent incumbent of the office being on privilege leave, and the joint Subordinate Judge having no Small Cause powers, the suit was registered as a regular suit. On his return from leave, the Judge also tried it as a regular suit. It was contended that the suit, notwithstanding its mode of trial, retained the character of small cause :—*Held*, that the Subordinate Judge continued to be a Judge with Small Cause Court powers during his absence on leave, and that the entering of the suit in the file of regular suits could not take it away from the category of small causes ; nor could the fact that, subsequently, the Subordinate Judge tried the suit under his ordinary jurisdiction deprive it of its character as a small cause. NARAYAN RAOJI RANADE v. GANGARAM RATANCHAND MARWADI, **11 Bom. L.R. 817 =33 B. 664=3 Ind. Cas. 816.**

(38)—*Power of Small Cause Court to set aside order rejecting plaint.*—It is not competent, to the Judge of a Small Cause Court, to set aside an order rejecting a plaint. JITMAL v. RAMCHANDRA, **5 B.H.C.A.C. 97.**

(39)—*Small Cause Court—All defendants not residing within jurisdiction.*—A Small Cause Court ought not to reject a plaint on the ground that all the defendants are not residing within the jurisdiction of that Court. KHODA BAKSH MISTRI v. BENIMANDAL, **6 B.L.R. 719, Note =14 W.R. 156.** (1 M.H.C. 13, *F.*) [*F.*, 6 B.L. R. 717=15 W.R. 397.]

(40)—*Abandonment of part of claim by plaintiff—Jurisdiction.*—It is competent to a plaintiff to abandon a part of his claim, so as to bring his case within the cognizance of a Small Cause Court. RAGHUNATH MUKAND v. SAROSH K. R. KAMA, **23 B. 266.**

(41)—*Act* VIII *of* 1859, *s.* 251—*Sale by Small Cause Courts—Satisfaction of decree.*—

Small Cause Court, Mofussil, Jurisdiction of—continued.

——2.—**Practice and Procedure**—*continued.*

Judges of Small Cause Courts should insist that all sales should be conducted strictly in accordance with the provisions of s. 251 of Act VIII of 1859. If, in any particular case, there is a decree for a considerable amount, and property of small value is sold, and purchased by the decree-holder, his receipts might be accepted as cash, but provision must be made for realizing all fees out of Court. INDRO NARAIN DEB v. GOBIND CHUNDER DHUR, **15 W.R. 368.**

(42)—*Act* XX *of* 1866, *ss.* 52, 53—*Application for enforcement of agreement recorded by registering officer—Jurisdiction.*—In an application to a Small Cause Court under s. 53 of Act XX of 1866 to enforce an agreement recorded by the registering officer under s. 52 of the said Act on the bond or obligation, a true copy whereof was filed with the application, it was *held* that under s. 53, the applicant was entitled to a decree only on production of the original obligation and of the record signed, as mentioned in s. 52, and that he was not entitled to a decree on production of a true copy of the same and that the proper course would be to refer the applicant to a regular suit. SREERAM ROY CHOWDHRY v. KOLEEMOODDEE MOLLAH, **9 W.R. 477.**

(43)—*Small Cause Courts Act* (XI *of* 1865), *s.* 51—*Small Cause Court Judge invested with powers of Principal Sudder Ameen by Government Notification—Trial of suits by such Judge whether legal—Civ. Pro. Code*, 1959, *s.* 350—*Applicability in case tried without jurisdiction—St.* 24 *and* 25 *Vict.*, *Cap.*, 105, *s.* 15, *construction of.*—S. 51 of Act XI of 1865 (under which the Government Notification of 6th June 1866 was issued), states in the clearest terms that is only "*when the state of business* of any Court of Small Causes is not sufficient to occupy its time fully" that "the Local Government may invest the Judge, within such limits as it may from *time to time* appoint," with certain powers. The Government in their Notification appear to have read and understood this section as authorizing them "to *permanently* invest" with the powers of a Subordinate Judgeand not only permanently, but unconditionally. The notification had thus the effect of permanently changing the jurisdiction and office of the Small Cause Court Judge and permanently erecting and establishing an entirely new Court. This the Government had no authority to notify, and the notification was therefore *ultra vires*. A plaint in an original suit was presented to an Acting Small Cause Judge, who had not been specially invested with the powers of a Subordinate Judge (like the permanent incumbent) and a decree was passed by him. *Held* that he had no right to receive the plaint as he was not a Subordinate Judge in the sense of s. 51 of the Act. [*Diss.*, 1 A. 87.] S. 350, Civ. Pro. Code, did not apply to a case which had been tried by a Court which had no jurisdiction to entertain it, as the judgment of the High Court

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——2.—Practice and Procedure—*continued.*

could not be one for "reversing or modifying the decree of the lower Court," there being no decree, no decree to reverse or modify, nothing but the semblance of litigation which in itself was a legal nullity. On the true construction of s. 15 of the 24th and 25th Vict., c. 104, the power of superintendence to be exercised by the High Court, is not merely administrative or ministerial but also judicial. MUSSUMAT BAJEE KOOER v. RAI DAMODUR DASS, **5 N.W.P. 55.**

(44)—*Small Cause Courts Act*, XI *of* 1865, s. 21—*Next setting of the Court, meaning of.*—Where the same Judge is the Judge of two different Small Cause Courts and sits in the one Court during the first half of every month and in the other, during the second half, held that the term "next sitting of the Court" in s. 21 will be on the first day on which the Judge sits in the Court after the expiry of the fifteen days spent in the other Court. MADHUB CHUNDER BISWAS v. OKHOY CHUNDER BISWAS, **13 W.R. 103.**

(45)—*Act* XI *of* 1865, s. 20—*Mortgage deed—Immoveable property—Sale of mortgage interest by Small Cause Court.*—The rights and interest of a judgment-debtor under a mortgage-deed hypothecating to him immoveable property are not saleable by a Small Cause Court. As a decree-holder is entitled to have these rights brought to sale, a sale of such rights by the Civil Court by virtue of a certificate issued under s. 20, Act XI of 1865, is valid. BUDDOO MULL v. MAHAROOP, **6 N.W.P. 129.** [*F.*, 9 M. 5.]

(46)—*Decree against son for father's debt—Son's interest in moveable property, sale of—Act* XI *of* 1865, s. 6.—When a decree is obtained against a person for the payment of the debt due by his deceased father, a Court of Small Causes can, in satisfaction of that decree, proclaim for sale and sell the undivided right, title and interest of the deceased, to which the defendant has succeeded, in the moveable property, without infringing the second proviso of s. 6 of Act XI of 1865, and until the judgment-creditor has exhausted that mode of proceeding to obtain satisfaction, he is not entitled to proceed against the debtor's immoveable property under s. 20 of the same Act. P. AHOBALASOO CHETTY v. VENKATAKRISTNAMMA, **3 M.H.C. 278.**

(47)—*Decree against a member of undivided Hindu family—Power of Small Cause Court—Partition.*—A Court of Small Causes has no power to do more in execution of a decree against a member of an undivided Hindu family than issue process for the attachment and sale of the defendant's undivided right, title and interest in the family moveable property. It would be for the purchaser at such a sale to obtain a partition of the share. IYAHVIEN v. CHITHAMBARIEN, **3 M.H.C. 312.**

***Small Cause Court, Mofussil, Jurisdiction of*—continued.**

——2.—Practice and Procedure—*concluded.*

(48)—*European British subject—Cantonment Magistrate — Jurisdiction — Act* III *of* 1859, s. 1—*Act* XI *of* 1865, s. 8—*Practising as a pleader—Personally working for gain—Concurrent jurisdiction.*—A European British subject not belonging to or connected with the Army, but merely residing within the limits of a Cantonment, is, by reason of such residence, amenable to the jurisdiction of the Cantonment Joint Magistrate under s. 1, of Act III of 1859. Both the Cantonment Joint Magistrate and the Small Cause Court have concurrent jurisdiction over a pleader residing within the limits of a Cantonment and practising as a pleader within the jurisdiction of a Small Cause Court. The jurisdiction of the Small Cause Court does not take away the jurisdiction of the Cantonment Joint Magistrate within the meaning of s. 12 of Act XI of 1865. SHAPURJI JEHANGIR v. RICHARD MORGAN, **4 B.H.C.A.C. 187.**

Returns called for from Small Cause Courts, Cir. No. 7, dated the 8th May 1865, **3 W. R. Civil Circular Orders, p. 1.**

Returns by Small Cause Court Judge presiding over more than one Court. Cir. No. 12, dated the 23rd June 1865, **3 W. R. Civil Circular Orders, p. 3.**

Calls for a statement of suits and appeals of the Small Cause Court type not exceeding Rs. 20 in value decided in 1873. Civ. Cir. Memo No. 16 dated 10th July 1874, **22 W. R. Civ. Cir. 7.**

See SUPERINTENDENCE OF HIGH COURT, 6 W. R. Mis. 26.

Suit cognizable by Small Cause Court—No special appeal—High Court—Interference—*See* SUPERINTENDENCE OF HIGH COURT, 5 B.L.R. Ap. 91.

——3.—Miscellaneous.

(1)—*Art.* 8, *Provincial Small Cause Courts Act* (IX *of* 1887)—*Jurisdiction—Suit by assignee of arrears of rent, after they fell due, for recovery of the amount due, nature of.*—A suit by an assignee of arrears of rent, after they fell due, to recover the sum due, is a suit for 'rent,' and as such is not cognizable by a Court of Small Causes. (*Per Curiam, Banerjee, J., contra*), SRISH CHUNDER BOSE v. NACHIM KAZI, **27 C. 827, F.B.=4 C.W.N. 357.** (4 C.W.N. 10, *F.*; 19 W.R. 431, *D.*) [*F.*, 4 C.W.N. 605; *D.*, 4 C.L.J. 402.]

(2)—*Civ. Pro. Code*, ss. 525, 526—*Provincial Small Cause Courts Act, sch.* II, *cl.* 24—*Award.*—A suit to contest an award or to set it aside is not the same as a suit to enforce a contested award. In the first case a Small Cause Court has no jurisdiction under cl. 24, sch. II of Act IX of 1887. In the second case, the suit is practically one to file an award under ss. 525 and 526 of the Code of Civil Procedure, and these sections are extended to Small Cause Courts by the second schedule attached to the Civ. Pro. Code. SIMSON v. MC.MASTER, **13 M. 344.**

Small Cause Court, Mofussil, Jurisdiction of—continued.

——**3.—Miscellaneous**—*continued.*

(3)—*Decree of Civil Court—Suit to enforce—Jurisdiction of Court of Small Causes.*—A suit cannot be maintained in a Small Cause Court upon a decree of a Civil Court. Although an action *prima facie* lies on the judgment of every Court of competent jurisdiction, the duty thus created is not within the terms of s. 6, Act XI of 1865. Further, the action on a judgment or decree in such cases will not give to the plaintiff a higher or better remedy than he already has. MANCHHARAM KALLIANDAS v. BAKSHE SAHEB MIR MAINUDIN KHAN, **6 B.H.C. A.C. 231.** [*R.*, 2 B. 624, F. B., 6 B. 7, 6 B. 292; *F.*, 8 B. 1.]

(4)—*Art.* 21, *sch.* II, *Act* IX *of* 1887 (*Provincial Small Cause Courts Act*)—*Suit to set aside sale—Jurisdiction of Small Cause Court.*—A suit, by a purchaser at Court auction, for recovery of the purchase-money paid by him or a portion thereof, on the ground of the judgment-debtor not having had a saleable interest in the property, is one to set aside a sale, and is excluded from the jurisdiction of a Small Cause Court. SONARAM DASS v. MOHIRAM DASS, **28 C. 235.** (1 C.W.N. 140, *D.*)

(5)—*Provincial Small Cause Court Act* (IX *of* 1887), *sch.* II, *art.* 41—*Suit by joint sharer for contribution—Suit between holders of joint patta, cognizable by Court of Small Causes—Civ. Pro. Code, s.* 586—*Contract Act, ss.* 69 *and* 70.—Art. 41, sch. II of Act IX of 1887 refers to a suit for contribution by a sharer in joint property. But, the mere fact that the patta, for the lands held by two parties distinctly, happens to stand in the name of both of them jointly, cannot render such lands joint property. So a suit by one of the joint patta holders against the other, for recovery of the amount of assessment paid on behalf of that other, is not one excluded by the above art. 41. For the purposes of second appeal, such a suit is one of the nature of small causes within s. 586 of the Code of Civil Procedure. SRINIVASA v. SIVAKOLUNDU, **12 M. 349.** (15 C. 652, *F.*) [*D.*, 8 M.L J. 149.]

(6)—*Decision recorded "Finding negative"—No judgment in law.*—Where the points for determination in a suit instituted in a Court of Small Causes were, (1) whether the bond was executed and (2) if so, whether there was consideration for it, and the only decision recorded by the Munsiff was "finding negative." *Held*, that the judgment could not be regarded as a judgment in law within the meaning of s. 203 (para. 1), Civ. Pro. Code. YENATHI NAIDU v. KUJJALIGAN, **15 M.L.J. 223.**

(7)—*Act* XXVI *of* 1864, *s.* 7—*Decision of Small Cause Court rejecting application for new trial—Judgment contingent on opinion of High Court.*—The decision of a Small Cause Court rejecting an application for a new trial, but making such rejection contingent on the opinion of the High Court, is not a contingent judgment upon which any reference can be made to the High Court under s. 7 of Act XXVI of 1864. HALL v. JOAKIM, **12 B.L.R. 34.** [*F.*, 11 C. 298, 15 M. 179; *D.*, 20 M. 358 =7 M.L.J. 140.]

(8)—Res judicata—*Small Cause Court decision.*—The decision in a small cause suit can operate as *res judicata*, when the question is litigated a second time in an original suit which admits of a second appeal. NAMASIVAYA GURUKAL v. KADIR AMMAL, **17 M. 168 =4 M.L.J. 31.** [*F.*, 18 M. 189; *R.*, 29 M. 195 =16 M.L.J. 41=1 M.L.T. 25.]

(9)—*Small Cause Court—Contract between Hindus.*—In all matters of contract and dealing between Hindus, the law applicable to the subject in the ordinary Civil Courts is the same which governs the Court of Small Causes. WOODOY CHAND HALDER v. GOOROO CHURN MAJOOMDAR, **13 W.R. 148.**

(10)—*Civ. Pro. Code, s.* 468—*Army Act of* 1881, 44 *and* 45 *Vic., c.* 58, *ss.* 144, 151—*Jurisdiction of Small Cause Courts over soldiers.*—A soldier may be sued in a Court of Small Causes, for a debt not amounting to £ 30, and the Commanding Officer of the soldier is bound to cause the summons of the Small Cause Court to be served on him. MAHOMED SAIB v. AGGAS, **10 M. 319.**

(11)—*Small Cause Court—Rules and orders in Military Code.*—The Rules and orders in the Military Code are not binding on the Small Cause Court. RAICHAND MANGAJ v. ABDULLA AMIRUDDIN KOTVAL, **5 B.H.C.A.C. 99.**

Small Cause Courts Mofussil, References by.

See ACT X OF 1867.

Small Cause Courts Presidency Towns Act.

See PRESIDENCY SMALL CAUSE COURTS ACT, 1850.

See PRESIDENCY SMALL CAUSE COURTS ACT, 1864.

See PRESIDENCY SMALL CAUSE COURTS ACT, 1882.

See PRESIDENCY SMALL CAUSE COURTS ACT, 1895.

Small Cause Court, Presidency Towns, Jurisdiction of.

1.—GENERAL.

2.—SMALL CAUSE COURT, PRESIDENCY TOWNS, PRACTICE AND PROCEDURE OF.

See PRESIDENCY SMALL CAUSE COURTS ACTS.

——**1.—General.**

(1)—*Jurisdiction—Presidency Small Causes Court and High Court.*—The Presidency Small Cause Court is not a Court of co-ordinate jurisdiction with the High Court, but is a Court of

***Small Cause Court, Presidency Towns, Jurisdiction of*—continued.**

——1.—General—*continued.*

inferior jurisdiction subject to the orders and control of the High Court. *In the matter of* OMRITOLALL DEY, **1 C. 78.** [*F.*, 5 C.L R. 170.]

(2)—*Arrest under writ of Small Cause Court—Exemption therefrom governed by English law.*—Where exemption from arrest under a writ of a Presidency Small Cause Court is claimed, the matter must be governed by the English Law and not by s. 642 of the Civ. Pro. Code, corresponding to which there is no section in the Small Cause Courts Act. *In the matter of* SOORENDRA NATH ROY CHOWDHRY, **5 C. 106.**

(3)—*Presidency Small Cause Courts Act, Ch.* VII, *s.* 22.—An application under ch. VII of the Presidency Small Cause Courts Act is not a suit within the meaning of s. 22 of the same Act. KRISHNASAMI CHETTI v. THE NATAL EMIGRATION BOARD, **17 M. 216=4 M.L.J. 70.**

(4)—*Non-British subject not residing in, but carrying on business by* munim *in Bombay—Jurisdiction—Act* XV *of* 1882 (*Presidency Small Cause Court's Act*), *s.* 18 (*b*)—*Meaning of "defendant"—Statutes, Construction of.—Per Sargent, C.J.—Prima facie*, the word "defendants" in cl. (*b*) of s. 18 of Act XV of 1882 (Small Cause Courts Act) is intended to have the same meaning when read with each of the three several cases mentioned in the clause as giving the Court juriedidtion ; and as the word includes non-British subjects among the defendants subject to the jurisdiction, if they are "resident" or "personally work for gain" within the territorial limits of the Small Cause Court, it would be a strained construction to hold that it did not include them among the defendants subject to the jurisdiction under the clause, when the ground of jurisdiction is that they are "carrying on business" within those limits. It may be true that non-British subjects who do not reside in British India do not make themselves personally subject to the general Municipal law of British India. Still, by establishing their business in British India from which business they expect to derive profit, they accept the protection of the territorial authority for their business and their property resulting from it, and may be regarded by so doing as submitting to the jurisdiction of the Courts of the country. GIRDHAR DAMODAR v. KASSIGAR HIRAGAR, **17 B. 662.** [*R.*, 20 B. 133, 25 B. 528, 11 M.L.J. 91=26 M. 544, 29 M. 69; *Cons & Expl.*, 29 M. 239=16 M.L J. 235=1 M.L.T. 71 ; *D.*, 26 M. 544, P.C.]

(5)—*Jurisdiction—Court of Small Causes (Bombay)—Suit for possession of immoveable property valued less than Rs.* 1,000—*Act* XXVI *of* 1864.—The Court of Small Causes (Bombay) has, under s.2 of Act XXVI of 1864, jurisdiction to try a suit for the possession of immoveable property valued less than Rs. 1,000. WALJI

***Small Cause Court, Presidency Towns, Jurisdiction of*—continued.**

——1.—General—*continued.*

KARIMJI v. JAGANATH PREMJI, **2 B. 84.** (2 Ind. Jur. (145-*n*, *D.*) [*R.*, 2 B. 91, 5 B. 295.]

(6)—*Act* IX *of* 1850, *s.* 28—*Act* XXVI *of* 1864, *s.* 2—*Small Cause Court—Jurisdiction—Sum added for purposes of.*—Having regard to the provisions of s. 28, Act IX of 1850, and s. 2, Act XXVI of 1864, the Small Cause Court at Calcutta has no jurisdiction in a case in which the plaintiff, in order to give jurisdiction to the Small Cause Court, claims as damages sums which by law he cannot recover, which he cannot be entitled to at all, and adds them to his claim for that purpose. BONAMALLY MAWN v. T. CAMPBELL, **10 B L R. 193=19 W. R. 20.** [*R.*, 24 C. 661.]

(7)—*Contract—Contract amount exceeding Court's jurisdiction—Suit for damages which fall within value of Court's jurisdiction.*—In a suit for damages on account of the defendant's refusal to take delivery of goods of the value of Rs. 3, 699-6 8 sold to him by the plaintiff, which goods were afterwards re-sold at a loss of Rs. 344-5-9, *held* that the Court of Small causes had jurisdiction over the suit, though the original contract was far more than Rs. 1,000. W. KUPPU CHETTI v. C. CHIDAMBARA MUDALI, **3 M.H C. 170.**

(8)—*Claim in excess—Jurisdiction of Court.*—The mere fact that the plaintiffs have claimed a sum in excess of the Small Cause Court's jurisdiction is not enough to take the case out of the operation of s. 20 of the Presidency Small Cause Courts Act, 1882, when the result of the suit shows that the true amount or value of the subject-matter was not above the Court's limit. SHRIDHAN v. GORDHANDAS, **3 Bom. L.R. 893=26 B. 235.**

(9)—*Small Cause Court, Presidency Towns—Abandonment of excess—Claim not within pecuniary limits of jurisdiction.*—The Court has no jurisdiction to hear a case, unless there be an abandonment of any excess above its pecuniary jurisdiction. GORACHUND CHUNDER BOSE v. CHARROO CHUNDER GHOSE, **Bourke O.C. 3=Cor. 93.**

(10)—*Jurisdiction of Small Cause Courts—Tradesman's account—Splitting up of cause of action.*—A tradesman cannot, by keeping separate accounts in respect of the dealings of a customer, so split up his cause of action as to bring his case within the jurisdiction of a Presidency Small Cause Court. CASSUM JOOMA v. THUCKER LILADHUR KISSOWJEE, **2 B. 570.**

(11)—*Small Cause Court, Presidency Towns—Splitting claim—Omission to abandon excess—Act* IX *of* 1850, *s.* 34.—Under s. 34, Act IX of 1850, an abandonment of excess not stated in the summons is a splitting of the claim, and the Court has no jurisdiction to amend its record, where there is no abandonment so stated. GORACHAND CHUNDER BOSE v. CHARROO CHUNDER GHOSE, **Bourke O.C. 3=Cor. 93.**

Small Cause Court, Presidency Towns, Jurisdiction of—continued.

——1.—General—*continued.*

(12)—*Jurisdiction of Small Cause Courts—Splitting causes of action—Act* IX *of* 1850, *s.* 34. —The defendants acted as plaintiff's brokers, guaranteeing the plaintiffs against any losses that might arise in the transactions entered into with Native firms by the plaintiffs through the defendants as brokers. Some of the firms becoming indebted, the defendants required the plaintiffs to sue them and gave a list of six firms. The plaintiffs incurred a large sum of money as costs in the suits and wrote to the defendants claiming recovery of taxed costs in all the suits. On the failure of defendants to pay the amount, the plaintiffs sued in respect of the taxed costs in one of the suits in the Small Cause Court. *Held* that the plaintiffs had split up the cause of action and that s. 34, Small Cause Courts Act, applied to this case. BLACKWELL AND CO. v. SUMAR AHMED, **6 B.H.C.O.C. 88.**

(13)—*Presidency Small Cause Courts Act, s.* 69—*Jurisdiction—Divisible contract.*—A contract for the delivery of goods provided that the goods should be delivered in two months by lots, and that the contract was to be treated as a separate contract in respect of each lot. Two suits were brought for breach of the contract in respect of both lots in the Presidency Court of Small Causes, and the damages claimed in respect of the breaches, though separately within the pecuniary jurisdiction of the Court, were in the aggregate beyond such jurisdiction. *Held*, the plaintiff was entitled to bring two suits as per terms of the contract. VOLKART v. SABJU SAHIB, **19 M. 304.**

(14)—*Jurisdiction—Small Cause Court—Suit against soldier—Army Act*, 1881, *s.* 144 (1)—*Stat.* 44 *and* 45, *Vic., c.* 58.—A Small Cause Court Judge has jurisdiction to entertain a suit against a soldier, as there is no provision in the Army Act that a soldier of the regular forces could not be sued. S. 144 (1) of the Army Act, 1881 (44 and 45 Vic., c. 58) provides that a soldier of the regular forces shall not be *compelled* to *appear* before a Civil Court on account of a claim of less than £30. NAGAR MAL v. BERRY, **A.W.N. 1883, 170.**

(15)—*Jurisdiction given to SmallCauseCourts (Presidency)—S.* 18, *Act XV of* 1882—*S.* 7, *Army Act* (1898) (51, *Vic. c.* 4).—The Army Act 1888 (51, Vic. c. 4), s. 7, does not affect the jurisdiction given by s. 18, Act XV of 1882, to Presidency Small Cause Courts. WATTS AND CO. v. BLACKETT, **18 C. 144.** (13 C. 37, *R.*) [*Appl.*, 18 C. 372; *Not F.*, 1 P.R. 1893.]

(16)—*Presidency Town's Small Cause Court Act* (IX *of* 1850), *s.* 91—*Jurisdiction—Adverse title pleaded in defence—Equitable defence--Plea by defendant of his own fraud.*—Under s. 91 of Act IX of 1850, a Presidency Town's Court of Small Causes cannot try a question of adverse title, either legal or equitable. But it is competent for a defendant in a suit under that section to set up an adverse title, either legal or

Small Cause Court, Presidency Towns, Jurisdiction of—continued.

——1.—General—*continued.*

equitable in bar of the demand, *i.e.*, the action. The Court of Small Causes in such a case cannot determine whether either of those titles is good, but it may, and indeed must, determine, in order to ascertain whether or not its jurisdiction to proceed with the suit is ousted, whether an actual question of title has been set up. Where, therefore, in a suit under the section, whereby the plaintiff sought to eject the defendant from a certain portion of the house occupied by him, the defendant set up the plea that the deed of sale relied on by the plaintiff and the deed of attornment passed by the defendant were all colourable, executed for placing the property beyond the reach of his creditors, *held* that the defendant was entitled to set up the defence, and that it ousted the jurisdiction of the Court of Small Causes to proceed further with the action, because such defence raised a question of adverse title. Where a contract or deed is made for an illegal or immoral purpose, a defendant, against whom it is sought to be enforced, may show the turpitude of both himself and the plaintiff, and a Court of justice will decline its aid to enforce a contract thus wrongfully entered into. It is not for his own sake, however, that the objection is ever allowed, but is founded on general principles of policy, which the defendant has the advantage of. LUCKMIDAS KHIMJI v. MULJI CANJI, **5 B. 295.** [*R.*, 10 M. 17, 18 M. 378, 20 M. 326, 32 M. 323=5 M.L.T. 77=2 Ind. Cas. 616.]

(17)—*Small Cause Court—Equitable jurisdiction, extent of—Act* IX *of* 1850, *ss.* 25, 32 — *Act* XXVI *of* 1864, *s.* 2.—The Court of Small Causes has an equitable jurisdiction only in the cases specified in s. 32 of Act IX of 1850, as the provisions of s. 2 of Act XXVI of 1864 do not extend the class of cases over which the Court has jurisdiction, but only enlarge the amount for which it may make a decree. Case where it has been held the Small Cause Courts cannot enforce trusts, unless the trust, sought to be enforced is one for the payment of a distributive share under an intestacy or a legacy under a will, the value of the claim being not greater than Rs. 1,000. The trustees cannot be sued in the Court of Small Causes by the *cestui que trust* for the recovery of the specific trust property or the value thereof. BAI JADAV v. TRIBHUVANDAS JAGJIVANDAS, **9 B.H.C. 333.** [*R.*, 12 B. 573, 21 B. 48.]

(18)—*Expl.* 1, *s.* 18, *Act* XV *of* 1882 (*Presidency Small Cause Courts*) — *Set-off exceeding pecuniary limit.* — A Presidency Small Cause Court cannot allow a set-off, if the amount sought to be set-off exceeds the amount of its pecuniary jurisdiction. BROJENDRA NATH DAS v. THE BUDGE-BUDGE JUTE MILL CO., **20 C. 527.** [*R.*, 19 A.W.N. 143, 17 C.P.L.R. 139.]

(19)—*Jurisdiction—Small Cause Court—Set-off not admitted.*—The defendant ordered certain goods of the plaintiff and the plaintiff

Small Cause Court, Presidency Towns, Jurisdiction of—continued.

——**1.—General**—*continued.*

consigned the goods, drawing on the defendant a bill of exchange, in favour of a certain Bank, which had been duly accepted by the defendant. The bill, when presented for payment was dishonored, and the attorney of the plaintiff paid the amount to the Bank. The defendant having refused to pay the bill, the goods, after notice to the defendant, were sold at his risk and realised a certain amount. It appeared from the evidence that the defendant alleged that the goods were inferior to the sample and the plaintiff refused to hold a survey until the defendant paid the amount of acceptance. The p aintiff now sued in the Court of Small Causes for the recovery of the price of the goods, giving the defendant credit for the proceeds realised from the sale of the goods. The amount originally due on the bill was beyond the jurisdiction of the Court of Small Causes. *Held* that the Small Cause Court had no jurisdiction in the matter as there is no payment by the defendant or admitted set off. In order to bring a claim within the jurisdiction of the Small Cause Court there must be a payment or an admitted set-off. A person cannot bring his claim within the jurisdiction by offering to give credit for any sum he may choose to allow. THOMAS SHORTT v. ABDUL RAHIMAN, **6 B. H.C.O.C. 53.**

(20)—*Presidency Small Cause Courts—Act* IX *of* 1850, *s.* 42.—A Presidency Small Cause Court, constituted under Act IX of 1850, could, during the same day, and at the same sitting of the Court, *ex parte* restore a cause once struck out under s. 42, though the order for striking out might have been duly recorded. It is of course open to the other party to apply for the setting aside of such *ex parte* restoration on sufficient grounds. SIB CHUNDER MULLICK v. KISSEN DYAL OPADHYA, **1 C. 476.**

(21)—*Madras Presidency Small Causes Courts Rules, rule* 102—*Setting aside* ex parte *decree—Sufficient cause for non-appearance—Illness of defendant--Order dismissing application owing to absence of grounds for granting it.*—Under r. 102 of the Madras Presidency Small Cause Court Rules, it is the duty of the Court to set aside an *ex parte* decree, if it is proved that the defendant was prevented by sufficient cause from attending at the trial of the suit. Where an application to the Madras Presidency Small Cause Court to set aside an *ex parte* decree was based on the ground of the defendant's illness on the day of hearing, and the Judge passed the following order on the application, "No grounds. Dismissed with costs:" *Held*, that the order meant not that the defendant's illness and his inability to appear on account of such illness were not grounds for setting aside the *ex parte* decree, but that the Judge was not satisfied that the defendant was prevented from illness from appearing, and that the High Court could not interfere in revision with the order. *In re* DAWOOD MOHIDEEN, **11 Ind. Cas. 992.**

Small Cause Courts, Presidency Towns, Jurisdiction of—continued.

——**1.—General**—*continued.*

(22)—*Jurisdiction of Registrar, Presidency Small Cause Court to set aside* ex parte *decree.*—The Registrar of the Presidency Small Cause Court has no jurisdiction to entertain an application for a new trial and for setting aside an *ex parte* decree made by him for default. The Court, as opposed to the Registrar, is under the rules, the proper and the only authority which can deal with such an application. HALADHAR MAITI v. CHOYTONNA MAITI, **30 C. 588=7 C.W.N. 547.**

(23)—*Small Cause Court—Second new trial.*—It is competent to the Judges of the Small Cause Court at Calcutta to grant a second new trial in the same case PURSON CHUND GOLACHA v. KAJOORAM, **10 B L.R. 355=19 W.R. 203.** [*F.*, 22 C. 784; *D.*, 3 C.L.J. 199, 4 C.L.J. 46=10 C.W.N. 14.]

(24)—*S.*38, *Presidency Small Cause Court Act* (XV *of* 1882), *as amended by s.*11 *of Act* I *of* 1895—*Power of Presy. Small Cause Court to pass order under s.* 373, *Civ. Pro. Code*, 1882, *after granting order for new trial—Suit, withdrawal of.*—The Presidency Small Cause Court has the power, after granting an order for a new trial at the instance of a plaintiff, to allow the withdrawal of the suit with liberty to bring a fresh suit. Though it exercises a revisional jurisdiction when it grants a new trial, it becomes an original Court as soon as it grants the new trial, and has the power, as such Court, to pass an order under s. 373, Civ. Pro. Code. JADU MANI BOISTABEE v. RAM KUMAR CHAKRAWARTI, **29 C. 239.**

(25)—*Presidency Small Cause Courts Act* (*Act* XV *of* 1882), *s.* 37—*Powers of Full Bench—Question of fact.*—On an application made by the unsuccessful party under s. 37 of Act XV of 1882, the Full Bench of the Presidency Small Cause Court cannot interfere with the decree of the Court of first instance, merely because in its opinion the latter Court has come to a wrong conclusion on the evidence. It cannot order a new trial, unless the decision is such as no reasonable man ought to have come to. SADASOOK GAMBIR CHUND v. KANNAYYA, **19 M. 96.** [*F.*, 24 C. 455=1 C.W.N. 44, 21 M. 232, 27 B. 563; *R.*, 23 B. 414, 31 M. 490=18 M.L.J. 480=4 M.L.T. 283.]

(26)—*Act* IX *of* 1850, *s.* 91—*Jurisdiction—Small Cause Court—Possession—"Without leave of the owner."*—A Small Cause Court has jurisdiction under s. 91 of Act IX of 1850 to put the plaintiff into possession of premises within the pecuniary jurisdiction of that Court. The fact that the occupier appears on summons and shows as cause that which does not amount to an allegation of title on the occupier, does not oust its jurisdiction. The words, "without leave of the owner" in s. 91, are not confined to the case of an original entry without leave, but also comprise a case in which the leave once granted by the original owner has

Small Cause Court, Presidency Towns Jurisdiction of—continued.

——1.—General—*continued.*

been withdrawn by the present owner, who derives title under him. DADABHAI HUSSANJI v. KUVARBAI, **10 B.H.C. 386.** (2 Taylor and Bell 57, *R.*)

(27)—*Presidency Small Cause Court Act* (XV *of* 1882), *s.* 28—*Calcutta Small Cause Court, jurisdiction of—Title to tiled huts.*—The Small Cause Court of Calcutta has jurisdiction to try the question of title to tiled huts, when such a question arises in execution proceedings. The Small Cause Court in executing the decree of another Court transferred to it, has the same powers as it possesses in regard to its own decrees. The same Court has powers to decide all questions arising in execution of a decree under s. 28 of Act XV of 1882. GUNAPUTTY ROY AGARWALLA v. THAKURDYE THAKURANI, **34 C. 823.** (26 C. 778, 4 C.W.N. 470, *R.*)

(28)—*Ss.* 37, 23, 28, *Presy. Small Cause Court Act*, 1882—*Proceeding under s.* 278, *Civ. Pro. Code, order of Small Cause Court made in*—*Ss.* 12, 9, *Presy. Small Cause Amending Act*, 1895—*S.* 9, *Act* I *of* 1908 *Operation of—Notification of Small Cause Court under powers reserved to it by—S.*283, *Civ. Pro. Code—S.*3, *Act* X *of* 1888—"*For the purpose of execution,*" *meaning of—Power of Calcutta Small Cause Court*—Res judicata.—An order of the Small Cause Court, Calcutta, made in a proceeding under s.278, Civ. Pro.Code, being an order made in a suit within the meaning of s. 37, Presy. Small Cause Court Act, is final. S. 23, Act XV of 1882, has been repealed by s.12 of the Amending Act I of 1895; but s. 9 of the latter Act continues in force the whole of the present practice and law of Procedure of the Small Cause Court, until the Procedure has been superseded by a new Procedure to be introduced by the rules framed by the High Court. S. 283, Civ. Pro. Code, has been excluded from application to a claim proceeding in the Small Cause Court, by a notification issued by the Court under the powers reserved to it by s. 23 of Act XV of 1882, which notification under s. 3, Act X of 1888, is still in force. The words of s. 28, Act XV of 1882, "for the purposes of execution," must be taken to mean for all purposes of execution, inclusive of the purpose of determining objections made to attachment. Though "tiled huts" may be immoveable property, for the purposes of execution, they must be deemed to be moveable property. The Calcutta Small Cause Court has full power and authority to determine the question of title under a mortgage over attached property, and that question is *res judicata* as between the parties. DEENONATH BATABYAL v. NUFFER CHUNDER NUNDY, **26 C. 778 = 3 C.W.N. 590.** (18 C. 296, *F.*) [*Reversed*, 4 C.W. N. 470; *R.*, 34 C. 823.]

(29)—*Presidency Small Cause Court Act* (XV *of* 1882), *s.*18—*Suit for maintenance cognizable.*—A suit for maintenance, where the amount had not been fixed by contract or declaratory decree, is cognizable by Presidency Small Cause Courts constituted under Act XV of 1882. POKALA v. MURUGAPPA, **10 M. 114, F.B.**

(30)—*Provincial Small Cause Courts Act*, IX *of* 1887, *sch*, II, *art.* 18—*Loan by trustee from trust funds—Suit by other trustees to recover amount due—Suit cognizable by Small Cause Court.*—Suit on the Small Cause side on a pronote executed by a trustee for money borrowed from the trust funds. The Court, however, returned the plaint under s. 57, Civ. Pro. Code, on the ground that the cognizance of the suit by a Court of Small Causes was barred by s. 18, sch. II to the Provincial Small Cause Courts Act. *Held*, that though the amount was a loan to one of the trustees by the remaining trustees out of the trust funds, a suit for the recovery of the debt due personally by a trustee for an amount lent to him out of trust funds was no more a suit relating to a trust within the meaning of art. 18 than a suit to recover a debt advanced out of trust funds to a stranger who was not a trustee. The suit was therefore cognizable by a Court of Small Causes. SUNDARALINGAM CHETTI v. MARIYAPPA CHETTI, **26 M. 200.**

(31)—*Incomplete gift of Government promissory notes—Suit by executor of donor to recover notes--Jurisdiction Small Cause Courts Act*, XV *of* 1882, *s.* 18.—A, as the executor of X, sued B in the Court of Small Causes at Bombay to recover two Government promissory notes of Rs. 2,000 in value, standing in the name of X. The defence was that the notes had been given by the testator to the defendant as a reward for past services. The Small Cause Judge on the evidence adduced by the defendant, *held* that there had been a gift in his favour. The plaintiff thereupon contended that the defendant was entitled to no relief from the Court, because, even granting that there was a gift, the gift was an incomplete one, inasmuch as the notes had not been endorsed. The Small Cause Judge dismissed the suit, holding that he had no power to declare that the gift was incomplete and on that ground to decree the return of the notes or payment of their value, and that, so far as the jurisdiction of the Small Cause Court was concerned, the defendant had a right to retain the notes. But, at the request of the plaintiff, the matter was referred for the High Court's opinion. *Held*, (1) that the Small Cause Court was competent to entertain the suit, on the ground that there was an incomplete gift to the defendant; and (2) that a decree might be passed in favour of the plaintiff ordering the defendant either to return the notes or pay their value. KHURSEDJI RUSTOMJI COLAH v. PESTONJI COWASJI BUCHA, **12 B. 573.** [*R.*, 8 M.L J. 149.]

(32) — *Breach of contract — Liquidated damages—Earnest money—Small Cause Court.*—A contract for the sale and delivery of 2000 *baras* of rubble stone contained a provision

Small Cause Court, Presidency Towns, Jurisdiction of—continued.

——1.—General—*continued.*

that, in case of breach by the purchaser, liquidated damages were to be paid by him at one rupee per bara. The purchaser deposited Rs. 1,000 as earnest money with the plaintiff, but made default in accepting the stone. The plaintiff brought an action to recover the sum of Rs. 1,000, being the alleged balance of liquidated damages due from the defendant to the plaintiff on account of the breach of contract by the former. The defendant pleaded to the jurisdiction of the Small Cause Court. *Held* under the circumstances of the case that the suit was rightly brought in the Small Cause Court. MEHERVANJI MANCHARJI v. PUNJA VELJI, **5 B.H.C.O.C. 147.**

(33)—*Small Cause Court—Jurisdiction—Suit on balance of account—Receipt in nature of part payment.*—The defendant consigned certain bags of rice and grain to Hongkong, through the plaintiffs, to be there sold by the agents of the plaintiffs, for the account of the defendant. Against this consignment, the plaintiffs advanced to the defendant a sum of Rs. 15,000. The plaintiffs gave credit to the defendant for certain sums alleged to have been received from the plaintiffs' agents at Hongkong, as proceeds of the sale of the defendants' grain, and amounting in all to the sum of Rs. 14, 115-3 3, leaving a balance due to the plaintiffs of Rs. 1,264 and odd. This balance with interest amounted to Rs. 1,355 14-5. The plaintiffs, abandoning a portion of their claim to bring the case within the jurisdiction of the Court of Small Causes, sued in the Bombay Small Cause Court to recover a sum of Rs. 1,000 from the defendant. The defendant disputed the correctness of the account sales forwarded by the agents at Hongkong, and pleaded want of jurisdiction in the Small Cause Court to try the same. *Held*, that both the plaintiffs and the defendant were bound by the nature of the transaction to have the proceeds of the sale applied to satisfy the advance made by the plaintiffs to the defendant, and that the receipt by the plaintiffs of the amount for which they gave credit in their particulars of demand was in the nature of a part payment, and that the suit was therefore, on a balance of account, and within the jurisdiction of the Court of Small Causes. EWART LATHAM AND CO. v. HAJI MUHAMMAD SIDDIK, **4 B.H C.O.C. 133.** [*D.*, 6 B.H.C.O.C. 53.]

(34)—*Reg.* XIX *of* 1827, *s.* 2—*Acts done by Collector of Bombay in official capacity—Revenue Court—Act* XX *of* 1850, *s.* 25—*Jurisdiction—Small Causes Court.*—The Revenue Court, under s. 2, Reg. XIX of 1827, has not exclusive jurisdiction over the Collector of Bombay for all acts done by him in his official capacity. Where the plaintiff brought an action for trespass against the Collector of Bombay who, *bona fide* believing that certain land on which a quarry had been opened by the plaintiff was Government waste land, by his servants forcibly stopped the quarrying operations of the

Small Cause Court, Presidency Towns, Jurisdiction of—continued.

——1.—General—*continued.*

plaintiff "for the purpose of preserving the land for Government, as land from which revenue might in future be collected," *held* that this act of the Collector was not a "matter concerning revenue" within the meaning s. 25, Act X of 1850, and the jurisdiction of the Small Cause Court was therefore not excluded. *Held* also that plaintiff's possession of the land was sufficient to entitle him to maintain an action of trespass against the Collector. NARAYAN KRISHNA LAUD v. GERARD NORMAN, **5 B.H C. O.C.** 1. [*R.*, 5 L.B.R. 163.]

(35)—*Small Cause Court—Insolvency jurisdiction—Act* XIV *of* 1882, *ss.* 8 *and* 3—*Act* XV *of* 1882.—The Insolvency jurisdiction of the Madras Small Cause Court, conferred by the notification of the Local Government under s. 8 (para. 2) of Act X of 1877, does not subsist, since Act XV of 1882 came into operation. *In re* WALLER, **6 M. 430.** [*F.*, 16 C 13.]

(36)—*S.* 19, *Presidency Small Cause Courts Act* (1882), *Legacy, suit for.*—A suit for a legacy, there being no allegation that the executors were in possession of sufficient assets to pay the legacy or that they had assented to pay the legacy, is a suit for the administration of an estate and for an account, and as such not cognizable by a Presidency Small Cause Court. OKHOY COOMAR BONNERJEE v. KOYLASH CHUNDER GHOSAL, **17 C. 387.**

(37)—*Jurisdiction—Court of Small Causes (Bombay)—Title to immoveable property—Act* IX *of* 1850, *ss.* 25, 91—*Act* XXVI *of* 1864, *s.* 2—*Form of suit—Practice.*—The Courts of Small Causes (Bombay) has no jurisdiction to try a suit brought under s. 91 of Act IX of 1850, where a question of adverse title to immoveable property is in dispute. But it has jurisdiction if the suit is under s. 25 of Act IX of 1850 as extended by s. 2 of Act XXVI of 1864, and the immoveable property in dispute does not exceed Rs. 1,000 in value. [*F.*, 5 B. 295; *D.*, 10 B. 30, 15 B. 400.] A plaintiff suing out his summons under s. 91 of Act IX of 1850, cannot be permitted to treat the case as if the summons had been sued out under s. 25 of the Act, and to proceed with the case, although the defendant may claim against him the fee adversely, and the property does not exceed Rs. 500 in value. But the Court will permit it, when the clerk of the Court and not the plaintiff is responsible for the mistaken form in which the summons has been issued. NOWLA OOMA v. BALA DHURMAJI, **2 B. 91.**

(38)—*Investigation of claim filed by a mortgagee—Question of title to immoveable property—Small Cause Court, jurisdiction of—Consent—Estoppel.*—When the Calcutta Small Cause Court in execution of a decree ordered the attachment of certain tiled huts as belonging to the judgment-debtor, and a claim was put in by the mortgagee of those huts, which was disallowed as being fraudulent, and the claimant brought a suit in the High Court on the

Small Cause Court, Presidency Towns, Jurisdiction of—continued.

——1.—General—*continued.*

original side to establish the validity of his mortgage, *held*, on the question whether the suit would lie; that the Small Cause Court had no jurisdiction to go into the question of the validity of the plaintiff's mortgage, and consent by the parties could not give jurisdiction to the Court; and that the plaintiff was not estopped from alleging that the Small Cause Court had no jurisdiction to deal with the matter. DENO NATH BATABYAL v. ADHOR CHUNDER SETT, **4 C.W.N. 470.**

(39)—*Art.* 31, *sch.* II, *Provincial Small Cause Courts Act* (IX *of* 1887)—*Suit by a person dispossessed of land, for mesne profits—Small Cause Court suits — Mesne profits — Second appeal.*—Where the plaintiff had been dispossessed of his land by the defendant, a suit by the former for recovery of mesne profits of land, during the period of dispossession, is not cognizable by a Small Cause Court. [*F.*, 25 B. 85; *R., & Commented upon*, 94 P.R. 1900; *Cited*, 119 P.R. 1894; *R.*, 15 M. 298, 39 P.L.R. 1901.] A second appeal in the suit referred to above would lie to the High Court. SRIRAM SAMANTA v. KALIDAS DEY, **18 C. 316.** [*R.*, 15 M. 298, 39 P.L.R. 1901; *Overruled*, 23 C. 884; *F.*, 25 B. 85.]

(40)—*Jurisdiction—Special registration cases—Presidency Small Cause Courts—Act* XX *of* 1866, *ss.* 52, 53,—Presidency Small Cause Courts have no jurisdiction to pass decrees in cases of special registration under the provisions of ss. 52, 53 of Act XX of 1866. *In the matter of* NILKAMAL BANERJEE v. MADHUSUDAN CHOWDHRY, **6 B.L.R. 177=14 W.R. 478.** [*D.*, 11 C. 169.]

Power of Small Cause Court to attach salary of Railway servant not fallen due—Salary disbursable outside jurisdiction of Court—*See* ATTACHMENT—GENERAL, 30 C. 713=7 C.W.N. 821.

See BAILMENT, 5 B.L.R. App. 31=14 W.R. 303.

See CERTIORARI, WRIT OF, 8 B H.C.O.C. 59.

See EVIDENCE—MISCELLANEOUS DOCUMENTS, 7 B.L.R. App. 61.

See EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 1 B. 82.

Suit on judgments—Court in Native States—Foreign judgments—Judgment of British Indian Court—Suit in High Court on judgment of Court of Small Causes—Civ. Pro. Code, 1877, s. 434—*See* FOREIGN COURT, JUDGMENT OF, 6 B. 292.

See HIGH COURT, JURISDICTION OF—CALCUTTA, 29 C. 498.

See LANDLORD AND TENANT—MISCELLANEOUS, 10 B. 30.

Small Cause Court, Presidency Towns, Jurisdiction of—continued.

——1.—General—*concluded.*

See LEGAL PRACTITIONERS—PLEADER—APPOINTMENT AND APPEARANCE, 1 B.L.R. A.C. 45=10 W.R. 82.

Presidency Court of Small Causes, Bombay, exclusive right of Barristers and Attorneys to practise in—Pleaders of Bombay High Court, whether entitled to practise in Presidency Small Cause Court—Right of High Court pleaders to practise in Mofussil Court—Civ. Pro. Code, 1885, ss. 2, 36—Power of Presidency Small Cause Court to make rules as to practitioners therein—*See* LEGAL PRACTITIONERS—PLEADER—APPOINTMENT AND APPEARANCE, 8 B. 105, F.B.

See NEGOTIABLE INSTRUMENTS — SUMMARY PROCEDURE ON, 8 B.L.R. App. 10.

See RIGHT OF SUIT—DECREES, 6 B. 7, 2 C. 434, 5 C. 294=4 C.L.R. 477.

Contract between British subject and non-British subject as to registered ship in Calcutta—Merchant Shipping Acts, ss. 53, 55—Jurisdiction of Small Cause Court—Execution of Small Cause Court decree—*See* SHIP, 2 Ind. Jur. N.S. 251.

——2.—Small Cause Court, Presidency Towns Practice and Procedure.

(1)—*Small Cause Court Act*, IX *of* 1850, *s.* 42—*Right of party to appear by another person—Court's power to require party's personal attendance—Long established practice—Law of Court.*—The words of s. 42 of Act IX of 1850 mean that the plaintiff may appear in person, or by such other person as may, by the Rules of the Court, appear for a party in a cause. The party is not bound by the Act to appear in person in the first instance. Where the personal attendance of the plaintiff in Court appears to the Judge to be necessary for the proper investigation of the case, he may require the plaintiff's attendance, unless the case is within the privilege given by s. 46 of the Act. If the plaintiff's appearance be or become unnecessary, it would be a vexatious thing to compel him to attend. The Judge is not bound to depend on the *ipse dixit* of the defendant as to the necessity for the plaintiff's presence. Where a Judge finds a long-established Court practice, he must take it to be the law of the Court until it is overruled by a higher tribunal, or by legislation. NENBAI v. HAIM MUSAJI, **4 B.H.C.O.C. 119.** [*F.*, 16 B. 152, 28 M. 117=14 M.L.J. 430.]

(2)—*Small Cause suit—Technical objection to cause of action—Duty of Court—Act* IX *of* 1850, *s.* 27—*Pleadings—Pracitce.*—Where, in a Small Cause suit, an objection of highly technical character, is taken to the form of the plaintiff's cause of action, it is the duty of the Court, under the provisions of s. 27 of Act IX of 1850, to rectify the mistake, whether the plaintiff makes the request or not, and so to take care that the case of the plaintiff is not prejudiced in the merits by such objection.

Small Cause Court, Presidency Towns, Jurisdiction of—continued.

—2—Small Cause Court, Presidency Towns Practice and Procedure—*continued.*

The Legislature never intended to introduce the nicetics of special pleading, which obtain in the Courts of Common Law in England, into the practice of the Court of Small Causes at Calcutta. The parties to a suit in that Court do not themselves declare and plead in technical fashion. There is no other declaration than the summons which is filled up by the officer of the Court on the oral statement of the complainant, and no plea except that which the Judge takes down from the mouth of the defendant or his pleader. MACKENZIE LYALL AND CO. v. L. W. DOVER, **14 W.R. 487.**

(3)—*New trial—Fresh evidence—Further inquiry—New trials—Additional facts stated by affidavit.*—A party who applies for a rule for a new trial, and obtains it on particular materials, ought not to be allowed to go into fresh evidence with a view to strengthen his case when the rule comes on for hearing. If, on hearing both parties, the Court thinks further inquiry necessary, it can make such inquiry in such manner as seems most fit to it. When new trials are moved for on allegation of facts, it would be very convenient that a practice should be introduced of requiring the facts to be stated by affidavit, and in like manner the answer to be supported by affidavit. MODHOOSOODUN KOONDOO v. MADHUBRAM SEWLOLL, **15 W.R. 161.**

(4)—*Presidency Small Cause Courts Act (Act XV of 1882), ss. 37, 69—Application to Full Bench for retrial.*—A hearing of an application for a new trial by a Full Bench, under s. 37 of the Presidency Small Cause Courts Act XV of 1882, is not the hearing of a suit within the meaning of s. 69 of the said Act, so as to entitle the Court to state a case for the opinion of the High Court, either on its own motion or at the requisition of either party. OAKSHOTT v. BRITISH INDIA STEAM NAVIGATION COMPANY, **15 M. 179.** [*D.*, 20 M. 358=7 M.L.J. 140.]

(5)—*Act IX of 1850 (Small Cause Court), s. 89—Right of Small Cause Court Judges to reserve questions for opinion of High Court.*—By the terms of the law, the Small Cause Court Judges are authorized to reserve questions for the opinion of the High Court, only where they arise in suits pending before them, and not when doubts may occur upon applications for the issue of process or warrants. MOHUN SINGH v. KAREEM-ONNISSA BEGAM, **8 M.H.C. 57.**

(6)—*Act XXVI of 1864, s. 7—Difference of opinion—Question of fact and law—Reference to High Court—Costs.*—Under s. 7 of Act XXVI of 1864, a question of fact cannot be reserved for the opinion of the High Court, where there is a difference of opinion between two Judges of the Small Cause Court at Calcutta. But, if

Small Cause Court, Presidency Towns, Jurisdiction of—continued.

—2.—Small Cause Court, Presidency Towns Practice and Procednre—*continued.*

the Judges differ on a question of law, it ought to be expressly stated and referred to the High Court. In the case of a difference of opinion between two Judges upon the point as to whether there should be a new trial, no rule can be granted. *Quære*:—Whether the High Court have power to give costs in a case in which they have declined to exercise jurisdiction? JARDINE SKINNER AND CO. v. J. W. B. MONEY, **14 W.R. 312.**

(7)—*Act XVIII of 1854, s. 10—Cotton fabrics bordered with silk—Silk in a manufactured state—Question of fact—Act IX of 1850, s. 55—Act XXVI of 1864, s. 7—Value of silk not more than one half of entire value.*—The question whether cotton cloths, with a border of silk at the ends varying from one to three inches, or having a portion of silk otherwise used in their manufacture are, or are not, "silks in a manufactured or unmanufactured state, wrought up with other materials," within the meaning of s. 10, Act XVIII of 1854, is not a question of law, which by Act XXVI of 1864, s. 7, and Act IX of 1850, s. 55, the Judge has power to reserve for the opinion of the High Court, but is a question of fact to be decided on evidence. Where the value of the silk wrought up with other materials is not more than half the value of the fabric, the fabric cannot be considered to be silk within the meaning of Act XVIII of 1854. LAKHMIDAS HIRACHAND v. THE GREAT INDIAN PENINSULA RAILWAY COMPANY, **4 B.H.C. O.C. 129.** [*R.*, 21 A. 412, P.C.]

(8)—*S. 69, Act XV of 1882 (Presidency Small Cause Courts)—Small Cause Court reference—S. 617, Civ. Pro. Code, 1882—Construction.*—A reference can only be made under s. 69, Act XV of 1882, for the opinion of the High Court, upon some question of law, or usage having the force of law, upon the construction of a document, if any such question arises in a suit or proceeding in which the amount or value of the subject-matter is over Rs. 500 and either party requires such reference. A Small Cause Court, making a reference under s. 69, should state the question of law, or usage having the force of law, or the construction of a document upon which the opinion of the High Court is sought. *Quære.*—Whether s. 617, Civ. Pro. Code, 1882, is to be read as incorporated with s. 69 of the Presidency Small Cause Courts Act? BENODE LALL ROY v. THE RIVER STEAM NAVIGATION CO., **1 C.W.N. 143.**

(9)—*Act XXVI of 1864, ss. 7, 8—Reference to High Court—Conclusion of case—Judgment contingent on opinion of High Court ought previously to be given.*—Where a Court of Small Causes thought fit to refer a case for the opinion of the High Court under ss. 7 and 8 of Act XXVI of 1864, it was bound to conclude the case and pass judgment thereon contingent

***Small Cause Court, Presidency Towns, Jurisdiction of*—continued.**

——2.—Small Cause Court, Presidency Towns, Practice and Procedure—*continued.*

upon the opinion of the High Court. DOSABHAI KAVASJI v. KHERBADJI HORMASJI, **7 B.H.C.O C. 180.** [*F.*, 4 B. 230.]

(10)—*Presidency Small Cause Courts Act* (XV *of* 1882), *s.* 69—*Duty of Judge in stating case to High Court—Conditions precedent.*—S. 69 of the Presidency Small Cause Courts Act (XV of 1882), makes it a condition precedent to the drawing up of a statement of the facts of the case by the Small Cause Court and referring it for the opinion of the High Court, that a question of law or usage having the force of law or as to the construction of a document which may affect the merits, arises in the case. If, upon the findings of the Judge, no such question arises, the Small Cause Court has no authority to refer the case for the opinion of the High Court, and the High Court has no jurisdiction to deal with it. The section, moreover, imposes on the Small Cause Court the duty of drawing up the case, and though in framing it, that Court may well invite the assistance of the parties and give weight to their suggestions, yet it ought not to send up questions which involve the High Court in the dilemma of either entering upon matters of fact, or refusing to answer the questions, or drawn in such a form as to involve an assumption which the facts as found by the Judge, do not warrant. The Small Cause Court is itself responsible for the form of the case which it submits for the opinion of the High Court. ISHWARDAS TRIBHOVANDAS v. KALIDAS BHAIDAS, **20 B. 779.**

(11)—*S.* 8—*Small Cause Court, reference from—Costs.*—This case had been referred from the Small Cause Court for the opinion of the High Court at the request of the plaintiffs. It appeared that no security or deposit for costs had been given as required by s. 8, Act XXVI of 1864, and plaintiffs did not appear. *Held* that the case was not properly before the Court, and that an application for costs by the defendant who did appear should therefore be refused. RAJKUMAR PARAMANIK v. L. STEWART, **5 B.L.R. App. 23.**

(12)—*Act* XXVI *of* 1864, *s.* 8—*Small Cause Court Reference—Omission to deposit costs—Non-appearance.*—If a party asks the Judge of the Small Cause Court to refer a case and does not appear in the High Court, he must be taken to have abandoned his case, and must have judgment given against him in the Court. The defendants who appear would be entitled to an order that the plaintiffs at whose request the reference was made should pay the costs of the reference and other expenses connected therewith. F. DISSENT v. THE JUSTICES OF THE PEACE FOR THE TOWN OF CALCUTTA, **5 B. L.R. App. 24=20 W.R. 349, Note.** [*R.*, 20 W.R. 349.]

(13)—*Jurisdiction—Special registration cases—Presidency Small Cause Courts—Act* XX *of*

***Small Cause Court, Presidency Towns, Jurisdiction of*—concluded.**

——2.—Small Cause Court, Presidency Towns, Practice and Procedure—*concluded.*

1866, *ss.* 52, 53.—Presidency Small Cause Courts have no jurisdiction to pass decrees in cases of special registration under the provisions of ss. 52, 53 of Act XX of 1866. *In the matter of* NILKAMAL BANERJEE v. MADHUSUDAN CHOWDHRY, **6 B.L.R. 177=14 W.R. 478.** [*D.*, 11 C. 169.]

Small Casue Jurisdiction.

See MAD. ACT IV OF 1863.

Small-pox.

Small pox, liability for carrying in a public conveyance a person suffering from—*See* BOM. ACT III OF 1888, s. 430, 7 Bom. L.R. 460.

Smoke.

Right of discharging—over neighbour's land whether capable of being acquired by prescription—*See* EASEMENT ACT, 1882, s. 28 cl. (*d*), 22 B. 831.

Whether smoke nuisance amounts to injury to reversioner—Nature and form of injunction to be granted—*See* NUISANCE, 3 S.L.R. 30=1 Ind. Cas. 958.

Social Questions.

Jurisdiction—*See* JURISDICTION OF CIVIL COURTS, 3 B.L.R.A.C. 91=11 W.R. 457.

Societies Registration.

See ACT XXI OF 1860.

Society.

(1)—*Mutual Benefit Society — Alteration of rules by majority of subscribers.*—Any rule of a Society, carried on for the equal benefit of all subscribers, which gives an undue advantage to a class of subscribers, is *extra vires* and is, even in the absence of an empowering rule to that effect in the rules of the Society, open to correction by a majority of subscribers, who could, by so acting affect the nominees of all existing subscribers. FALLE v. MACEWEN, **7 C. 1=8 C.L.R. 577.** [*Appl.*, 22 B. 451.]

(2)—*Voluntary Benefit Society — Rules of society, whether could be altered.*—First plaintiff became a member of the Bombay Uncovenanted Service Family Pension Fund in 1875. A proviso added to the rules of the Association in 1871 provided that incumbents on the Fund residing in England shall be paid their monthly pensions at the fixed rate of two shillings to the rupee. At the end of 1877, this was amended so as to exclude from the benefit of the fixed rate the widows of members who had joined the fund after the 1st January, 1888. In July, 1895, further amendments were made abrogating the two shillings rate privilege previously secured to the members who had joined before 1st January 1888. Plaintiffs alleged

Society—*concluded.*

that the above alterations in the rule, were *ultra vires* of the society and prayed for a declaration that the second plaintiff, wife of the first, would be entitled, on her becoming a widow, to receive her pension at par. Plaintiff's claim was rejected on the following grounds: —The contract with the first plaintiff was, in effect, only that his widow, if he left one, was to receive such pension as the rules prescribed, and that the rules were liable to alterations by a majority at a general meeting to which he would be subject so long as he remained a member. If the plaintiffs had referred to the rules they agreed to submit to, they would have noticed that they were liable to alteration, and it could hardly be contended that a vote passed by the members of the Fund, with a view to restore the disturbed equality of widow's pensions, was beyond the competence of the subscribers, merely because the expectations of some of the members such as those of the plaintiff in this case were considerably greater than those of others. STEVENS v. BEDFORD, **22 B. 451.**

(3)—*Incorporated society—Gift to Managing Committee of* 15 *persons—Subsequent formation of society—Right of president to enforce the gift.* —There was a gift of property to 15 persons, forming the Managing Committee for the purpose of establishing a school. This committee then formed a corporate body and registered itself under Act XXI of 1860. There was no deed of transfer by the members of original Managing Committee to the present society. *Held* that the president or secretary of such society can sue to enforce such gift against the donor as such a suit is not one to enforce a contract with the previous committee but to recover property granted to it; that a deed of transfer is not absolutely necessary. RAI GAGARMAL v. BAWA KASUR SINGH, **41 P.R. 1897.**

Unregistered—Secretary and Depositor—Personal liability of—*See* CLUB, 11 P.R. 1892.

Suitto enforce admission as member of a—*See* JURISDICTION OF CIVIL COURTS, 2 Hay 83.

Suit against Secretary of—For rent of premises let—Secretary when and how far liable as agent—Indian Contract Act, IX of 1872, s. 230—*See* RIGHT OF SUIT—GENERAL, 22 B. 754.

Sodi Razinama.

See EVIDENCE—SECONDARY EVIDENCE, 2 M. 117.

Sodomy.

See ACT IV OF 1869, s. 10, 68 P.R. 1882.

Soil.

Lease—Covenant by lessor for re-grant to lessee's heirs—Covenant for single renewal—Right to—and mines—Construction of lease—*See* LEASE—CONSTRUCTION OF LEASE, 7 B. 109.

Soldier.

(1)—*Soldier not on duty but on leave—Applicability of Articles of War—Exemption from arrest.*—In a suit against a soldier to recover from him a debt of Rs. 300, incurred by him while on leave at Simla (doing work as a contractor) it was contended that under s. 40 of the Articles of War, he was exempt from being sued in the Civil Courts, and under s. 78 of Act VIII of 1859, he was not liable to be arrested, though, during such leave, he was not in active military service but employed himself as a contractor. *Held*, that an action will lie against him if the plaintiff had given notice of the intended action at his place of residence but he should not be arrested in execution of the decree obtained against him, nor committed to custody on failure to give security under s. 78 of Act VIII of 1859. SUTHAROO v. CARTER, **94 P.R. 1868.**

Army Schoolmaster—Cantonment Court of Small Causes — Jurisdiction — *See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 6 M.H.C. 83.

Fort of Lahore—Suit against—Special Provisions "Municipal Limits" — *See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 125 P.R. 1881.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 5 W.R. S. C. Ref. 21.

Jurisdiction of Small Cause Courts over soldiers —*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—MISCELLANEOUS, 10 M. 319.

Suit against soldier—*See* SMALL CAUSE COURT, PRESIDENCY TOWNS, JURISDICTION OF—GENERAL, A.W.N. 1883, 170.

See ST. 44 AND 45 VIC. CH. 58, s. 104, 11 M. 475.

Suit against soldier—*See* ST. 44 AND 45, VIC. C. 58, s. 144, Proviso, 10 B. 218.

Sold Notes.

See BOUGHT AND SOLD NOTES.

Variation in Bought Notes, effect of—*See* CONTRACT ACT, 1872, s. 7, 2 S.L.R. 7.

Broker's—on agreement by sale—Cancellation of stamps—*See* STAMP ACT, 1879, sch. I, 46, sch. II, cl. 2 and ss. 11 and 34, 14 B. 102.

Solenamah.

Statements in, nature of—*See* HINDU LAW—PARTITION, 3 Ind. Cas. 234.

Solicitors.

See LEGAL PRACTITIONERS.

(1)—*Duty of Solicitor.*—It is the duty of the Solicitor, who has once undertaken a cause, to carry it to a conclusion. He cannot refuse to do that duty by reason of the client not having complied with any application that may have

Solicitors—*concluded.*

been made to him. OBSERVATIONS ADDRESSED BY LORD WESTBURY, ON BEHALF OF THE PRIVY COUNCIL, TO A SOLICITOR OF THE COURT, **4 B.L.R. P.C. 29=2 Sar. 533.**

Director partner acting as—for company—Remuneration for work done—*See* COMPANY—POWERS AND LIABILITIES OF DIRECTORS, 6 B.L.R. 278.

Right to be heard on matters relating to professional misconduct—*See* CONTEMPT OF COURT, 16 C.W.N. 386, P.C.

See MINOR — SUITS BY AND AGAINST MINORS, 17 M. 257.

Duty of, in transactions concerning Purdanashin ladies—*See* PURDANASHIN WOMAN, 16 C.W.N. 649=39 C. 933=16 Ind. Cas. 110.

Assets of partnership in the hands of Receiver — Solicitor's costs — Creditor's claim—Priority—*See* PARTNERSHIP—MISCELLANEOUS, 11 Bom. L.R. 1062=34 Bom. 484=4 Ind. Cas. 135.

Letters between—of several plaintiffs—Privileged communications — *See* PRIVILEGED COMMUNICATIONS, 4 B. 631.

See ST. 24 AND 25, VIC. C. 104, s. 15, 2 C. W.N. 727.

Constructive notice through—*See* VENDOR AND PURCHASER—NOTICE, 4 C. 897=4 C.L. R. 193.

Solicitor and Client.

See LEGAL PRACTITIONERS.

(1)—*Solicitor's lien—Lien can be exercised where a solicitor is dicharged by his client—Right of inspection of documents over which lien exists in administration suits.*—The right to be exercised by a solicitor claiming a lien largely depends upon the circumstances under which he has ceased to act for his client. The test is whether or not the solicitor has discharged himself or whether he has been discharged by the client; in other words, the question is whether the solicitor has ceased to act for his client owing to any unjustifiable action of his own or whether he has so ceased owing to the action of the client. The obligation on the solicitor to give inspection of and to produce documents in his possession, over which he has a lien in an administration action, is confined to those cases where they are essential to the determination of those questions which arise in the normal administration proceedings, when the estate is being actually administered. AYESHABAI v. AHMED ESSA, **13 Bom. L.R. 670.**

See INSPECTION OF DOCUMENTS, 11 C. 655.

See LIMITATION ACT, 1908 art, 84, 1 B. 505.

Somaj.

(1)—*Social questions—Jurisdiction—Right of action—Declaratory decree—Exclusion from Somaj—S.* 3, *Reg.* VIII *of* 1793.—In a suit for a decree declaring plaintiff's rights to a membership of the *somaj* or society of which defendants and himself were members, *held* that no right of action would lie in such a case; no question of caste was involved; the case did not come under s. 3, Reg. VIII of 1793; and on principles common to English and Hindu law, Courts of law had no jurisdiction in matters of a purely social nature. SUDHARAM PATAR v. SUDHARAM, **3 B.L.R.A.C. 91=11 W.R. 457.** [*F.*, 18 B. 115; *R.*, 10 M. 133, 15 B. 599, 23 B. 122, 3 Bom. L.R. 718=26 B. 174; *D.*, 21 C. 463.]

See CONTRACT—ILLEGAL CONTRACTS, 2 B.L.R.S.N. 4 (*b*)=10 W.R. 349.

See JURISDICTION OF CIVIL COURTS, 3 B. L.R.A.C. 91=11 W.R. 457.

Son-in-law.

Hindu Law—Succession—Custom of Reddi caste—Legality of practice of constituting—Heir to property of father-in-law—Right to disinherit heir in favour of—*See* HINDU LAW—CUSTOM, 1 M.H.C. 51.

Sonthal Parganas.

See BEN. ACT XXXVII OF 1855.

(1)—*Mul-raiyat, rights of, when transferable, whole or portion—Mustagir, rights of.*—The rights of a mul-raiyat, who is a village headman or settlement-holder in the Sonthal Pergannas, are in their entirety transferable, saleable and attachable. The privilege, which a mul-raiyat possesses of transferring his tenure, must be exercised in respect of the whole tenure at the same time; in other words, if he chooses to transfer his tenure, he must alienate the whole of his rights in the village including his right of managing the village and collecting the rent as also his right to the land in his possession. He cannot split up the tenure so as to part with a portion and retain the remainder. A sale of a portion of the tenure confers no title on the purchaser. The rights of a *mustagir* is not absolutely restricted to the collection of rent from ordinary rights. The rights of a mul-raiyat and of a *mustagir* explained. DARBARI PANJIARA v. BENI RAI, **2 C.L.J. 77=32 C. 1014.**

See APPEAL—ACTS AND REGULATIONS, 6 C.L.R. 555.

See CONTRACT ACT, 1872, ss. 23, 24, 26 C. 238.

Decree obtained in—Transfer to Court outside — Arrest of judgment-debtor—*See* EXECUTION OF DECREE—GENERAL, 10 Ind. Cas. 538.

See GUARDIAN AND WARDS ACT, 1890, 34 C. 569.

Jurisdiction of High Court in Sonthal Pergannas—*See* HIGH COURT, JURISDICTION OF—CALCUTTA, 3 C. 298.

Sonthal Parganas—*concluded.*

See HIGH COURT, JURISDICTION OF—CALCUTTA, 10 C. 761.

See JURISDICTION—SUITS FOR LAND, 4 C. 222=2 C.L.R. 478.

Soodras.

See SUDRAS.

Sorcery.

Imputation of, constitutes defamation—*See* DEFAMATION, 4 C.L.J. 390.

South Breeze.

Right to—*See* PRESCRIPTION—EASEMENT—LIGHT AND AIR, 14 C. 839.

Sovereign.

Sovereign—Private and public property of sovereign—Seizure of property—Act of State—Municipal Courts—Jurisdiction.—Military stores of the Begum Sumro having been seized under the orders of the Governor-General, a suit was brought for damages for alleged wrongful seizure. The defence was that the Courts had no jurisdiction. It appeared that the Begum had been recognised as a sovereign and her jaghir resumed by Government by an act of State on her death. *Held* that there was no distinction between the private and public property of a Sovereign and that even if property in its nature private was seized in the exercise of Sovereign power, that circumstance could give no jurisdiction to a Municipal Court. FORESTER v. SECRETARY OF STATE FOR INDIA, **14 P.R. 1867.** [*Reversed on appeal*, 1 P.R. 1872, P.C.=2 Suther. 628=12 B.L.R. 120=I.A. Sup. Vol. 10=3 Sar. 1.]

Can employ as well as dismiss public servants—*See* ACT OF STATE, 5 Bom.L.R. 30=27 B. 189.

Oudh loans 1838 and 1842, payments due under Political pension—Liability to attachment for debt, exemption from—S. 266 (*g*), Civ. Pro. Code, 1882—No distinction observed between State property vested in the sovereign of Oudh—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 18 C. 216, P.C.=17 I.A. 181.

Mohamedan Law—Dominion of sovereign over property of every kind—Property of sovereign subject to ordinary rules of inheritance and partition—Right of sovereign to possess private property—*See* MAHOMEDAN LAW—MISCELLANEOUS, 1 M.H.C. 281.

Sovereign Powers.

(1) *Kathiawar State—Whether British territory—Relation of British India with Native States, how ascertained—Sovereign powers of the Governor of Bombay in Council—Exercise in Native States through Political Agent—Courts of Political Agent and Assistant Political Agents, if King's Courts—Function of Governor in Council on appeal, whether judicial—Appeal to Privy Council.*—The rights and powers of control possessed and exercised over the Native States in India by the British Indian Government, with the corresponding restrictions upon the independent action of those States, are, to

Sovereign Powers—*concluded.*

some extent, the necessary consequence of the suzerainty vested in the predominant power. But apart from this general source, rights of very varying kinds have been acquired in connection with the several States, from other sources. Such rights differ not only in origin but in kind and in degree in the cases of different States, so that in each instance in which the nature or extent of such rights becomes the subject of consideration, enquiry has to be made into the circumstances of the particular case (24 I. A. 137=2 C. W. N. 1, *R.*). On a review of the relation of Kathiawar States and their people to British India, and the character of the control exercised by the British Indian Government over those States and particularly with relation to the administration of justice. *Held*, that the Kathiawar States are not included within the King's dominions. Large as has been the political control exercised over them, any assertion of territorial sovereignty has been avoided. No legislative power over them has ever been claimed. The intervention in their affair has never been carried farther than was judged necessary in the emergency, for the maintenance of peace, good order and security. The position of the Chiefs has always been respected; and, at least, in the case of the more important among them, many of the functions commonly regarded as attributes of sovereignty have been preserved to them. The form adopted in establishing and regulating tribunals in the province has been that which was regular and appropriate if it was not British territory, but quite irregular and inapplicable if it was. If a Court, administering justice on the King's behalf, makes an order, judicial in its nature, by which some one is injuriously affected, the person aggrieved is not precluded from applying to the King in Council to redress his wrong merely by the fact that he is not the King's subject. The jurisdiction, exercised by the courts of the Assistant Political Agents and the Political Agent in Kathiawar, and by the Governor of Bombay in Council on appeal, is political and not judicial. No appeal lies to His Majesty in Council from the courts in Kathiawar or from the decision of the Governor of Bombay in Council on appeal. HEMCHAND DEVCHAND v. AZAM SAKARLAL CHHOTAMLAL AND THE TALUKA OF KOTDA SANGANI v. THE STATE OF GONDAL, **10 C.W.N. 361=8 Bom. L.R. 129, P.C.=3 A.L.J. 250=33 C. 219=3 C.L.J. 395=16 M.L.J 115=1 M.L.T. 115=33 I.A. 1.**

Sovereign Prince.

See CIV. PRO. CODE, 1908, s. 86, 21 B. 351.

Suit against a—Necessity for previous consent of the Governor-General of India or the Local Government—Maintainability of suit—*See* CIV. PRO. CODE, 1908, s. 86, 2 C.L.J. 163.

Suit against—with respect to his land situate in British India—*See* JURISDICTION OF CIVIL COURTS, 9 C, 537=12 C.L.R. 465.

Special Act.

Rule as to civil procedure generally incorporated in special Act—Inconvenience pointed

Special Act—*concluded.*

out.—The introduction of a clause affecting civil procedure and Civil Courts generally, such as s. 15 of Act X of 1876, into an Act purporting to regulate a special branch of civil procedure only, *viz.*, that relating to revenue jurisdiction, is inartistic in legislation and inconvenient in the administration of justice. Such a general provision, when hidden in a special Act not often resorted to in practice, is apt to be overlooked by pleaders and Judges who are seldom concerned in revenue cases. JADOW MULJI v. CHHAGAN RAICHAND, **5 B. 306.**

Special Appeals.

See ACT III OF 1843.

See ACT XVI OF 1853.

Special Commissioners.

(1)—*Resumption suits* — Sudder Dewanny Adawalut—*Special Commissioners—Ben. Reg.* III *of* 1828—*Procedure*—Wasilat.—The *Sudder Dewanny Adawalut* at Calcutta, acting as Special Commissioners under Ben. Reg. III of 1828 in resumption suits, have jurisdiction in a summary way to direct payment of *wasilat*, or mesne profits, of lands taken possession of by Government for resumption, to the party entitled to the same upon a decree declaring the lands not liable to assessment. If the Court is not satisfied with the title of the party claiming the *wasilat*, the proper course to pursue is to direct inquiries to find the party entitled. RAJAH LEELANUND SINGH v. THE GOVERNMENT OF BENGAL, **1 W.R.P.C. 20=9 M.I.A. 479=1 Suther. 535=2 Sar. 46.** [*R.*, 2 B.L.R.A.C. 114; *D.*, 9 B.H.C.A.C. 7.]

(2)—*Power to sell—Vesting the property in the Special Commissioner — Procedure.*—The Court has no power or jurisdiction whatever—inherent or conferred—first, to appoint a Special Commissioner for sale of immoveable property; secondly, to vest immoveable property in a Special Commissioner; and, lastly, to empower any such Special Commissioner to execute a conveyance of such property. ANANDRAO v. SITABAI, **10 Bom. L.R. 1176.**

Powers of—*See* BEN. ACT II OF 1869, 8 C. 397=10 C.L.R. 419.

Court not competent to discuss whether Special Commissioner in preparing register rightly appreciated decision of the Commissioner—*See* BEN. ACT II OF 1869, s. 25, 22 C. 112.

Special Damage.

See APPELLATE COURT — OBJECTIONS FIRST TAKEN IN APPEAL, 6 B.L.R. App. 73.

See DEFAMATION, 10 A. 425=A.W.N. 1888, 157.

Easement—Private right of way—Obstruction—Special damage, necessity of—Injunction—*See* EASEMENT, 64 P.R. 1901.

See INJUNCTION—SPECIAL CASES, 10 B. 390.

Public thoroughfare, obstruction to—Special damage essential for right of suit in Civil Court

Special Damage—*concluded.*

—*See* JURISDICTION OF CIVIL COURTS, 10 A. 498=A.W.N. 1888, 205.

Public way dedicated by Zemindar—Suit by him for removal of obstruction—Special injury need not be proved—*See* JURISDICTION OF CIVIL COURTS, 10 A. 553=A.W.N. 1888, 213.

See JURISDICTION OF CIVIL COURT, 3 C. 20 F.B., 12 C. 424, 26 C. 653=3 C.W.N. 551, F.B., 27 C. 793, 103 P.L.R. 1901.

See NUISANCE, 4 P.R. 1895.

See PROCESSION, 18 B. 693.

See PUBLIC RIGHT, 11 M. 42.

See RIGHT OF SUIT--OBSTRUCTION TO PUBLIC HIGH-WAY. SUITS CONCERNING, A.W.N. 1881, 3, 5 C.W.N. 285, 9 M. 463, 2 B. 457.

See RIGHT OF SUIT—MISCELLANEOUS, 71 P.L.R. 1901=33 P.R. 1901.

Obstruction to road—Facts to establish—*See* RIGHT OF WAY, 1 Ind. Cas. 110.

Right of private way, suit for—special damage, proof of, whether necessary — *See* RIGHT OF WAY, 6 C.W.N. 197.

Words actionable for *per se*—*See* SLANDER, 3 C.L.R. 181.

Special Exceptions.

Assumption of absence of general or special exceptions in a charge for offence—*See* BURDEN OF PROOF—MISCELLANEOUS, 4 C. 124=3 C.L.R 122.

Special Judge.

See BEN. ACT VIII OF 1885, ss. 55, 105, 106 108, 21 C. 521.

Jurisdiction of special Judge—Judgment not *res judicata*, when—*See* BEN. ACT VIII OF 1885, ss 101, 102, ch. X, 22 C. 244.

Appeal from decision of—*See* BEN. ACT VIII OF 1885, s. 104, cl. 2, 17 C. 326.

See BEN. ACT VIII OF 1885, ss. 104 (2), 105, 106, 108, 16 C. 596.

Status of the ryots dealt with in the decision of Settlement Officer—Order of—On appeal from Settlement Officer's decision—Second appeal—*See* BEN. ACT VIII OF 1885, ss. 104 (2), 106, 107, 108, cl. 2, 21 C. 776.

Second appeal—Decision of—On appeal from decision of a Revenue officer—*See* BEN. ACT VIII OF 1885, ss. 106, 108 (3), 24 C. 462, F.B=1 C.W.N. 294.

Decision of—Second appeal—*See* BEN. ACT VIII OF 1885, s. 108, 25 C. 34.

See BEN. ACT VIII OF 1885, s. 108, cl. (2), 23 C. 723.

See BOM. ACT XVII OF 1879, 20 B. 281.

Revisional powers of special Judge under Bom. Act XVII of 1879—*See* BOM. ACT XVII OF 1879, s. 3, cl. (*w*), 14 B. 387.

Competency of, to vary decree *proprio motu*—unsecured loan, provision for insisting on payment of, before redemption—*See* BOM. ACT XVII OF 1879, ss. 12, 53, 22 B. 520.

Special Judge—*concluded.*

Power of review—*See* BOM. ACT XVII OF 1879, s. 53, 15 B. 650.

Powers of revision of special Judge — *See* BOM. ACT XVII OF 1879, ss. 53, 54, 15 B. 180.

Revisional powers of—Withdrawal of suit—*See* BOM. ACT XVII OF 1879, s. 54, 12 B. 684.

See BOM. ACT XVII OF 1879, s. 74, 19 B. 116, F. B.

See APPEAL—ORDERS, 7 C. W. N. 440.

See CIV. PRO. CODE, 1908, s. 115, 19 B. 286.

See SUPERINTENDENCE OF HIGH COURT, 18 B. 347.

Special Marriage.

See ACT III OF 1872.

Special or Second Appeal.

1.—GENERAL.
2.—ADMISSION OR REJECTION OF APPEAL.
3.—APPEALS AGAINST ORDERS WHEN LIE AND WHEN NOT.
4.—ERRORS OF LAW OR PROCEDURE.
5.—GROUNDS OF APPEAL.
6.—PRACTICE AND PROCEDURE IN SPECIAL APPEAL.
7.—RIGHT OF SPECIAL APPEAL.
8.—SMALL CAUSE COURTS SUITS.
9.—MISCELLANEOUS.

See CIV. PRO. CODE, 1908, s. 47.

See CIV. PRO. CODE, 1908, ss. 100-104.

See CIV. PRO. CODE, 1908, O. XLI.

——**1.—General.**

(1)—*Second appeal—General Clauses Act, I of* 1868, *s.* 6—*Act* X *of* 1877, *s.* 3.—A right of second appeal, where it existed prior to Act X of 1877, now exists in the case of any proceedings in execution which were commenced prior to, and were still pending on, the 1st of October 1877. SYUD NADIR HOSSEIN v. BISSEN CHAND BASSARAT, **3 C.L.R. 437.** [*R.*, 18 P.L.R. 1900.]

(2)—*Appeal—Second appeal not open, if first appeal not maintainable—Decree on award—Ss.* 540, 562, 622, *Civ. Pro. Code*, 1882 (=*ss.* 96, 115, *O.* XLI, *r.* 23, *present Code*).—When no appeal lies to the Subordinate Judge, a second appeal to the High Court does not lie from his decision. Where a decree was passed by the Munsif upon an award, and an appeal was preferred to the Sub Judge who set aside the decree of the Munsif on the ground that the award was bad, and sent the case back for the trial of the case on the merits, it was *held* that the award being good and valid, no appeal lay to the Sub Judge and no appeal lay to the High Court against his order and the remedy lay under s. 622, Civ. Pro. Code. GANGA CHARAN BOY v. SASTI MANDAL, **6 C.W.N. 615.** (25 C. 141, *R.*)

(3)—*Sambalpur district—Divisional Judge, appellate decision of — Second appeal whether lies to the Calcutta High Court—Bengal and*

Special or Second Appeal—continued.

——**1.—General**—*continued.*

Assam Laws Act (VII *of* 1905), *sch. D—Act* II *of* 1904 *before repeal by Act* IV *of* 1906 *— Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 584 *— Gift — Registration without delivery of possession—Validity—Transfer of Property Act* (IV *of* 1882), *s.* 123—*Erroneous interpretation of law by Central Province Courts, if binds parties of Calcutta High Court—Gift by Hindu female heiress—Suit by reversioner to have deed declared void — Cause of action —Specific Relief Act* (I *of* 1877), *s.* 39.—The District of Sambalpur was part of the Central Provinces until 16th October, 1905, when it was added to the Province of Bengal by proclamation. *Held* that, under Act VII of 1905, an appeal preferred on the 21st December, 1905, against an appellate decision of the Divisional Judge of Sambalpur of 22nd August, 1905, lay to the Calcutta High Court, and not to the Judicial Commissioner of the Central Provinces. A second appeal, though not expressly provided for by Act II of 1904 (which was in force at the time this appeal was preferred), lay under s. 584 of the Civ. Pro. Code, the Court of the Divisional Judge being a Court subordinate to the Calcutta High Court, since Act VII of 1905 came into operation. Under s. 123 of the Transfer of Property Act, a deed of gift, if registered, is valid, whether accompanied by delivery of possession or not. The fact that the Courts of the Central Provinces were erroneously of opinion that delivery of possession was necessary to give validity to the deed would not render the deed inoperative. When such a deed is executed by a Hindu female heiress, a cloud is thrown on the rights of reversioners, so as to give them a cause of action under s. 39, Specific Relief Act, to have the deed declared null and void as against them. BALBHADRA v. MUSST. BHAWANI, **11 C.W.N. 956=6 C. L.J. 233=34 C. 853.** [*R.*, 34 C. 941=11 C.W. N. 959=6 C.L.J. 237.]

(4)—*First appeal—Decision modifying first Court's decree—Appeal from decision not to Chief Court but to Commissioner—Second regular appeal—Special appeal.* — Where the Deputy Commissioner's decision on appeal modified the decree of the first Court on a material point, the appeal from such appellate decision should be presented to the Commissioner's Court and not to the Chief Court. SANDHI KHAN v. JALALUDDIN KHAN, **23 P. R. 1879.**

(5)—*Decree of first Court modified on appeal —Second regular appeal to Commissioner and not to Chief Court—Act* XVII *of* 1877, *s.* 38.—Where the first appellate Court has modified the decree of the first Court, namely that of the munsif, the party aggrieved should present his second appeal not to the Chief Court but to the Commissioner under s. 38 of Act XVII of 1877. BUTA v. MUSSAMMUT KHEMO, **63 P. R. 1879.**

(6)—*Document, admissibility of—Omission of party to appeal against order of remand by lower appellate Court.*—The omission of a

Special or Second Appeal—continued.

——1.—General—*continued.*

party to prefer an appeal against an order of remand passed by a lower appellate Court, rejecting a document as being inadmissible in evidence, does not preclude him on second appeal from contending that the document is admissible. KANTO PERSHAD HASARI v. JAGAT CHUNDRA DUTTA, **23 C. 335**. (14 B. 232, 12 A. 510, *F.*) [*F.*, 5 C.L.J. 47 Note; *R.*, 24 C. 725 F. B., U.B.R. (1897-1901) Vol. II, 310; *D.*, 9 C.W.N. 111.]

(7)—*Pleadings—Admission of a document in second appeal—Discretion of two Courts not to be interfered with in second appeal—Document not produced at first hearing, effect of.*—Where a document is not produced by a party at the first hearing of a case and the lower Courts refused to admit it on that ground, a Court of second appeal ought not to admit it, especially when the admission of the document in evidence would necessitate a fresh trial of the case. JAWALA SAHAI v. ABDUL GHANI, **11 Ind. Cas. 289.**

(8)—*Second appeal preferred on question of limitation not raised in Courts below.*—Where an appeal was preferred on a question of limitation which was not raised in the Courts below, *held* that the appellant had waived his claim to raise the plea of limitation (8 B. 535, *F.*): *Held*,—also that the appellant in order that the question of limitation may be dealt with by the Appellate Court, must appeal on the whole case. MAUNG SHWE LA v. MAUNG SHWE GON, **L.B.R. 1893—1900, 539.** (6 C. 267, *F.*). [*R.*, 2 L.B.R. 237, U.B.R. 1897—1901, Vol. II, p. 443.]

(9)—*Further Appeal—Objection taken for the first time—Cause of action—Suit based on non-existent cause of action—Novation—Consent of parties.*—*Held* that a plea that the suit is based on a non-existent cause of action should be taken at the first hearing, and that ordinarily a party, who has allowed a case to be decided in two Courts on the merits, should not be heard to raise such a plea as this on further appeal. A cause of action cannot be said to have been superseded by a new agreement, when the latter has not reached the stage of completeness and the parties have not finally consented to its terms. BHUP SINGH v. JIWAN SINGH, **2 P.L.R. 1911=9 Ind. Cas. 385=28 P.W.R. 1911.**

(10)—*Second regular appeal—Act* IX *of* 1873, *s.* 5—*Reversal "on a point material to the merits of the case," meaning of.*—In this suit brought for proprietary possession of land the main pleas urged by the defendant were, among others, 1st, adoption by the deceased, and 2nd, that the deceased duly executed a will leaving his nephew heir to the suit lands. The first Court decreed for the defendant on both grounds, but the first appellate Court decreed in favour of the defendant upon the will, but considered the alleged adoption not proved. Its decree was also thus in favour of the defendant. On appeal to the Chief Court by the plaintiff, the question was put before the Full Bench whether the decision of the Commissioner passed upon regular appeal was a decision reversing that of the original Court upon a point material to "the merits of the case." *Held* that the words "on a point material to the merits of the case" mean a difference of opinion on broad facts alleged by one or the other party to the case, and upon the decision of which, in part or whole, the position of one party is substantiated and the other defeated. In this view, the plaintiff had no ground for an appeal, for, in point of fact, his position was not materially substantiated by the finding of the Commissioner that the defendant was not adopted. MUSSUMMAT RUKHAN DEVI v. JASWANT RAI, **88 P.R. 1875, F.B.** [*R.*, 104 P.R. 1876.]

(11)—*Cases where second appeal permitted—Acquiescence, question of—Second appeal.*—The question of acquiescence is not question of fact, and in a second appeal, the judgment of the lower Appellate Court is not final. CASPERZ v. KADAR NATH SARBADHIKARI, **28 C. 738=5 C.W.N. 858.** (21 A. 496, P.C., *R.*)

(12)—*Second appeal—Costs.*—A Second appeal lies as to costs, from an appellate decree. S. M. BHUGOPATI PAL v. MAHOMED ALI, **7 C.W.N. 647.** (15 A. 333, *Rel. on.*)

(13)—*First Court, decision of—Reversal on point material to merits—Second appeal.*—As it matters materially, as regards enhancement, under which clause of the Tenancy Act a tenant is classed, a judgment of a Deputy Commissioner, reversing the decision of the Court of original jurisdiction on such question, is a reversal or modification on a point material to the merits of the case, and consequently the Additional Commissioner was bound to hear the appeal against such judgment of the Deputy Commissioner on the merits, as there is a second appeal in such a case. SANDHI v. GANGA RAM, **11 P.R. 1876.**

(14)—*Special appeal—Decision in regular appeal—Review of appellate judgment improperly granted—Special appeal.*—In a special appeal, a decision passed in a regular appeal may be questioned on the ground that there has been a substantial error or defect in law in the procedure or investigation of the case upon the merits. [*R.*, 22 W.R. 399.] Although an order granting review cannot be made the subject of appeal standing alone, yet the appellate Court can take notice of it in special appeal, and if the review was improperly granted, can set aside the judgment passed in furtherance of such review. BHYRUB CHUNDER SURMAH CHOWDHRY v. MADHUBRAM SURMAH, **11 B.L.R. 423 F.B.=20 W.R. 84.** [*Appl.*, 22 W.R. 183, 23 W.R. 438=1 C. 197.]

(15)—*Appeal, second—Question of fact or law—Liability of estate to pay* Nankar *holders—Question to be decided upon construction of documents—Misinterpretation of documentary evidence—Interference on second appeal.*—Where a lower appellate Court has misread

Special or Second Appeal—continued.

——**1.—General**—*continued.*

and misinterpreted the documentary evidence on the record, has misunderstood the real point for decision in the case, and its finding on a question of fact is based on no evidence at all, the Court of second appeal can interfere with that finding.—The question as to the obligation of an estate to pay *Nankar* holders which is to be decided upon a construction of the documents before the Court, is a mixed question of law and fact. INDAR DAWAN SINGH v. DEPUTY COMMISSIONER, FYZABAD **13 Ind. Cas. 629.**

(16)—*Custom and usage, proof of—Second appeal, ground of—Finding of fact.*—In a second appeal, the High Court can interfere where there is no evidence to justify the finding of fact arrived at by the lower appellate Court. PEARY MOHAN MUKHERJEE v. JOTE KUMAR MUKHERJEE, **11 C.W.N. 83.** [*R.*, 2 Ind. Cas. 96.]

(17)—*Powers of interference of the High Court in second appeal—Question of law—Legal evidence—Sufficient evidence for proving custom—Custom—Daughter—Custom excluding a daughter from inheritance*—Wajib-ul-arz.—Where a question arises as to the existence or non-existence of a particular custom, and the lower appellate Court had acted upon illegal evidence or on evidence legally insufficient to establish the alleged custom, the question is one of law, and the High Court is entitled, on second appeal, to consider whether the finding is based upon legal and sufficient evidence, and if not, to upset the finding (30 A. 311, A. W.N. 1908, 112, 5 A.L.J. 456, 4 M.L.T. 169. *F.*). Among Pathans of Mauza Surseni, a daughter is by custom excluded from inheritance. An entry in a *Wajib-ul-arz* is very important evidence as to custom, and unless there is very strong evidence showing that it is incorrect, it should be accepted. SHAHBAZ KHAN v. RAHIMAN, **11 Ind. Cas. 536.**

(18)—*Where no second appeal lies—Torts—Malicious prosecution—Amount of damages—Second appeal.*—The question of the amount of damages is a question of fact, and it is not open to the High Court to interfere in second appeal upon such a question. MUSSAMMAT DHUMAN v. SYED ABDULLA KHAN, **6 A.L.J. 381=31 A. 333=1 Ind. Cas. 760.** (10 W.R. 164, 3 C.L.J. 340, *R.*).

(19)—*Reference to the High Court of N.W. Provinces—Question of fact—Second appeal.*—There can be no reference to the High Court of the North-West Provinces where the question involved is one of fact and not of law. There is no provision of law for a reference to the High Court of an Ajmir case which has been decided by a second Court of appeal. BADRUDDIN v. BISMILLAH, **11 Ind. Cas. 671.**

(20)—*Second appeal—Appeal against order—Civ. Pro. Code, s. 32—Lower Appellate Court dismissing suit against one of the defendants.*—Where, in a suit by a purchaser of a piece of land from the first defendant for its recovery and for the removal of a latrine erected thereupon by the second defendant, the Municipal Chairman, the appellate Court made an order dismissing the suit against the second defendant on the ground that the claim against him was for damages and was barred under the Municipal Act, *held* that there was no second appeal, since there was no decree against which a second appeal could be preferred, and that the appeal could neither be entertained as an appeal against an order under s. 32, Civ. Pro. Code, since the District Judge did not hold that the second defendant had been improperly joined and direct that he should be excluded from the suit. SYED ALLI SAHEB v. CHAIRMAN OF THE SALEM MUNICIPALITY, **3 M.L.J. 223.**

(21)—*Second appeal—Omission to consider evidence—Misreading or misconstruing evidence—Omission to make specific mention of document—Civ. Pro. Code (Act V of 1908), s. 100—Conflict of decisions.*—There is considerable conflict of judicial opinion on the point whether a second appeal will lie where the lower appellate Court omits to consider evidence or misreads, or misconstrues evidence. But the omission of the Court to make specific mention of a particular document and the statement in it, does not amount to a substantial error or defect in procedure within the meaning of s. 100 of the Code of Civil Procedure. DIBAKAR NAG v. MRITTUNJOY BHATTACHARYA, **13 Ind. Cas. 495.**

(22)—*Misreading of evidence—Review—No evidence.*—A misreading or misconception of evidence is not a ground for interference in second appeal. The remedy in such a case is by an application for review of judgment. (19 W.R. 222, 1 C.L.J. 232, *R. and F.*; 17 I.A. 122 =18 C. 23, 14 I.A. 101=14 C. 940, 16 I.A. 233 =17 C. 291, 19 I.A. 1=19 C. 249, 21 I.A. 39 =21 C. 504, *R.*; 20 B. 753, 30 C. 207, 33 C. 200, *D.*) If, however, there is no evidence in support of the finding of the Subordinate Court, the Court of second appeal would be entitled to interfere. ANANDA CHANDRA SEN v. PARBATI NATH SEN, **4 C.L.J. 198.** (17 I.A. 65= 17 C. 875, *F.*) [*R.*, 9 C.L.J. 623=1 Ind. Cas. 530.]

(23) *Execution—Appeal from orders—Second appeal—Chota Nagpur—Landlord and Tenant Procedure Act* (I *of* 1879, *B.C.*), *s.* 144—*Act* V *of* 1903, (*B.C.*) *s.* 41.—Under Act I (B.C.) of 1879, as amended by Act V. (B.C.) of 1903, no second appeal lies from an order passed in execution. RAJA ISSUR LAL SINGH v. PATROO SAHU SINGH, **10 C.W.N. 284=33 C. 378.**

Rules for the Admission of Special Appeals—Privy Council circular dated 27th January 1872, **17 W.R. H. C. Rul. and Ors. p. 3.**

Special Appeals, **14 W.R.H.C. Rules, p. 11.**

Second appeal—Question of fact—Whether can be raised for the first time—*See* ACT XX OF 1863, s. 14, 7 M.L.T. 311=6 Ind. Cas. 684.

Determination of question whether there is a garden—Second appeal—*See* BEN. ACT XI OF 1859, s. 37, 7 Ind. Cas. 912.

See BEN. ACT V OF 1875, s. 40, 21 C. 935.

Special or Second Appeal—continued.

——**1.—General**—*continued.*

Whether question of law can for the first time be allowed to be raised in second appeal—*See* BEN. ACT VI OF 1876, s. 10, 11 C.W.N. 1127.

See BEN ACT I OF 1879, 27 C. 508, F. B.= 4 C.W.N. 333.

See BEN. ACT VIII OF 1885, 15 C. 107.

Nature of tenancy—Question of law—Second appeal—See BEN. ACT VIII OF 1885, s. 7, 7 Ind. Cas. 785.

Leaving important evidence out of account whether amounts to question of law for a second appeal—*See* BEN. ACT VIII OF 1885, s. 29, 33 C. 200.

Proceeding under s. 105, B. T. Act—Second appeal—*See* BEN. ACT VIII OF 1885, ss. 38, 105, cl. (4), 9 Ind. Cas. 493.

Misunderstanding documents—Question of law—Second appeal—*See* BEN. ACT VIII OF 1885, s. 50, 13 C.L.J. 418=15 C. W. N. 752.

Landlord's application for assessment of fair and equitable rent—*See* BEN. ACT VIII OF 1885, ss. 103 A. 105, 106 A. 109 A. 33 C. 832.

Second appeal where Court of first appeal wrongly excluded evidence—Error of law—*See* BEN. ACT VIII OF 1885, ss. 104 (2) and 107, 11, C. W. N. 1028.

In cases under ss. 105, 106, Bengal Tenancy Act—*See* BEN. ACT VIII OF 1885, ss. 105, 106, 9 C. L. J. 574=4 Ind. Cas. 62.

See BEN. ACT VIII of 1885, ss. 105, 106, 28 C. 471=5 C. W. N. 798.

A decision of the Special Judge, on appeal from the decision of a Settlement Officer on an application by the landlord under s. 105 (1) holding that no case was made out for enhancement of rent is not subject to second appeal—*See* BEN. ACT VIII OF 1885, ss. 105, 109 (3), 4 C. L. J. 138=33 C. 837.

See BEN. ACT VIII OF 1885, ss. 106, 108 (3), 21 C. 935.

Decision of question relating to interest in and as between conflicting parties—Second appeal— *See* BEN. ACT VIII OF 1885, s. 153, 8 Ind. Cas. 824.

Maintainability of—By mortgagee against an order refusing to set aside a rent-sale of property comprised in his mortgage—*See* BEN. ACT VIII OF 1885, s. 153, 1 C.L.J. 454.

Right of appeal when a co-sharer sues for his share of rent and makes his other co-sharers parties to the suit—*See* BEN. ACT VIII OF 1885, s. 153, 13 C.W.N. 793=4 Ind. Cas. 20.

Suit for rent--Defendant contesting plaintiff's ownership as to all the lands—Question as to amount of annual rent payable raised by decision—Appeal against decree lies—*See* BEN. ACT VIII OF 1885, s. 153, 8 C.L.J. 519.

Suit for rent valued at Rs. 99—Award of damages under s. 186-A—Bengal Tenancy Act—Second appeal—*See* BEN. ACT VIII OF 1885, ss. 153, 186-A, 9 Ind. Cas. 806.

Special or Second Appeal—continued.

——**1.—General**—*continued.*

Order under s. 173, B.T. Act—Second appeal—*See* BEN. ACT VIII OF 1885, s. 173, 1 Ind. Cas. 279.

Practice—Second appeal—When point of law can be taken for the first time in—*See* BOM. ACT XVII OF 1879, ss. 7 and 12, 3 S.L.R. 106=4 Ind. Cas. 599.

Right to rent of land—Land Suit—Right of Second appeal on questions of fact—*See* BUR. ACT XVII OF 1875, ss. 2 (*b*), 30, 3 L.B.R. 90.

Burma Courts ACT (XVII of 1875), second appeal under— Limitation — *See* BUR. ACT XVII OF 1875, s. 27, 10 C. 946.

Application for partition—Decision of Deputy Commissioner— Appeal to Commissioner—Second appeal to High Court—*See* C. P. ACT XVIII OF 1881, ss. 22, 136-H, 9 Ind. Cas. 202 =13 C.L.J. 412.

Question of law arising upon facts found—Second appeal—*See* C.P. ACT IX OF 1883, ss. 3, 43 (2), 6 Ind. Cas. 75.

Suit for rent—Claim of third party set up—Second appeal—*See* C. P. ACT XI OF 1898, s. 81 (*b*), 14 C.P.L.R. 31.

See MAD. ACT VIII OF 1865, s. 69, 10 M. L.J. 398.

Second appeal from District Judge's decision on appeal from Forest Settlement Officer—*See* MAD. ACT XXI OF 1882, s. 10, 11 M. 309, F.B.

Powers of appellate Court—*See* MAD. ACT I OF 1908, s. 6, 20 M.L.J. 528=8 M.L.T. 135= M.W.N. 1910, 331=7 Ind. Cas. 74.

Suit for recovery of fees under the Excise Act—Relief for compensation joined--Not entertainable by the Assistant Collector—No appeal lies—*See* U. P. Act II OF 1901, s. 177, 3 A.L.J. 802=A.W.N. 1906, 314.

Suit for arrears of rent—Tenant denying relation of landlord and tenant—Question of proprietary title—Right of second appeal to District Judge—*See* U. P. Act II OF 1901, s. 177, sch. IV, 5 A.L.J. 128=A.W.N. 1908, 69.

Decision in ejectment suit—Second appeal—*See* U. P. Act II of 1901, s. 182, 8 Ind. Cas. 529.

Objection as to want of stamp cannot be taken for the first time in second appeal—*See* AWARD, 10 C.L.J. 41=2 Ind. Cas. 414=37 C. 63=14 C.W.N. 75.

Second appeal decided on facts—Application for review—*See* CIV. PRO. Code, 1908, ss. 14 151, & O. 47, r. 1, 6 A.L.J. 979 =4 Ind. Cas. 809=32 A. 71.

Further appeal treated as revision—*See* CIV. PRO. CODE, 1908, s. 20, 96 P.L.R. 1909=108 P.W.R. 1909.

Costs, order as to—Second appeal against order as to costs—Discretionary power of Court, jurisdiction to interfere with—*See* CIV. PRO. CODE, 1908, s. 35, O. XX. r. 6 (3), s. 100, 6 O.C. 52.

***Special or Second Appeal*—continued.**

——1.—General—*continued*.

Costs, Court's power to give and apportion—Discretionary power of Court, second appeal against—Grounds of second appeal, particulars to be observed in drawing up—*See* CIV. PRO. CODE, 1908, s. 35, O. XX, r. 6 (3), s. 100, 6 O.C. 39.

Small Cause suit—Order in execution—Only one appeal—No right of second appeal—*See* CIV. PRO. CODE, 1908, s. 42, (1911) 2 M.W.N. 595.

Setting aside sale—Fraud—Material irregularity—Change in the law—Second appeal—Effect—*See* CIV. PRO. CODE, 1908, ss. 47, 104, O. XXI, rr. 90, 92, O. 43, r. 1, cl., (j) 9 Ind. Cas. 135.

Payment to decree-holder before date of sale—Fraud in conduct or publication of sale—Second appeal—*See* CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 90, 10 Ind. Cas. 625.

Application under ss. 244, 311, Civ. Pro. Code—Second appeal—*See* CIV. PRO. CODE, s. 47, O. XXI, r. 90, s. 104, O. XLIII, r. 1, 2 Ind. Cas. 983.

Second appeal against order setting aside order granting review—*See* CIV. PRO. CODE, 1908, s. 114, O. XLVII, rr. 1, 4, 6 C.L.J. 225.

Second appeal—Making decree in favour of party not made party in lower appellate Court—Power of Court—*See* CIV. PRO. CODE, 1908, s. 154, O. XLI, r. 33, 9 Ind. Cas. 815.

Grounds of second appeal—Misconstruction of document—Portion of evidence being in writing and Judge mistaking the meaning of it—Effect—*See* CIV. PRO. CODE, 1908, O.I. r, 13, O. XXI, r. 63, s. 99, 9 C.L.J. 623=1 Ind. Cas. 530.

Finding of fact—Petition for mutation reciting a gift—Evidence of gift disbelieved—Petition for mutation not amounting to a gift—Question not a question of construction—*See* CIV. PRO. CODE, 1908, O. II, rr. 3, 6, 4 A.L.J. 121=A.W.N. 1907, 36=29 A. 267.

Misjoinder of causes of action, objection as to, raised in—Procedure—*See* CIV. PRO. CODE, 1908, O. II, rr. 3, 6, 7, 2 C.L.J. 602.

Question of jurisdiction and important point of law allowed to be taken for the first time in second appeal—*See* CIV. PRO. CODE, 1908, O. IX, r. 13, 5 Ind. Cas. 525=12 C.L.J. 53.

Subordinate Court erroneously exercising jurisdiction by rejecting documents that ought to have been received—Power of High Court in second appeal—*See* CIV. PRO. CODE, 1908, O. XIII, rr. (1) 2, s. 100, 12 C.W.N. 312=8 C.L.J. 147.

Personal decree against mortgagor—Direction to pay in instalments—Judicial discretion—Second appeal—*See* CIV. PRO. CODE, 1908, O. XX, r. 11 & O. XXXIV, r. 6, 15 C.W.N. 1088,

***Special or Second Appeal*—continued.**

——1.—General—*continued*.

Order under O. 21, r. 92, Civ. Pro. Code—Second appeal—*See* CIV. PRO. CODE, 1908, O. XXI, r. 89, s. 47, 13 C.L.J. 467.

Application to set aside sale—Dismissal—Second appeal—*See* CIV. PRO. CODE, 1908, O. XXI, r. 90, 8 Ind. Cas. 883=9 M.L.T. 171.

Objections as to limitation, not allowed to be taken for the first time, in second appeal—*See* CIV. PRO. CODE, 1908, O. XXVI, rr. 13, 14, s. 100, 31 M. 540=5 M.L.T. 222.

Finding of lower Courts that document not proved — Interference in second appeal—*See* CIV. PRO. CODE, 1908, O. XLI, r. 22, 8 A.L.J. 1297.

A second appeal lies against a decree on an award not agreed to by all the parties—*See* CIV. PRO. CODE, 1908, sch. II, rr. 1, 16, 9 C. W.N. 873.

Plaintiff partly interested in property in suit—Setting up exclusive right—Consent of co-sharers given in second appeal—Right to decree—*See* CO-SHARERS—GENERAL, 9 Ind. Cas. 487.

Suit for recovery of profits of mouza wrongly appropriated by co-sharer—Small Cause nature—under s. 586 of the Civ. Pro. Code, 1882—*See* CO-SHARERS—SUIT BY CO-SHARERS, 6 C. 284=7 C.L.R. 94.

Against order about costs, maintainability of—*See* COSTS—SPECIAL CASES, 8 O.C. 251.

Court-fee paid must cover all relief claimed—Second appeal by one of several appellants—Ground of appeal going to whole of respondent's decree—Court-fee—*See* COURT-FEES, 15 A. 112 =A.W.N. 1892, 248.

Appeal to lower appellate Court by respondent in High Court insufficiently stamped—Procedure — *See* COURT-FEES ACT, 1870, ss. 10, 12, A.W.N. 1905, 280=2 A.L.J. 839, F.B.=28 A. 270.

Custom—Finding in favour of existence of custom based upon illegal or legally insufficient evidence—Question of law—High Court entitled in second appeal to consider validity of finding—*See* CUSTOM, A.W.N. 1908, 112=5 A.L.J. 456=4 M.L.T. 169=30 A. 311.

Custom, whether established—High Court can go into the question in second appeal—*See* CUSTOM, 3 Ind. Cas. 558.

Relief granted on further appeal which was not asked for in lower Court—*See* CUSTOMS—PUNJAB—ALIENATION, 83 P.L.R. 1909.

Plea given up in the lower appellate Court cannot be retaken before the Chief Court—*See* CUSTOMS—PUNJAB—ALIENATION, 88 P.W. R. 1911.

See DAMAGES—DAMAGES, SUITS FOR, 9 C. 116=12 C.L.R. 89.

Point not raised in the pleadings nor in the appeals not to be considered—*See* EQUITABLE MORTGAGE, 4 L.B.R. 371.

Special or Second Appeal—continued.

——**1.—General**—*continued.*

Official records — Evidentiary value — Interference in second appeal—*See* EVIDENCE—GENERAL, 22 M.L.J. 393.

Court expressing opinion as to sufficiency of evidence—Pleader declining to call further evidence—Whether objection can be raised in second appeal as to insufficiency of evidence adduced — *See* EVIDENCE - GENERAL, 13 Bom. L.R. 1021.

Finding of fact, how far it can be challenged in second appeal—*See* EVIDENCE ACT, ss. 13, 32, cls. (3) and (5), 10 Ind. Cas. 188.

See EVIDENCE ACT, 1872, s. 32, sub-s. 5, 12 C. 219, P.C.=12 I.A. 183.

Finding of fact based on evidence cannot be disturbed in second appeal—*See* EVIDENCE ACT, 1872, s. 32 (5), 8 Ind. Cas. 728.

Error of law—Boundary dispute—Omission of lower Court to admit topographical Survey Map in evidence—*See* EVIDENCE ACT, 1872, s. 36, 11 C.W.N. 230=9 C.L.J. 455.

Erroneous reason as to applicability of s. 90, Evidence Act—Interference in second appeal—*See* EVIDENCE ACT, 1872, ss. 130, 90, 15 C.L.J. 7.

Practice—Objections not taken in the grounds of appeal not considered—*See* GOVERNMENT, 5 M.L.T. 214.

Delay in presenting second appeal—dismissal—Power of High Court to extend time for payment—*See* HIGH COURT, JURISDICTION OF—MADRAS, 4 M.L.T. 341.

Plea that plaint does not disclose a cause of action ; whether may be raised in second appeal—*See* HINDU LAW—ALIENATION, 8 A. L.J. 922.

Finding of fact based on misconception of what is the evidence, whether can be accepted as a legal finding in second appeal—*See* HINDU LAW—GUARDIANSHIP, 4 N.L.R. 20.

Appellant in second appeal cannot rely on grounds of appeal abandoned before lower appellate Court—*See* HINDU LAW—PARTITION, 6 Ind. Cas. 795.

Property whether really or nominally debutter—Question of fact—Second appeal—*See* HINDU LAW — RELIGIOUS ENDOWMENTS, 9 Ind Cas. 650.

Power to allow fresh evidence to be given in second appeal—*See* HINDU LAW — REVERSIONER, 5 Ind. Cas. 666.

Question of mixed law and fact, whether can be raised in second appeal—*See* HINDU LAW—STRIDHANAM, 6 N. L. R. 3=5 Ind. Cas. 426.

Question of waiver may be raised in second appeal—*See* INSTALMENT DECREE, 6 Ind. Cas. 138.

Special or Second Appeal—continued.

——**1.—General**—*continued.*

Objection as to jurisdiction, whether may be taken for the first time in second appeal—*See* JURISDICTION — QUESTION OF JURISDICTION, 6 Ind. Cas. 384.

Question whether grantees were tenants—Second appeal—*See* KILLAJAT ESTATES, 15 C.W.N. 266=9 Ind. Cas. 394=38 C. 278.

Question of permanent tenancy, if could be raised in second appeal for the first time—*See* LANDLORD AND TENANT—EJECTMENT, 9 C.L.J. 467=1 Ind. Cas. 112.

Finding as to adverse possession whether may be disturbed in second appeal—*See* LANDLORD AND TENANT—EJECTMENT, 8 A.L.J. 877, F.B.

Both parties giving evidence—Question of *onus* in second appeal—*See* LANDLORD AND TENANT, RELATIONSHIP OF LANDLORD AND TENANT, 3 Ind. Cas. 431.

Finding of fact—Sufficiency or insufficiency of evidence—No ground of interference—Practice—*See* LANDLORD AND TENANT—TRANSFER OF TENANT'S INTEREST, 9 Ind. Cas. 427.

Practice—Contentions covered by the pleadings, issues and grounds of appeal, whether can be raised if they had been abandoned by the vakil in the lower Courts—*See* LANDLORD AND TENANT—MISCELLANEOUS, 5 M.L.T. 213=19 M.L J. 347.

Tenant's right to transfer material and right to occupy—Evidence—Custom—High Court's power to interfere—*See* LANDLORD AND TENANT—MISCELLANEOUS, 4 Ind. Cas. 304.

Objection as to want of notice or cause of action can be allowed for the first time in second appeal—*See* LEASE—GENERAL, 5 Ind. Cas. 336.

Question of law urged for the first time in second appeal—Validity—Effect upon costs—*See* LEASE—GENERAL, 2 Ind. Cas. 202=14 C.W.N. 141.

Contention not raised in the written statement, nor found in the issues—Right of raising it in appeal — Practice—*See* LEASE—GENERAL, 5 M.L.T. 220=19 M.L.J. 208.

Limitation—Abandonment of plea—Consent—Revival in appeal — *See* LIMITATION — QUESTION OF LIMITATION, 19 M. 416.

Power of Court of second appeal to deal with question not specified in memorandum of appeal—Plea of limitation—Second appeal from Sambalpur Court—*See* LIMITATION ACT, 1908, s. 3. arts. 132, 147, 11 C.W.N. 959, F.B. =6 C.L.J. 237=34 C. 941.

See LIMITATION ACT, 1908, s. 18, arts. 166, 181, 3 C.W.N. 333.

See LIMITATION ACT, 1908, art. 110, 4 C. W.N. 605.

Special or Second Appeal—continued.

——1.—General—*continued.*

Death of respondent—Application by appellant for substitution of heirs—Civ. Pro. Code, ss. 582 and 587—*See* LIMITATION ACT, 1908, art. 175, 11 C.W.N. 1100=6 C.L.J. 715=34 C. 1020.

Limitation for bringing representatives of a deceased person on record—*See* LIMITATION ACT, 1908, arts. 181, 175, 16 M.L.J. 475=1 M. L.T. 348=29 M. 529.

Whether a sale by a guardian was for benefit of minors is a question that can be gone into on—*See* MAHOMEDAN LAW—ALIENATION, 4 C.L.J. 485=11 C.W N. 71=34 C. 36.

Finding as to state of mind of a person at the time when he performed a certain act, *e.g.*, executing a deed of gift—Finding of fact—Second appeal — *See* MAHOMEDAN LAW—GIFTS, 8 A.L.J. 1154.

Second appeal—Suit cannot be changed in—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 10 B. 461, P.C.=13 I.A. 66.

See NOTICE, 13 C. 3.

Finding of fact as to a direction on a will—Liability to be reviewed—*See* NUNCUPATIVE WILL, 5 N.L.R. 85=3 Ind. Cas. 59.

Objection to the addition of party as co-plaintiff—Second appeal to High Court—*See* PARTIES TO SUIT—GENERAL, 7 C. 148.

Plaint—Amendment in second appeal—*See* PLAINT—AMENDMENT OF PLAINT, 6 Ind. Cas. 542.

Amendment of plaint—When allowed—*See* PLAINT—AMENDMENT OF PLAINT, 7 M.L T. 225=6 Ind. Cas. 288.

Amendment when may be allowed in second appeal — *See* PLAINT—AMENDMENT OF PLAINT, 9 Ind. Cas. 774.

Powers of Commissioner, Kamaon division—Second appeal—*See* POSSESSION—ADVERSE POSSESSION, 3 Ind. Cas. 8.

Pre-emption suit—Further appeal—Jurisdiction—Value during pendency of suit—*See* PRE-EMPTION—GENERAL, 68 P.W.R. 1912.

Legal effect of transaction ignored by parties and the Judges in lower Courts—Rights of appellants to press the view in second appeal—*See* PRE-EMPTION—MISCELLANEOUS, 6 N.L. R. 78=6 Ind. Cas. 824.

No first appeal against respondent—Whether decree can be passed against him in second appeal—*See* REGISTRATION ACT, 1908, s. 17, 12 C.W.N. 625.

Ground not raised in lower Courts or in memo. of appeal cannot be raised for the first time in arguments in Chief Court—*See* REGISTRATION ACT, 1908, s. 17, 6 Ind. Cas. 651=47 P.W.R. 1910.

Special or Second Appeal—continued.

——1.—General—*concluded.*

Plea of *res judicata* whether can be taken in second appeal—*See* RES JUDICATA—GENERAL, 5 Ind. Cas. 294.

Evidence, disregard of—Finding of fact—*See* RES JUDICATA—PARTIES, 11 C.W.N. 380.

See REVIEW—JURISDICTION TO REVIEW, 9 W.R. 471.

High Court bound to accept findings of fact in second appeal—*See* RIGHT OF OCCUPANCY—GENERAL, 9 Ind. Cas. 456.

Addition of a party to the suit in—Direction given for—*See* ROAD, 5 M.L.T. 225.

In cases of sanction to prosecute—*See* SANCTION TO PROSECUTE, 17 M.L.J. 266, F.B.=2 M.L.T. 239=30 M. 382.

Question as to the weight which the lower appellate Court should have given to certain documents, or that the lower appellate Court misunderstood the result of first Court's local investigation, is no ground of second appeal—*See* ST. 24 AND 25 VIC., CH. 104, s. 15, 13 C.W.N. 105=4 Ind. Cas. 329.

No—lies against decision of the lower appellate Court to act under s. 11 of Act VII of 1887—*See* SUITS VALUATION ACT, 1887, s. 11, 15 M.L.J. 487.

Concurrent findings of three Courts on question of fact—High Court will not interfere in second appeal—*See* TRANSFER OF PROPERTY ACT, 1882, s. 59, 13 C.W N. 40=3 Ind. Cas. 309.

Suit embracing two or more distinct subjects—Value for Court-fees and for appeal—Right of further appeal—*See* VALUATION OF SUITS, 41 P.R. 1910=65 P.W.R. 1910=6 Ind. Cas. 715=56 P.L.R. 1910.

——2.—Admission or Rejection of Appeal.

(1)—*Civ. Pro. Code*, 1882, *ss.* 54, 551, 543, 582, 584, 585—*Second appeals not falling within s.* 584—*Duty of Judge to determine and reject*—*Rejection of second appeals*—*Grounds to be stated.*—*Per Edge, C.J.*:—S. 585, Civ. Pro. Code, is a positive prohibition by the Legislature to the Courts which are bound to act under the Code against admitting, as second appeals, appeals from appellate decrees which do not come under s. 584, Civ. Pro. Code. It is the duty of the Judge to see, when a memorandum of appeal from an appellate decree is presented to him for admission, that the appellant does not, through inadvertence or otherwise, seek to obtain admission of an appeal by stating in his memorandum of appeal one of the grounds mentioned in s. 584, when such ground plainly does not arise. The Judge in such a case is entitled to dismiss the appeal summarily. He should not send up the case for a *Bench* under s. 551, Civ. Pro. Code, which section applies only to cases in which the memorandum of appeal has been admitted and the appeal has been registered.

Special or Second Appeal—continued.

——2.—Admission or Rejection of Appeal —*concluded.*

Per Aikman, J:—A memorandum of appeal may be rejected under s. 543, Civ. Pro. Code, if it is not drawn up in the manner prescribed by law, and it may also be rejected on any of the grounds set forth in s. 54, read with s. 582, Civ. Pro. Code. But whether rejected under s. 543, or under s. 54, the reasons for the rejection ought to be recorded. If the grounds set forth in the memorandum of appeal were such as could not by any chance come within any of the clauses of s. 584, it would be the duty of the Court to reject it, because in such cases it would appear from the statement in the memorandum that the appeal would be barred by the prohibition in s. 585. It has been the practice of the High Court of Allahabad to allow questions regarding the construction of documents to be raised in second appeals, though it is difficult to say under which clause of s. 584, such questions would fall. Unless it appears from the statement in the memorandum of appeal, taken by itself that a second appeal does not lie, it is doubtful whether a second appeal can be summarily rejected under cl. (*a*) of s. 54 read with s 582, Civ. Pro. Code. When it is necessary to refer to the judgment appealed against to see whether a second appeal will lie, it would be better in such a case to fix a date under s. 551, Civ. Pro. Code, for hearing the appellant or his pleader before throwing out the appeal. RUDR PRASAD v. BAIJNATH, **15 A. 367=A.W.N. 1893, 115.** [*R.*, 30 A. 290=A.W. N. 1908, 109=5 A.L.J. 584.]

(2)—*Suit to recover lands—Title by purchase —Oral evidence whether sufficient when uncorroborated by documentary evidence.*—Plaintiffs sued for the recovery of certain lands on an alleged title by purchase. The first appellate Court dismissed the suit on the ground that the kobala relied on by them was not proved, and that, without any documentary evidence to corroborate the oral testimony of the plaintiffs' witnesses, the lower appellate Court could not be satisfied of the justice of their claim. The High Court refused to interfere with the finding of the lower appellate Court which was one of fact upon a legal ground. The lower appellate Court had rightly held that the depositions of the plaintiffs' witnesses as to their possession uncorroborated as they were by any documentary evidence of title generally available to parties really having possessory interest in the land, could not have the effect of establishing the truth of the statements of the plaintiffs. TROYLUKHONATH GHOSE v. NUBO KOOMAR ROY, **10 W.R. 204.**

See REVIEW—JURISDICTION TO REVIEW, 14 W.R. 438.

——3.—Appeals against orders when lie and when not.

(1)—*Special appeal allowed—Act* XXIII *of* 1861, *ss.* 5, 6, *dismissal of appeal under—Special appeal.*—There is a special appeal from

Special or Second Appeal—continued.

——3.—Appeals against orders when lie and when not—*continued.*

an order dismissing an appeal under ss. 5 and 6, Act XXIII of 1861. INDUR CHUNDER BAHOO v. WOOZEER ALI KHAN, **7 W.R. 338.**

(2)—*Cross-decrees—Act* VIII *of* 1859, *s.* 209 —*Special appeal from* ex parte *decisions.*—Where A applies to have a decree held by his son against B set off as cross-decree under s. 209, Act VIII of 1859, on the ground that his son *held benami* for him, *held* the parties to the decrees are not the same in any possible sense. A special appeal lies from an *ex parte* decision passed by an appellate Court in regular appeal. TARA CHAND GHOSE v. ANAND CHANDRA CHOWDHRY, **2 B.L.R. A.C. 110=10 W.R. 450.** [*F.*, 20 W.R. 402; *Appl.*, 3 C. 228; *R.*, 6 B.H.C. A.C. 161, 8 P.R. 1871, 9 A. 36.]

(3)— Ex parte *decree of lower appellate Court—Second appeal.*—A second appeal lies from an *ex parte* decree of a lower appellate Court. MARUTI VALAD UMAJI v. VITHU, **16 B. 117.**

(4)—Ex parte *decree—Special appeal.*—A special appeal lies from an *ex parte* decision passed by an appellate Court in regular appeal. PARAN CHUNDER GHOSE v. CHUKKUN LALL ROY, **20 W.R. 402.**

(5)—*Regular appeal*—Ex parte *appellate decree—Special appeal.*—A special appeal lies from a decision given *ex parte* in regular appeal against the respondent. RAMSHET BACHASHET v. BALKRISHNA ABABHAT, **6 B.H.C.A.C. 161,** [*Appl.*, 3 C. 228; *R.*, 20 W.R. 402, 8 A. 354, F.B.].

(6)—*Act XII of* 1881 (*N.W.P. Rent Act*), s. 191—*Decree of District Judge on appeal from appellate decree of Collector—Appeal to High Court.*—An appeal lies to the High Court from the decree of a District Judge passed on appeal from an appellate decree of a Collector. JAI RAM v. DULARI CHAND, **3 A. 309, F. B.=A. W.N. 1883, 147.**

(7)—Ex parte *decree under Act* X *of* 1859—*Order rejecting application to set aside—Special appeal—Dismissal of such application for default—Second application not entertainable.*—The effect of s. 13, Act VI of 1862 of the Bengal Council, is to place decrees of the Collector's Courts passed *ex parte* on the same footing as decrees of the Civil Courts passed under the same circumstances; for, the section allows an appeal to the Court to which appeals against the decision of the Court passing the order would lie, in the same way as is allowed by s. 119 of Act VIII of 1859, and that brings the matter under the general provisions of appeals and of special appeals to the High Court; and, consequently, a special appeal will lie in such a case. There is no provision in the procedure laid down under Act X of 1859 for the entertainment of a second application praying that an *ex parte* decree be set aside when a previous application for the

Special or Second Appeal—continued.

——3.—Appeals against orders when lie and when not—*continued.*

same purpose has been dismissed for default. SUDEROODDEEN v. HURONATH SEIN, **8 W.R. 87.**

(8)—*Civ. Pro. Code, Act* VIII *of* 1859, ss. 346, 347—*Special appeal—Rejection of application for re-admission of appeal dismissed for default.*—Where an application for the re-admission of an appeal dismissed for default was rejected, a special appeal lay from the order rejecting the application, if it was illegal. The mere filing of a *vakalatnama* is not appearing in person or by pleader. MUSSUMAT BIBEE HALOO v. MUSSUMAT ATWARO, **7 W. R. 81.** [*F.*, 11 C.L.R. 537 ; *R.*, 7 A. 538 = A. W.N. 1885, 144.]

(9) *Civ. Pro. Code, Act* VIII *of* 1859, ss. 346, 347—*Dismissal of appeal for non-appearance—Order refusing re-admission of appeal under* s. 347—*Special appeal from order.*—A special appeal is admissible from an order of a lower appellate Court rejecting an application, under s. 347 of Act VIII of 1859, for the re-admission of an appeal dismissed for non-appearance of the party or pleader, if such appeal raises pleas which justify the High Court in interfering with a discretionary order. The lower appellate Court having dismissed an appeal under s. 346 of the Civ. Pro. Code, the appellant applied for its re-admission on the ground that though he was present in the Court he had not heard the call when the appeal was taken up and that his pleader who had been engaged in another Court at the time of the call had put in an appearance within five minutes. The appellate Court summarily rejected the application. The High Court, in remanding the application for proper inquiry and consideration, *held* that the grounds on which the application was made certainly deserved to be inquired into and considered by the lower appellate Court. JALL SINGH v. ZAHURIA, **6 N.W.P. 222, F.B.**

(10)—*Act* VIII *of* 1859, s. 346, *order under, dismissing regular appeal for non-appearance of appellant or pleader—Special appeal.*—A special appeal lies to the High Court from an order passed under s. 346 of Act VIII of 1859 dismissing a regular appeal for non-appearance of the appellant either in person or by a pleader. CHINNAPPA CHETTI v. NADARAJA PILLAI, **6 M.H.C. 1.** (3 M.H.C. 109, *commented on*).

(11)—*Special appeal — Execution of decree —"Regular appeal"—Term explained.*—The word "regular appeal" means nothing more than a general ordinary appeal, an appeal lying on every ground of error, whether of fact or of law, and should not be confined to appeals from a decree Hence a special appeal lies from a regular appeal in matters relating to the execution of decree. BAGUBAI v. KAZI SAYAD NIZMUDDIN, **6 B.H.C.A.C. 205.**

(12)—*Witness absconding to avoid summons—Order of Court fining witness—Appeal—Act* XIX *of* 1853, *s.* 28, *repeal of, by Act* X *of* 1861.—By the words of s. 365 of Act VIII of 1859, the Legislature intended to give the person aggrieved by any order of a Civil Court imposing a fine on him as a punishment for keeping out of the way in order to avoid service of summons to attend as a witness, the right to appeal from such order.—The Court had the power to inflict a fine upon a person for absconding or keeping out of the way to avoid his being summoned as a witness, only under Act XIX of 1853. Such a fine could only have been inflicted under the provisions of s. 28 of Act XIX of 1853, and the provisions of that section having been repealed, as to proceedings under Act VIII of 1859, by Act X of 1861, the Judge has no longer power to inflict a fine in such a case. GUJADHUR PERSHAD NARAIN SINGH v. JUGDEO NARAIN, **10 W.R. 233.**

(13)—*Act* VIII *of* 1859, ss. 229, 231—*Enquiry —Miscellanous appeal.*—Where the Court below has held an enquiry under s. 229 of the Civ. Pro. Code, Act VIII of 1859, and a regular appeal lies to the High Court under s. 331, the case is not one that the High Court can entertain and determine as a miscellaneous appeal. GOOROO DOSS ROY v. PUNCHANUN BOSE, **9 W.R. 337.**

(14)—*Political Agent's decision in regular appeal—Special appeal.*—A special appeal lies against the decision of a Political Agent passed in regular appeal. NILOWA v. FAKIRAPPA, **6 B.H.C.A.C. 75.** [*R.*, 7 B.L.R. 452.]

(15)—*Act* VIII *of* 1859, ss. 257, 269, 372—*Act* XXIII *of* 1861, ss. 11, 44—*Special appeal—Order in execution.*—Under s. 11, Act XXIII of 1861, a special appeal will lie from a decision passed in appeal from an order relating to the execution of a decree. A special appeal will not lie from an order under s. 257, Civ. Pro. Code, 1859, confirming a sale in execution of decree. MAHOMED HOSSEIN v. SHEIKH AFZUL ALI, **B.L.R. Sup. Vol. App. 1 = W.R. F.B. 83 = Marsh 296 = 2 Hay 293.**

(16)—*Special or second appeal—Orders subject or not to appeal—Order on application for revival of suit—Act* LIII *of* 1860, s. 2—*Civ. Pro. Code*, 1859, s. 378.—The Zillah Judge reversed a decree in the plaintiff's favour on the ground that the suit was barred by the period of limitation prescribed by s. 30, Act X of 1859; subsequently to this decree, Act LIII of 1860 came into operation, which, by ss. 1 and 30, provided that suits for causes of actions which had accrued before the 1st of August, 1859, might be instituted within two years from that day; and by s. 2 that suits or appeals dismissed on the ground that they had not been commenced within the period prescribed by the Act of 1859 might be revived. The Zillah Judge rejected an application under the Act of 1860 to revive the suit. *Held* that this was not an application for a "review of judgment"

Special or Second Appeal—continued.

——3.—**Appeals against orders when lie and when not**—*continued.*

within s. 378 of Act VIII of 1859, as to which the order of the Court was final; but, being for the revival of a suit under the provisions of the latter law, his order was the subject of an appeal. BUNGSHEEDHUR MUNDUL v. PUDDOLOCHUN ROY, **Marsh 38=W.R. F.B. 11 =1 Ind. Jur. O.S. 5=1 Hay 90.**

(17)—*Confirmation of sale—Deposit of landlord's fee—Sale certificate, application for—Limitation—Civ. Pro. Code*, 1882, *s.* 244 (=47 *present Code*) — *Appeal — Second appeal.*—There is no limitation for an application to deposit landlord's fee as prescribed by the Bengal Tenancy Act and for confirmation of the sale and the granting of the sale certificate. An order upon such an application may be regarded as one under s. 244, cl. (*c*), Civ. Pro. Code, and, as such, an appeal and a second appeal would lie. KRISHNA CHANDRA DUTT v. ANUKUL CHANDRA CHUCKERBUTTY, **6 C. W.N. 190.**

(18)—*Second appeal disallowed—Succession Certificate Act, ss.* 19, 26—*Appeal from order of District Court under s.* 26.—S. 26 of the Succession Certificate Act confers on the District Court the same appellate jurisdiction over an order of an inferior Court as is conferred by s. 19 on the High Court over the order of a District Court. There is no provision in the Act for a second appeal in any case. SUBBA RAO v. PALANI ANDI PILLAI, **17 M. 167=4 M.L.J. 72.**

(19)—*Costs—Discretion— Second appeal.*—An order as to costs is purely discretionary with the lower Court. No second appeal will lie in regard to costs alone, where such discretion has been exercised. FUTEEK PAROOEE v. MOHENDER NATH MOZOOMDAR, **1 C. 385 =25 W.R. 226.** [*F.*, 12 C. 179; *R.*, 6 O.C. 52.]

(20)—*Civ. Pro. Code, s.* 492—*Appeal from application.*—No second appeal lies from an application under s. 492 of the Civ. Pro. Code, 1882, RAMCHUNDRA v. JANARDHAN, **4 Bom. L.R. 138.**

(21)—*Application for review—Special appeal.*—An appeal which has been preferred to the Judge was withdrawn the next day through another pleader. Subsequently an application was made to the Judge to have the appeal restored to the file, on the ground that the second pleader had no authority from his client to withdraw the appeal. The Judge refused to interfere. *Held* that the order was one passed on an application for review of the former order and therefore no special appeal lay from the second order. Further, as the only ground upon which the Judge was asked to proceed was a petition from the appellant said to have been sent to her vakil by post; the Judge could not be directed to take any further action in the matter. MODHOOMUTTY DEBIA v. DHUNPUT SINGH, **13 W.R. 167.**

Special or Second Appeal—continued.

——3.—**Appeals against orders when lie and when not**—*continued.*

(22)—*Order granting review of judgment, no second appeal from—Civ. Pro. Code*, 1882, *s.* 629.—No second appeal lies against an order, under s. 629 of the Civ. Pro. Code, granting a review of judgment. THAN SINGH v. CHUNDUN SINGH, **11 C. 296.**

(23)—*Ss*, 591, 629, *Civ. Pro. Code*, 1882—*Order setting aside order granting review, second appeal from.*—A second appeal does not lie to the High Court from an order setting aside an order granting review. S. 591, Civ. Pro. Code, permits but one appeal. KANTI CHUNDER MOOKERJEE v. SALIGRAM, **24 C. 319.** [*F*, 6 C.L.J. 225.] *See also* IMAM BUX v. MAHADEO GOPE, **24 C. 319 note.**

(24)—*Civ. Pro. Code, ss.* 588, 629—*Order granting review, no second appeal lies from.*—S. 588 does not allow a second appeal against an order under s. 629 since such an order is not itself a decree. PAPAYYA v. CHELAMAYYA, **12 M. 125.** (11 C. 296, *F.*).

(25)—*Ss.* 244, 588, *Civ. Pro. Code*, 1882—*Order passed on any question, subsequent to an order absolute for foreclosure of mortgaged property—Second appeal.*—Any question arising as to an order absolute for foreclosure of mortgaged property, after such order has been made, not being one relating to the execution of a decree within the meaning of s. 244, Civ. Pro. Code, a second appeal from an order disposing of such a question does not lie. TARA PADO GHOSE v. KAMINI DASSI, **29 C. 644.** (25 C, 133, *R.*) [*F.*, 6 O.C. 114.]

(26)—*Act* VIII *of* 1869 (*B.C.*), *s.* 102—*Special appeal—Title—Conflict of claims not between parties—Special appeal—Suit dismissed against non-appealing defendant — Jurisdiction.*—No special appeal lies under s. 102, Act VIII of 1869 (B.C.), in a case where the contention (if any) as to title is not between the parties to the suit, nor is there any conflict of claims between them. It is very doubtful whether the High Court, after deciding that no special appeal lies, could at all consider whether the lower appellate Court was justified in dismissing the suit as against the defendant against whom the Munsiff has given a joint decree, but who had not appealed to the Judge. SRISTEEDHUR CHUCKERBUTTY v. KOONJO BEHARY BISWAS, **18 W.R. 261.**

(27)—*Special appeal—Decision on question of title—Title—Suit for Rent Act* VIII (*B.C.*) *of* 1869, *s.* 102.—In a suit for rent, in which the sum claimed was less than Rs. 100, the defendant pleaded that the plaintiff had ceased to have any interest in the land, and the suit was dismissed. There was no finding as between the plaintiffs and any other person claiming title to the land. *Held* that a special appeal to the High Court was barred by s. 102, Act VIII (B.C.) of 1869. DONZELI v. TEKAN NODAF, **2 C.L.R. 556.** (23 W.R. 227, 21 W.R. 36, *C.* and *F.*) [*F.*, 9 C.L.R. 86, 7 C. 330.]

Special or Second Appeal—continued.

——8.—Appeals against orders when lie and when not—*continued.*

(28)—*Second appeal from order of Special Judge—Ss.* 105, 106, 108, *Bengal Tenancy Act*, 1885.—A second appeal does not lie from an order of a Special Judge as to the standard of measurement of lands, to the High Court, such order not being a decision in a case under s. 106, Bengal Tenancy Act. NAROHARY JANA v. HARI CHARAN PRAMANICK, **26 C. 556.** (25 C. 34, 24 C. 462, *D.*).

(29)—*Act* X *of* 1859—*Act* XXII *of* 1872—*Act legalizing suits entertained without jurisdiction passed subsequent to decision—Whether special appeal lies in such a case.*—A suit under Act X of 1859 instituted in a Court not competent to receive the plaint, had been dismissed by the lower appellate Court. Act XXII of 1872 which was passed subsequently declared that certain officers who had erroneously exercised a jurisdiction they did not possess, should not, therefore, be deemed not to have had jurisdiction. The plaintiff who preferred a special appeal after the passing of the Act, contended that the decision of the Court of first instance was no longer illegal and without jurisdiction, and that the lower appellate Court should decide the suit on its merits. *Held* (*per* Turner, J.) that the special appellant should have instituted a fresh suit, as a new law passed since the decision of a suit cannot make that decision wrong, which was, and still is, in reference to the law then in force right, and that although a Court may decide after further consideration, that a previous interpretation of the law which had been acted on in a former case was erroneous, this alteration is no ground for reviewing cases already decided; and that, consequently, the special appeal should be dismissed. *Held* (*per* Spankie, J.) that the special appeal should be allowed, the decision appealed against being contrary to the law in force at the time the special appeal was instituted, which law the Court was bound to enforce. BULDEO v. LUCHMUN, **5 N.W.P. 106.** [*R.*, 6 N.W.P. 153, F.B.]

(30)—*Act* XXIII *of* 1861, *s.* 35—*Remedy of auction purchaser—Special appeal from order setting aside sale—Review.*—The High Court has no jurisdiction to entertain a special appeal from an order of a Zillah Judge, setting aside a sale, nor can it set aside his order under s. 35 of Act XXIII of 1861, as void for want of jurisdiction. The only remedy which is open to the auction purchaser (the special appellant in the case), is to apply for a review of judgment of the Zillah Judge. RAGHOO NATH SINGH v. TOODAY SINGH, **5 N.W.P. 19.**

(31)—*Civ. Pro. Code, s.* 257—*Irregularity in conducting sale—Sale confirmed by lower Court and first appellate Court—No special appeal.*—Where a defendant complains, under s. 257, Civ.Pro. Code, of irregularity in conducting the sale of his lands taken in execution of a decree against him, and the sale is confirmed by the Court of first instance and the order is affirmed on appeal by the Civil Judge, a special appeal to the High Court does not lie. VARADHA REDDI v. VENKATA SUBBA REDDI, **5 M.H. C. 213.**

(32)—*Act* VIII *of* 1859, *s.* 257, *order under, confirming sale in execution—Special appeal—Act* XXIII *of* 1861, *s.* 35—*High Court, when can interfere.*—Where, under s. 257 of Act VIII of 1859, an order has been passed confirming a sale of immoveable property made in execution of a decree, no special appeal will lie from that order. The appellant in this case, relying on the Full Bench ruling in 6 W.R. Mis. 77, contended that the High Court can interfere under s. 35 of Act XXIII of 1861 whenever a subordinate Court exercises a jurisdiction which it had not or goes beyond its jurisdiction. But the High Court *held* that the case did not fall within the view of the above Full Bench ruling, inasmuch as in this case the Judge certainly had jurisdiction which he had lawfully exercised and never exceeded. He might have taken a wrong view of the case, but he cannot therefore be taken to have gone beyond the jurisdiction vested in him by law. ABDOOL KUREEM v. OOGHUN LAL, **6 W.R. Mis. 119.** [*Appr.*, 9 W.R. 218, F.B.]

(33)—*Execution sale—Objections by judgment-debtor disallowed—Appeal—Civ. Pro. Code*, 1859, *s.* 257.—Where, on the disallowance by a Civil Court of the objections preferred by a judgment-debtor to the attachment and sale of certain immoveable property in execution of a decree against him, the judgment-debtor preferred an appeal against the order without expressly objecting to the confirmation of sale, *held* that the Judge was entitled to deal with the appeal as an appeal against the sale which had taken place before the appeal was preferred, and as if it were an appeal against the order confirming the sale. The appeal should not be dealt with as if it were one under s. 257 of Act VIII of 1859, and so, no further appeal lay to the High Court. SONAMONEE DOSSIA v. MOTEE SINGH, **14 W.R. 385.**

(34)—*Civ. Pro. Code, s.* 588—*Order refusing to set aside sale.*—An order refusing to set aside an execution sale falls under s. 588, Civ. Pro. Code, and is appealable, but no second appeal lies against an order passed in appeal under that section, even though the decree-holder himself may be the purchaser. DAIVA NAYAGAM PILLAI v. RANGASAMY AIYAR, **19 M. 29=5 M.L.T. 153.** [*F.*, 28 C. 4 =5 C.W.N. 124.]

(35)—*S.* 588, *Civ. Pro. Code*, 1882—*Application by judgment-debtor to have sale in execution of decree set aside—Second appeal—Material irregularity alleged.*—On a preliminary objection being taken at the hearing of an appeal, that, having regard to the provisions of s. 588 of the Code of Civil Procedure, no second appeal lay from the order passed in

Special or Second Appeal—continued.

——3.—Appeals against orders when lie and when not—*continued.*

appeal by a District Judge on the application of a judgment-debtor to have an execution-sale set aside on the ground of material irregularity, *held*, that no second appeal lay to the High Court. GOPI KOERI v. GOPI LAL, **21 C. 799.** (9 C. 656, *R.*) [*R.*, 1 O.C. 186.]

(36)—*Order in execution of a decree.*—Under Act VIII of 1859, there was no special appeal from orders passed in execution of a decree. ANONYMOUS, **1 Ind. Jur. O.S. 50.** ANONYMOUS, **1 Ind. Jur. O.S. 68.** But there is now since the passing of Act XXIII of 1861. See MAHOMED HOSSEIN v. AFZUL ALLY, **B.L.R. Sup. Vol. Ap. 1=Marsh 296=W.R F.B. 83=2 Hay. 293**; BAGURAI v. NIZMUDDIN, **6 B.H. C.A.C. 205.** VIRASAMY MUDALI v. MANONMANY AMMAL. VENKATA BALAKRISHNA CHETTI v. VIJIARAGHUNADHA VALAJI KRISHNA GOPALER, **4 M.H.C. 32.**

(37)—*Ss.* 244, 311, 312, 588, *Civ. Pro. Code*, 1882—*Mere allegation of fraud—Second appeal.*—A mere allegation of fraud, in an application under s. 311, without any attempt to substantiate it, is not enough to bring the case under s. 244, and cannot give a right of second appeal. UMAKANTA ROY v. DINO NATH SANYAL, **28 C. 4=5 C.W.N. 124.** (18 C. 422, 22 C. 802, 19 M. 29, *F.*; 4 C.W.N. 538, *D.*) [*D.*, 31 C. 385].

(38)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 354—*Order of remand—Special appeal.*—Special appeal did not lie from an order of remand under s. 354 of the Code. COLLECTOR OF AGRA v. BULJEETA, **3 Agra 368=Agra F.B. Ed., 1874, 161.**

(39)—*Order dismissing suit for default of appearance not a decree and not appealable—S.* 2, *Civ. Pro. Code*, 1882—*Remand.*—An order dismissing a suit for default of appearance, is not a decree, as defined in s. 2, Civ. Pro. Code, 1882. Consequently neither an appeal nor a second appeal lies from such an order. (23 C. 115, 827, 22 M. 221, *R.*). In setting aside such an order of the Court of first instance, the lower appellate Court acts without jurisdiction. The lower appellate Court cannot also, by remanding the case to the first Court, direct it to proceed to try it. AMRITO LAL MUKERJEE v. RAM CHANDRA ROY, **29 C. 60.** [*R.*, 127 P.R. 1907, F.B.=51 P.W R. 1907].

(40)—*Refusal to restore suit dismissed for default—Dismissal of appeal from order refusing restoration—No second appeal.*—A second appeal does not lie from an order dismissing an appeal preferred against an order refusing to restore a suit dismissed for default under s. 102, Civ. Pro. Code, 1882. BALARAM v. MULLA, **5 C.P.L.R. 81.**

(41)—*Act* VIII *of* 1859, *s.* 347—*Appeal dismissed for default—Order refusing to re-admit—Special appeal.*—An appeal having been dismissed for default of prosecution, the Commissioner refused to re-admit it under s. 347 of Act

Special or Second Appeal—continued.

——3.—Appeals against orders when lie and when not—*concluded.*

VIII of 1859. *Held* that no special appeal lay from the order of the Commissioner, ALLUM DEEN v. MUSSUMATE BUDDEE, **32 P.R. 1869.**

(42)—*Appeal dismissed for default — Order refusing re-admission—Special appeal.*—Where a principal Sudder Ameen dismisses an appeal for default and the Judge refuses to re-admit the appeal, no special appeal lies to the High Court from the order of the Judge. The application for re-admission should be made to the principal Sudder Ameen and not to the Judge. KISTO PERSAD DUTT v. MR. T. A. COWIE, **W.R. 1864, 315.**

(43)—*Special appeal — Order refusing to admit regular appeal—Limitation.*—A special appeal did not lie against an order of the Judge refusing to admit a regular appeal presented after the expiration of the time provided for preferring appeals. MUSSAMUT PHOOLHAREE v. BABOO BISHESHU PERSHAD, **3 Agra 301.**

(44)—*Appeal—Limitation— Sufficient cause—Appeal against order.*—As against the order of a Judge declaring that sufficient cause had not been shown for presenting an appeal from an *ex parte* judgment of a Deputy Collector after time, no special appeal lies. Such an order is not a decision in appeal. ROGHOONATH SINGH v. ROY MOHUN LAL MITTER, **7 W.R. 296.**

(45)—*Act* X *of* 1877, *ss.* 244, 588 *and* 622—*Second appeal.*—S. 588 provides that the decision of the appellate Court from orders under s. 244 shall be final; so that, even if the appellate Court makes an erroneous order in point of law, no second appeal lies to the High Court. Nor can the High Court interfere, under s. 622, in this matter as the appellate Court had jurisdiction to hear the appeal. SURYAVAPRASAKA RAU v. VAISYA SANNYASIRAZU, **1 M. 401.**

See BEN. ACT VIII OF 1885, ss. 104 (2), 106, 107, 108, cl. 2, 21 C. 776.

See BEN. ACT VIII OF 1885, ss. 106, 108 (3), 24 C. 462, F.B.=1 C.W.N. 294.

See BEN. ACT VIII OF 1885, ss. 106, 108 (3), ch. X, 22 C. 477.

See BEN. ACT VIII OF 1885, s. 153, 27 C. 484=4 C.W.N. 269, 28 C. 116.

——4.—Errors of Law or Procedure.

(1)—*Act* XIV *of* 1859, *s.* 15—*Suit under—Appeal--Act* XXIII *of* 1861—*Interference by High Court.*—No appeal lies, under s. 26, Act XXIII of 1861, from an order or decision passed in a suit instituted under s. 15, Act XIV of 1859. But, where an appeal had been preferred and no objection taken by the opposite side and the appeal allowed, *held* that the High Court could not interfere. HURDYAL SINGH v. KUNHYA LALL, **19 W.R. 247.**

***Special or Second Appeal*—continued.**

——4.—Errors of Law or Procedure—*contd.*

(2)—*Civ.Pro. Code, s.* 584—*Second appeal—Grounds impugning findings of fact.—Held by the Full Bench* (*Petheram, C.J., dissenting*).—It is competent for the High Court to entertain pleas in second appeal which impeach the findings of fact recorded by the lower appellate Court, on the ground that such findings are conjectural, that they ignore the evidence, and that the Court has given no reasons for the conclusions at which it arrived. Where a lower appellate Court has drawn strained or unreasonable conclusions from the evidence, or has discredited or disbelieved witnesses or documentary proof upon capricious or unsustainable grounds, or has perversely interpreted or shut its eyes to proved facts, or has stated no intelligible reasons for arriving at its findings of facts, the High Court may take notice of all such matters in second appeal. (9 C. 309, 10 C. 932 and 11 C.L. R. 104, *R.*). *Per Petheram, C.J.*—The High Court is not at liberty, in second appeal, to look into the evidence in the cause, for the purpose of ascertaining whether the lower Courts have found the facts correctly, for, no question of fact is included among the grounds of appeal allowed under s. 584. And it would seem to be the intention of the Legislature that in small causes the findings of the lower Courts on questions of fact should be absolutely final. The expression "specified law" in s. 584 (*a*) means the statute law, and the expression, "usage having the force of law" in the same clause means the common or customary law of the country or community. Clause (*a*) is confined to cases in which the lower appellate Courts have either misconstrued a statute or a written document, or have come to a wrong conclusion as to what is the customary law of the country or community with reference to questions at issue between the parties. Clause (*b*) can only refer to mistakes in law. Probably it was intended to meet cases in which the lower Courts had treated the question as one of fact, when it was really one of law; it does not extend the operation of cl. (*a*), and is included in it. "Procedure" in cl. (*c*) means the process followed by Courts in the trial of cases which come before them. It cannot be held to include the mental process by which a Judge or Jury come to a conclusion on a question of fact. *Per Mahmood, J.*—S. 574 of the Civ. Pro. Code, was intended to guard against such failure of justice as might arise from the defective or arbitrary exercise of the extensive powers possessed by the Court of first appeal in cases which, with reference to their nature, would be proper subjects of second appeal; and a judgment of the first appellate Court which falls short of the due compliance with the various clauses of s. 574, is essentially defective, and such defect could properly be made the subject of complaint in second appeal within the purview of s. 584. (2 A.W.N. 104 and 158, *R.*). The word "procedure" in s. 584 (*c*) must be understood in its most general sense, as including all the rules contained in the Civ. Pro. Code, or any other law regulating the investigation of cases by the Civil Courts. When the Court of first appeal, after having entered into the merits of the case, has considered the evidence and adjudicated upon the merits in the manner required by s. 574, the mere circumstance that the conclusions at which the Court has arrived are erroneous, or opposed to the weight of evidence, will not justify interference in second appeal, even though such conclusions proceed upon an improper conception of the exact effect and bearing of the case upon the merits. On the other hand, where the Court of first appeal, while adjudicating with due compliance with the provisions of s. 574, arrives at conclusions upon the merits ignoring any steps essential for justifying those conclusions, or where such conclusions are based upon evidence inadmissible by law, or proceed upon an erroneous view of the legal effect of any material part of the evidence, or are arrived at under a misconception either of the rules of evidence or of any other law, such conclusions, though they purport to be distinct findings of fact, would lay the judgment of the lower appellate Court open to second appeal under cl. (*c*) of s. 584, so long as the error is substantial enough to have possibly affected the justice of the case upon the merits. NIVATH SINGH v. BHIKKI SINGH, **7 A. 649, F.B. = A. W.N. 1885, 151.** [*Overruled*, 18 C. 23, P.C. = 17 I.A. 122; 20 C. 93, P.C.; *Diss.*, 10 A.W.N. 196; *R.*, 7 A. 765, F.B., 6 A.W.N. 166.]

(3)—*Costs—Ground for special appeal.*—It is very far a matter of discretion how costs are to be awarded; and the question as to how costs have been awarded is not, as a matter of right, a point for special appeal. BEER PERSHAD v. DOORGA PERSHAD, **W.R. 1864, 215.**

(4)—*Appeal from portion of decree relating to costs.—Held*, in conformity with a Full Bench ruling of the late Sudder Court, that a special appeal lies from the order of the lower Courts in matters relating to costs, and that there is nothing in the law limiting or taking away the right to appeal specially from that part of a decree which relates to costs in any case where any legal ground for special appeal is shown to exist. ASSA RAM v. KASHMEEREE DASS, **Agra, F.B. 90 = Ed. 1874, 68.**

(5)—*Costs—Improper exercise of discretion—Appeal—Special appeal.*—If a Court should award costs to the losing party it might be an improper exercise of discretion against which a regular appeal would lie; but it would not be a matter of special appeal, unless it should be held contrary to law to award costs under any circumstances to the losing party. If costs should be allowed contrary to law, it would be a subject of special appeal. HAFIZULLA v. JAMSHEDJI, **4 B.H.C. A.C. 41.** [*F.*, 8 B.H.C. A.C. 100, 1 C. 385 = 25 W.R. 266.]

(6)—*Appellate Court—Discretionary power under s. 7 of Act* IX *of* 1873—*Objection to wrong exercise of discretion, urged in special*

appeal.—The power given to the Court in s. 7 of Act IX of 1873 of confirming a decision upon the perusal of the judgment appealed against, and the memorandum of appeal, and hearing the appellant, is a very large one, and one which should be sparingly and cautiously exercised in cases where interests in land are concerned. In cases where the facts are few and simple, as for instance, in cases of the nature of those cognizable in Courts of Small Causes, the power might be more freely exercised. But the exercise of the discretion otherwise than in accordance with the views above expressed, is not an error which the Chief Court can correct in special appeal. AHMED KHAN v. BEHRAM, **91 P.R. 1877.**

(7)—*Costs—Pleaders' fees — Regular and special appeals.*—A special appeal is not admissible on a matter of costs unless the order of the lower Court be contrary to the provisions laid down in some Act or Regulation ; nor is a regular appeal permissible when there has been a *bona fide* exercise of discretion by the lower Court. DESAJI LAKHMAJI v. BHAVANIDAS NAROTAMDAS, **8 B.H.C. A.C. 100.** [*R.*, 1 C. 385=25 W.R. 226, 3 B. 202, 16 B. 241.]

(8)—*Hearing of appeal before date fixed—Pleaders present at hearing.*—The deciding of an appeal posted for hearing to the 14th December, on the 12th when the pleaders were present, is no such defect in procedure as to render it necessary for the High Court to interfere in special appeal. MUSSUMAT HUKEEMUNISSA v. MUSSUMAT BIBEE MUCKDOONUM, **1 W.R. 246.**

(9)—*Special or second appeal—Other errors of law or procedure—Erroneous order as to costs.*—The Court below gave the plaintiff a decree in a suit for mesne profits for such an amount as should be ascertained to be due, and ordered that the plaintiff should have his costs on the amount claimed. *Held* that this constituted no ground of special appeal, but that the remedy of the defendant was by application to the Court below to amend the order. BHUGGOBAN CHUNDER GHOSE v. SHUMBHOO CHUNDER GHOSE, **Marsh, 503.**

(10)—*Suit for damages—Nominal damages awarded—Costs.*—In a suit for damages, the lower appellate Court, holding that it was a case for nominal damages, gave the plaintiff a decree for 4 annas, but declared him liable for the defendant's costs in the appellate and the first Court, which amounted to Rs. 21, on the ground that the suit, though not contrary to law, was clearly a vexatious one, inasmuch as the plaintiff had already prosecuted the defendant criminally, and caused him to be fined. *Held* that when costs were awarded upon such an erroneous principle, interference in special appeal was rendered necessary. MAHENDRO NATH MOJOOMDAR v. FUTTICK PAROOE, **24 W.R. 319.**

(11)—*Question of costs—Special appeal—Illegal exercise of jurisdiction.*—This special appeal came before the High Court on a question of costs alone and the High Court said that, as a general rule, such an appeal would not lie on a question relating to costs alone, especially when, as in this case, the special appellant has not shown that the Court had exercised its discretion illegally or contrary to any rule having the force of law. ACHUMBIT SINGH v. KUNHYA LAL MOHAJUN, **7 W.R. 208.**

(12)—*Jurisdiction—Civil and Revenue Courts—Special appeal—Objection as to jurisdiction—Costs.*—Plaintiff brought a suit in the Civil Court in respect of a matter over which the Revenue Court had exclusive jurisdiction. The suit was heard and determined by the Court of first instance and its decree was affirmed in appeal to the District Judge. *Held* that it was open to the original plaintiff, in special appeal to take the objection that the Courts below had proceeded without jurisdiction, although it was the plaintiff himself that selected his *forum.* [*R.*, 23 B. 22]. In the above-mentioned case, the appellant although he succeeded, was ordered to pay all the costs of the suit to the respondent, because it was the appellant himself that originally selected the wrong Court. BHAI TRIMBAKJI v. TOMU VALAD KUTUR, **2 B.H.C. 192.**

(13)—*Act* VIII *of* 1859, *s.* 73—*Intervenor made a party to suit—Objection in special appeal.*—Under s. 73, Act VIII of 1859, in a suit for rent, an intervenor should not be made a party to the suit, unless he is entitled to or claims to be entitled to any share or interest in the amount of rent sued for. But if he is made a party without any objection on the part of the plaintiff in the Court of first instance, it is too late to take that objection in special appeal. LUCHMEE DHUR PATTUCK v. RUGHOOBUR SINGH, **24 W.R. 286.**

(14)—*Delay in taking steps to summon witnesses—Refusal to issue summonses—Substantial error in procedure—Special appeal.*—Where the Courts below refused to issue fresh summonses to the plaintiff's witnesses as he had delayed asking the Court to issue its process within a reasonable time, *held* that he was not entitled to come up in special appeal and ask the High Court to compel the lower Courts to condone his carelessness and indifference to his own interests. BROJO LALL MOOKERJEE v. AUGHORE LALL GHOSAL, **25 W.R. 71.**

(15)—*Order for payment of decree by instalments without providing for interest or penalty agreed upon on default—Discretion, Arbitrary exercise of—Civ. Pro. Code,* 1859, *s.* 194.—When the lower Courts ordered the decree to be paid by instalments which were hardly sufficient even to cover the interest and did not provide for the interest and penalty conditioned in case of default. *Held* that they had exercised the discretion vested in them by s. 194,

Special or Second Appeal—continued.

——4.—Errors of Law or Procedure—*contd.*

Act VIII of 1859, arbitrarily and without due caution, and their order could be interfered with and set aside on special appeal. BABOO HUR GOBIND v. HURKHO, **1 Agra 116.**

(16)—*Act* VIII *of* 1859, *s.* 194—*Instalment-decree — Costs.*—Where the Court awarded payment of the debt due to a creditor in such a manner as, so far from effectually securing its payment even within a period of twenty years, fails to provide for the payment of the interest intermediately accruing thereon, *held* that the powers vested in the Courts under s. 194, Civ. Pro. Code of 1859, had not been properly exercised and that the disavowal of the creditor's costs by the lower Court without assigning any reason was contrary to the usual practice. NOWAB JAFREE BEGUM v. AHMED HOSSEIN KHAN, **1 Agra 270.**

(17)—*Suit for enhancement—Plaintiff's own witnesses giving adverse evidence—Refusal by lower Court to permit amendment of plaint—Discretion of lower Court.*—In this suit for enhanced rent, the defendants did not appear, but the plaintiffs' witnesses having themselves deposed to the village being a ghatwallee one, the lower Courts held that the plaintiffs' suit must fail, they having claimed to enhance the rent on the village as consisting wholly of *mal* lands, and an application to amend the plaint was refused. *Held* that the lower Courts were right. The plaintiffs sued for enhanced rent on all the assessable lands of the village calling them *mal* lands; and, on the face of the evidence given by their own witnesses, the case could not have proceeded in the form in which it was made and the matter of allowing amendment of the plaint being within the discretion of the lower Court, its refusal to permit the amendment could not, by itself, form a ground for special appeal. MESSRS. R. WATSON & CO. v. NIDHOO DIGWAR, **10 W.R. 87.**

(18)—*Suit based on ownership—Qualified admission of plaintiff's possession—Duty of Court to try question of possession.*—This suit was instituted by the plaintiff as owner of certain property. The defendants admitted in their written statement that the plaintiff was in possession of the disputed share till the year 1268, though they qualified that admission by stating that this possession was held in the capacity of *Zur-i-peshgeedar* or mortgagee. The High Court held that the lower appellate Court was wrong in not having tried the question of possession of the property. If, on enquiry, it be found that the plaintiff was in possession as an owner and not as a *Zur-i-peshgeedar*, the bare fact of such possession having extended over a period sufficient to bar any claim on behalf of the defendants for recovery would be sufficient to give the plaintiff a title to be maintained in possession of the disputed property. The High Court therefore remanded the case to the lower appellate Court to try the question of possession, and then to give to it such legal effect as might be

Special or Second Appeal—continued.

——4.—Errors of Law or Procedure—*contd.*

deemed just and proper under the circumstances of the case. GOPAL ROY v. TEKAET ROY, **8 W.R. 323.**

(19)—*Appellate Court reversing judgment without giving reason.*—The order of the appellate Court reversing the judgment of the lower Court without giving reasons for differing as to facts, is no legal judgment, and may be interfered with on special appeal. SHEIKH GOBURDHUN v. SHEIKH SADHOO, **1 W.R. 244.** [*D.*, 7 W.R. 1.]

(20)—*Special or second appeal—Other errors of law or procedure.*—The Judge decided that the plaintiff was barred by limitation, but his judgment did not disclose the grounds on which he held that plaintiff was not entitled to deduct, in calculating the twelve years' limitation, the time occupied by certain suits brought for the same property, in which he was non-suited. *Held* that it was no ground of special appeal that the judgment was silent on the subject of the claim to deduction, and that, whether the point was urged in the lower Court or not, the plaintiff had no ground of special appeal in respect of omission of all notice of it in the judgment. RAMSOONDER DOSS v. MAHOMED ABBED, **1 Ind. Jur. O.S. 102.**

(21)—*Appellate Court—Omission to give reasons for decision—Error of procedure.*—The omission of an appellate Court to give reasons for its decision is not a ground for ordering a re-trial or re-hearing of the case, provided there has not been any substantial error in its decision upon the merits. Where, however, the High Court finds it necessary that the lower appellate Court should state its reasons for the decision, the proper course would be, not to reverse the decree, but to retain the case in special appeal and require the Judge of the lower appellate Court to state fully his reasons for the decision. DOOLEE CHAND v. MUSSAMUT OOMDA BEGUM, **18 W.R. 473.** [*R.*, 10 C. 932, 12 C. 199.]

(22)—*Appeal—Judgment of lower appellate Court, what to contain—Act* VIII *of* 1859, *s.* 359.—S. 359, Act VIII of 1859, requires to be stated the points to be decided as well those in appeal as those in the original pleadings, to be stated, and the reasons for the decision arrived at thereon. ROOP CHAND ROY v. RAM KANT KOBEERAJ, **W.R. 1864, 98.**

(23)—*Judgment — Reasons for decision not written until after decree in appeal—Special appeal.*—A District Judge's omission to write a judgment containing the reasons for his decision before the decree in appeal is passed, does not affect the decision of case on the merits, and is not a ground of special appeal. BHAGVATSANJI JALAMSANGJI v. PARTABSANGJI AJJABHAI, **4 B.H.C.A.C. 105.**

(24)—*Decree imperfect—Not capable of being drawn from judgment—Fresh trial.*—Where

***Special or Second Appeal*—continued.**

——4.—Errors of Law or Procedure—*contd.*

decree is imperfect and also one which could not be drawn from the judgment and the Judge who gave the judgment, was no longer the Judge of the District, *held* that the decree must be set aside and a fresh trial ordered. KISHEN DYAL LALL v. MULVEE ABDOOL LUTEEF, **19 W.R. 267.**

(25)—*Suit for possession—Confirmation by lower appellate Court of first Court's decree—Finding contrary to allegation in plaint—Error, if substantial—Civ. Pro. Code (Act VIII of 1859) s. 350.*—Where a Court of first appeal confirmed the decree of the first Court in plaintiff's favour in a suit for possession of land, and found that one of the defendants was plaintiff's ryot (contrary to the allegation in the plaint), *held* that the error did not affect the merits of the case or the jurisdiction of the lower Court, and that, therefore, the High Court could not interfere under s. 350, Civ. Pro. Code (Act VIII of 1859). RAM CHUNDER CHATTERJEE v. RAM JEEBUN DASS, **14 W.R. 141.**

(26)—*Local Investigation, making of—Special appeal—Grounds.*—The law does not make a local investigation imperative in every case. The want of it is not a ground of special appeal. BYKUNT NATH SEIN v. PEAREE MONEE DASSEE, **1 W.R. 195**

(27)—*Local inquiry — Judge's discretion—Special appeal.*—No special appeal lies from a Judge's exercise of discretion as to making further local inquiry. POORYO PERSAD ROY v. CHUNDER NATH CHATERJEE, **1 W. R. 249.**

(28)—*Local investigation—Discretion — Refusal to order.*—As a general rule, it is purely a matter in the discretion of the Court whether an Ameen shall be sent to make a local investigation. The refusal to order a local investigation is not a defect in law. RAJ KISHEN MOOKERJEE v. HURO MOHUN MOOKERJEE, **5 W.R. 248.**

(29)—*Local inquiry in suit as to enhancement of rent—Discretion of Judge to order local inquiry in suit to contest notice of enhancement—Order of Judge.*—In a suit brought to contest a notice of enhancement, a Judge is not bound to order a local inquiry, merely because he incidentally states such an enquiry to be the best source from which to obtain reliable evidence upon the point of rates. Nor will a special appeal lie on the subject of the Judge exercising a discretion as to ordering or not ordering such an inquiry. HERALOLL SEAL v. GUNGADHUR SUNNAPUTTY, **W.R.F.B. 19 =1 Ind. Jur. O. S. 8=1 Hay. 229.** *See also* GUNGADHUR SUNAPATTY v. HERALOLL SEAL, **Marsh. 60.**

(30)—*Review—Mistake of account—No special appeal.*—Where in a decree a mistake of account had crept in, that is no ground for preferring a special appeal, as there has not been any error in law or procedure. The proper remedy is by way of an application for review. RAM KANTH ROY CHOWDURY v. KALEE MOHUN MOOKERJEE, **22 W.R. 310.**

***Special or Second Appeal*—continued.**

——4.—Errors of Law or Procedure—*contd.*

(31)—*Defendant erroneously described as minor—Discretion of Court.*—The father of a defendant, against whom a decree was passed in the first Court, preferred an appeal described himself as appellant on behalf of his minor son. It was found that the defendant was not a minor, but that he was of full age and had defended the suit in person, and had in person applied to the Court below for review of judgment. The lower appellate Court dismissed the appeal, refusing to pass an order allowing this appeal by the father to stand as an appeal by the defendant. *Held*, that the lower appellate Court, if it had thought fit, might have allowed the appeal to stand as an appeal by the defendant, but the High Court could not interfere with the order in special appeal. SHAMA CHARAN GHOSE v. TARAK NATH MUKHOPADHYA, **3 B.L.R. App. 115.**

(32)—*Decree proceeding on mistake as to applicability of law—Mistake of Judge not affecting merits.*—The Court will not interfere on special appeal with a decree proceeding on a mistake as to the applicability of a law when such error does not affect the decision of the case. KUREEM KHAN v. MUHFOOZ, **W.R. F.B. 16=1 Ind. Jur. O.S. 77=1 Hay. 226.** *See also* S.C. JUGOBUNDOO MOZOOMDAR v. GOOROO PERSAD ROY, **Marsh. 52.** *See also* ESSAN CHUNDER DUTT v. PRANNAUTH CHOWDHRY, **Marsh. 270=2 Hay. 236.** *See also* AKBER ALLY v. HOSSAN ALLY, **1 Ind. Jur. N.S. 101=5 W.R. Mis. 29.**

(33)—*Powers of High Court in special appeal.*—Though it is not competent for the High Court to question in special appeal the facts found by the lower Courts, still it is open to them to examine the soundness of the conclusions drawn from them by those Courts, because that is a matter of law. JOGENDRA NATH SINGH v. KALI CHARAN ROY, **9 C.W.N. 663.** (20 C. 93, *Appl.*)

(34)—*Misjoinder of causes of action—Ground of appeal.*—Misjoinder of causes of action alone was held not to be a valid ground of special appeal. SHUNKUR PATUKH v. LALA SHEO CHURN LAL, **2 N.W.P. 443.** [*R.*, **2 C.L.J. 602.**]

(35)—*Misjoinder of parties and causes of action — Objection allowed by first appellate Court—Special appeal.*—The fact that the lower appellate Court holds an objection on the score of misjoinder to be good, is no ground for a special appeal. MAHOMED HOSSEIN v. PATUN, **20 W.R. 147.**

(36)—*Possession—Illegal ejectment—Cause of action—Proof—Parties—Intervenor—Error in procedure—Effect.*—In a suit by a tenant against the landlords for the recovery of possession of certain property on the ground of illegal ejectment, the plaintiff is bound to prove the affirmative of the issue relating to the illegal ejectment, before he could succeed as against

Special or Second Appeal—continued.

——4.—Errors of Law or Procedure—*contd.*

his alleged landlords. The fact that the lower Court wrongly allowed certain intervenors to be made parties to the suit, whose allegations were contrary to those put forward either by the plaintiff himself or by the original defendants, cannot be a valid ground of appeal for setting aside the judgment against the plaintiff. The error in adding the parties was one of procedure only. It is incumbent upon the plintiff to show that it had produced an error in the decision of the case on the merits. NUNHOO MAHTOON v. MUSST. TEELOCO KOOER, **18 W.R. 313.**

(37)—*Plaint filed in name of deceased party—Representative of deceased put on record as plaintiff.*—In this case, the suit had been instituted in the name of a person who had died previously. But it was not known at the time of filing the plaint that that person was dead. But as soon as the mistake was found out, the heir and representative of the deceased was at once put upon the record as plaintiff in his room and the suit was throughout conducted, in fact, by such representative. *Held*, that no possible injury could have accrued to the defendant from the fact of the plaint having been filed after the death of the party, and the irregularity, if any, was immaterial. GOLUCK CHUNDER DUTT v. THE COURT OF WARDS, **10 W.R. 127.**

(38) *Review—Evident error or omission—Special appeal.*—If the Court to which an application for a review of judgment is made be of opinion that the review desired is necessary to correct an evident error or omission, or requisite for the ends of justice, and if there be matter before it upon which it may come to that opinion, an order admitting the application cannot be the subject of special appeal. SAHEBJAN BIBEE v. SYUD SUFDAR ALI, **22 W.R. 288.**

(39)—*Erroneous remand—Civ. Pro. Code*, 1859, *s.* 351—*Remand—Special appeal.*—Where a case has not been disposed of by the Court of first instance on a preliminary point, the lower appellate Court is not competent to remand the case, but should merely send an issue down to the lower Court for trial, retaining the appeal on its own file. A special appeal lies against orders remanding suits. NANABHAI NAROTAMDAS v. RAMSHET GOVINDSHET, **6 B.H.C. A.C. 156.**

(40)—*Act* VIII *of* 1859, *s.* 351—*Remand without framing necessary issues—Error of procedure—Decision not affecting merits—Special appeal.*—Where a Judge, instead of framing issues upon which the whole of the case might have been tried, remanded the suit generally for a re-trial in a case which did not come within s. 351 of Act VIII of 1859, his remanding it is no doubt an error in procedure, but it is not one for which a special appeal will lie, if the decision did not affect the case on the merits. JAGOBUNDHOO HALDAR v. SREE NARAIN MITTER, **20 W.R. 188.** [*F.*, 6 N.W.P. 101, 6 N.W.P. 114.]

Special or Second Appeal—continued.

——4.—Errors of Law or Procedure—*contd.*

(41)—*Act* VIII *of* 1859, *s.* 351—*Remand by lower appellate Court under—Additional evidence not called for under s.* 355—*Special appeal maintainable.*—In this case, the lower appellate Court, instead of requiring the first Court to take the required additional evidence under s. 355 of Act VIII of 1859 and to return the case with such evidence, had ordered a remand under s. 351, which the law did not give; and the High Court *held* that, as affecting jurisdiction, a special appeal will lie to it, and remanded the case to the Judge for passing legal orders in the matter. RAM KANT PANDEY v. MUSSAMUT GUNESHEE KOONWUR, **6 W.R. 47.**

(42)—*Act* VIII *of* 1859, *s.* 351—*Improper remand by lower appellate Court—Error not affecting decision on merits—Interference by High Court in special appeal.*—Where a lower appellate Court improperly remanded a suit under s. 351, Act VIII of 1859, instead of disposing of the issue in the case on the evidence on the record and taking further evidence, if necessary, or remitting an issue, and the error in procedure did not affect the decision on the merits, the High Court will not interfere in special appeal. GHASI RAM v. BUDH SINGH, **7 N.W.P. 193.**

(43)—*Civ. Pro. Code* (*Act* VIII *of* 1859), *ss.* 351, 354, 372—*Suit for redemption of mortgage—Whether mortgage merged into sale—Remand under s.* 351 *instead of under s.* 354, *effect of—Error or defect in decision of case on merits.*—However irregular the action of the lower appellate Court might be in remanding a case under s. 351 when it should have remanded it under s. 354, such order is not necessarily void, and therefore to be reversed. If the case went back under s. 351, merely for the purpose of trying a particular issue laid down by the Judge, it may be that the first Court would be under the necessity of confining itself to the trial of that particular issue, and thus the finding of the appellate Court on other parts of the case in the suit would be final; and as it is possible that the error on the Judge's part may have caused error in the decision of the case on the merits, his decision should be reversed, and the Judge should be directed to make the remand under s. 354, Civ. Pro. Code, Act VIII of 1859. GUJRAJ SINGH v. BIJAI SINGH, **6 N.W.P. 114.**

(44)—*Civ. Pro. Code* (*Act* VIII *of* 1859), *ss.* 352, 354—*Remand by appellate Court—Irregularity—Special appeal.*—Where a lower appellate Court is of opinion that there is a question of fact essential to the right determination of the suit upon the merits, which the Court of first instance had not determined, it must direct the latter Court, under s. 354 of Act VIII of 1859, to determine that question, keeping the case on its own file and ordering the first Court, after taking the necessary evidence and deciding the issue fixed by it, to send up the finding with the evidence, and

Special or Second Appeal—continued.

——4.—Errors of Law or Procedure—*contd.*

then proceed to try the case as on appeal. If, instead of doing so, the appellate Court remands the case, under s. 352 of Act VIII of 1859, for trial on the merits, there would be no irregularity affecting the merits of the case or the jurisdiction of the Court which would justify the interference of the High Court on special appeal. GUNGA MONEE DOSSEE v. ISSUR CHUNDER SHAHA, **17 W.R. 465.**

(45)—*Act* VIII *of* 1859, *ss.* 351, 354—*Improper remand by lower appellate Court—Power of High Court to interfere in special appeal.*—A lower appellate Court remanded a case to the Court of first instance which had already decided all the points at issue on the merits. *Held* by the High Court that though the Judge ought to have kept the case on his own file, and either have called for further evidence or have remitted issues under s. 354, his error in procedure could not be interfered with in special appeal as the decision on the merits has not been prejudiced. BULDEO PERSHAD v. GOLAB KHAN, **6 N.W. P. 101.**

(46)—*Irregularity in remand—Civ. Pro. Code*, 1859, *s.* 350.—In a suit for pottah at a certain rate, the Deputy Collector did not examine certain of the plaintiff's witnesses, although they were ready to be examined. The District Judge, on appeal, remanded the case for taking the evidence of those witnesses. The Deputy Collector, on the remand, took the evidence of the witnesses, retried the case, and again dismissed the plaint. *Held*, that the lower appellate Court was competent to remand the case, but was in error in that, whilst remanding the case, the Court did not direct the lower Court to take the evidence, and to return the case to it with the evidence and his finding thereon, without pronouncing a decision of his own. But as the error had not caused any injustice, the whole evidence having been before the lower appellate Court, the High Court could not interfere in special appeal. NUSSUROODDEEN HOOSSEIN CHOWDHRY v. LALL MAHOMED PURMANICK, **13 W. R. 234.** [*R.*, 14 B. 232, 28 C. 324=5 C.W.N. 509.]

(47)—*Special or second appeal—Other errors of law or procedure—Improper dealing with remanded case—Re-hearing and decision of case on remand for particular purpose.*—The Court of appeal directed a remand to try the issue on a plea of payment. The lower Court determined the whole case over again. *Held* that it had no power to do more than try the issue referred, and that, on this ground, its decision might be set aside on special appeal. MOLTAN ALLEE v. SHEW BUKSH, **Marsh. 603.**

(48)—*Review of judgment—Appreciation of evidence—Special appeal.*—A Judge cannot allow a review of judgment for the reason that, if he went through the evidence again, he might come to a different conclusion, and if it appear in special appeal that no grounds have been shown on which a review could be granted,

Special or Second Appeal—continued.

——4.—Errors of Law or Procedure—*contd.*

the High Court can interfere and restore the original judgment. CHUNDER CHURN AUGGRODANY v. LOODUNRAM DEB, **25 W.R. 324.**

(49)—*Civ. Pro. Code* (*Act* V *of* 1908), *s.* 100—*Second appeal—Misreading evidence—Misconstruction of entire deposition—Ambiguous admission—Misconstruction of document.*—Where the lower appellate Court has misread evidence, as opposed to misconstruing a document, that error cannot be set right in second appeal. Where the case is not one in which the entire deposition has been misconstrued, but is a case of an admission made, which is not altogether ambiguous in its terms, and the inference therefrom is not an inference of law but an inference of fact, the High Court cannot interfere in second appeal. ANANTA GHOSH v. PYARY LAL MUKHERJEE, **3 Ind. Cas. 101.** (25 W.R. 250, 32 C. 719=1 C.L.J. 232, 30 C. 207=7 C.W.N. 126, *R.*)

(50)—*Revision—Appeal, second—Important question of law—Misinterpretation of a piece of documentary evidence—Punjab Courts Act* (XVIII *of* 1884), *s.* 70 (1) (*b*).—Though the misconstruction of a document, which is the foundation of a suit, or which is in the nature of a contract or a document of title, is a ground for second appeal, a second appeal does not lie merely because some portion of the evidence is in writing and the lower appellate Court makes a mistake as to the meaning of it. (13 C.L.J. 418, 15 C.W.N. 752, 10 Ind. Cas. 325, *F.*) The misinterpretation of a post-card, which is only a piece of evidence to prove authority to sell, is not such an important question of law as would justify the admission of a petition for revision as a second appeal under s. 70 (1) (*b*) of the Punjab Courts Act. NARAIN SINGH v. JAGGAT SINGH, **14 Ind. Cas. 331=190 P.W.R. 1912.**

(51)—*Review by District Judge of his predecessor's judgment—Reversal—Special appeal.*—Where a District Judge reverses his predecessor's judgment on reviewing it, and the High Court, on special appeal, finds that there is no ground on which the judgment could be disturbed, the review should be set aside and the judgment restored. PARBUTTY CHURN DOSS v. PROTAB CHUNDER SEN, **23 W.R. 275.**

(52)—*Review of judgment of former Judge—Review admitted on insufficient grounds—Ground of special appeal—Documentary evidence—Court when competent to reject, for want of legal proof.*—On the facts merely, and, in the absence of any fresh evidence forthcoming, a Judge should not admit a review of a judgment which has been passed by his predecessor; but the mere fact that he has so admitted the review cannot form, by itself, a ground for special appeal. It is altogether inconsistent with justice for a Court to reject documents summarily for want of legal proof,

Special or Second Appeal—continued.

——4.—Errors of Law or Procedure—*contd.*

without first being clear that the party producing them had been made to understand the nature of the proof required and has had an opportunity of producing it. SHAIKH GHOLAM HOSSEIN v. OKHOY COOMAR GHOSE, **3 W.R. Act X, Rul. 169.**

(53)—*Remand order, erroneously made—Review — Second special appeal.* —Where a remand order is passed by the High Court, and there has been a ruling which, if brought to the notice of the Court, would affect the order, the course to rectify the mistake is to apply for a review of the order and not to contest the order in a subsequent special appeal. SOKHO NARAYAN KHANDALKAR v. NARAYAN BHIKAJI KHANDALKAR, **6 B H.C A.C. 238.** [*R.* 10 B.H.C. 444, 23 B. 137.]

(54)—*Error in valuation of suit—Jurisdiction—Erroneous decision—Special appeal.*—Objection was taken to the valuation of this suit, but the High Court was of opinion that as it had not been shown that the jurisdiction of the Courts had been affected by reason of such valuation, the error (if any) had not caused any defect in the decision of the case on the merits, and, consequently, refused to interfere with the decision of the lower Courts on that ground. KISTO CHURN MOJOOMDAR v. DWARKANATH BISWAS, **10 W.R. 32.**

(55)—*Redemption suit—Valuation of claim—Stamp duty—Special appeal—Error in valuation.*—The stamp duty payable, under sch. B of Act X of 1862, on a suit to redeem mortgaged land paying revenue to Government, should be calculated on the sum for which the land is mortgaged and not on the market value of such land. *Semble* :—Where a party, by an error in the valuation of a claim, is made to pay more costs than he otherwise would have had to pay, that alone cannot generally be made a ground for a special appeal. NANDRAM SUNDARJI NAIK v. BALAJI VITHAL, **5 B H.C. A.C. 153.**

(56)—*Requirement of stamp duty in appeal, non-compliance with — Appellant willing to supply deficiency—Appeal not to be dismissed—Interference by High Court.*—An appeal should not be dismissed because the requirements of the Stamp Act have been disregarded, when the Court finds that the appellant is willing to supply the deficiency. If the Civil Judge dismisses the appeal, the course taken by him amounts to such a substantial error in the investigation of the case as calls for the interference of the High Court on special appeal. AMBALA RAMASWAMY IYENGAR v. MAHAMADALLI RAVUTAN, **8 M.H.C. 330.**

(57)—*Application by defendant to summon plaintiff as witness—Discretion of Court—High Court when will interfere with discretion.*—It is within the discretion of the Court to summon the plaintiff as witness or not and it is not open to the defendant to complain that he desired to summon the plaintiff, as his witness, but that

Special or Second Appeal—continued.

——4.—Errors of Law or Procedure—*contd.*

the lower Court refused to summon him, unless he is able to make out circumstances or facts enabling the High Court to form an opinion that the lower Court had exercised its discretion illegally. INDRO LOCHUN GHOSE v. GRISH CHUNDER ROY CHOWDHRY, **10 W.R. 134.**

(58)—*Lower Court dismissing suit under s. 170, Act VIII of 1859—Appellate Court, power of.*—If a Court of first instance dismisses a suit under s. 170 of Act VIII of 1859, on the ground of the plaintiff's refusing to answer a question material to the case when duly required to do so, the High Court will not interfere on appeal with that decree, though it might be otherwise if the plaintiff had, since the decree, endeavoured to purge his contempt. J. RAMJI SHETT v. A. MULLANDEAGATA KUNHI, **3 M.H.C. 299.** [*F.*, 4 M.H.C. 142.]

(59)—*Plaintiff summoned as witness—Default—Dismissal of suit—Act VIII of 1859, s. 170.*—The plaintiff was summoned as a witness but did not appear. The first Court instead of enforcing his attendance, or proceeding to pass a decree against him under s. 170 of Act VIII of 1859, tried the case on the merits giving him a modified decree. The lower appellate Court dismissed the plaintiff's claim on the ground of non-attendance. *Held* that the first Court having waived the order for plaintiff's attendance, it was necessary that the Judge in appeal should have again summoned him, and he might then have acted under s. 170 of the Code. KISTO COOMAR CHOWDHURY v. GOBIND COOMAR **W. R. 1864, 133.**

(60)—*Misjoinder of claims—Substantial injury not proved—Special appeal.*—Mere misjoinder of claims, without proof of substantial injury sustained thereby, is no ground for special appeal. DURSHIN PANDEY v. MUSST. SAMINAH BEBEE, **1 W.R. 114.**

(61)—*Civ. Pro. Code, s. 246—Sale in execution—Claim to property based on* hibba—*Suit by plaintiff for declaration—Non-appearance of auction-purchaser, effect of.*—Plaintiff sued for a declaration of title in certain lands under a *hibbanamah* alleging that they had been sold in execution of a decree notwithstanding his intervention under s 246 of the Civ. Pro. Code. The lower Courts *held* that the *hibba* under which plaintiff claimed was false. It was urged in special appeal that, as the auction-purchaser, who had been made a defendant and summoned under s. 162 of the Civ. Pro. Code, to give evidence did not appear, the plaintiff's case should have been decreed against him *ex parte*. The High Court declined to interfere being of opinion that, in the face of the strong reasons given by the lower appellate Court for holding the *hibba* to be collusive, it would be in the highest decree improper to decree that the *hibba* was genuine merely because the auction-purchaser did not choose to appear to give evidence. SYUD ABDUL HUQ v. SYUD AMBUR ALI, **8 W.R. 422.**

Special or Second Appeal—continued.

——4.—Errors of Law or Procedure—*contd.*

(62)—*Order of Court refusing to inflict fine on recusant witness—Appeal.*—No special appeal lies from the order of a Munsif refusing to inflict fine upon a recusant witness. PRAN KISTO DEO v. KALEE DOSS DEO, **7 W.R. 460.**

(63)—*Change of party from defendant to plaintiff—Objection under s.* 73, *Act* VIII *of* 1859—*Witness, examination of—Discretion of Court.*—A person who had been originally a defendant in a suit was, by order of the Court, which was not objected to by him, made a plaintiff, and he fought out the case in that capacity in the original Court and also appealed as plaintiff to the Zillah Court. As he lost the suit in both the Courts, he appealed to the High Court on the ground that the first Court had no power to make him a plaintiff under s. 73 of the Civ. Pro. Code. *Held*, that the objection could not be taken in special appeal inasmuch as he was an assenting party to the course taken by the first Court, and never questioned the propriety of what had been done when he appealed to the lower appellate Court. Even if a witness has not been named in the list of witnesses of a party, that will be no good ground for refusing to examine such witness when produced. It is quite in the discretion of a Court of first instance, after a plaintiff's case is closed, to allow him to call further witnesses; and there is no right of special appeal upon that point. RAKHAL DOSS MUNDUL v. PROTAB CHUNDER HAZRAH, **12 W.R. 455.**

(64)—*Commission for examination of witness—Refusal by lower Courts not based on sufficient grounds—Special appeal to High Court—Remand.*—Where, on a commission to examine a witness on the defendant's behalf having been returned unexecuted, the defendant applied a second time for the issue of a commission which was also refused by both the lower Courts, *held*, that, there being no sufficient grounds for the lower appellate Court not issuing the commission, the case should be remanded and a commission ordered to be issued. JHOTEE SINGH v. GOPAL SINGH, **23 W.R. 457.**

(65)—*Civ. Pro. Code, Act* VIII *of* 1859, *ss.* 342, 372—*Final orders passed in regular appeal whether open to revision in special appeal—Appellant residing out of British India—Order for security for costs of appeal—Powers of High Court in special appeal.*—The term "decision" in s. 372 of the Civ. Pro. Code, is larger than the term "decree," and the expression "decision passed in regular appeal" may embrace orders rejecting or dismissing an appeal, although such orders are passed before an appeal is heard on the merits, and may not necessitate the preparation of a decree. When the decision passed in regular appeal turns on a mere question of fact and if that question of fact is determined after due investigation, there is no ground of special appeal. In like manner, when the Code gives to a Court of regular appeal, a discretionary power, and that discretionary power has been fairly exercised, it is no good ground of special appeal that a wiser exercise of the discretion would have led to a different result. Under s. 342, Civ. Pro. Code, it is in the discretion of an appellate Court in any case to demand security for costs from the appellant, and it is compulsory on the Court to demand security of the appellant if he is residing out of British Territories in India, and is not possessed of any land or other immoveable property within those territories independent of the property to which the appeal relates. If, then, in any case, the appellate Court, after duly considering the facts of the case and the circumstances of the parties, comes to the conclusion that security should be taken for the costs of the appeal, and on the failure of the appellant to furnish such security, rejects the appeal, the High Court ought not to interfere in special appeal merely on the ground that, in the exercise of the discretion given to the lower appellate Court, another Court might have thought it unnecessary to call upon the appellant to furnish security. Again in a case in which an appellate Court finds that the appellant resides out of British territories in India, and has no land or other immoveable property within such territories, unless it can be shown that the investigation of either of the issues of fact touching the appellant's residence and property has been defective, or that there has been error in law, the High Court has no power to interfere in special appeal. GOPAL KHUNDEE RAO v. DEOKEE NUNDUN, **6 N.W. P. 172.**

(66)—*Appeal decided in appellant's absence—Appeal dismissed for default — Re-hearing—Review—Special appeal — Pleader signing memo. of appeal refusing to argue on ground of being unprepared — Neglect of duty — Damages.*—When an appeal was called on for hearing, the appellant applied for a postponement of the case which was refused. Then the Judge took up the case and dismissed the appeal in the absence of the appellant. But before doing so, he looked into the facts of the case with such light as he could obtain from other sources, and came to the conclusion that the appeal was not a valid one. *Held* that the appeal must be looked upon as having been dealt with on default. [*F.*, 12 C. 605; *R.*, 5 C. L.J. 247=11 C.W.N. 329=2 M.L.T. 123=34 C. 403, F.B.] When an appeal has been dismissed for default of appearance of the appellant, he might apply either for a rehearing of the appeal, or for a review of judgment, but he is not entitled to a special appeal. [*R.*, 20 W. R. 425, 16 B. 23.] A pleader, who signs the memorandum of appeal but refuses to argue the case on the ground of being unable and unprepared, fails in his duty and is liable to be either dealt with by the Court for neglect of his duty as a pleader, or sued by the client for neglect of his interests. BULDEO MISSER v. SYUD AHMED HOSSEIN, **15 W.R. 143.**

(67)—*Mortgagee—Suit for redemption—Tender by mortgagor—Insufficiency of—Decree.*—

Special or Second Appeal—continued.

——4.—Errors of Law or Procedure—*contd.*

In a suit for redemption of certain mortgaged property, where the amount tendered by the plaintiff is insufficient to pay off the mortgage-debt, the plaintiff is not entitled, as of right, to a decree contingent upon his paying such sum as shall be found due. BOISTUB DOSS KOONDOO v. HURO NARAIN HALDAR, 17 W.R. 408.

(68)—*Enhancement—Land varying in quality—Omission to specify rates of rent—Special appeal.*—In a suit for enhancement of rent, the omission of the Ameen or the Judge to specifically appropriate to every portion of the land which varies in quality its appropriate rent, or to specify the rate which each particular kind of land should bear in striking a certain average rate per beegha, cannot be a ground for special appeal. BABOO GOOROODOSS ROY v. BABOO HURRONATH ROY, **W.R. 1864, 61.**

(69)—*Alienation by heiress in possession—Suit by reversioner framed wrongly as for immediate possession— Competency of Court to grant relief by way of declaration.*—In this case, plaintiff as mother and guardian of her minor son, impugned certain alienations by her mother, the minor son being the reversioner or the next heir after the mother of the plaintiff. But the plaint was framed as for possession of property wasted and sold by the plaintiff's mother, and for the removal of property from her hands, subject to the payment of profits to her. The lower Courts gave the plaintiff a decree declaring most of the alienations to be good only for the lifetime of the mother, and thus gave only such relief as the plaintiff was, by law, entitled to. In special appeal, it was contended that the suit was altogether wrongly framed and was therefore liable to dismissal. The High Court, however, was of opinion that the suit should not be dismissed at the stage of special appeal merely because of its having been wrongly framed. The Court which tried the case, perceiving the defect in the plaint, declared the relief to which the plaintiff was entitled. The decree, it was true, was not made in accordance with the prayer of the plaint, but was yet strictly such as the plaintiff was legally entitled to and such as she ought to have asked for. Nor was the course thus adopted by the first Court made a ground of appeal to the first appellate Court. There having been no substantial error or defect in law, in the procedure or investigation of the case, which had produced any error or defect in the decision of the case upon the merits, the High Court dismissed the special appeal. BAMA SOONDUREE DOSSEE v. BAMA SOONDUREE DOSSEE, **10 W. R. 133.** [*Reviewed*, 10 W R. 301; *R.*, 12 W.R. 26, 32 C. 62=9 C.W.N. 25.]

(70)—*Special or second appeal—Other errors of law or procedure—Refusal to examine plaintiff's title on erroneous ground—Civ. Pro. Code, 1859, s. 372—Defect in law in procedure.*—Where the Courts below have avowedly abstained from examining into a plaintiff's

Special or Second Appeal—continued.

——4.—Errors of Law or Procedure—*concld.*

claim of title to land the subject of the suit, on the ground that the plaintiff was a party to the deed under which the defendant claimed, when in fact the deed showed he was no party to it, this constitutes a defect "in the procedure and investigation of the case producing error in the decision of the case upon the merits" within Act VIII of 1859, s. 372, and a special appeal will lie. ABDOOL SALAM v. IMRALOONISSA BEBEE, **Marsh. 6=1 Hay. 28.**

(71)—*Declaratory relief granted different from that asked for in plaint—Court of second appeal, power of, to interfere with discretion of lower Courts.*—Where the two Courts below exercised their discretion in granting the plaintiff a declaration somewhat different from that asked for in the plaint, without any formal amendment of the plaint, the Court of second appeal refused to interfere, in the absence of good reasons justifying interference. MUHAMMAD SARFARAZ BEGAM v. MUNNA, **17 Ind. Cas. 315.**

(72)—*Valuation of suit—Improper valuation—Second appeal.*—The proper time for taking an objection as to the valuation of the suit is at the registration of the plaint, and it cannot be allowed to be raised for the first time in second appeal. KALADDIN G. BAKAS v. RAGHOJI, **1 B.H.C. 62.**

(73)—*Act XXIII of 1861, s. 5—Scope—Non-payment of process fee—Effect.*—The provisions contained in the first portion of s. 5, Act XXIII of 1861, are imperative. Where the Court ordered a co-defendant to be joined, and the plaintiff failed to pay the allowance necessary for the purpose of causing a notice to be served on such co-defendant who did not appear, the proper course for the Court is to dismiss the suit. When the Court, without adopting such a course, proceeded and passed a decree from which the original defendant appealed on the merits without taking the objection that the suit ought to have been dismissed, *held* that this objection could not for the first time be raised in special appeal. SHEAK ABAS v. IBRAHIMJI HASANJI, **5 B.H.C.A.C. 118.**

Admission of pleader—Mistake of law—Second appeal—*See* BEN. ACT IX OF 1879, ss. 1C-A. 64-A, 9 Ind. Cas. 621.

See CONSIDERATION, 2 N.W.P. 209.

See DECREE—DECREE, CONSTRUCTION OF, 8 B.H.C.A.C. 241.

See ISSUES—ADDITIONAL ISSUES, 11 W.R. 61.

Defect of parties raised in first Court but given up in first appellate Court—Whether objection can be raised in second appeal—*See* LIMITATION ACT, 1908, Art. 14, 9 C.L.J. 91=3 Ind. Cas. 693.

See REVIEW—GROUND FOR REVIEW, 24 W.R. 186.

Special or Second Appeal—continued.

——5.—**Grounds of Appeal.**

(1)—*Grounds of special appeal—Vagueness.*—The grounds of special appeal should not resolve themselves into vague grounds which convey no information to the respondent as to what the point of law is that he has to meet. The grounds should be specific, and should indicate clearly the error of law assigned, or the substantial error or defect in law in the procedure or investigation which is imputed; and in the latter case, it should be made to appear on the face of the grounds of appeal that such error or defect probably produced error or defect in law in the decision on the merits, by stating what bearing the supposed error or defect had on the merits of the case. Mere criticisms of the reasoning employed by Courts below are not grounds of special appeal. NAND KISHOR DAS MOHANT v. RAM KALP ROY, **6 B.L.R. App. 49=15 W. R. 8.**

(2)—*Civ. Pro. Code*, 1908, *s.* 100 (=*s.* 584, *sub-s.* (*a*), *Civ. Pro. Code*, 1882)—"*Specified*," *meaning of—Special appeal, grounds of.*—In sub-s. (*a*), s. 584, Civ. Pro. Code, the word "specified" obviously means specified in the memorandum or grounds of appeal. [*F.*, 20 C. 93, P.C.; *R.*, 15 A. 123.] No second appeal will lie under the Civ. Pro. Code, except on the grounds specified in s. 584. An erroneous finding of fact, being a different thing from an error or defect of procedure, there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure the finding of the appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding. DURGA CHOWDHRANI v. JEWAHIR SINGH CHOWDHRI, **18 C. 23=17 I. A. 122, P. C.=5 Sar. 560.** (14 C. 740 and 17 C. 291, *F.*; 9 C. 309 and 7 A. 649, *overruled.*) [*F.*, L. B. R. 1893-1900, 543 and 568, 5 C. L. J. 55; *Appl.*, 1 A. L. J. 637=6 Bom. L. R. 770=29 B. 1=8 C. W. N. 865, P. C.; *Appr.*, 2 N. L. R. 98; *Cited*, 11 C. W. N. 230=9 C. L. J. 415; *R.*, **21 C. 504, 20 B. 699, 24 C. 825, 25 C. 146, 2 C.W.N. 649, 25 B. 202, 27 B. 452, 5 Bom. L. R. 174, 5 Bom. L. R. 225, 31 C. 503=8 C. W. N. 425, 4 C.L.J. 198, 9 Bom. L. R. 393.]**

(3)—*Special or second appeal—Grounds of appeal — Question of damages — Discretion of Judge.*—A Judge has a discretion with respect to the amount of the damages which will not ordinarily be interfered with on special appeal. TEEKARAM KYBUTT v. RAJKISHEN ROY, **Marsh. 495.**

(4)—*Appeal, second—Question of fact—Reasonable compensation.*—The question as to what is reasonable compensation is a question of fact and cannot be interfered with in second appeal by the High Court. SAMPAT RAI v. RAM PERSHAD, **17 Ind. Cas. 517.** (26 M. 111, 6 A.L.J. 381=1 Ind. Cas. 760=31 A. 333, *Rel. on*).

Special or Second Appeal—continued.

——5.—**Grounds of Appeal**—*continued.*

(5)—*Suit for damages for false charge and arrest—Different views of lower Courts regarding evidence, not a ground for special appeal—Question as to amount of damages awardable, a question of fact.*—Plaintiff sued for damages on the ground that the defendant had brought a false criminal charge of breach of trust against him and caused him to be arrested and had thereby injured his reputation. The first Court held that a reasonable and probable cause for the charge was established by the evidence. The lower appellate Court, however, took a different view of the evidence and concluded that the defendant had failed to show that he had reasonable and probable cause for charging the plaintiff criminally with breach of trust. *Held* that this difference between the lower Courts in their view taken of the evidence cannot constitute a subject for special appeal. Also, the amount of damages to be awarded was a question of fact for decision by the lower Court, and that Court having fixed such sum as it had considered to be a sufficient compensation to the plaintiff, it was not competent to the High Court on special appeal to interfere with that order. BANEE MADHUB CHATTERJEE v. BHOLANATH BANERJEE, **10 W.R. 164.** [*R.*, 31 A. 333=6 A.L.J. 381=1 Ind. Cas. 760=9 Ind. Cas. 984.]

(6)—*Plaint—Pleadings — Special appeal — New ground.*—A plaintiff praying to set aside an alienation on the ground of the illegitimacy of the alienor and failing to prove the alleged illegitimacy, cannot, in special appeal, be allowed to urge a new ground for the prayer. SREE PERSHAD v. RAJ GOOROO TUMBUCK NATH DEO, **14 W.R. 386.**

(7) *Decree—Amendment—Special appeal.*—If on the Judge's own judgment, he has committed an error in calculating the amount to be decreed, that could be rectified by an application in due time to the Judge to amend his decree, and it is not a ground for the High Court to interfere in special appeal. In the absence of the Judge who passed the decree, the law admits of his successor amending or reviewing his predecessor's judgment on good cause being shown. MIRZA AKBAR ALI v. MULLICK MUKHDOON BUKSH, **25 W.R. 63.**

(8) *Plea of non-disclosure of cause of action, urged too late.—Plea of want of opportunity to adduce evidence, how to be established.*—In a suit to have the plaintiff's name registered in the Collectorate as the purchaser of an estate, and to have his possession therein confirmed, *held*, it was too late for the defendant who had fully contested with the plaintiff on his title in both the lower Courts, to contend in special appeal for the first time that the plaintiff had no cause of action against him. In order that a party may establish the plea that the Court of first instance gave him no opportunity to adduce evidence in proof of his case, he is bound to show that he produced certain witnesses or

Special or Second Appeal—continued.

——5.—Grounds of Appeal—*continued.*

other evidence before that Court, and that it rejected the evidence on the ground alleged. BUKSH ALI SOWDAGUR v. JOYANUT KHAN, **11 W.R 248.**

(9)—*Act* X *of* 1859, *s.* 10—*Receipt—Award of damages.*—The receipt contemplated by s.10 does not mean a challan bearing a *mublukbundi*, or total in figures, and some mark not a signature of the Tahsildar. An award of damages by the lower appellate Court, under this section, though excessive, cannot be interfered with in special appeal, if it is within the legal limit. JOHEE-ROODEEN MAHOMED v. DABEE PERSHAD SINGH, **13 W.R. 22.**

(10)—*Special appeal, if lies from an order refusing to award damages—Act* VI *of* 1862.—A special appeal does not lie from an order of the Court refusing to award damages under s. 2, Act VI of 1862. MAHARAJAH DHEERAJ MAHATAB-CHAND BAHADOOR v. DEBENDER NATH THAKOOR, **W.R. 1864, Act X, Rul. 68.**

(11)—*Right of Intervenor—S.* 77, *Act* X *of* 1859.—S. 77, Act X of 1859 is applicable to a suit for rent in which a third party intervenes. The point which the Judge has to decide in such a suit is whether the plaintiff or the third party is actually receiving and enjoying the rent. BEBEE NOOR JAHAN v. MUTTY LALL SAHOO, **W.R. 1864, Act X, Rul. 73.**

(12)—*Special or second appeal—Grounds of appeal — Jurisdiction, Question of.*—A special appeal will not lie upon a question of jurisdiction depending upon a question of fact, unless the fact has been determined by the lower Court or is admitted by the parties. *Quære.*—Whether, if the fact appears, a special appeal will lie unless the error in procedure has affected the merits. LUTEEFOONNISSA BEEBEE v. POOLIN BEHARY SEIN, **W. R., F. B. 31=1 Ind. Jur. O.S. 10=1 Hay, 242.** and POOLIN BEHARY SEIN v. LUTEEFOONISSA BEEBEE, **Marsh 107.**

(13)—*Jurisdiction — Special appeal.*—The High Court cannot enter into a question of fact on special appeal, even upon a point of jurisdiction. THE COURT OF WARDS v. MUSSAMUT ROOP MOONJUREE KOOER, **25 W.R. 260.**

(14)—*Suit upon two bonds—Splitting of cause of action—Objection to jurisdiction—Appellate forum not changed—Ground for special appeal.*—Where a cause of action cognizable by the Principal Sudder Ameen was split into two suits and tried by the Sudder Ameen and then heard in appeal by the Judge to whom the appeal would equally have lain whether the case was originally tried by the Sudder Ameen or Principal Sudder Ameen, it was *held* that, if the Judge was wrong in not deciding in the appellant's (defendant's) favour on the ground of jurisdiction, the error was not one which affected the decision of the case upon its merits, and therefore, not a ground of special appeal. KADER BUKSH v. KOOTUBOODEEN AHMED, **5 W.R. [illegible]**

Special or Second Appeal—continued.

——5.—Grounds of Appeal—*continued.*

(15)—*Grounds of second appeal not affecting the jurisdiction of the Court or the merits of the case, but relating to order of lower appellate Court remanding case for amendment of plaint by having it signed by person duly authorised in that behalf—Whether second appeal lies on such ground—Civ. Pro. Code, s.* 578.—In a second appeal to the Chief Court the grounds of appeal were that both the lower Courts had erred in law in not having rejected the plaint, inasmuch as it was not signed by any person duly authorized in that behalf, and that the lower appellate Court was wrong in remanding the case for amendment for the plaint, when the plaint was not properly and duly signed. *Held*, these grounds did not affect the jurisdiction of the Court or the merits of the case. *Held*, also, under the circumstances of the case, s. 578 of the Civ. Pro. Code debarred the Court from reversing or varying the decree, whether the orders of the lower Court were right or wrong. OBENDUR RAHMAN CHOWDRY v. R. M. A. K. M. PALANEAPPA CHETTY, **14 Bur. L.R. 122.**

(16)—*Special or second appeal—Grounds of appeal—Existence of legal necessity.*—Where both the lower Courts found that there was no necessity for a widow to borrow money, the High Court refused in special appeal to consider it other than a question of fact, and held they could not interfere with the finding in special appeal. INDER CHUNDER BADOO v. HURNATH CHOWDHRY, **1 Hay, 257.**

(17)—*Issues—Evidence gone into in lower Courts*—Onus *of proof—Special appeal to High Court.*—Where each of the parties to a suit had gone into evidence in the lower Courts upon the issues raised in the case, no question, as to whether the *onus* lies on the one or the other, can arise in special appeal before the High Court. HUREE MOHUN MOJOOMDAR v. ASGUR BEHAREE, **23 W.R. 324.**

(18)—*Act* XIV *of* 1859, *s.* 20—*Proceedings to keep decree alive.*—The question whether proceedings taken to execute a decree had been taken *bona fide* to keep alive such decree, is a question of fact. No special appeal lies from an order finding that the proceedings taken were taken *bona fide*. BHUBAN MOHAN CHATTOPADHYA v. SAUDAMINI DABI, **3 B.L.R. App. 59.**

(19)—*Execution—Proceedings found not* bona fide—*Finding of fact—Special appeal.*—Where a Judge found on evidence that certain notices in execution proceedings alleged to have been served on the judgment-debtor were not caused to be properly served, and also that these notices were not made in good faith, *held*, these were findings of fact which could not be disturbed in special appeal. ABDOOL AZEEZ v. SHUMSUNNISSA, **11 W.R. 263.**

(20)—*Finding as to prescriptive right—Interference in special appeal.*—Where a Subordinate Judge found substantially that plaintiffs had proved their right of user for a period

Special or Second Appeal—continued.

——5.—**Grounds of Appeal**—*continued.*

which would give them a right by prescription, the High Court refused to interfere in special appeal with that finding, though it was not distinct as to the period for which the plaintiffs were in enjoyment. WUZEEROODDEEN v. SHEOBUND LALL, **11 W.R. 285** [*F.*, 11 W.R. 522; *R.*, 14 W.R. 199; *D.*, 12 W.R. 76.]

(21)—*Appeal—Order of Judge under Act* XIX *of* 1841—*Interference by High Court on ground of rejection of evidence which ought to have been admitted.*—No appeal lies from an order of a Judge proceeding under Act XIX of 1841. The fact that the Judge may have rejected evidence which ought to have been received and considered does not warrant the High Court in interfering to set aside an order of such Judge. VENKATACHELLA CHETTI v. PARVATAMMAL, **2 M.H.C. 413.**

(22)—*Special or second appeal—Grounds of appeal—Consent of parties.*—The High Court will not, even with consent of parties, pronounce a decree on the facts in a special appeal. KADAMBINEE DOSSEE v. DOORGA CHURN DUTT, **Marsh, 4.** and DOORGA CHURN DUTT v. KADAMBINEE DOSSEE, **1 Hay, 25.**

(23)—*Special appeal—Question of fact—Interference.*—It is most essential that the High Court in second appeal should be very careful in not interfering with the inferences of fact drawn by the lower appellate Court. HAMEER MAHOMED CHOWDHRY v. FOOL MAHOMED CHOWDHRY, **16 W.R. 311.**

(24)—*Omission to consider presumptions of fact, good ground for special appeal.*—It is not for the Chief Court, in special appeal, to say how far the presumptions of fact asked by the parties to be drawn from certain circumstances necessarily follow from them, it is a question for the lower Courts. Where the lower Court has omitted to consider any presumptions of fact properly arising in the case, such omission will form a good ground for special appeal. MUSST. ABADEE KHANUM v. MUSST. RANEE, **80 P.R. 1869.**

(25)—*Suit for enhancement of rent—Presumption—Act* VIII *of* 1869 (*B.C.*), *ss.* 3, 4.—Where, in a suit for enhancement of rent, it was decided (by the Subordinate Judge) that the tenure had its origin at the time a kabuliat of the year 1200 had been given, and that, therefore, there was no presumption under s. 4, Act VIII of 1869 (B.C) entitling the ryot to receive putta at uniform rent, *held*, on special appeal to the High Court, that there was no error in law. MAHOMED MANOO BHOOYAH v. SHAIKH MAHOMED ASANOOLAH CHOWDHRY, **17 W.R. 349.**

(26)—*Old decree—Payment of rent—Evidence—Reduced rent—Error in law.*—Where a Court found that the amount of rent mentioned in an old decree had never been paid, but that a certain reduced rent had been paid for 20 years subsequent to the date of the decree, and consequently came to the conclusion that, in some way or other, the parties had abandoned the decree and treated the same as a matter which was not to regulate the rent, *held* that there was no error in law committed by the Court in having arrived at that conclusion. WOOMA MOYEE BURMONYA v. KUNNUCK CHUNDER MOOKERJEE, **17 W.R. 418.**

(27)—*Special appeal—Reasons given by lower Court for its decision not accepted in full*—The decision of the lower appellate Court cannot be set aside in special appeal although the High Court does not agree with or support all the reasons which the Judge has given for his decision, provided that the reasons which he has given and the inferences which he has drawn, are not such as he could not rightly give or legally draw under the facts and circumstances of the case. RUMMEEZOODDEEN BHOOYAN v. JOYMALA, **15 W. R. 303.**

(28)—*Special appeal—Finding of fact—Finding of lower appellate Court final.*—The High Court must take as final the finding of the lower appellate Court upon a question of fact, although it does seem to be at least doubtful whether the judgment of the first Court was not the right one, and although it is not unlikely that the High Court might come to a different conclusion. LOOYEE DHUR ATTO v. PROSUNNO MOYEE DOSSEE, **20 W.R. 267.**

(29)—*Appeal—Finding of fact—Special appeal—Interference by High Court—Evidence—Credibility of witness—Weavers and cultivators—Award—Possession*—Onus *of proof.*—The High Court, in special appeal, may disturb a finding of fact by a lower appellate Court, if the reasonings and the views on which that finding is based are erroneous in law. It is an error in law to reject the evidence of weavers, simply because they are weavers, or to accept the testimony of witnesses who are cultivators, from the mere circumstance that they are cultivators. In a suit for possession, where the defendant sets up an award under s. 15, Act XIV of 1859, in his favour, the *onus* of proving possession and dispossession alleged in the plaint lies, in the first instance, on the plaintiff before the defendant could be called upon to prove his case. JUGGURNATH DEB v. MAHOMED MOKEEM, **17 W. R. 161.**

(30)—*Weight of evidence—Special appeal—Interference by High Court.*—The weight of evidence is not a point on which the High Court can interfere in special appeal, as it is for the lower appellate Court to decide what amount of credibility is due to what evidence. BABOO DHOONDH BAHADOOR SINGH v. BABOO PRIAG SINGH, **17 W. R. 314.**

(31)—*Question of fact—Decision of, by first Court, not based on satisfactory grounds—Appellate Court not going on merits—Remand.*—Where a question of fact on which a whole case turns is not decided by the first Court by giving satisfactory grounds for the conclusion arrived at, and the lower appellate Court simply

Special or Second Appeal—continued.

——5.—**Grounds of Appeal**—*continued.*

pronounced its reasons to be good without either going into the merits of the case or giving its view of the evidence, that the case should be remanded for a re-hearing. KRISTO GOBIND KUR v. GUNGA PERSHAD SURMA, **23 W.R. 266.**

(32)—*Act* VIII *of* 1859, *s.* 359—*Reasons for decision of appellate Court.*—What s. 359 of Act VIII of 1859 means when it says that the "reasons" for the decision of an appellate Court must be stated, is not the reasons for coming to any conclusion of fact, but reasons showing upon what points of fact or law the decision turns; and the bare fact that the Judge has not given the reasons for his judgment is not in itself a ground of special appeal. RAMESSUR BHUTTACHARJEE v. SHAIK BHANOO, **12 W.R. 272.** (11 W.R. 312 and 559, *D.*)

(33)—*Omission to state reasons in appellate judgment—Second appeal — Civ. Pro. Code,* 1882, *ss.* 574, 584 —The fact that the judgment (of an appellate Court) has not been drawn up in the manner prescribed by s. 574 of the Civ. Pro. Code is no ground for second appeal under s. 584, unless it could be shown that the judgment has failed to determine any material issue of law. BISVANATH MAITI v. BAIDYANATH MANDUL, **12 C. 199.** (18 W.R. 473, *F.*)

(34)—*Judgment in appeal without recording reasons—Act* VIII *of* 1859, *s.* 359.—Where a Court of special appeal can find that a lower appellate Court has really gone through the evidence, and has come to the same opinion as that of the Court of first instance it is no ground of special appeal that the Judge has not rewritten these reasons on his own account, though it would be more satisfactory if he had stated *seriatim* the points raised on appeal, and had given his own reasons for deciding them either one way or the other, as prescribed by s. 359, Act VIII of 1859. KULUMUTTEE KOER v. JOWAHUR ALI, **11 W.R. 318.**

(35)—*Special appeal—Credibility of witnesses.*—The inference drawn by a lower appellate Court from facts against the credibility of witnesses cannot be interfered with in special appeal, whether the reasons given for the inference are right or wrong. MUSSAMUT PUTASHEE KOOER v. SHEO PERSHAD RAM OOPADHYA, **24 W.R. 61.**

(36)—*Appellate Court assuming circumstances not deposed to—Decision based on assumptions —Remand.*—Where the lower appellate Court, having before it the evidence in the case, had chosen to assume a circumstance not deposed to by the plaintiffs or even suggested, and to ground on the fact so assumed an imputation of unjust dealing on the part of the defendant, and on that assumption confirmed the decision of the first Court without hearing out the appeal, the High Court, in special appeal, considering that such imputation was unjustifiable, directed that the case should go back to the lower appellate Court in order that it might

Special or Second Appeal—continued.

——5.—**Grounds of Appeal**—*continued.*

give a proper judgment in the appeal after due consideration of the whole circumstance and of evidence adduced in the case. CHAND MONEE DOSSEE v. OBHOY CHURN MAL, **24 W.R. 289.** [*R.*, 7 C. 263=8 C.L.R. 449.]

(37)—*Special appeal—Remand—Insufficient inquiry.*—The High Court on special appeal set aside the judgment of the lower appellate Court and remanded the case for a complete enquiry as the previous hearing of the suit before the lower appellate Court was inadequate. SHAGUR CHUNDER SHAHA v. SREEMUTY MOHAMAYA,, **25 W.R. 25.**

(38)—*Special appeal—Finding of fact—Errors of law—Evidence*—Ex parte—*Evidence against person not party to decree—Decree in contested suits.*—Considering as evidence what is no evidence and rejecting good evidence without assigning a reason, are errors of law, and if a lower appellate Court, in coming to a finding of fact, falls into such errors of law, that finding may be set aside in special appeal. [*R.*, 7 C. 263 =8 C.L.R. 449.] An *ex parte* decree is evidence *quantum valeat* even as against a person not a party to it. [*R.*, 12 A. 1, F.B.] A decree obtained by A against B cannot be considered as conclusive evidence against the title of C. HUNSA KOOER v. SHEO GOBIND RAOOT, **24 W.R. 431.**

(39)—*Limitation—Adverse possession—Proof.*—A person suing for possession of land must prove that he has been in possession at some time within 12 years of the date of suit, in order to avoid the plea of limitation being set up. GOBINDO CHUNDER MOULICK v. MUDHOOSOODUN MOULICK, **25 W.R. 550.** (17 W.R. 165, *D.*)

(40)—*Limitation—Plea first raised in special appeal.*—As limitation is not a question of jurisdiction, it cannot be pleaded for the first time in special appeal. SHEO GOLAM SINGH v. ROY DINKUR DYAL, **12 W.R. 215.**

(41)—*Special appeal—Error in law—Construction of sale-deed—Identification of land.*—It is an error in law for a lower appellate Court to assume without evidence that the lands in certain deeds of sale are the same as those in dispute, to accept oral evidence rejected by the first Court as self-contradictory, and to put an unjustifiable construction on other evidence. BEHAREE LALL NAEK v. SREERAM ROY, **20 W.R. 259.**

(42)—*Special appeal—Question of fact.*—The mere fact of a suit being cognisable by a Small Cause Court and for less than Rs. 500, does not bar a special appeal. But the High Court cannot interfere in special appeal on a pure question of fact decided by the lower Court upon the weight of evidence. KEWAL KANDOO v. OMRAO SINGH, **25 W.R. 166.** *See also* OMRAO SINGH v. KEWAL KANDOO, **25 W.R. 166, Note.**

(43) — *Civ. Pro. Code, s.* 567, *objections not raised before first appellate Court under,*

Special or Second Appeal—continued.

——5.—Grounds of Appeal—*continued.*

cannot be set forth as grounds of second appeal.—Where the plaintiffs, appellants in a second appeal, had failed to take certain objections before the first appellate Court, with regard to certain findings of the Court of first instance upon remand, they ought not to be permitted to raise those objections, for the first time, as grounds of their second appeal, because they had failed to raise those objections in proper time under s. 567 of the Civ. Pro. Code. MUHAMMAD ABDUL HAI v. SHEO BISHAL RAI, **10 A. 28=A.W.N. 1887, 234.**

(44)—*Dormant partners—Evidence—Error—Appeal—Evidence—Witness being dependant on plaintiff.*—In a partnership business, there can be dormant partners—persons who actually share in the profits, although not appearing to the world as partners. So, a Judge deciding, from the fact of one person carrying on business firm and appearing to the world to be the only person carrying it on, that there can be no other person in partnership with him, commits an error which materially affects the decision of the case on the merits and is a ground of special appeal. [*R.*, 7 A. 649, F.B.] A witness is not disentitled to credit simply because he is a servant or dependant of the plaintiff by whom he is called. SHOOBUL CHUNDER KULLEAH v. KOYLASH CHUNDER MAL, **14 W.R. 23.**

(45)—*Finding of fact—Special appeal.*—A finding of fact arrived at upon merely speculative reasoning, *held* to be contrary to law. Such mis-trial can be set aside by the High Court in special appeal. MAHOMED AIZADDI SHAHA v. SHAFFI MULLA, **8 B.L.R. 26.** (2 B.L.R. P.C., 120. *R.*]

(46)—*Objections in special appeal.*—Right of respondent in special appeal to urge objections under s. 348, Civ. Pro. Code, 1859. ISHORE GHOSE v. JAMES HILLS, **W.R. F.B. 48.**

(47)—*Grounds of objection—Special appeal.*—An objection that a finding of fact by the Courts below is unsupported by any evidence, ought to be stated in distinct words on a petition of special appeal to the High Court. RAMAMOOGRA SAHOY v. MUSSAMAT DHONDIA, **25 W.R. 140.**

(48)—*Special appeal—Judgment based on mistakes of fact—Remand.*—In this case, as the judgment of the lower appellate Court was founded upon many mistakes of fact, the High Court in special appeal set aside that judgment and sent the case back for a fresh decision. POORNO CHUNDER CHATTERJEE v. BABOO CHUNDER COOMAR ROY, **24 W.R. 171.**

(49)—*Appeal—Appellate decision based neither on evidence nor on admissions—Second appeal.*—Where the decision of the District Judge in appeal is based neither on evidence nor on admission, it is not binding on the parties in second appeal. VISHWANATH BHIKAJI v. DHONDAPPA, **17 B. 475.**

Special or Second Appeal—continued.

——5.—Grounds of Appeal—*continued.*

(50)—*Second appeal—Finding of lower Court based on misconception of evidence—Finality.*—Where the lower Court has misconceived the evidence and based its finding thereon, such finding cannot be accepted as a legal finding in second appeal. GOVIND v. VITHAL, **20 B. 753.** [*R.*, 4 N.L.R. 20; *D.*, 4 C.L.J. 198.]

(51) *S.* 584, *Civ. Pro. Code*, 1882—*Ground of second appeal.*—A second appeal will lie, where the conclusion arrived at by the lower appellate Court has been the result of an erroneous finding of a fact based on an erroneous view of the law. ISHAN CHUNDER DAS SARKAR v. BISHU SARDA, **24 C. 825=1 C.W.N. 665.** (18 C. 23, P.C., 19 C. 253, P.C., 20 C. 93, P.C., *R.*) [*R.*, 25 B. 202, 5 Bom.L.R. 956.]

(52)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 372—*Special appeal—Omission of first appellate Court to take into consideration presumption of fact—Interference by High Court.*—Where the decision of an appellate Court was most materially affected by the exclusion from the mind of the Judge of a presumption arising out of the circumstances of the case, there was a defect in the decision of the case upon the merits within the meaning of s. 372, Civ. Pro. Code, Act VIII of 1859, so as to justify the High Court in interfering to remedy the defect on special appeal by directing an issue. NILATATCHI v. VENKATACHALA MUDALI, **1 M.H.C. 131.** [*F.*, 5 M.H.C. 464; *R.*, 2 M.H.C. 428.]

(53)—*Finding of the first appellate Court without evidence to support it—Substantial error—Civ. Pro. Code*, 1882, *s.* 584.—Where the first appellate Court, in the absence of any evidence, came to the conclusion that a deed of compromise, upheld by the lower Court, was not for the benefit of a minor, *held*, that it was a substantial error or defect in the procedure of the first appellate Court. There is a second appeal, if the finding of the first appellate Court is arrived at without any evidence to support it; for such a procedure amounts to a substantial error in the proceedings of the first appellate Court, and affords a good ground for a second appeal being brought under s. 584, sub s. (*c*), Civ. Pro. Code. HAMANTA KUMARI DEBI v. BROJENDRO KISHORE ROY CHOWDHRY, **17 C. 875=17 I.A. 65, P.C.=5 Sar. 542.** [*F.*, 4 C.L.J. 198; *R.*, 15 B. 670; *D.*, 26 C. 53=2 C.W.N. 649.]

(54)—*Allegations and proofs on record, Judge's overlooking of, a defect in law—Such oversight when constitutes ground for special appeal.*—The special appellant, the defendant in this case, urged that the lower appellate Court had omitted to take notice of the proofs and allegations of the parties to the suit as to whether the lands in dispute had been held at an uniform jumma by the special appellant and his ancestors for a long series of years; and the High Court observed that unless good and sufficient reasons exist to the contrary, every

Special or Second Appeal—continued.

——5.—Grounds of Appeal—*continued.*

Judge on a question of fact is bound to take into consideration all the allegations and proofs on the record bearing upon that question, as well as the material presumptions of law and fact which arise therefrom. The lower appellate Court had committed the double mistake of overlooking these presumptions, as well as the material proof and oversight, though a defect in law in the investigation of the case, would not necessarily constitute a ground for special appeal, except when the error or defect in law is of such a character that it might have caused an error in the decision of the case on the merits. GUNEE BISWAS v. SREEGOPAL PAUL CHOWDHRY, **8 W.R. 395.**

(55)—*Appreciation of evidence—Discrediting witnesses—High Court—Special appeal—Error of law.*—Where the lower appellate Court disbelieved the evidence of a witness, not for anything in his deposition, nor for anything opposed to it in the evidence of other witnesses, but simply because he being a naib-patwaree, signed certain danna bundee papers as patwaree: *Held* by the High Court in special appeal, that the lower appellate Court committed an error of law to necessitate a remand of the case for further inquiry. MR. W. MACKENZIE v. JOWAHIR MAHTOON, **25 W. R. 137.** [*F.*, 1 N.L.R. 31.]

(56)—*Witness believed—Ground for believing not good—Special appeal.*—If the Judge of the lower appellate Court has dealt with the evidence adduced on both sides, and there is enough to show that he had weighed it, and come to the conclusion that the plaintiff's witnesses ought to be believed, the giving in the course of his observations a reason which may not be considered a good one is not a ground of special appeal. SHEO GOLAM SAHOY v. MOHADEO LALL SAHOO, **18 W. R. 110.**

(57)—*Refusal to examine witnesses—Special appeal.*—It is not imperative on a lower appellate Court to examine any number of witnesses a suitor may ask to have examined; and the refusal of the Court to do so is not a ground for special appeal. RAM DHUN SINGH v. RUNG LALL SINGH, **W. R. 1864, 249.**

(58)—*Special appeal—Question of fact—Decision not amounting to error of law.*—Unless a Judge commits such an error in the mode of dealing with a case on the evidence before him as would make his conclusion on the facts bad in law, the High Court would not entertain a special appeal from such decision. MOHUR MATOON v. BIBEE UMATUM, **18 W. R. 499.**

(59)—*High Court—Special appeal—Judgment not based on evidence.*—A judgment, which shows on the face of it a want of due consideration of the evidence in the case, and the introduction of other matters, is one which may be brought before the High Court in special appeal, GOORAJ KANT ACHARJE v. KHOODEE NARAIN MANNA, **22 W. R. 9.**

Special or Second Appeal—continued.

——5.—Grounds of Appeal—*continued.*

(60)—*Special appeal—Finding of fact based in part on inadmssible evidence—High Court's power of interference.*—A finding of fact by the lower appellate Court upon evidence, a portion of which was inadmissible, can be interfered with in special appeal. GURU DAS DEY v. SAMBUNATH CHUCKERBUTTY, **3 B.L.R.A.C. 258.**

(61)—*High Court—Special appeal—Remand—Evidence.*—The High Court has power to remand a case, where a lower appellate Court has overlooked the most direct and best evidence put forward by a party, and has also failed to consider the omission or non-appearance of evidence on the part of the adverse party. ROHEE LALL v. DINDYALL LALL, **21 W. R. 257.**

(62)—*Procedure—Error in procedure due to mistake in finding of fact—Good ground for second appeal.*—An error in procedure in the lower appellate Court, in consequence of a mistake committed by it on a question of fact, will be a good ground for a second appeal. (17 C. 875, P. C., *R.*) In the present case, the District Judge, under a mistake, thought that a bond which was really dated 19th November, 1885, was dated 8th November, 1886; and in consequence of this, treated the rest of the defendant's deposition in which he stated that the bond had been passed by him a fortnight before he signed in the plaintiff's account book, the acknowledgment sued on dated the 10th November, 1885, as "false." *Held* that the District Judge must have been biassed by the opinion so formed as to the defendant's untruthfulness in dealing with the rest of the defendant's evidence, and that there had been such a substantial error in procedure as to preclude the High Court from accepting the District Judge's finding as conclusive in second appeal. VIRBHADRAPPA v. MAHANTAPPA, **15 B. 670.**

(63)—*Decision of lower Court on mixed question of law and fact when may be interfered with by High Court on second appeal—Suit in ejectment—Evidence of acts of user—Finding that title was not inferrible from such acts, a mixed finding of law and fact not questionable on second appeal.*—This was a second appeal from the lower appellate Court's decree dismissing the plaintiff's suit in ejectment. The finding of that Court was that the plaintiff had not established title to the land in suit. The proof of ownership put forward on behalf of the plaintiff was altogether oral and consisted of acts of user over the land on the part of licensees of the plaintiff or his predecessors in title. The lower appellate Court found against the plaintiff, feeling unable to draw, from such acts of user, the inference that the land in dispute belonged to the plaintiff. Such finding was held by the High Court to be a mixed one of law and fact with which it could not interfere on second appeal. Where from facts found by the lower appellate Court, it is easy to rule with certainty that a certain legal inference ought or ought not to be drawn, the High Court, in second

Special or Second Appeal—continued.

——5.—**Grounds of Appeal**—*continued.*

appeal, can and often does correct erroneous conclusions drawn by the lower appellate Court. Where, however, the legal inference to be deduced from the facts is doubtful, it is not competent to the High Court in second appeal, to interfere with the lower Court's findings. In other words, where the question upon the facts and law is such a one as a Judge in England would lay before the Jury to decide, it is not open to the High Court to consider the propriety of the finding of the lower appellate Court. RAJARAM v. GENESH HARI KARKHANIS, **21 B. 91.** [*R.*, 4 Bom. L.R. 801, 28 B. 215.]

(64)—*Second appeal—Misdirection, whether a ground.*—The fact that the lower appellate Court has misdirected itself as to the effect of evidence with has been admitted in a suit, is an error of law affording a good ground for a second appeal. RAM PROSAD DAS v. RAJO KOER, **5 C.L.R. 94.** [*R.*, 7 A. 649.]

(65)—*Judgment not based on evidence—Special appeal--Remand.*—Where the judgment of a lower appellate Court is not based on the whole evidence on the record, the High Court on special appeal can remand the case and order a re-trial. SHUNDABUN MOHUNT v. SARUT CHUNDER ROY, **23 W.R. 160.** [*R.*, 7 C. 263=8 C.L.R. 449.]

(66)—*Evidence—First Court giving reasons for disbelieving witnesses—Appellate Court taking a contrary view—Reasons—Practice.*—Where the first Court has given very full reasons for disbelieving the evidence of the witnesses of the defendant, if the Judge of the appellate Court finds reasons to believe the defendant's witnesses, and to discredit those of the plaintiff, he should, when the first Court has expressed such a decided opinion on the point, give clearly his reasons for differing from the first Court. ABDUL ROHMAN v. BIBEE SOFY MIKHAYASH SAHEBA, **24 W.R. 293.** [*R.*, 7 C. 263=8 C.L.R. 449.]

(67)—*Grounds for—Discrediting witnesses for general reasons not affecting credit of particular deponent—Mistake of law.*—To discredit witnesses merely for general reasons not affecting the particular credit of any individual deponent, is to commit an error of law, which can be the subject of a second appeal. DADOO BRIJ LAL v. MOHAN LAL BAGRI, **1 N.L.R. 31.** (24 W. R. 251, 25 W.R. 137, *F.*; 7 M.I.A. 169, 15 I.A. 81, *R.*)

(68)—*Second appeal, ground of—Erroneous view of evidence.*—An erroneous view of evidence involves an error of law. ISWAR CHUNDER SANTRA v. SATISH CHUNDER GIRI, **30 C. 207 =7 C.W.N. 126.** [*D.*, 4 C.L.J. 198.]

(69)—*Court's discretion in dealing with evidence, not to be interfered with in special appeal.*—Where, on account of certain discrepancies between the plaint and the depositions of certain witnesses, the lower appellate Court disbelieved the plaintiff's story as a whole and

Special or Second Appeal—continued.

——5.—**Grounds of Appeal**—*continued.*

dismissed the suit, *held* that the lower Court had used a discretion which it had a perfect right to use, and that the High Court could not interfere with its order in special appeal. NARBHASE SINGH v. LUCHMEE NARAIN POOREE, **11 W.R. 307.**

(70)—*Procedure—Application to use documents filed in another case—Tender of document.*—To put in a petition before the trial of a suit, praying that the documents filed in another suit which is tried with the present case, might be used for the purpose of this case, and not to tender documents at the trial, is but laying a trap for the Court, and cannot afford ground of complaint if the suit is dismissed for want of evidence. GOBIND CHUNDER MOOKERJEE v. RAJ NARAIN MOOKERJEE, **24 W.R. 136.**

(71)—*Suit for declaration of right of user of tank—Evidence required.*—This was a suit to declare plaintiff's right of user over the water of defendant's tank for the purposes of irrigation, which rignt the defendant denied. The lower appellate Court found it satisfactorily proved by the evidence of the plaintiff's witnesses that his lands had been for a number of years irrigated by the water of the disputed tank, and gave plaintiff a decree accordingly, reversing the decision of the first Court. The special appeal preferred to the High Court was rejected on the ground that the finding of the lower appellate Court as to the degree of credibility attached to the evidence as sufficiently proving a continuous and uninterrupted user on the part of the plaintiff, was not such as could be interfered with in special appeal. TOOLSEE DOSS KOBEERAJ v. BHYRUB LAL TEWAREE, **8 W.R. 311.** [*R.*, 30 C. 281.]

(72)—*Ejectment—Pottah pleaded found to be collusive*—Farkhuttee—*Evidence of* bona fides—*Special appeal—Possession.*—In a suit for ejectment where the defendant pleads that he holds under a pottah extending from 1271 to 1283 granted to him by the plaintiff and another jointly, and both the lower Courts find the pottah to be a false and collusive one, the contention in special appeal, that neither of the Courts below has taken into consideration the evidence which the defendant was prepared to give as to the *bona fides of* his *farkhutte* which shows that he paid rent up to 1276 is a fair ground of objection; for, as the plaintiff herself admits that possession remains with the defendant without any objection being made on her part for six or seven years at least, if it could be shown by the defendant by proving this *farkhuttee* that he has been in continued possession up to 1276 paying rent to the plaintiff, it is clear that his possession would be that of a tenant, and not of a wrongdoer, and any thing that may be found to be due from him for the use and occupation of the land would be rent and not mesne profits. MOHUN SINGH v. MUSSAMUT JUGBUTHY KOOER, **24 W.R. 297.**

Special or Second Appeal—continued.

——5.—Grounds of Appeal—*continued.*

(73)—*Evidence, complete disregard of—Effect—Error in law.*—A complete disregard of evidence, which, although not conclusive and an estoppel, is of such a nature that a judgment in opposition to it cannot be allowed to stand, amounts to an error in law. HEERA LALL GHOSE v. KALEE DOSS MOOKERJEE, **23 W. R. 65.**

(74)—*Special appeal—Errors of law—Evidence.*—Where an appellate Court ignores the great body of evidence on the record and places reliance on what can be shown either to be no evidence at all or what points almost exclusively the other way, and lays down, as positive *dicta* of law, points which are not law, the High Court would be justified in considering such proceedings as errors of law, notwithstanding that the Court below has ostensibly based its judgment on the evidence. MUSSAMAT ROOP NARAIN KOOER v. RESSAL TEWAREE, **24 W.R. 119.** [*R.*, 7 C. 263=8 C.L.R. 449.]

(75)—*Special appeal—Error in investigation—Remand.*—Where the High Court finds in special appeal that the material defects in the investigation of a case by the Court below have produced error in the decision on the merits, it remands the case for re-trial. SHIBO SOONDUREE DOSSEE v. CHUNDER KANT GHOSE, **21 W.R. 217.**

(76)—*Framing of issues—Judicial determination.*—A Judge must be held to mistake the principle of judicial determination, if, instead of framing a simple issue, *viz.*, "is the plaintiff's allegation proved," he places himself under the necessity of choosing between the plaintiff's story and the defendant's. SHAIKH AMEER BEPAREE v. HURREE MOHUN KURMOKAR, **23 W.R. 87.**

(77)—*Act* VIII *of* 1859, *s.* 374—*Omission to state points—Oral pleas, addition of.*—Omission to state the real point recited or adjudicated renders a petition of appeal inadmissible under s. 374, Civ. Pro. Code. The law gives no authority to add oral pleas. SECUNDER SIKDAR v. FUTTEH ALLY, **1 W.R. 246.**

(78)—*Findings on fact--Powers of lower appellate Court and first Court—Interference by High Court.*—A lower appellate Court has as much authority to decide upon facts as theCourt offirst instance. Although the High Court could disapprove and interfere with verdicts of a lower appellate Court setting aside judgments of the first Court on insufficient or erroneous grounds, it is not at liberty to do so, simply because the judgment of the first Court is more detailed or more satisfactory on the evidence. DOIBO CHUNDER ROY v. WOOMA MOYEE DEBIA, **19 W.R. 321.**

(79)—*Evidence—Court's discretion in weighing evidence—Interference in special appeal.*—The High Court cannot in special appeal enter

Special or Second Appeal—continued.

——5.—Grounds of Appeal—*continued.*

into the question whether the reasons given by a lower appellate Court for not giving any weight to documents filed as evidence in a case, are sufficient or not, it being within the discretion of that Court to give as much or as little weight to the evidence as it might think fit. MOONDUR BEEBEE v. HUNOOMAN PERSHAD, **11 W.R. 277.**

(80)—*Special appeal—Underrating evidence—Chitta of Revenue Survey.*—Where it appeared that the lower appellate Court had greatly underrated the importance of a piece of evidence, *viz.*, a chitta of the Revenue Survey, the High Court sent back the case to the lower Court in order that that Court might re-consider the evidence, and after giving proper weight to the evidence pass such decree as the justice of the case might require. SUROSSUTY DOSSEE v. UMBIKA NUND BISWAS, **24 W.R. 192.** [*R.*, 7 C. 263=8 C.L.R. 449.]

(81)—*Questions of fact—First Court and lower appellate Court differ—Special appeal.*—Where, in respect of questions of fact, there is a difference of opinion between the first Court and the lower appellate Court, it is not open to the parties in special appeal before the High Court to argue whether the first Court is right in its finding upon these questions or the lower appellate Court. TARA PROSUNNO MOJOOMDAR v. BISHONATH SIRCAR, **23 W. R. 144.**

(82)—*Non-appreciation of evidence — Interference by High Court.*—The High Court reversed the decision of the lower appellate Court where that Court, on the mere appearance of a document, discarded the evidence of witnesses who testified to the making and signing of it. LALLAH JAH v. MUSSAMUT BIBEE TELLEBMATOOL ZUHRA, **21 W.R. 436.**

(83)—*Benamee—Suspicion of possible* mala fides—*Inference of fraud.*—Suit for a declaration of the plaintiff's right to property attached in execution of a decree passed against her husband. The question was whether the plaintiff was the real purchaser of the land or it had been bought by her husband in her name. The property was found to be in the possession of the plaintiff. It appeared, however, that the *Kobala* under which the plaintiff claimed was made just before the decree in question was passed. A decree in favour of the plaintiff was passed by the first Court, and this decree was reversed on appeal, the appellate Court holding that there was much suspicion of possible *mala fides* in the purchase. *Held*, that it was not enough that there was possible *mala fides*. There must be proof that the transaction was not what it appeared to be and that instead of being a purchase by the wife, it was a purchase by the husband in the wife's name; in the absence of such evidence, the plaintiff was bound to succeed. The High Court also held that the lower appellate Court

Special or Second Appeal—continued.

——5.—**Grounds of Appeal**—*continued.*

committed an error of law in resting its decision upon such circumstances. MUSSAMUT MEHAR BANOO v. KERAMUT ALI, **22 W.R. 402.**

(84)—*Evidence—Comparison of signatures—Discrepancy—Interference by High Court in special appeal.*—A comparison of signatures is a mode of ascertaining the truth, which ought to be used with very great care and caution. Where, in deciding an appeal, the first appellate Court placed reliance on a comparison of the signatures in a mortgage-deed, and the signature in a vakalut-nama, and the High Court found in special appeal that there were considerable discrepancies between the two signatures, the High Court came to the conclusion that the comparison of the signatures must have been conducted in some way which led the first appellate Court into error, and remanded the case for re-trial, though the question was a matter of fact. SREEMUTTY PHOODEE BIBEE v. GOBIND CHUNDER ROY, **22 W.R. 272.** [*R.*, 37 C. 467=14 C.W.N. 1114, 39 C. 606=16 C.W.N. 312]

(85)—*Special or second appeal—Grounds of appeal—Receipts for rent—Comparison of signatures—Credibility of evidence.*—In a suit for rent the defendant pleaded payment and put in evidence receipts for the rent claimed. The Court of first instance disbelieved this evidence and gave a decree for the plaintiff. The Judge on appeal compared the signature of the plaintiff on the receipts with his signature to a document not in evidence in the case, and reversed the decree and dismissed the suit. *Held*, that the decision of the Judge, proceeding upon the point as to the credibility and weight of evidence, could not be objected to on special appeal. RAMSOONDER SIRCAR v. KISTOBAG BAG, **Marsh, 322=2 Hay, 421.**

(86)—*Special or second appeal—Grounds of appeal—Receipts for rent—Civ. Pro. Code*, 1859, s. 372—*Error in investigation of case.*—In a suit for arrears of rent the defendant pleaded payment and filed receipts. The Collector distrusted the receipts, and gave a decree in favour of the plaintiff, saying that as to three of the receipts evidence had been given which he did not believe; and that with respect to the other receipts no evidence had been offered. The Judge, on appeal, reversed the decree, and gave a decree in favour of the defendant, expressing an opinion that the distrust of the evidence in support of the three receipts was without sufficient reason. *Held* that, with respect to the receipts in support of which no evidence had been offered, the plaintiff was entitled to a decree for the rents to which they applied, and that the finding of the Judge that such rents had been paid without any evidence having then been given of such payments was an "error in the investigation of the case" which had produced error in the decision of the case upon the merits, within s. 372 of Act VIII of

Special or Second Appeal—continued.

——5.—**Grounds of Appeal**—*continued.*

1859, and was therefore ground of special appeal. MOHUN CHUNDER DHUR v. KIDGE, **Marsh, 381=2 Hay, 419.**

(87)—*Production of copy of deed—Finding on evidence as to genuineness of deed, not open to interference in special appeal—Point raised in issue between co-defendants, plaintiff not competent to contest on special appeal.*—Plaintiff claimed the ancestral property held by one P.R. as his preferential heir. The defendant D.D. widow of the eldest son of P.R. relied on a deed of gift by P.R. to his wife who on her death bequeathed it to her by will. The Court of first instance found both the *hibanamah* and the will genuine and dismissed the plaintiff's suit. The Principal Sudder Ameen, however, only pronounced on the *hiba* which he considered proved, and, holding that opinion upon the will as it concerned two of the co-defendants only. It was urged on special appeal that the Principal Sudder Ameen should have found as to the genuineness of the will as well, but the High Court held that there having been no dispute as to the genuineness of the will on the part of the plaintiff, the Principal Sudder Ameen had rightly ruled that he could not raise nor try that issue which was between two co-defendants in the suit, the special appellant not having any interest. Further, the Principal Sudder Ameen's decision was in the result a finding of fact upon evidence with which no interference was possible in special appeal. BHUGWAN CHUNDER BANERJEE v. SREEMUTTEE DUKHINA DEBIA, **8 W.R. 356.**

(88)—*Remand—Mis-apprehension of evidence—Improper reception of evidence—Genuineness of documents inferred from their appearance—Strong view of conduct of parties.*—Where the Judge of the lower appellate Court completely misapprehended the evidence, sent for and gave consideration to some documents which were not put in evidence before the first Court, without recording any reason for this step, came to the conclusion that a document was fabricated, merely because it presented an appearance which, in his judgment, an authentic and real document would not be likely to have under the circumstances, and had taken a very strong view of the conduct of the parties, the High Court, holding that the case had not been properly and carefully tried in the Court below remanded the case for re-trial by another Judge. NOWAB KHAN v. RUGHOONATH DOSS, **20 W.R. 474.**

(89)—*Misconstruction of document—Question of law—Special appeal.*—The misconstruction of a document is an error in law, and is, as such, within the terms of the present special appeal law. The Courts, in order to ascertain the intention of parties, must look to the writing alone, and not to the statement of the parties themselves or their witnesses. Where the word used in *potta* are "*ta bahali bundobust Sircar*" the *potta* endures as long as the settlement and not merely during the grantee's

Special or Second Appeal—continued.

——5.—Grounds of Appeal—*continued.*

lifetime. ODIT NARAIN v. MAHARAJAH MAHESHUR BUX SINGH, **Agra (F.B.) 52=Ed. 1874, 39.**

(90)—*Special appeal — Misconstruction of documents—Proof.*—Misconstruction of a document as a ground of special appeal must be clearly shown. Where a lower Court for instance, records in its judgment north instead of south, or a tree instead of a nullah as a boundary in recording the words of a document on which it relies to prove what are the boundaries, such errors would undoubtedly be a "misconstruction," and afford good ground for special appeal. But where the objection is a mere matter of opinion, where the lower appellate Court has, for reasons given, placed a particular boundary mark in a particular part of a disputed piece of land, unless it can be shown that its conclusion is incompatible with the wording of the document it professes to go upon, such decision would not be a misconstruction; it might be a wrong decision on the facts, but there would be no such misreading of a document as would allow of a special appeal. KALEE CHURN PATTUR v. CHUNDEE CHURN MUNDUL, **9 W.R. 366.**

(91)—*High Court—Interference with concurrent findings of lower Courts—Construction of written admission.*—Though it is an unusual course for the High Court to interfere with the concurrent finding of two Courts on a question of fact in special appeal, yet it would do so if the decision has turned entirely on the construction of a written admission, which has been wrongly understood. LALLA IMRIT LALL v. MAHOMED LALLZAMAH, **18 W.R. 447.**

(92)—*Document, misconstruction of—Special appeal—Civ. Pro. Code (Act VIII of 1859), s. 372.*—The misconstruction of a document which is the foundation of a suit, is a ground for special appeal, although it is not named in s. 372 of Act VIII of 1859. But no special appeal lies by reason of a mistake as to the meaning of some portion of the evidence which is in writing if it is connected with other evidence affecting its construction. NOWBUT SINGH v. CHUTTUR DHAREE SINGH, **19 W.R. 222.** [*F.*, 4 C.L.J. 198, 10 C.L.J. 593, 15 C.W.N. 752=13 C.L.J. 418; *Expl.*, 9 C.W.N. 154; *R.*, 22 W.R. 314, 9 C.L.J. 623.]

(93)—*Sale—certificate, construction of—Interference by High Court—Special appeal.*—A Judge is bound to give full effect to the terms of a sale certificate; and when he proceeds to limit the effect of the certificate by certain inferences and conclusions drawn from other documents, he does that which he is not at liberty to do and commits an error of law, which it is in the power of the High Court, in special appeal, to remedy. MOOKHYA HURUKRAJ JOSHEE v. RAM LALL GOMASHTA, **14 W.R. 435.** [*Expl.*, 27 B. 334=5 Bom. L.R. 217.]

Special or Second Appeal—continued.

——5.—Grounds of Appeal—*continued.*

(94)—*Deposition of witness—Construction of—Special appeal—Survey map—Evidentiary value — Amin's report—No opinion expressed by Court — Assumption without evidence, if ground for special appeal.*—The construction of the deposition of a witness, being only what the Court thinks is proved by it, and not being a question of law, is not a ground of special appeal. [*F.*, 3 Ind. Cas. 173.] A survey map is not conclusive evidence of possession; it may be used as evidence of it, but its value depends on the circumstances under which it is made. No special appeal lies to the High Court on the ground that the lower Court has passed no opinion on the report of an Amin. An assumption made by a Court, there being no evidence on which it could be founded, amounts to an error of law and it is a ground for special appeal. HIMMAT ALI KHADIM v. NYAMUTOOLLAH KHADIM, **23 W.R. 250.**

(95)—*Evidence— Admission of defendant—Admissibility of whole—Effect of admission on co-defendants—Evidence Act, s. 83—Thakbust map—Presumption as to its accuracy—Misconstruction of evidence and faulty inference—Reversal of decision by High Court in special appeal.*—Where an admission by a defendant is put in it must be taken as a whole and cannot bind the other co-defendants. Under s. 83 of the Evidence Act, a thakbust map must be presumed to be accurate. Where the first appellate Court misconstrued the evidence, acted contrary to the provisions of the Evidence Act and did not take into consideration an inquiry made by an Ameen, which was very much relied upon by the first Court, the High Court in special appeal reversed the decision of the first appellate Court. NIAMUTOOLLAH KHADIM v. HIMMUT ALI KHADIM, **22 W.R. 519.**

(96)—*Special appeal—Grounds for.*—Where a lower appellate Court bases its judgment on the conclusion it comes to upon reading the contents of a document which involved the question of its construction and upon considering the facts of the case and the conduct of the parties: *held*, that no special appeal would lie to the High Court from such a judgment. BUNGSHEE DHUR MAHATA v. MADHOO SOODUN CHOWDHRY, **23 W.R. 406.**

(97)—*Special or second appeal—Grounds of appeal—Decision without sufficient evidence.*—In a suit on a kabuliat, the Court of first instance found that the kabuliat had not been signed by the defendant, but by a third party, and that there was no evidence that such third party was authorized to sign it. The Judge on appeal reversed the decision. *Held* that the decision of the Judge holding the defendant responsible for the signature of a person of whose authority there was no evidence was erroneous in point of law, and was a ground of special appeal. SHAM CHAND BYSACK v. BUNGO CHUNDER CHATTERJEE, **Marsh. 556 =2 Hay. 663.**

Special or Second Appeal—continued.

——5.—Grounds of Appeal—*continued.*

(98)—*Boundary line — Ameen's report and map — Report untrustworthy — Report found deficient— Special appeal.* — Where an Ameen is deputed to mark out the boundary line between two estates, if the Judge of the lower appellate Court finds as a fact that the Ameen's report is unsatisfactory and his map wrong, the High Court cannot interfere with that finding in special appeal. If it finds the Ameen's report deficient in any point, it can send for the man and examine him ; but unless it sees reason to disbelieve his statements, or to differ from his conclusions as to where the boundary line runs, it must, in deciding the case, take those conclusions into its serious consideration, and if it rejects them, it ought to give reasons for differing in this particular from the first Court which accepted them. SHEO DYAL SINGH v. HODGKINSON, **24 W.R. 342.**

(99)—*No opinion on one of many points in evidence—Special appeal — Right of water— Presumption.*—The omission to record an opinion on one of many items of evidence (*e.g.*, an Ameen's report) is not such an error in law as to come within the scope of the provisions for special appeals. No presumptions of law in regard to rights of water are known in this country, but proof of ancient, reasonable user by particular recognised means is sufficient to give the right. SREEMUTHY BUNDHOO SOOKOOLANY v. MAHARAJA JOY PROKASH SINGH BAHADUR, **W.R. 1864, 367.**

(100)—*Special appeal—Refusal to consider evidence — Payment of subsequent bill while earlier one unpaid—Error in law—Decision of first Court based on entry in day-book—Entry ignored by appellate Court—Error in law.*—It is an error of law for a Judge to refuse to consider the evidence adduced by plaintiff in support of her demand, simply on the ground that it was improbable that the plaintiff would have received payment for one bill whilst an older one remained unpaid. It is an error of law and a subject for a special appeal for a lower appellate Court to ignore an entry in a day book on which the first Court decided the case. DARIMBOO DEBEE v. HURREEHUR MOOKERJEE, **18 W.R. 53.**

(101)—*Special appeal—Credibility of witnesses.*—Where the first Court, for the reasons given by it, chose to disbelieve certain witnesses and the Court of appeal thought that two of those witnesses were credible, that is a matter with which the High Court has no power to interfere in special appeal. SREEKANT GHOSE v. BHUGWAN CHUNDER SEN, **24 W.R. 13.**

(102)—*Suit for possession— Presumption of fraud from party's non-attendance—Dismissal of suit for not proving fact in particular way— Error of law.*—In a suit for possession brought by G, a purchaser at a Court-sale, an *ex parte* decree having been given, the defendants obtained an order for a new trial, alleging that

Special or Second Appeal—continued.

——5.—Grounds of Appeal—*continued.*

the suit was really brought by R without G's knowledge. At the new trial, G, though summoned and also ordered to attend as party, failed to attend, and the case was thereupon permitted to be withdrawn under s. 97, Civ. Pro. Code. R then brought a fresh suit alleging that he got a conveyance from G of all his rights. G was made a defendant and he put in an answer supporting the plaintiff's allegation. He was again ordered to attend, and on his failing to do so, the case was dismissed as tainted with fraud. On appeal, the Judge also dismissed the suit, holding, that, until G should come forward and give evidence in plaintiff's favour, the plaintiff could have no right whatever. *Held* that, in dismissing the suit on the sole ground that the plaintiff had not proved the purchase, which he alleged, by producing his vendor as a witness, the Judge was wrong in point of law. RAM DHUN BANERJEE v. RAM NARAIN MOOKERJEE, **11 W.R. 311.**

(103)—*Special appeal—Error of law—Discrediting witnesses for general reasons.*—To discredit witnesses merely for general reasons not affecting the particular credit of any individual deponent is to commit an error of law, which can be the subject of special appeal. SHEO PURSHUN PANDEY v. BRUN PANDEY, **24 W.R. 251.** [*F.*, 1 N.L.R. 31 ; *R.*, 7 C. 263 =8 C.L.R. 449.]

(104)—*Witness disbelieved by lower appellate Court, not sufficient ground for special appeal.* —There is nothing in the law authorising the High Court to interfere in special appeal because the lower Court has happened to disbelieve a witness on the ground that the witness is an interested person, or when, upon any other ground within its own discretion, it does not attach much credit to the statement of that witness. DWARKANATH DOSS BISWAS v. MUDDUN MOHUN CHUCKERBUTTY, **6 W.R. 292.**

(105)— *Appeal — Judgment — Grounds for believing witnesses not given—Ground for special appeal.*—The circumstance that the lower appellate Court had omitted to give in its judgment its reasons for having believed the witnesses whom the first Court had disbelieved, cannot by itself constitute a ground for special appeal. LUKHEE MONEE DOSSIA v. RAJKISHORE PAUL, **4 W.R. 106.**

(106)—*Appellate Court — Special Appeal— Reasons.*—No general rule can be laid down as to when the reasons should be stated by an appellate Court for believing one set of witnesses rather than another; and the omission of a lower appellate Court to state such reasons is not a ground for special appeal. SHUMSHUROODY v. JAN MAHOMED SIKDAR, **21 W.R. 260.**

(107)—*Evidence—Objection to admissibility taken in special appeal.*—All objections as to the admissibility of evidence must be taken in

Special or Second Appeal—continued.

——3.—Grounds of Appeal—*continued.*

the first Court. If the objection is not raised either in the first Court or in the lower Court, it cannot be taken in special appeal. MUKDOOMUNISSA v. NOKHY SINGH, **24 W.R. 296.**

(108)—*Practice—Witnesses—Examination—Contrary statements.*—A Court examining witnesses should draw their attention while they are under examination to their previous statements contrary to those made by them while under examination, but an omission to do so does not render the judgment bad in law. SHAM LALL v. ANUNTEE LALL, **24 W.R. 312.**

(109)—*Examination of witnesses in Court of first instance—Transfer of Suits—Deposition read by another Judge—Irregularity—Waiver—Objection in special appeal—Act* VIII *of* 1859, *ss.* 172, 173, 183—*Wagering contract*—Bona-fides—*Mistake in estimate of evidence—Special appeal*—Onus *of proof.*—The meaning of s. 183 of Act VIII of 1859 taken in connection with s. 172 is, that the judgment is to be given upon the examination of the witnesses by the Judge himself, and not upon a perusal of depositions, except those taken under s. 173 and the subsequent sections, which are expressly allowed to be read in evidence at the hearing. Whenever it is practicable, the witnesses should be examined before the Judge who is to pronounce the judgment; and care should be taken in the transfer of suits, and in the disposal generally of the business of the lower Courts, to prevent the necessity of resummoning witnesses; but where a deposition taken by another Judge is read, instead of the witnees being examined, it is only an irregularity which may be waived by the parties, and which would not be a ground for reversing the decree on the special appeal, unless it appeared that the appellant had been prejudiced by it. *Per Tucker, J.*—When a Judge of a Court of original jurisdiction, whose proceedings are regulated by the Civ. Pro. Code, dies, or is removed to another appointment, before the conclusion of a trial, or when a partially tried suit is removed from one Court to another, the evidence of the witnesses who have been examined by the Court which commenced the enquiry, must be taken *de novo*, unless the parties consent that the depositions already recorded shall be read at the hearing before the Judge or Court on whom it will devolve to pass judgment. [*R.*, 8 A. 576 = A.W.N. 1886, 195; *D.*, 14 B. 232.] Where in a suit upon a contract the defendant alleged that the contract was a wagering one and both parties had evidence and the *onus* was thrown upon the plaintiff of showing that the contract was not a time bargain and the Judge did not hold that the defendant was entitled to succeed without giving any evidence, unless the plaintiff disproved the allegation of want of *bona fides*, it was held that the *onus* was not thrown on the plaintiff in the proper sense and so as to be an error in law. It was for the Judge to estimate in the particular case the amount of evidence required, and the exact force of the

Special or Second Appeal—continued.

——3.—Grounds of Appeal—*continued.*

presumption that the contract was a *bona fide* one, and if he has made a mistake in his estimate, it is not a ground for a special appeal. NARANBHAI VRIJBHUKANDAS v. NAROSHANKAR CHANDOSHANKAR, **4 B.H.C.A.C. 98.**

(110)—*Act* VIII *of* 1869, *s.* 28—*Promissory note insufficiently stamped—Erroneous procedure in lower Court.*—The plea of the defendant in this suit that the document sued on by the plaintiff was insufficiently stamped, was overruled by both the lower Courts which decreed the plaintiff's claim. On special appeal by the defendant, the High Court was of opinion that the document was a promissory note and should bear a stamp of 12 annas and that the deficiency in stamps could not be supplied when the document was admitted in evidence. The appeal was, however, *held* to fail because the document had been admitted by the first Court and accepted by the lower Court as bearing a sufficient stamp, and the insufficiency of the stamp was the only ground charged in special appeal; and further, the error in the admission of the document did not in any way affect the decision on the merits. MAKBUL AHMED v. MUSSAMUT IFTIKHAR-UNNISSA BEGUM, **7 N.W.P. 124.** [*R.*, 3 A. 581, F.B.]

(111)—*Act* XVIII *of* 1869, *s.* 20—*Stamp—Evasion to pay—Penalty—Discretion—Interference by High Court.*—A Court may, under s. 20 of the General Stamp Act, refuse to allow a defect, as to stamp duty, to be remedied, unless it be proved affirmatively to its satisfaction that there was no intention to evade the payment of stamp duty. Where the District Court has found as a fact that a document was executed on an insufficient stamp for the purpose of evading the provision of the General Stamp Act, and so refused to allow the parties to pay the sum required to make up the full amount of stamp duty chargeable on the document, the High Court could not, in special appeal, question the correctness of that order. GAMBHIRMAL v. CHEJMAL, **10 B.H.C. 406.** (3 B.H.C. 94, *D.*)

(112)—*Special appeal—Objection as to admission of secondary evidence.*—Whether secondary evidence is admissible in place of primary and better evidence, is always a question for the judicial determination of the Court which has to try the case on its merits, but although it cannot be, as a determination of fact, impeached in a Court of special appeal on the merits of the decision, still it must be based upon legal evidence, and therefore it is competent for the party complaining of the admission of secondary evidence to object on special appeal that the decision of the lower Court as to the admissibility was either given on no evidence at all or on evidence that was not legally sufficient to support it. CHUNDER KANT GHOSE v. SHOWDAMINEE DEBIA, **9 W.R. 517.**

(113)—*Lost deed—Unstamped document—Secondary evidence of contents—Ground for*

***Special or Second Appeal*—continued.**

——5.—Grounds of Appeal—*continued*.

special appeal.—All that it would be right for the Court to require for the protection of the revenue, in cases where a lost deed was shown not to have had a stamp, would be that the same money should be paid, before admitting secondary evidence, as would have to be paid if the deed itself were produced. But that is a question for the Court to deal with for the protection of the revenue. If the Court does not do that, but allows secondary evidence to be given of the contents of the deed, it is not an error which affects the merits of its decision, and which a person can take advantage of in special appeal. HARAN CHUNDER BHOORREE v. RUSSIK CHUNDER NEOGGEE, **20 W.R. 63.**

(114)—*Additional evidence on appeal, parties not entitled to put in as of right—Discretion of appellate Court.*—The parties in an appeal are not entitled, as of right, to put in additional evidence. The Appellate Court may allow additional evidence in certain cases; but a special appeal will not lie in the event of the Court refusing to allow it. GOLAM MUKDOOM v. MUSSAMUT HAFEEZOONISSA, **7 W.R. 489.** [*Appr.*, 15 W.R. 429; *R.*, 23 A. 121.]

(115)—*Additional evidence — Discretion of Appellate Court—Special appeal.*—Although the lower appellate Court has the power to allow additional evidence to be taken under certain circumstances when the case is before it on appeal, a special appeal will not lie in the event of that Court, in the exercise of its discretion, refusing to allow such evidence to be taken. KULPO SINGH v. THAKOOR SINGH, **15 W.R. 429.** [*R.*, 23 A. 121=21 A.W.N. 11.]

(116)—*Act* VIII *of* 1859, *s.* 355—*Application to file additional exhibits—Refusal of application—High Court not competent to interfere with.*—It is not competent to the High Court to interfere with the discretion exercised by the lower Court in refusing to allow a party to file additional exhibits upon an application made under s. 355 of Act VIII of 1859. MOHESH CHUNDER SHEET v. SHOSHEE MOOTHEE DEBIA, **6 W.R. 196.** [*Appr.*, 15 W.R. 429.]

(117)—*Rejection of evidence—Merits of case affected—Error in law.*—The rejection by a Judge of the evidence in a suit by reason of a total misconception of the position of the person from whom the plaintiff derives his title, is an error in law, where it affects the decision of the case on its merits. HURO CHUNDUR CHOWDHRY v. GOBIND CHUNDUR MOITREE, **17 W.R. 255.**

(118)—*Act* VIII *of* 1859, *s.* 15—*Court's power to pass declaratory decrees—Declaration where plaintiff can sue for possession—Wrong exercise of discretion — Objection first urged in second appeal—Objection to Jurisdiction, when may be urged.*—Courts have power to grant declaratory decrees in all cases in which the plaintiff would be entitled to relief if he asked for it, though, in the exercise of the discretion

***Special or Second Appeal*—continued.**

——5.—Grounds of Appeal—*continued*.

vested in them, they should as a general rule, refuse to grant such decrees where the plaintiff is entitled to sue for possession. Where, in a suit for declaration of the plaintiff's right to succeed to the *guddee* of a Mahant, the first Court passed a declaratory decree though the plaintiff was in a position to sue for possession, the Chief Court declined to interfere with the decree on an objection taken for the first time in second appeal, merely on the ground that the first Court in granting such decree erred in the exercise of the discretion conferred on it by law. A plea to the jurisdiction may be taken at any stage if the facts on which it rests are patent on the face of the record; but a party is not entitled to have new evidence taken when a case has reached the stage of a second appeal, merely on the suggestion that such evidence, if taken, might go to show that the suit was beyond the jurisdiction of the first Court. BAIKUNT DAS v. HUKAM DAS, **55 P.R. 1877.**

(119)—*Civ. Pro. Code*, 1859, *s.* 350—*Misjoinder of plaintiffs.*—The misjoinder of plaintiffs is not a ground for the reversal of a decree either in a special appeal or in a regular appeal, if the investigation of the case on the merits has not been affected by it. SAYAD MIYA GULAM NABI v. KHARANBIBI HAFIZULAH, **6 B.H.C. A.C. 177.**

(120)—*Special appeal—grounds.*—A special appeal to the High Court can only be brought when the decision appealed against is contrary to some law or usage having the force of law, or there is a substantial error or defect in law in the procedure or investigation of the case. An error of fact cannot be any ground of special appeal. So, where, in a rent suit, the Judge erroneously stated that the rate admitted by the defendant was the old rate shown in a former decision when the rates were different, *held*, that no special appeal lay. CHAMRU SINGH v. TOTA ROY, **19 W.R. 430.**

(121)—*S.* 584, *Civ. Pro. Code*, 1882—*Second appeal — Grounds of appeal.*—*Held*, under the circumstances of the case, that the High Court had no power to hear the appeal as a second appeal, there not having been, in the proceedings below, any error or defect within the meaning of s. 584, Civ. Pro. Code. LUKHI NARAIN JAGADEB v. JODU NATH DEO, **21 C. 504, P.C.=21 I.A. 39=6 Sar. 408.** (18 C. 23, P.C., and 19 C. 249, P.C., *R.*) [*R.*, 26 C. 53, 4 C.L.J. 198.]

(122)—*Special appeal, points not raised in grounds of, not arguable at hearing—Point decided in previous suit between parties not to be re-opened*—Res judicata.—The defendants, the present appellants, raised questions regarding their liability for payments, in some sense voluntary in their nature; neither before the first appellate Court nor in the grounds of special appeal, were any such questions raised, and the Court refused to allow the points to be raised and argued on special appeal. Where, in

Advocate High Court
Jammu & Kashmir

Special or Second Appeal—continued.

——5.—Grounds of Appeal—*continued.*

a previous suit between the parties, a point was put in issue and tried and the Judge of the lower appellate Court had re-opened it, the order of the Judge was reversed by the High Court on the principle of *res judicata*. MEER BAHADOOR ALI v. MUSSAMUTTI SUNEECHUROO, **6 W. R. 157.**

(123)—*Plea of* res judicata—*Whether permitted to be taken in special appeal—Query.*—Whether a plea of *res judicata* can be taken in special appeal if not pleaded in bar to the suit in the first Court. HAR GOBIND v. JOTH RAM, **59 P.R. 1879.**

(124)—*Finding of fact—Special appeal.*—The finding that the plaintiff asking the Court to demolish a house stood by and allowed the house to be erected by the defendant, is a finding of fact and cannot form a ground for special appeal. DURSUN LALL CHOWDHRY v. KASHEE CHOWDHRY, **25 W.R. 494.**

(125)—*Suit to get rid of effect of decision—Appeal.*—A legal point involved in an adverse decision should be contested by means of an appeal; but no suit lies to get rid of that decision. BHEEM ROKHEET v. SARTUCK CHUNDER RANA, **W.R. 1864, 55.**

(126)—*Act* VIII *of* 1859, *s.* 359—*Judgment not pronounced in open Court with reasons for decision—Irregularity — Special appeal.* — In this case, the judgment of the appellate Court was written after the Judge had ceased to hold office, and was not pronounced by him in open Court with the reasons for the decision, as directed by s. 359 of Act VIII of 1859. *Held* that the irregularity had not affected the merits of the case and that it was no ground of special appeal. GANPATRAM LAKHMIRAM v. JAICHAND TALAKCHAND, **4 B.H.C.A.C. 109.**

(127)—*Claim against share-holder—Objection of decree not disclosing extent of share, pleader not competent to raise, when not taken in special appeal.*—One of the grounds of objection which the appellant's pleader sought to raise, *viz.*, that the Judge ought to have passed a joint decree and not a decree against each share-holder respectively to the extent of his share—not having been taken in special appeal, the High Court was of opinion that it could not be permitted to be taken by the appellant's pleader. *Per Mitter, J. (Contra)*:—The case ought to be remanded to the first Court to try the extent of the shares belonging to the different defendants. The parties ought to have been asked to disclose their respective shares and a decree ought to have been passed in favour of the plaintiff against each defendant, in proportion to his share, and it was immaterial whether the above point had been previously taken or not. MAHARAJAH MOHESSUR BUKSH SINGH BAHADOOR v. MUTHOOM PERSHAD, **8 W.R. 514.** [*R.*, 11 W.R. 131.]

(128)—*Capacity to adopt—Matter of legal inference—Special appeal.*—The determination

Special or Second Appeal—continued.

——5.—Grounds of Appeal—*concluded.*

of the question whether an incapacity to adopt on the part of a senior co-widow results from the facts found by the lower Courts, under the circumstances of a particular case, involve matter of legal inference and is consequently open to inquiry on second appeal. LAXMIBAI v. SARASWATIBAI, **1 Bom. L.R. 420=23 B. 789.** [*R.*, 25 B. 527.]

(129)—*Appeal—Right of vakil to be heard—Grounds of appeal should be filed.*—It is a condition precedent to an advocate or vakil being heard on behalf of a special appellant that some duly certified ground or grounds of appeal shall have been filed. KISHEN CHUNDER ROY v. HURISH CHUNDER BOSE, **3 W.R. 216.** [*F.*, 15 C. 706.]

(130)—*Special appeal — Presumptions.*—Where the lower appellate Court concluded against the genuineness of a deed of sale to certain appellants, on a presumption arising from the existence of a possessory lease to other parties, and rested his decision entirely on such presumption, his decision was set aside in special appeal on the ground that the presumption did not necessarily arise. MUSSAMUT AKJOO BIBEE v. KOONJO BEHAREE LALL, **19 W.R. 287.**

See ADMISSION — ADMISSIONS BY OR AGAINST THIRD PERSONS, 2 N.W.P. 207.

See APPELLATE COURT--OBJECTIONS FIRST TAKEN IN APPEAL, 9 W.R. 503.

See ARBITRATION—MISCELLANEOUS, 57 P.R. 1876.

Ground not urged in lower appellate Court —Right to urge in further appeal—*See* CIV. PRO. CODE, 1908, O. XXXII, r. 7, 134 P.L.R. 1911.

See EVIDENCE—MAPS, 15 C. 353.

See GHATWALI TENURE, 18 W.R. 376.

See HINDU LAW—INHERITANCE, 20 W.R. 197.

See JUDGMENT—GENERAL. A.W.N. 1882, 6.

Of appeal—*See* JURISDICTION—QUESTION OF JURISDICTION, 7 B.H.C.A.C. 79.

See LOCAL INVESTIGATION, 8 W.R. 6.

See PLAINT—AMENDMENT OF PLAINT, 2 B.H.C. 162.

See REVIEW—REVIEW AFTER TIME, 114 P.R. 1876.

Giving no opportunity for reply—Ground for special appeal—*See* RIGHT OF REPLY, 8 B.L.R. App. 44.

Alternative reliefs in plaint—Partition—Findings of fact unaccompanied by reasons—Not conclusive in second appeal—Practice—Procedure. — *See* VARIANCE BETWEEN PLEADINGS AND PROOF, 19 B. 323.

Special or Second Appeal—continued.

——6.—**Practice and Procedure in Special Appeal.**

(1)—*Civ. Pro. Code, ss.* 565, 566, 587 — *Second appeal—Determination of questions of fact—Remand.*—It was not intended that the High Court, sitting as a Court of second appeal, should determine questions of fact on the evidence. The only grounds on which second appeals are cognizable, are those mentioned in s. 584, which relate to errors of law or usage having the force of law or substantial error or defect in procedure which may possibly have produced error or defect in the decision of the case on the merits. When an appeal has been admitted on those grounds, the whole case cannot be opened so as to enable the High Court to deal with it under s. 565. If the lower appellate Court has omitted to frame or try any issue or to determine any essential question of fact, the proper course for the High Court is to remit the issues for trial to that Court. GIRDHARI LAL v. W. CRAWFORD, **9 A. 147 = A. W. N. 1886, 325.** (7 A. 765, 8 A. 172, *Overruled.*)

(2)—*Improper admission of evidence by lower Court—Remand.*—Though the High Court cannot, on second appeal, generally look at the evidence itself to decide the sufficiency of evidence in the case, other than that improperly admitted, to support the lower Court's finding, yet, in cases where it is clear from the judgment that the Court below has arrived at its findings independently of the improperly admitted evidence, there need be no remand. WOMES CHANDER CHATTERJEE v. CHUNDER CHURN ROY CHOWDHRY, **7 C. 293.** (24 W. R. 392, *Diss.*) [*R.*, 23 C. 179, 31 C. 380, 35 C. 701 = 12 C. W. N. 657 = 6 C. L. J. 563.]

(3)—*Extension of time for presenting appeal.*—The High Court has the power to extend the time for presenting a special (appeal. BABOO KASHINAUTH ROY v. MYNOODDEEN CHOWDRY, **W.R.F.B. 146.**

(4)—*Presentation—Vacation*—No indulgence can be shown to a special appellant whose time for appealing had expired, by reason of his not exercising any diligence in preparing his petition. The vacations are not periods to be added to the prescribed periods for appealing. KISHTOPROSHAUD CHUCKERBUTTY v. RADA KANTO BHUTTACHARJEE, **W. R. 1864, Mis. 13.**

(5)—*Special or second appeal—Procedure in special appeal—Right of respondent to urge objections under s.* 348, *Civ. Pro. Code,* 1859.—In a special appeal, as well as in a regular appeal, it is competent for the respondent to show that points decided against him ought to have been decided in his favour. In an appeal in a suit for enhancement of rent, where the tenant is appellant and seeks to reduce the amount, the respondents may show, on other points of law, that it ought to have been enhanced beyond that which the decree gave him. HILLS v. ISHORE GHOSE, **Marsh, 161 = W.R.F.B. 48 = 1 Ind. Jur. O. S. 25 = 1 Hay 350.**

Special or Second Appeal—continued.

——6.—**Practice and Procedure in Special Appeal**—*continued.*

(6)—*Appeal—Right of respondent to take objection which he might have taken in separate special appeal.*—The respondent in a special appeal could not take any objection to the decision of the lower Court which he might have taken if he had preferred a separate special appeal. MAKUDU RAVULLAN v. MASTAN SAHIB, **1 M.H.C. 102.** (1 Ind. Jur. 25, *Not F.*)

(7)—*Issues in the lower Court, party abiding by, not competent to go behind issues on special appeal.*—On special appeal, the High Court, cannot allow a party to go behind the issues, by which he was content to abide in the Court below and which were actually tried there properly. If either of the lower Courts had refused to entertain any material issue, it would have afforded him good ground of complaint, but, in the absence of any such allegation, it is not competent to him to raise objection, on such grounds, during special appeal. SHAIKH AHMED MUNDUL v. SHAIKH SONAOOLLAH, **8 W. R. 5.**

(8)—*Second appeal—Pleadings—Meaning of plea that the judgment of the lower appellate Court is perverse.*—It is not competent to an appellant in second appeal under a ground that the judgment of the lower appellate Court is perverse to raise any question of law. JWALA PRASAD v. BINDA CHARAN, **A.W.N. 1892, 8.**

(9)—*Obscurity in judgment, how removed—Appeal.*—Where the decision of a Court is obscure on any point, it is the business of the Court which passed the decision to make it clear on an application made to it for that purpose. It is not the duty of the appellate Court to make that clear which is obscure in the judgment of a lower Court. SHUMBOONATH SINGH v. MOOKTA RAM KOTAL, **11 W.R. 381.**

(10)—*Civ. Pro. Code, s.* 561—*Second appeal—Objections—Withdrawal of appeal, effect of, on hearing of objections.*—Where an appellant filed his appeal on the eighty-ninth day of limitation and the respondent, after the period of limitation for an appeal had expired filed objections under s. 561 of the Civ. Pro. Code and where at the hearing the appellant adandoned the appeal. *Held* that the objections also could not be entertained. THAKUR RAI v. GULZAR RAM, **A.W. N. 1893, 68.**

(11)—*Second appeal—Perverse judgment of lower appellate Court—Civ. Pro. Code,* 1872, *s.* 594.—Where the lower appellate Court had drawn such unreasonable and strained conclusions from the facts, all of which conclusively pointed in a direction opposite to its decision, *held* that its decision could not be allowed to stand. RAJRANI KUARI v. MANNI SAHU, **A. W.N. 1882, 66.**

(12)—*Misplacement of the burden of proof.*—Where misplacement of the onus has been acquiesced in by the parties in the Court of first instance or in the lower appellate Court, the

Special or Second Appeal—continued.

——6.—Practice and Procedure in Special Appeal—*continued.*

High Court would be very reluctant to interfere with the result unless there are reasons to suppose that the error may have produced error in the decision of the case on the merits. GANGADAS v. DAMA, 5 Bom. L.R. 177.

(13)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.*372 —*Special appeal—Remand of suit for finding on issue framed — Objection by special appellant going to merits of case.*—Where the lower Court returned a finding on an issue framed by the High Court in a special appeal, the special appellant could not take an objection to the finding and the evidence so returned going to the merits of the case which otherwise was not open to him. No rights were given by s. 25 of Act XXIII of 1861 which were inconsistent with s. 372 of Act VIII of 1859. NILAYATATCHI v. VENKATACHALAM MUDALI, **1 M.H.C. 250.**

(14)—*Special appeal—New ground.* — In special appeal, a new ground may be taken, if it manifestly arises out of the facts alleged and admitted, whether pressed or not before the lower appellate Court. KALI MOHUN CHATTERJEE v. KALI KRISHNA ROY CHOWDHRY, **2 B.L.R. App. 39=11 W.R. 183.** [*R.*, 2 M. 346.]

(15)—*New point taken for first time in second appeal — Question of law.*—The High Court will allow a new point to be taken for the first time in second appeal, when it is purely a question of law which arises on the findings of the Courts below, and could not be affected by any facts outside those findings. NAGESH v. GURU RAO, **17 B. 303.** [*R.*, 18 B. 679, 27 B. 452, 1 N.L.R. 1.]

(16)—*Point not taken in lower Courts, whether could be taken for first time in second appeal—Practice.*—A point not taken in both the lower Courts, and not made one of the grounds of second appeal, cannot be taken for the first time in second appeal, where it sets up a new right differing in kind (and not merely in degree) from that asserted throughout the trial. RACHAWA v. SHIVAYOGAPA, **18 B. 679.** [*R.*, 1 N.L.R. 1.]

(17)—*Second appeal—New point.*—An appellant should not, upon second appeal, be allowed to raise an entirely new point, if it is one for the right determination of which it is necessary to go into evidence which has not been produced in the lower Courts, or unless it is a pure point of law going to the question of the jurisdiction of the lower Courts, and capable of being determined without the consideration of any evidence other than that on the record; and even if it falls within such exceptions, it is a pure matter of discretion with the Court to consider it or not. FAKIR CHAND AUDHIPARI v. ANUNDA CHUNDER BHATTACHARJI, **14 C. 666.** [*R.*, 1 N.L.R. 1.]

Special or Second Appeal—continued.

——6.—Practice and Procedure in Special Appeal—*continued.*

(18)—*Second appeal—New defence.*—A defence which was not raised either in the Court of first instance or in the lower appellate Court could not be raised for the first time in second appeal. RAGHUNANDAN RAI v. SUT RAMRAJ, **A.W.N. 1881, 72.**

(19)—*Legal plea, raised for first time in second appeal—Duty of Court.*—A legal plea cannot be allowed to be raised for the first time in second appeal, when it would be necessary for the Court to ascertain many points of facts, before it could properly adjudicate upon such plea. The uniform practice of the Court is to allow legal pleas in second appeals for the first time only when they require no new points of facts for determination, and those pleas can be disposed of on the materials on the record. MAHABIR TIWARI v. JHANGUR, **A.W.N. 1887, 213.** [*R.*, 13 A. 381.]

(20)—*Practice — Second appeal — Defendant respondent not allowed to set up in second appeal a case which he had not set up in either of the lower Courts.*—A respondent to a second appeal, defendant in the suit, should not be allowed to set up in second appeal a case involving findings of fact, which case he has never set up in either of the lower Courts. KESHO TEWARI v. RADHE KISHAN, **A.W.N. 1898, 107.**

(21)—*Plea taken for the first time in, entertainment of.*—Plaintiffs sued on a mortgage, of which they alleged themselves to be assignees. The mortgage was found, by the Court of first instance, to be a genuine transaction. On appeal, it was found to be a sham. In second appeal, it was contended for the plaintiffs that, even if the mortgage was a sham, as between the mortgagor and the mortgagee, they (the plaintiffs) took it as *bona fide* assignees without notice. *Held*, the plea being one not put forward before the lower Courts, could not be entertained, for the first time, in second appeal. ANNAMALAI CHETTIAR v. PITCHU AIYAR, **15 M.L.J. 28=28 M. 122.** [*R.*, 30 M. 470=17 M.L.J. 119=2 M.L.T. 104, F.B.]

(22)—*Objection as to jurisdiction involving questions of fact, not admissible in special appeal.*—The question in this special appeal related to jurisdiction. The defendant-appellant contended that the Court in which the suit was brought had no jurisdiction as he was living in Calcutta. The lower appellate Court had found that, though he may, to some extent, have been living in Calcutta, he had also a dwelling-house within the jurisdiction of the Court in which he was sued. It was sought to be urged during second appeal that the defendant had made a transfer to other parties, of his rights and interests in the house. But the High Court *held* that as such objection had not been taken even before the lower appellate Court, it was not competent to the defendant to raise it in special appeal. RAMANUND ROY CHOWDHRY v. URNOKALEE DEBEA, **2 W.R. 267.**

Special or Second Appeal—continued.

——6.—**Practice and Procedure in Special Appeal**—*continued.*

(23)—*Point not taken in Courts below, taken for first time in second appeal—Costs.*—Where the Subordinate Judge awarded a fourth share to the plaintiff (adopted son), and the defendant (natural son) in his appeal to the District Court did not raise any question about the correctness of that award, but contended in second appeal that, under any circumstances, the plaintiff was entitled only to a fifth share, held that, under the circumstances and having regard to the nature of the question, the point might be allowed in the second appeal but that the appellant could not be allowed the costs of the appeal. GIRIAPA v. NINGAPA, **17 B. 100.** [*R.*, 17 B. 303, 27 B. 452.]

(24)—*Plea not raised in original Court or grounds of appeal—Plea raised in special appeal.*—Where an issue was not raised before the original Court, nor was it taken in the grounds of appeal from its judgment, *held*, that it was too late to set up the plea for the first time in the special appeal to the High Court, especially when the evidence was not directed to it. AMEEROONNISSA KHATOON v. ABADOONNISSA KHATOON, **15 B.L.R. 67, P.C.= 23 W.R. 208=2 I.A. 87=3 Sar. 423.**

(25)—*Practice—Second appeal—Plea that appeal in lower Court was barred by limitation—Plea cannot be raised at the hearing when not taken in memo of appeal.*—A plea that an appeal to the lower appellate Court was time-barred because the insufficient Court-fee in the memo of appeal therein was not made good till after the expiry of the period of limitation, cannot be urged at the hearing of the second appeal when it has not been taken in the memo of second appeal. RAM KISHEN UPADHIA v. DIPAUPADHIA, **13 A. 580=A.W.N. 1891, 166.** [*R.*, 15 A. 123, F.B.=13 A.W.N. 47, 34 C. 941 =11 C.W.N. 959, 6 C.L.J. 237.]

(26)—*Practice—Plea of limitation not raised in the written statement—New pleas involving decisions of new facts—Whether can be raised in second appeal—Act* XV *of* 1877 (*Limitation*), *sch.* II, *arts.* 119, 144 *and* 127.—Where the defendant only contended in his written statement that art. 119 was applicable, but on second appeal relied on arts. 127 and 144. *Held*, that as the new pleas of limitation under arts. 127 and 144 involve the decision of new questions of fact the defendant-appellant cannot be allowed to raise them in second appeal. Art. 119 of the Limitation Act has no application to a suit for possession. (25 C. 354, 30 M. 308, *R.*) *Obiter.*—Art. 91 of the Limitation Act does not apply where the prayer for the cancellation of a document is not an essential part of the plaintiff's relief. APPAVU MANIGARAN v. MUTHUSWAMY PILLAI, **5 M.L.T. 262.** (14 M. 26, *R.*)

(27)—*Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 374—*Special appeal—Point of law.*—A point of law, neither raised in the Court of first instance, nor alluded to in the lower appellate Court could not, under s. 374 of Act VIII of 1859, be argued for the first time in special appeal before the High Court. LALLA JOWAHIR LALL PANDEY v. THE COURT OF WARDS ON BEHALF OF SHIVA SUNKUR PERSHAD SAHOO, **17 W.R. 214.**

(28)—*Pleadings—Special appeal—Point of law first raised.*—A point of law may be raised for the first time in special appeal, even though it was not taken before the High Court on a former occasion when it passed an order of remand. DARIMBA DEBIA v. NIL MONEE SINGH DEO, **15 W.R. 180.**

(29)—*Objection taken for first time in second appeal—Practice.*—An objection based upon a point of law may be made in second appeal, and the Court must take notice of it, if it does not involve the taking of any additional evidence on matters of disputed facts. GAVDAPPA v. GIRIMALLAPPA, **19 B. 331.** [*R.*, 25 B. 202, 1 N.L.R. 1, 1 S.L.R. 142.]

(30)—*Hindu Law—Joint family—Mitakshara law—Alienation by joint consent or by* kura—*Special appeal—Parties not to set up new case.*—In a Hindu family governed by the Mitakshara law, the family property can only be alienated by the joint consent of all the members, express or implied, or in the event of such a case of family necessity occurring, as will, in the eye of the law, save to invest the *karta* with authority to alien as the agent of all, then by the *karta* alone. It is not competent to a party to a special appeal before the High Court to raise an argument entirely different from that raised in the Courts below and to set up a state of facts entirely inconsistent with his statements in the lower Courts. BUNSEE LALL v. SHAIKH AOLADH AHSAN, **22 W.R. 552.**

(31)—*Special appeal—New issue.*—The plaintiff's case in the lower Court having been that his father had been extravagant, and the issue there having been whether the debts for which plaintiff's ancestral property was to be sold had been incurred for purposes sanctioned by the Hindu law, *held* that he could not in special appeal be permitted to change the allegation on which he went to trial and raise a new point, *viz.*, that his father having, under the Mitakshara law, been only a sharer with his sons, the rights and interests sold could not comprise the whole property. SHIU DAS NARAYAN SINGH v. BHAGWAN DUTT, **2 B.L.R. App. 15=11 W.R.O.C. 10.**

(32)—Res judicata—*If plea can first be taken in special appeal—Practice—Second appeal.*—A plea of *res judicata* may be taken orally in second appeal though it is not entered on the memorandum of appeal, inasmuch as such a plea involves a question of jurisdiction which a Court is bound to entertain whenever such question comes to its notice. BRIJBASI RAI v. SHIVATAHLU RAI, **A. W. N. 1891, 10.**

***Special or Second Appeal*—continued.**

——6.—Practice and Procedure in Special Appeal—*continued*.

(33)—*Pleadings—Second appeal—Point raised for the first time—When not to be allowed—Civ. Pro. Code (Act V of 1908), s. 100—Res judicata between co-defendants—Previous rent suit—Subsequent title suit.*—Where a point was not raised in the written statement, nor was any issue framed upon it, and no evidence was adduced by either of the parties with regard to it, and the Courts below had not expressed any opinion on the point : *Held*, that that point cannot be allowed to be raised for the first time in second appeal. Where, in a previous rent suit, the real question for determination was whether the landlords were entitled to recover rent from all the defendants or from some of the defendants only, and the Court held that the landlords had failed to prove that they were entitled to recover rent from some of the defendants : *Held*, that this finding cannot preclude these defendants from establishing their title to the property as against the other defendants in the previous suit, if they have any title. JINNAT ALI v. NISSA BIBI, **7 Ind. Cas. 123** (31 C. 958, 8 C.W.N. 30, 1 Ind. Cas. 913, 36 C. 193, 5 C.W.N. 724, *Rel. on*).

(34)—*Plea of title under* miras *pottah—New plea in special appeal.*—In a suit for possession of certain lands by right of purchase, the defendant pleaded that he had long held the lands under a *miras* pottah which both the Courts below found to be false. *Held* that the defendant should not be allowed in special appeal to take his stand on an altogether new case based upon a separate title under s. 6 of Act X of 1859, that is to say a right of occupancy accorded to a ryot in possession for 12 years. SOORJO KOOMAR v. GUNGADHUR ROY, **12 W.R. 80.** (8 W.R. 374, 10 W.R. 361, *D.*; 11 M.I.A. 7, *F.*) [*D.*, 19 W.R. 219.]

(35)—*Civ. Pro. Code, Act X of 1877, s. 232—Assignment not in writing—Objection for the first time taken in special appeal.*—Though s. 232 of the Civ. Pro. Code contemplates the existence of an assignment in writing as a condition precedent to the assignee's application to execute the decree being granted, there is nothing in that section which required the assignment to be filed with the proceedings; and when such objection is taken for the first time in special appeal, it must be presumed that the Court executing the decree did all things which the law prescribed to be necessary, and *non constat* that an assignment in writing exists, though it does not appear to have been filed. TOTA SINGH v. KAHN SINGH, **87 P.R. 1880.**

(36)—*Mortgage — Redemption — Plea, not taken in lower Courts, taken in the appellate Court—Validity.*—Where a plaintiff sues for redemption on the ground of holding in right of dower, she cannot be allowed, in special appeal, to base her right to redeem on the ground of being heir to mortgagor. MUSSAMUT BEBEE RAHOMAN v. MUSSAMUT FUZULOONISSA, **W.R. 1864, 326.**

***Special or Second Appeal*—continued.**

——6.—Practice and Procedure in Special Appeal—*continued*.

(37)—*Practice—Confession of judgment by one of several defendants — Dismissal of suit—Second appeal—Objection for the first time.*—One of the defendants in a suit for possession and mesne profits confessed judgment. The suit was nevertheless dismissed in the Court of first instance and on appeal. The plaintiff appealed to the High Court, and there he objected for the first time to the decrees of the lower Courts on the ground that one of the defendants had confessed judgment. *Held* that he could not take that objection in second appeal. DWARKA v. RAMDHANI, **A.W.N. 1883, 158.**

(38)—*Easement—New point in second appeal.*—It is not open to the defendant to raise a new point that the way claimed was not a defined track, without having raised it in the lower Courts or in the memorandum of second appeal. SHAIKH KHODA BUKSH v. SHAIKH TAJUDDIN, **8 C.W.N. 359.**

(39)—*Pleadings—Setting up new case in second appeal—Suit for partition—Prayer in the nature of an easement, whether can be granted—Practice.*—Where the plaintiff has sued only for partition between himself and the defendants, he cannot, in second appeal, be permitted to set up a new case in the nature of an easement, and ask for an injunction restraining defendants from interfering with his user of the property as a cattle pen. SANKARALINGA MAISTRY v. POONAMALI MAISTRY, **6 Ind. Cas. 423 = 8 M.L.T. 87.** (34 C. 51, 4 C.L.J. 437, 11 C.W.N. 20, 1 M.L.T. 364, *D.*)

(40)—*Ground of appeal taken in lower appellate Court not argued there—Whether bars its being taken in second appeal—Notice, sufficiency of.*—Where the notice on which a party relies is only a four days' notice it was held that it was clearly insufficient in law. The fact that a ground of appeal taken in the lower appellate Court was not argued therein does not prevent its being taken in second appeal. RAMACHANDRA v. LAXMIPATHAYA, **3 M.L.T. 293.** (18 M. 83, *R.*)

(41)—*Second appeal—Objection of want of proper notice to quit raised for first tme in appeal—Practice.*—In a suit for ejectment, the objection by the tenant of want of a proper notice to quit may be raised for the first time even in second appeal. (2 M. 346, 12 M. 353, P. J. for 1880, p. 122, *R.*) In the present case, the objection was not taken in the written statement, nor apparently even in the memorandum of appeal. It was, nevertheless, in fact, dealt with by the appellate Court. *Held* that the High Court in second appeal would allow the defendant to take the objection of want of notice. VITHU v. DHONDI, **15 B. 407.** [*R.*, 18 B. 110.]

(42)—*Compromise—Revival of suit—Jurisdiction—Special appeal.*—Where the Court below might have dealt with the suit as if it had

***Special or Second Appeal*—continued.**

——6.—Practice and Procedure in Special Appeal—*continued.*

been a revival of the previous suit which ended in compromise, but has not done so, the High Court cannot do so in special appeal. TRILOCHUN CHATTERJEE v. RASH MOHUN CHATTERJEE, **20 W.R. 432.**

(43)—*Failure to suit—Relief first asked in special appeal.*—When a plaintiff fails to make out a claim for enhanced rent, he is not] entitled in special appeal to a decree for rent at the original rate. KASHEE PERSHAD SEN NEOGEE v. JAMIR PAIKAR, **2 C L.R. 265.**

(44)—*Sale by widow of her absolute property—Special appeal.*—Where the plaintiff claimed as a reversioner to set aside a sale made by a Hindu widow, and it was found that the property belonged to the widow absolutely, the plaintiff not having in the lower Courts put forward any claim as heir of the widow cannot be allowed to urge such claim in special appeal. KRIPA NATH MOJOOMDAR v. SARODA CHOWDHRAIN, **1 W.R. 282.**

(45)—*Suit for declaration that certain property is self-acquired—Variation of title in special appeal—Variation of relief.*—Where a plaintiff sues to set aside a summary order declaring his brother to bave rights and interests in certain property, and to have it declared that that property is his own self-acquired property and fails to prove his allegation, he cannot, in special appeal, ask the Court to declare that he is entitled to a moiety of the property as a member of a joint Hindu family. As he had chosen to sue on a particular title and had failed to establish it, he cannot ask the Court to give him a decree on a title which he, looking to the character in which he brought his suit, had repudiated. A Court can give to a party proving his title any relief that it may think necessary, though it may not be what the plaintiff seeks; but a Court cannot allow a plaintiff to vary his title. HEMANGINEE DOSSEE v. PITAMBER DEY, **5 W.R. 197.**

(46)—*Alleged admission by party—Statement by Judge—Enquiry as to whether Judge was right in making statement—Special appeal—Review—Procedure.*—Where a Judge states as a fact that an admission was made before him by a party to the suit, the High Court in special appeal has no power to enquire whether he was right or not in making that statement. If the Judge erred in supposing the alleged admission to have been made, the proper course for the party was at once to bring the error to the notice of the Judge, and to apply for a review of his judgment. BYKUNTNATH GOOPTO v. PROSUNNO MOYEE DABIA, **5 W.R. 196.**

(47)—*Special appeal—New title.*—The defendants who in the Court below unsuccessfully claimed to retain possession of some land under a Kabala from a Muhammadan widow, who was alleged by them to have been absolutely entitled thereto under her right of dower, could not, in special appeal, set up for the first

***Special or Second Appeal*—continued.**

——6.—Practice and Procedure in Special Appeal—*continued.*

time that the widow was entitled to a share by inheritance, if not as *denmohur*, no case of that kind having been made in the Courts below, and no enquiry asked for into the state of the family or as to whether any and what share came to the widow. AMBIKA CHARAN DUTT v. NADIR HOSSEIN, **2 B.L.R.A.C. 258=11 W. R. 133.**

(48)—*Review—Civ. Pro. Code, ss.* 353, 375—*Special appeal, rules in trial of—Finding of lower appellate Court, based on insufficient evidence—Procedure.*—A case which is tried on special appeal is subject to all rules provided for regular appeals so far as the same may be applicable. Where the High Court comes to the conclusion that the evidence on the record is not legally or reasonably sufficient to support the findings of the lower appellate Court, it can deal with the case without any remand, and without calling up the case and re-hearing it. JOY RAM ROY v. OMRAO ROY, **12 W.R. 431.**

(49)—*Adverse finding of fact by first Court—Omission to file memorandum of objections—Civ. Pro. Code, s.* 348.—Where the first Court found against the defendant on a matter of fact, but decreed in his favour on a point of law, and on the plaintiff's appeal, the defendant omitted to file a memorandum of objections to the adverse finding of fact of the first Court, and the appellate Court did not go into the question of fact in confirming the decree of the first Court on the point of law, *held* that, under the circumstances, the High Court could give judgment, in special appeal, in plaintiff's favour, without a remand. WAIGANKAR v. WADEKAR, **5 B H.C.A.C. 194.**

(50)—*Marine Insurance—Perils of sea—Constructive total loss—Remand—Special appeal—Interference of fact from evidence.*—Plaintiff sued to recover Rs. 897 with interest, as for a total loss, upon a policy of insurance on goods shipped on board a vessel for the voyage from Surat to Karachi. The vessel, after leaving Surat, met with bad weather, and, having sprung a leak, was forced to put into Dwarka harbour. Of the goods shipped, the iron was thrown overboard during the voyage, and jagari and oil were placed in a godown at Dwarka, and subsequently plundered and carried away by robbers. The cotton seeds alone remained and they were sold after being dried and cleaned. The District Judge found for the plaintiff. *Held*, (*a*) that there was no actual total loss of goods insured, as a large portion of them was landed at Dwarka, and supposing the robbery to be a loss occasioned by perils of the sea, still the cotton seeds which formed the more valuable portion of the cargo remained; (*b*) that the robbery was a loss not strictly by perils of the sea, but by one of the perils insured against; (*c*) that the District Judge should have considered whether there was a constructive total loss of the goods insured to entitle the plaintiff to abandon.

Special or Second Appeal—continued.

——6.—Practice and Procedure in Special Appeal—*continued.*

The High Court accordingly remanded the case to the District Judge for determining whether the whole or any part of the cargo was practically capable of being sent in a marketable state of the port of destination. The District Judge was further directed to find whether there was any constructive total loss in which case plaintiff would be entitled to recover the amount claimed with interest, and if not, to award such a proportion of the value of the iron and jagari and oil which were actully lost, and of the amount of the deterioration suffered by the cotton seeds and other articles, as the sum insured by the defendant bore to the whole sum insured. In estimating the value of the goods lost and the amount of the deterioration which the under-writers were to be charged with, the District Judge was directed to consider what proportion the sum insured bore to the actual value of the goods, and if it was less than the actual value, to allow for the loss and deterioration in the same proportion. [*R.*, 12 B.H.C. 23.] The High Court is not at liberty, in a special appeal, to draw any inference of fact from the evidence in the case. DWRAKADAS LALUBHAI v. ADAM ALI SULTAN ALI, **3 B.H.C.A.C. 1.** [*R.*, 12 B. H.C. 23.]

(51)—*Remand to lower appellate Court—Fresh evidence taken by lower appellate Court under s.* 356, *Act* VIII *of* 1859, *Special appeal not to be treated as regular appeal.*—On this special appeal, it was urged that, as the lower appellate Court had, instead of remitting the case to the first Court, itself taken fresh evidence, the High Court must treat the case as a regular appeal and should come to a finding on that evidence; in other words, every suitor being entitled to two findings on matters of fact, where the first appellate Court chooses to itself take further evidence, the case takes then a form of an original suit and must be heard by the High Court not as a special appeal, but, as a regular appeal. The High Court *held* that the Legislature when enacting Act VIII of 1859, never intended to convert special appeals into regular appeals when it allowed the Judge sitting as a Court of appeal to record further evidence under s. 536, or to pronounce a judgment on the evidence recorded which had not been considered by the first Court as described in s. 353. LALLA HEERA LAL v. GOUREE BYJNATH PERSHAD, **4 W.R. 43.**

(52)—*Discovery of fresh evidence—Review petition.*—Where a party on coming tothe High Court on second appeal discovers that there is evidence which ought to have been placed before the lower Courts, the practice is to allow the second appeal to be withdrawn in order that a review petition may be presented to the lower appellate Court. RAMCHANDRA v. KRISHNAJI, **5 Bom. L.R. 615=28 B. 4.** [*R.*, **31 M. 415.**]

Special or Second Appeal—continued.

——6.—Practice and Procedure in Special Appeal—*continued.*

(53)—*Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 355—*Additional evidence taken in lower appellate Court— Special appeal to High Court—Procedure by High Court.*—The fact of a lower appellate Court taking additional evidence under s. 355, Act VIII of 1859, does not make a special appeal oefore the High Court liable to be heard and decided as if it were a regular appeal. MAHMOOD KAMIL v. ABDOOL LUTEEF, **23 W.R. 51.** [*Appr.*, 7 A. 765, F. B.]

(54)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 355—*Appeal—Admission of fresh evidence by appellate Court — Special appeal—Power of High Court to examine said evidence.*—Where the first appellate Court examined a witness not examined by the lower Court, the High Court in special appeal was entitled to consider the evidence of the said witness. ABDOOL LUTEEF v. MAHOMED KAMIL, **22 W.R. 369.**

(55)—*Act* VIII (*B.C.*) *of* 1869, *s.* 4—*Uniform payment of rent—Evidence bearing on every year—Exclusion of period of ejectment by* vis major—*High Court—Special appeal—Evidence—Difference in appreciation of evidence by lower Court—Decision on question of evidence by High Court.*—To support a finding of uniformity of payment of rent for any given number of years, it is not necessary that there should be evidence bearing directly on every year of that number; it is sufficient if the whole space of the time is included between limits upon which the evidence bears, provided that that evidence is such as to lead to the belief that the rent was uniform throughout the intervening period. A break in the intervening period by eviction of the tenant by a third person though it would put an end to the ryot's possession, would not destroy his holding. So that, if he is subsequently restored to possession, he is restored to his original holding. Where the Court of first instance and the first appellate Court differed in the consideration of the evidence adduced in a case and came to different conclusions the High Court went into the question of evidence fully. RASHBEHARY GHOSE v. RAM COOMAR GHOSE, **22 W.R. 487.**

(56)—*Second appeal—Sufficiency of evidence to support given conclusion of fact—Question of law.*—It is a question of law for the High Court to determine on second appeal, whether there is evidence before it, on which a Court could properly arrive at any given conclusion of fact. BIDHUMUKHI DABEA CHOWDHRAIN v. KEFYUTULLAH, **12 C. 93.** (12 C. 82, *F.*) [*F.*, L.B.R. 1893-1900, 543.]

(57)—*Appreciation of evidence.*—An appreciation of evidence by the lower appellate Court is binding upon the High Court in second appeal; but, where such appreciation is influenced by an erroneous view of the plaintiff's

Special or Second Appeal—continued.

—— 6.—Practice and Procedure in Special Appeal—*continued.*

cause of action as stated in his plaint, it is open to the High Court in second appeal to interfere. BALA v. SHIVA, **5 Bom. L.R. 85=27 B. 271.**

(58)—*Second appeal—Practice—Party refusing to produce evidence in lower Court—Case not to be remanded.*—Where a party had ample opportunities to produce his evidence, but refused to submit to the ruling of the first Court as to the *onus* of proof and declined to produce evidence, the High Court refused in second appeal to remand the case so as to give the party another opportunity of putting in his evidence. KANHIA LAL v. DEBI DAS, **22 A. 141=A.W.N. 1900, 2.**

(59)—*Letting in evidence in—Evidence not placed before the lower appellate Court.*— A party can validly object to the letting in of fresh evidence, not placed before the lower appellate Court, in second appeal. THE SECRETARY OF STATE FOR INDIA v. MANJESHWAR KRISHNAYA, **31 M. 415**. (28 B. 4, 18 M. 480, *R.*)

(60)—*Plaintiff summoned as witness by defendant—Non-appearance of plaintiff--Dismissal of suit.*—In the absence of any petition by the defendant for attachment or other legal process to be made by the Court to compel plaintiff to appear, it is not obligatory on the Court to dismiss the case merely on account of the non-appearance of the plaintiff summoned by the defendant to attend as witness. BUSHTEE NARAIN ROY v. SHAM SOONDUR NUNDEE, **2 W.R. Act X, Rul. 42**

(61)—*Remand—Order of remand to be followed by lower Court—Mesne profits—Principle of assessments.*—Where a suit was remanded by the High Court for the assessment of mesne profits with reference to the principle laid down in 13 W.R. 37 if a certain state of things be found to have existed, and the Munsif assessed the profits accordingly on findings that such state of things existed, but the Judge on appeal, being of opinion that the ruling in 13 W.R. 37 had been overruled by a later decision in 14 W.R. 294-295, reversed the decision of the Munsif, *held* that the Judge ought to have obeyed and carried out the order of remand. If that order was wrong, the party aggrieved had his remedy by way of review, but he could not ask the High Court on special appeal to go behind the order and hold that it was wrong with reference to the ruling in 14 W.R. pp. 294-295. (13 W.R. 37, *R.*) The ruling in 9 W.R. 446 (F.B.) with reference to the principle assessing mesne profits considered and explained. NURSINGH ROY v. JOHN ANDERSON, **19 W.R. 125** (*After remand from* 16 W.R. 21.) [*F.*, 24 W.R. 271.]

(62)—*Suit to set aside sale by widow—Absence of legal necessity—Remand on special appeal—High Court whether competent to see if evidence on record warrants a contrary finding.*—Plaintiff the son of one R sued for possession of

Special or Second Appeal—continued.

——6.—Practice and Procedure in Special Appeal—*continued.*

certain property by setting aside a deed of sale executed by the widows of R as guardians of the plaintiff during his minority. The decree of the first Court affirmed by the first appellate Court was, that the deed of sale be set aside and plaintiff do recover possession, on the ground that there was no necessity to sell the property. The High Court was of opinion that there was no error in law sufficient to justify the reversal of the decision of the Judge and to hold that the sale was valid as having been made under necessity. Appellants urged that the case might be remanded for further enquiry, but it was *held* that the High Court has power before a case was remanded, to see whether there is any evidence on the record which would warrant a contrary finding, and unless there should be evidence on the record which would have justified the Judge in finding that there was a legal and valid cause for the sale in this case, a remand to the lower Court would be useless. (*Per Peacock, C.J.*)—*Per Bayley, J.* The law does not enable the High Court to try questions of fact on evidence in special appeal, as it could do in regular appeal, because there is this legal distinction between the two forms of appeal, *viz.*, that the former trial shall be limited to questions detailed in s. 372 of Act VIII of 1859 from which a finding of fact is entirely excluded, and the latter, *i.e.*, regular appeal may be on questions of law and questions of fact also. The special appeal law, Act VIII of 1859, s. 372, does not allow of the High Court trying facts on the evidence on the record, the question of the sufficiency of evidence being a matter for regular appeal only. RAM PERSHAD SOOKUL v. RAJUNDER SAHOY, **6 W.R. 262.** [*Cons.*, 24 W.R. 20.]

(63)—*High Court, powers of, in second appeal—Evidence.*—Where in a suit for pre-emption based on contract, the District Judge, on appeal, found that the right existed as a custom and decreed in favour of the plaintiff, on a state of facts not asserted by him, the High Court can, in second appeal, look into the evidence already on the record to see whether the plaintiff's allegations as to the basis of his right are substantiated (*Per Petheram, C.J., Oldfield* and *Tyrrell, JJ.*; *Straight* and *Brodhurst, JJ., contra*). DEOKISHEN v. BANSI, **8 A. 172, F.B. =A.W.N. 1886, 35** (7 A. 765, *R.*) [*Overruled*, 9 A. 147, F.B.]

(64) — *Practice — Duty of High Court in revision.*—In second appeals, it is not the duty of the High Court to enter into the merits of the evidence, *a fortiori*, in cases of revision. All that the High Court, as a Court of revision, is required to do, is to see whether the requirements of the law have been duly and properly obeyed by the Courts whose orders are subjected to revision, and whether the irregularity as to failure of exercise of jurisdiction is such as would justify interference by the High Court. MUHAMMAD HUSAIN v. AJUDHIA PRASAD, **10 A. 467=A.W.N. 1888, 179.**

Special or Second Appeal—continued.

——6.—Practice and Procedure in Special Appeal—*continued.*

(65)—*Special appeal from judgment—Review after disposal of appeal—Act* VIII *of* 1859, s. 376—*Admission of special appeal, what constitutes.*—*Held* that a Judge was right in refusing to entertain an application for a review of his judgment, after a special appeal from that judgment had been admitted, tried, and disposed of. The words "special appeal shall have been admitted" in s. 376 of Act VIII of 1859, refer to cases which have got beyond the inchoate stage of appeals, and in which it had been shown *prima facie* that there were errors in law. RAJ DHAREE LALL v. MAHADEO SINGH, **11 W.R. 511.** (5 W.R. 25, F.B., *Dist.*; 9 W.R. 301; 407, *F.*).

(66)—*Remand order, appeal against—High Court bound by findings of fact of lower appellate Court.*—Whether an appeal is made against an order of remand by the Court of first appeal, or whether the propriety of such order is questioned only in a second appeal from the decree which might ultimately be made by that Court, in either case, the High Court cannot question the findings of fact of the lower Court, unless they are contrary to law, or if partly of law and partly of fact, unless there was no evidence to support them. TIKA RAM v. SHAMA CHARAN, **20 A. 42=17 A.W.N. 195.** [*R.*, 14 P. R. 1904=140 P.L.R. 1904.]

(67)—*Admission of appeal after time—Power of High Court to rectify such error.*—The High Court, in special appeal, can examine the grounds on which an appeal has been admitted by the lower Court after the period allowed by the law of limitation. CHUNDER DOSS v. BOSHOON LALL SOOKUL, **8 C. 251=11 C.L.R. 177.** (2 B.L.R. A.C. 184, Note=10 W.R. 178).

(68)—*Proof of document—Possession—Conduct of suit—Special appeal—Substantial error or defect in law—Evidence of fact.*—In 1841, the plaintiffs herein filed a suit to recover possession of two villages. In answer to that, the defendants herein who were also defendants in that suit produced a document purporting to be a conveyance by way of mortgage in 1792, by the ancestors of the plaintiffs, of their 6/16 share in the villages, to the ancestors of the defendants, to become a sale at the expiration of 10 years in the event of the debt not being paid off. That suit of 1841 was withdrawn by consent with a view to arbitration. The plaintiffs subsequently brought the present action in 1859 for recovery of the same two villages. The defendants tendered the document of 1792 in evidence in the present case. The said document was in the record of the Court from the date of its first production in 1841, till the date of this suit, without plaintiffs taking any steps to bring the question of its genuineness to a decision. *Held* that the time which had elapsed since it was first produced must be taken into account and that the defendants ought not to be required to prove the document

Special or Second Appeal—continued.

——6.—Practice and Procedure in Special Appeal—*continued.*

in the same way that they might have been required to do when it was first produced and relied upon by them. *Held*, further, that the case might have been different if the defendants had, by their conduct in the interval, admitted that the document was not a genuine one, or had shown that they did not intend to rely upon it, so as to mislead the plaintiffs and induce them not to take any further proceedings. An objection of want of evidence of a fact cannot be taken in special appeal when the suit appears to have been conducted as on an admission of that fact. The High Court on special appeal cannot examine into the evidence recorded in the suit with a view of determining a question of fact. DEVAJI GOYAJI v. GODADBHAI GODEBHAI, **2 B.H.C. 27.** [*Appl.*, 23 W.R. 174.]

(69)—*Question of fact—Concurrent finding.*—The Court refused to interfere with the concurrent decision of the Courts below on a question of fact. ATTAR SINGH v. SOWAYA SINGH, **38 P.R. 1866.**

(70)—*Second appeal—Finding of fact.*—A second appeal lies where there was no evidence before the lower appellate Court upon which that Court could properly arrive at the conclusion of fact at which it did arrive. SHIVABASAVA KOM AMINGAVDA v. SANGAPPA BIN AMINGAVDA, **1 A.L.J. 637, P.C.=8 C.W.N. 865=29 B. 1=6 Bom. L.R. 770=8 Sar. 720,** (14 I.A. 101, 17 I.A. 122, *Appl.*).

(71)—*Finding of fact.*—A finding of fact cannot be interfered with in second appeal, however erroneous, if there be some evidence in support of the finding. DWARKA NATH BAKSHI v. MUKUNDU LAL CHOWDHURY, **5 C.L.J. 55.** (18 C. 23, *R.*)

(72)—*High Court, Second Appeal—Question of fact.*—The High Court has generally no jurisdiction to entertain second appeal on the ground of erroneous findings of facts however gross or inexcusable the error would seem to be: but it will interfere in those cases where it is clear that the lower appellate Court has completely failed to appreciate the points which justly weighed with the Court of first instance. AMRITA v. DADA, **4 Bom. L.R. 822.** [*R.*, 5 Bom. L.R. 956].

(73)—*Findings of fact.*—Findings of fact arrived at by the lower Courts are binding upon the High Court in second appeal but when the lower Courts attach erroneous legal inferences to findings of pure facts they are open to correction in second appeal. RAJARAM v. NANCHAND, **3 Bom. L.R. 225.**

(74)—*Findings of fact.*—The High Court cannot accept a finding of fact, arrived at without an application of sound principles to the consideration of evidence, as binding upon it. SHARIFA v. MUNEKHAN, **3 Bom. L.R. 167 =25 B. 574.** [*D.*, A.W.N. 1904, 135, 26 A. 594.]

Special or Second Appeal—continued.

——6.—Practice and Procedure in Special Appeal—*continued.*

(75)—*Second appeal—Question of fact.*—The High Court cannot interfere in second appeal with question of fact. BENI BAHADUR SINGH v. RAM BARAN SINGH, **A.W.N. 1887, 183.**

(76)—*Finding of fact.*—Where the question involved is a pure question of fact, no second iappeal lies except under very special circumstances. *Per Mahmood, J.*—The effect of the Full Bench Ruling in Nivath Singh's case, (7 All. 649; is not that, upon a mere suggestion of the appellant, a second appeal can be converted into a first appeal or that translating the whole of the evidence into the English language would entitle the appellant to have his appeal, on pure questions of fact, admitted and heard. Any amount of translations from one language into another cannot affect the provisions of the law contained in ss. 584 and 585, Civ.Pro. Code. The Court is bound to hear the parties even when they appear in person, and cannot speak the English language. KARAMAT-UL-LAH v. BADAR-UD-DIN, **A.W.N. 1886, 161.**

(77)—*Question of fact.*—The sufficiency or insufficiency of accommodation for residence to a Hindu widow is a question of fact determinable by the exigencies of each case, and the High Court in second appeal will not disturb the conclusions arrived at by the Courts below. KISANDAS v. RUNGUBAI, **9 Bom. L R. 383.**

(78)—*Question of fact—Second appeal—Conclusiveness of finding.*—A person who had contracted to supply bread to the troops at Peshawar authorised the defendants to take payment of moneys due from Government and to pay to the soojeewallas, who had supplied him the flour required for the contract. In a suit by the contractor's wife and son to recover a certain amount as such soojewallas, *held* that the question whether the plaintiffs were included in the class to whom payments were to be made, was purely a question of fact which could not be entertained in second appeal. MUSSAMUT CHANGEE v. MEWA RAM, **13 P.R. 1866.**

(79)—*Finding of facts—Interference on second appeal.*—The High Court will not, on second appeal, generally interfere with the findings of facts by the lower appellate Court, except on some very special ground, as where there is no such satisfactory finding of facts as appears necessary under the peculiar circumstances of the case. GOLUCK NATH v. KIRTI CHUNDER HALDAR, **16 C. 645.**

(80)—*Second appeal—Interference on questions of fact.*—If, in second appeal, it is found that certain material facts, which have an important bearing upon the question at issue, have been omitted to be considered, the High Court will interfere with the decision of the lower appellate Court, even if it be on a question of faet. DENA NATH BANERJEE v. HARI DASI, **11 C. 499.**

Special or Second Appeal—continued.

——6.—Practice and Procedure in Special Appeal—*continued.*

(81)—*Findings of fact—Interference by High Court in second appeal.*—The High Court will interfere with findings of fact, even in second appeal, in extraordinary cases where the lower appellate Court has clearly misapprehended the evidence, before it, discarding important evidence and giving unwarranted weight to other evidence so as to be led into, not any mere incidental mistake, but a total misconception of the case. FUTTEHMA BEGUM v. MOHAMED AUSUR, **9 C. 309.** [*Overruled*, 18 C. 23, P.C.; *R.*, 7 A. 649, F.B.=5 A.W.N. 151, 12 C. 563].

(82)—*Inference from finding of fact.*—In second appeal, although it is not open to the Court to question the correctness of a finding of fact, it is open to it to question the soundness of an inference drawn from a finding of fact. KRISHNA KISHORE NEOGI v. MIR MAHOMED ALI, **3 C.W.N. 255.** (20 C. 93, *R.*)

(83)—*Findings of fact—Inferences from facts found.*—The High Court in second appeal is bound by the finding of facts arrived at by the lower appellate Court; yet it is open to the High Court to consider the propriety of the inference drawn by the lower appellate Court from the facts. GANESH v. VITHAL, **6 Bom. L.R. 312.**

(84)—*Inference of law from findings of fact.*—The High Court can on second appeal interfere with incorrect inferences of law as to the legal consequences regarded as following from facts found by the lower Courts. VENKATESH v. BHAVANISHANKER, **5 Bom. L.R. 174.**

(85)—*Inference of law from findings of fact—Questions of mixed law and fact—Second appeal.*—Though pure findings of fact cannot be interfered with on second appeal, yet, it is competent to, and is the duty of, a Court on second appeal to interfere with incorrect inferences of law as to the legal consequences regarded as following from the facts found by the lower appellate Court. LACHMESWAR SINGH v. MANOWAR HOSSEIN, **19 C. 253=19 I.A. 48, P.C.=6 Sar. 133.** [*F.*, 5 Bom. L.R. 225; *R.*, 21 B. 91, 21 B. 110, 24 C. 825, 25 B. 202, 4 Bom. L.R. 801, 5 Bom. L.R. 174, 5 Bom. L.R. 956.]

(86)—*Practice — Second appeal — Inference of law from facts.*—In second appeal, the High Court will interfere with a finding embodying only an inference of law deduced from facts found byit. BANKU BEHARI SHAHA v. KRISTO GOVINDO JOARDAR, **30 C. 433.**

(87) — *Concurrent findings on matter of evidence—Second appellate Court not to disturb such findings.*—Where there had been a conflict of evidence and the first two Courts decided that the evidence of the plaintiffs predominated the Court of second appeal would not disturb their finding. SETH DHANRAJ v. BAXI BAHADURSING, **4 C.P.L.R. 67.**

Special or Second Appeal—continued.

——6.—Practice and Procedure in Special Appeal—*continued.*

(88)—*Act* VII *of* 1868—*Concurrence of lower Courts as to portion only of plaintiff's claim, not sufficient to bar second appeal.*—The concurrence of both lower Courts as to portion only of the plaintiff's claim is not such a concurrence as would bar a second appeal in regard to the whole claim, but has rather the effect of forcing the party to appeal under Act VII of 1868 for the portion only as to which the lower Courts differed in opinion. The concurrence of the first and second Courts for the purpose of barring a second appeal must be absolute in regard to all substantial rights dependent on fact, or else an appeal will always lie. NIGHAYA v. JULLA, **76 P.R. 1869.**

(89)—*First and second appeals—Findings of fact and conclusions of law.*—Although the findings of fact of a Court in first appeal must, when there is evidence on the record in support of them, be accepted as final by a Court hearing an appeal from an appellate decree, yet the correctness of the conclusion of law from the facts found can be considered in second appeal. WUTZLER v. SHARPE, **15 A. 270= A.W.N. 1893, 151.**

(90)—*Finding of fact, when can be questioned in second appeal.—Per Edge, C.J.*—A finding of fact, where there is absolutely no evidence to support it, can be questioned in second appeal, because it is then a question of law. ANGAN LAL v. MUHAMMAD HUSSAIN, **13 A. 409=A. W.N. 1891, 159.**

(91)—*Findings of fact based on conjecture—Powers of High Court.*—Findings of fact not based on evidence, but upon conjectures made by the lower Courts, are, strictly speaking, legal inferences and the expression of their legal views; and the High Court can, in second appeal, decide whether such inferences and such views are correct under the law. (*Per Mahmood, J.*). SANKAR LAL v. SUKHRANI, **4 A. 462=A.W.N. 1882, 106.**

(92)—*Second regular appeal—Finding of facts—Concurrence of two Courts—Act* VII *of* 1868, *s.* 5.—The plaintiff in the present suit sued for the release of certain property attached in execution as property of his brother. The first Court held the property to be joint and therefore not liable to attachment for the debts of the plaintiff's brother. It accordingly decreed the plaintiff's claim. On appeal to the Deputy Commissioner, it was held that though the property was joint, the plaintiff's brother's share was liable to attachment in execution. The plaintiff thereupon appealed to the Commissioner urging that the property was not joint. *Held* that, notwithstanding the concurrence of two Courts on facts, it was still open to the Commissioner on second regular appeal to alter that finding. DEVI DITTA v. JHUNDU, **29 P.R. 1873.**

(93)—*Special appeal—Finding of fact—User of easement as of right—Finding by lower appellate Court of plaintiff's failure to prove.*—

Special or Second Appeal—continued.

——6.—Practice and Procedure in Special Appeal—*continued.*

The lower appellate Court had found upon the evidence that the plaintiff, appellant in the second appeal, had not proved his user, as of right, of an easement on the defendant-respondent's land, and the High Court *held* that it could not interfere with such finding which was a decision on a question of fact which the law gave the second appellate Court no power to question, and also that it was not warranted in inferring a user in the absence of evidence of enjoyment by the appellant. MOONSHEE ZUMEER ALI v. MUSSUMUT DURGHAHIM, **2 W.R. 212.**

(94)—*Muhammadan Law—Decree against husband—Execution against property standing in the name of the wife—Finding of fact by the lower Court—Appeal.*—In a suit by a decree-holder against a Muhammadan husband in respect of property standing in the name of his wife, *held*, that a distinct finding of fact had been arrived at by the lower appellate Court which could not be interfered with in special appeal. The Court accordingly dismissed the special appeal under cl. 36 of the Letters Patent. RANEE SHURNO MOYEE v. LUCHMEEPUT CHUTTER SINGH, **6 W.R. 118.**

(95)—*Suit for rent—Question of* nugdee *rent and* bhowlee *tenant—Finding of fact.*—In a suit for arrears of rent, a decision on the question whether the defendants were holding on payment of *nugdee* rents or as *bhowlee* tenants, is a finding of fact, which cannot be interfered in special appeal. SHUMBUL SINGH v. BABOO TOONDUN SINGH, **24 W.R. 469.**

(96)—*Findings of fact—Misconstruction of deed.*—The High Court will, in second appeal, interfere with findings of facts of the lower Courts, if they are based upon a misconstruction of, or a misinterpretation of the meaning of passages in, a document which is the very foundation of the claim. HARA SUNDAR MAJUMDAR v. BASUNTA KUMAR ROY, **9 C.W.N. 154.** (19 W.R. 222, *R.*).

(97)—*Assault — Damages, amount of—Question of fact—Practice—High Court, power of.*—In a suit for damages for an assault, the question of the amount of damages is a question of fact, and it is not open to the High Court to interfere in second appeal upon such a question. MUMTAZ HUSAIN v. A. E. LEWIS, **9 Ind. Cas. 984.** (31 A. 338, 6 A.L.J. 381, 1 Ind. Cas. 760, 10 W.R. 164, 3 C.L.J. 140, *R.*)

(98)—*Question of fact—Translation of records.*—In a second appeal where the only ground taken is that "the judgment of the lower appellate Court is based on mere conjecture, and not supported by the evidence on the record," it is the duty of the appellant to get the evidence relied on by him to prove his plea translated and to furnish the Court with the translations of the evidence in order that the

Special or Second Appeal—continued.

——6.—Practice and Procedure in Special Appeal—*continued.*

Court should be in a position to arrive at a conclusion on the matter. AJUDHIA PRASAD v. MOHAN LAL, **A.W.N. 1886, 167.**

(99)—*Findings of fact — Papers not fully translated.*—In a second appeal on a mere question of fact, time was given to the appellant to prepare a paper-book containing all the evidence in the case. When the case came on for hearing, it appeared that, so far from all the evidence on which the decrees of the lower Courts were based being placed before the Court, the Court had not even the evidence of the appellant's witnesses in its integrity. *Held* that it would be most unjust and misleading to try any question on selected samples only of the evidence furnished by one party to a controversy, and that it would be most improper to admit pleas on questions of fact to be addressed to the High Court on any basis less extensive than the entire evidence referred to. HEMRAJ v. PARTAB SINGH, **A.W.N. 1886, 166.**

(100)—*Second appeal, finding of fact when binding in — Finding based on legally insufficient evidence—Failure of plaintiff to prove his case in original Court — Further evidence, whether can be permitted in second appeal.*—A finding of fact, in order to be conclusive and binding on a Court of second appeal, must be a finding based on evidence legally sufficient to support it, and where there is no sufficient evidence to justify such a finding, the finding cannot operate as a finding of fact. Where a plaintiff had failed in the Court of first instance to produce all the evidence to support his case: *Held*, that it would be improper to permit him in second appeal to call further evidence. GAURI SHANKAR v. MADHO CHARAN, **16 Ind. Cas. 887.**

(101)—*Lower appellate Court confirming decision of first Court—Reasons for decision not set out—Special appeal.*—The absence of any reasons by the lower appellate Court for confirming the decision of the Court of first instance, or the insufficiency of additional reasons, where such are given, is no ground in special appeal either for reversing the judgment or for ordering a new trial. SHAMEE MAHOMED v. PRODHAN PALEE, **5 W.R. 178.**

(102)—*Special appeal—Second appeal—Procedure in second appeal—Powers of appellate Court—Question of fact—Ss.* 584, 585, *Civ. Pro. Code*, 1882.—The limitations to the power of the appellate Court, by ss. 584 and 585, in a second appeal, ought to be attended to, and the appellant ought not to be allowed to question, the finding of the first appellate Court, on a question off act. PERTAP CHUNDER GHOSE v. MAHENDRA NATH PURKAIT, **17 C. 291 = 16 I.A. 233, P.C. = 5 Sar. 444.** [*R.*, 17 C. 726, F.B.; 18 C. 23 = 17 I.A. 122; 26 C. 53; 2 C.W.N. 649; 25 B. 202; 4 C.L.J. 198; 26 B. 617.]

Special or Second Appeal—continued.

——6.—Practice and Procedure in Special Appeal—*continued.*

(103)—*Lower Courts giving decree without jurisdiction—Special appeal—Costs.*—Where in a special appeal before the High Court, it was found that the Courts below had passed judgment in a case without jurisdiction and that the Court of Small Causes had to try the case, the High Court directed the plaint to be sent to the Small Cause Court upon the plaintiff paying within 3 months all the costs of the litigation. DHUN MONEE CHOWDHRAIN v. WOOMA CHURN ROY, **23 W.R. 445.**

(104)—*Change of pleading not allowed.*—Where the plaintiff sued for possession by avoidance of a deed of gift and failed, he cannot, in second appeal, claim as heir of the donee, nor can he claim to set aside a sale by the donee as being unauthorised by the deed of gift. KANHIA v. MAHIN LAL, **10 A. 495 = A.W.N. 1888, 181.**

(105)—*Vendor and purchaser—Jurisdiction—Previous application to Collector—Suit premature.*—An objection having been raised, in second appeal, that the Court had no jurisdiction to entertain the suit, as the plaintiffs had not asked the Collector to place them on the register, *held* that this circumstance was not necessary to give jurisdiction, although it might be a reason for treating the suit as premature. The objection, however, being taken for the first time in second appeal, was disallowed. BHIKAJI v. PANDU, **19 B. 43.**

(106)—*Stamp—Document tendered in evidence not duly stamped—Failure to pay stamp duty and penalty in lower Court—Offer to pay same in second appeal, not allowed.*—An instrument which is not duly stamped will not be admitted in evidence, on second appeal, on payment of the stamp and penalty, when there is no evidence that the stamp and penalty were tendered to and refused by the District Court. LAKSHMAN DAS v. RAMBHAU, **20 B. 791.**

(107)—*Second appeal — Application to set aside sale on grounds of fraud and material irregularity made under old Code—Rejection of application — Order, decree under old Code—Subsequent passing of new Code — Whether character of order affected — Consent order (person named as executor) — Consent order against him—Executorship renounced—Whether order binding upon person taking out letters of administration.*—An application to set aside an execution sale on the ground of fraud and material irregularity was dismissed by the first Court on September 21, 1907. The order was upheld on appeal. *Held*, that a second appeal was competent, for the order was a decree under s. 244 of the old Code, and the new Code could not retrospectively affect the character of that order which under the new Code is not a decree under s. 47, but an order under O. XXI, rr. 90 and 92. A creditor of a deceased debtor cannot sue a person named as executor in the will of the deceased, unless he has either administered, that is, intermeddled

Special or Second Appeal—continued.

——6.—Practice and Procedure in Special Appeal—*continued.*

with, the estate or proved the will. Consequently, the seizure and sale of part of the testator's assets under an execution founded upon a judgment in a suit so constituted is ineffectual to bind the testator's estate. (1894 A.C. 437, 63 L.J. P.C. 90, 6 R. 510, 71 L T. 99, 2 Ind. Cas. 818, 14 C.W.N. 256, 4 Bom. L.R. 340, *Rel*) A consent order against two persons, who were named as executors in the will of a deceased person but who had subsequently renounced, is not binding upon the estate of the deceased in the hands of a person in whose favour the letters of administration have been granted. LAL BEHARY MITRA v. NAGENDRA NATH CHATTERJEE, **16 Ind. Cas. 690.**

(108)—*Second appeal—Application to set aside sale on ground of fraud—Civ. Pro. Code*, 1908, *ss.* 104 (2), 154, *O.* XXI, *rr.* 90, 92, *O.* XLIII, *r.* 1 (*j*)—*Accrual of right of appeal Commencement of Code—Fraud—General allegation without particulars, whether sufficient.*—A second appeal does not lie under the Code of 1908 against an appellate order confirming an order of refusal to set aside a sale in execution on the ground of fraud. Where a sale was held on November 14th, 1908, and an application to set it aside was made on December 12th, following, but the order rejecting the application was made on July 5th, 1909, after the commencement of the new Code, *Held* that no second appeal lay. General allegations of fraud unaccompanied by particulars are not sufficient to amount to an averment of fraud of which any Court ought to take notice. RAJ MOHAN PAL v. GOBINDA CHANDRA PAL, **14 Ind. Cas. 53.**

(109)—*Enhancement of rent, suit for—Mokururee lease—Decision against plaintiff—Proof of tender—Special appeal.*—Where a question as to whether there was a mokururee lease or not was raised in a suit for enhancement of rent which was decided against the plaintiff, *held* that he could not, in special appeal, take advantage of the want of regular proof of tender and have his suit dismissed entirely with the result that he (plaintiff) might bring a fresh suit for compelling the defendant to pay the money. DWARKANATH SIRCAR v. GUNGA NARAIN SHALOOYE, **19 W.R. 93.**

(110)—*Decree of ejectment — Inquiry into nature of tenure in special appeal—Interference by High Court.*—The High Court cannot, in special appeal, go behind a decree for ejectment and hold that the tenure was of such a character that no order for ejectment could pass. BEEGO ROY v. BAL MOHUND MISSER, **17 W.R. 421.**

(111)—*Personal property plundered, suit to recover value of, limitation for—Act* XIV *of* 1859, *s.* 1, *cl.* 16—*Measure of damages, objection regarding, whether could be raised in special appeal.*—A suit for damages to recover the value of personal property plundered and other consequent damages, is in no sense a suit for damages on account of injury to personal property within the meaning of cl. 2, s. 2, of Act XIV of 1859. The period of limitation applicable to a suit for damages in respect of such plundered property is six years as mentioned in cl. 16 of s. 1 of Act XIV of 1859, no other limitation having been expressly provided for such suits by the Act. SHEIKH AHMEDOOLLA v. HUR CHURN PANDAH, **2 W.R 235.**

Proceedings before village conciliator—Their nature — Certificate — Computation of limitation—Limitation Act XV of 1877, art. 144—*Onus* of proof—Objection to jurisdiction of Court—Second Appeal—*See* BOM. ACT XVII OF 1879, ss. 46, 47, 48, 13 B. 424.

A plea that a suit was filed in a wrong Court, cannot, for the first time, be raised in second appeal—*See* U.P. ACT II OF 1901, ss. 25 and 31, A.W.N. 1905, 53=2 A.L.J. 156.

See APPELLATE COURT — OBJECTIONS FIRST TAKEN IN APPEAL, 2 B.L.R. A.C. 254 =11 W.R. 134, 9 W.R. 493.

Power to enter into question of jurisdiction of Court deciding appeal—*See* CIV. PRO. CODE, 1908, O. IX, r. 3, ss. 99, 105, 6 Ind. Cas. 464 =7 A.L.J. 675.

See JURISDICTION—QUESTION OF JURISDICTION, 8 B.H.C. A.C. 245, 12 B.H.C. 13.

See LANDLORD AND TENANT — EJECTMENT, 18 B. 110.

See LIMITATION — QUESTION OF LIMITATION, 8 B. 535.

See LIMITATION ACT, 1908, ss. 4, 5, 25 M. 166.

Misconstruction of a portion of documentary evidence—Question of fact—Ground for—*See* LIMITATION ACT, 1908, arts. 89, 90, 120, 1 C. L.J. 232=32 C. 719.

When question of limitation can be raised for the first time in—*See* LIMITATION ACT, 1908, arts. 91, 141, 9 C.W.N. 636=1 C.L.J. 408=33 C. 257.

See MAHOMEDAN LAW—DOWER, A.W.N. 1882, 139.

See MALICIOUS PROSECUTION, 14 W.R. 425.

Point not taken even in the memorandum of second appeal cannot be allowed—*See* PRACTICE AND PROCEDURE, 5 M.L.T. 210.

Belief or disbelief in evidence—Different effects—Second Appeal—*See* PRACTICE AND PROCEDURE, 7 C. 263=8 C.L.R. 449.

Objection raised for the first time in second appeal—*See* PRACTICE AND PROCEDURE, 1 C.W.N. 530.

Impossible findings of lower Courts — High Court's powers of interference — *See* PRACTICE AND PROCEDURE, 2 A.L.J. 27=27 A. 356=A.W.N. 1904, 276.

Special or Second Appeal—continued.

——6.—**Practice and Procedure in Special Appeal**—*concluded.*

See BOM. REG. XVIII OF 1827, s. 10, 10 B. H.C. 441.

See REVIEW—JURISDICTION TO REVIEW, 9 B.H.C. 238.

See REVIEW—REVIEWS AFTER TIME, 6 B.H.C. A C. 146.

See RIGHT OF SUIT—BUILDING, SUIT TO RESTRAIN, 22 W.R. 73.

Objection as to under-valuation of suit—Under-valuation not prejudicially affecting disposal of suit—Second appeal—Admissibility of objection—*See* SUITS VALUATION ACT, 1887, s. 11, 24 M. 43.

Second appeal—Suit to recover money made over by Magistrate acting under s. 517, Crim. Pro. Code—Suit of Small Cause nature—*See* TORT, 9 C.W.N. 495=1 C.L.J. 355.

——7.—**Right of Special Appeal.**

(1)—*General—Second appeals to the High Court—Portion of Civ. Pro. Code covering them.*—Second appeals to the High Court must either come within chap. 42 or under ss. 588 and 591 of the Civ. Pro. Code (of 1877). HIRDHAMUN JHA v. JINGHOOR JHA, **5 C. 711.**

(2)—*Civ. Pro. Code*, 1882, s. 586 (=s. 102, *new Code*)—*What determines whether second appeal lies.*—For the purpose of determining whether a second appeal lies or is prohibited by the section, what must be looked at is not the shape in which the case comes up in appeal to the High Court, but the shape in which the suit was originally instituted in the Court of first instance. KIAM-UD-DIN v. RAJJO, **11 A. 13=A.W.N. 1888, 280.** [*Appl.*, 15 B. 400.]

(3)—*Second appeals — Restricted to matters contained in decrees.*—Appeals from appellate decrees under s. 584 of the Civ. Pro. Code (of 1877) must be restricted to matters contained in the decree alone and do not lie against particular findings in the judgment. [*R.*, 56 P.R. 1904=84 P.L.R. 1904, A.W.N. 1908, 211=4 M.L.T. 172.] *Quære.*—Whether any finding of a Court, not embodied in the decree can be considered as *res judicata* in a subsequent suit? KOYLASH CHUNDER KOOSARI v. RAM LALL NAG, **6 C. 206.** *See also* NIAMUT KHAN v. PHADU BULDIA, **6 C. 319.**

(4)—*Act* XVII *of* 1877, *s.* 39, *whether retrospective.*—The repeal of Act IX of 1873 by Act XVII of 1877 prevented any more second regular appeals being presented thereunder and from the date of its repeal by s. 39 of Act XVII of 1877. No such appeal will, after the passing of the latter Act, be permitted in suits under Rs. 50 in value of the nature cognizable by a Small Cause Court. But there is nothing in Act XVII of 1877 to take away the jurisdiction of the Court over a pending appeal. PANA LAL v. ALA DIA SHAH, **4 P.R. 1878.**

Special or Second Appeal—continued.

——7.—**Right of Special Appeal**—*continued.*

(5)—*Act* XVII *of* 1877, *s.* 38—*Modification of decree — Second regular appeal — Jurisdiction.*—Where plaintiff's claim was decreed in full against all the defendants, and the Judicial Assistant, on appeal by all the defendants, modified the decree by reversing it against some defendants only, *held* that the decree of the Court of original jurisdiction had been modified within the meaning of s. 38 of Act XVII of 1877, and that, therefore, a second regular appeal by the remaining defendants in respect to whom the decree of the First Court was confirmed should have been presented to the Court of the Commissioner, and not the Chief Court. KANHA v. DIAL SINGH, **12 P.R. 1880.**

(6)—*Second appeal allowed—Act* X *of* 1877, *s.* 584—*Construction—Second appeal—Defendant.*—A respondent in an appeal, who does not appear at the hearing of the appeal or present a petition for a rehearing, may, under Act X of 1877, present a second appeal against the decree of the lower Court. MODALATHA, *ex parte*, S. **2 M. 75.** [*Diss.*, 4 A. 387, F.B., 1 L.B.R. 183, *R.*, 8 A. 354, 31 M. 157=3 M. L.T. 336; *D.*, 10 C.P.L.R. 32.]

(7)—*Act* VIII *of* 1859, *s.* 347—*Appeal struck off for default—Appeal against order refusing to revive.*—A special appeal lies against an order of the lower appellate Court refusing to revive, under s. 347, Act VIII of 1859, an appeal struck off for default. SHAIKH GOLAM MAHOMED AKBUR v. KOONJ BEHAREE LAL, **5 W.R. Mis. 27.**

(8)—*Act* LIII *of* 1860, *s.* 2—*Application for revival of suit rejected—Special appeal.*—*Held* by the Full Bench that, if an application for revival of a suit under s. 2, Act LIII of 1860, is rejected, a special appeal will lie against such order. BUNGSHEEDHUR MUNDUL v. PUDDO LOCHUN ROY SIRDAR GHATWAL, **W.R.F.B. 11=Marsh. 38=1 Ind. Jur. O.S. 5 =1 Hay. 90.**

(9)—*Decision indicated to be erroneous by decree and judgment taken together—Special appeal.*—An aggrieved party has a right of special appeal against the decision of a lower appellate Court, if its decree, as explained by its judgment taken together, shows that the decision is erroneous. MAHARANI INDERJEET KOONWAR v. CHOKEW SAHOO, **W.R. F.B. 81.**

(10)—*Enhancement of rent, suit for—Value below Rs.* 100—*Special appeal to High Court—Act* VIII *of* 1869 (*B.C.*), *s.* 102.—*Notice of enhancement—Formalities — Omission of certain words—How affects suit.*—Where, in a suit for enhancement of rent, the question of right to enhance had been determined, *held* that a special appeal will lie to the High Court under s. 102 of Act VIII of 1869 (B.C.). Where the defendant, in a suit for enhancement, knew well and pleaded to the grounds of enhancement, *held* that the mere omission of the words "same class of tenants" in the notice of

Special or Second Appeal—continued.

——7.—Right of Special Appeal—*continued.*

enhancement was not fatal to the suit. *Held* further that the omission of the words "otherwise than by the agency and at the expense of the ryot" was also immaterial, where the plaint distinctly stated that the productive powers of the soil had increased owing to the fact that it had been irrigated by water taken from the plaintiff's *khas* tank. MESSRS. WATSON & CO. v. RAM DHEEN GHOSE, **17 W.R. 495.**

(11)—*Alteration of rent—Special appeal—Act* VIII (*B.C.*) *of* 1869.—Where the point which has been decided by the Judge in appeal is simply this—whether the rent fixed by a previous decision was subsequently altered and new arrangements come to between the parties—that does not come within the purview of s.102, Act VIII (B.C.) of 1869. NURUBDESSUR PERSHAD ROY v. SHAIKH JUNGOLE, **24 W. R. 49.**

(12)—*S.* 586, *Act* XIV *of* 1882, *Civ. Pro. Code—Suit for arrears of chowkidari tax—Second appeal.*—In a suit for arrears of chowkidari tax, there is a second appeal. ASSANULLA KHAN BAHADUR v. TIRTHABASHINI, **22 C. 680.**

(13)—*No second appeal allowed—Act* VIII *of* 1859—*Erroneous remand under* s. 351 *instead of calling for additional evidence under* s. 355, *not by itself ground for special appeal.*—Under s. 351 of the Civ. Pro. Code (Act VIII of 1859), it is not competent to an appellate Court to remand a case where the judgment of the first Court had not been passed on a preliminary point which excluded any necessary evidence of fact. In such a case, the appellate Court should proceed to call for additional evidence under s. 355 directing the first Court to record such evidence but retaining the case on its own file. But if, under such circumstances, the appellate Court remands the case under s. 351, such erroneous procedure constituting only a technical objection by which the appellant cannot have been in any way prejudiced, it could not, by itself, empower him to maintain a second appeal. NOWCOWREE MUNDUL v. MOOKTA BIBEE, **2 W.R. 181.** [*Appr.*, 14 B. 232; *R.*, 6 W.R. 47, 13 W.R. 76, 20 W. R. 188.]

(14)—*Order of confirmation of sale passed by first appellate Court, no second appeal lies from.*—A preliminary objection was taken to the second appeal, in this case, on the ground that the order of the first appellate Court that confirmed the sale was final under s. 257 of Act VIII of 1859. Upholding the objection, the High Court dismissed the second appeal because the appellant, having had his regular appeal, had legally no ground for a second appeal. MUDDUN MOHUN ROY CHOWDHRY v. RAM CHUNDER GOOPTO, **2 W.R. Mis. 41.**

(15)—*Decision of first Court not appealed against—Special appeal.*—Parties, who did not appeal from the decision of the first Court, cannot appeal specially against the decision of the lower appellate Court, on the ground that the decision of the first Court prejudiced their rights. BOYKANT RAM SAHOO v. POORNO CHUNDER DASS, **W.R. 1864, Act X, Rul. 97.**

(16)—*Application by plaintiffs for withdrawal of suit, refusal of, not a ground for special appeal.*—The question whether or not an application by a plaintiff to withdraw his suit should be granted is one entirely within the discretion of the first Court and the refusal of such an application cannot by itself form any ground for special appeal. RAJ KISHEN ROY v. RAJ KISHEN DEO, **6 W.R. Act X, Rul. 24.**

(17)—*Civ. Pro. Code, ss.* 521, 522, 582—*Decree by first Court against terms of award—Decree on first appeal in accordance with award, no second appeal lies from.*—The provisions of ss. 521 and 522 of the Code of Civil Procedure are applicable to the Court of first appeal by reason of s. 582, so that, when a Court of first instance wrongly sets aside an arbitration award and passes a decree against its terms, and the Court of first appeal dealing with the merits of the case comes to the conclusion that the award was not open to any such objections as are contemplated by s. 521 of the Code, and upon that finding, passes a decree strictly in conformity with the terms of such arbitration award, such decree of the Court of first appeal is entitled to the same finality as the decree of the first Court would have been entitled to under the last part of s. 522 of the Code. Such a decree cannot, therefore, be made the subject of a second appeal. NAURANG SINGH v. SADAPAL SINGH, **10 A. 8 = A.W N. 1887, 240.** (12 W.R. 93, 12 C.L.R. 564, *Diss.*) [*Overruled*, 28 A. 408 = A.W.N. 1906, 64 = 3 A.L.J. 168; *Diss.*, 8 C.W. N. 390; *F.*, 89 P.R. 1904 = 26 P.L.R. 1905.]

(18)—*Suit cognizable by Small Cause Court.*—No second appeal lies in a suit cognizable by a Small Cause Court, notwithstanding the fact that a question of title to immoveable property was raised, tried and decided in the lower Court. MOHESH MAHTO v. SHEIK PIRU, **2 C. 470, F.B. = 1 C.L.R. 33.** [*Appr.*, 3 M. 192, F.B., 15 B. 400; *F.*, 24 C. 557; *Compare*, 31 C. 1001.]

(19)—*Act* XXIII *of* 1861, *s.* 27—*Cross decrees—Sale of decree—Special appeal.*—Under s. 27, Act XXIII of 1861, no special appeal will lie in a suit for damages for the sale of a decree for a very inadequate consideration. The purchaser of a decree is no party to the suit within the meaning of s. 11, Act XXIII of 1861. KRISTO MONEE THAKOOR v. BISHAMBHUR DOSS, **5 W.R. 216.**

(20)—*Special appeal—Appeal of co-defendant—No appeal preferred by special appellant against decision of first Court.*—A defendant is not entitled to prefer a special appeal against a decision passed on the appeal of his co-defendant, by which the decision of the Court of first instance not appealed against by the

Special or Second Appeal—continued.

—**7.—Right of Special Appeal**—*continued.*

former was upheld. MODHOO SOODUN ROY v. SHURMO MOYEE DEBEE, **5 W.R 106.** [*R.*, 7 W.R. 366.]

(21)—*Non-appearing defendant with interest identical with plaintiffs, not entitled to appeal from judgment in favour of his co-defendants.*—The present special appellant was one of the defendants in the lower Courts. Plaintiffs who were *putneedars* under him sued to recover land from the proprietors of an adjoining talook and made their landlord, the special appellant, a *pro forma* defendant. Plaintiffs having failed to prove possession, the suit was dismissed; and special appellant, who did not appear in the Court below, now sought, in this special appeal by him, to set aside the judgment adverse to his *putneedars*, but the High Court *held* that he was not in a position to bring a special appeal. He was a defendant in the case, but did not appear, and, though his interests were identical with those of the plaintiffs who had not preferred any appeal, yet he could not be allowed to occupy their position and appeal against the judgment favourable to his co-defendants. JUGUNNATH CHATERJEE v. MESSRS. GORDON STUART AND CO., **6 W.R. 36.**

(22)—*Special appeal by one defendant against another—Maintainability.*—A special appeal by one defendant against another cannot be entertained. RAMESSUR GHOSE v. AZUM JOARDAR, **17 W.R. 373.**

(23)—Ex parte *decree—Appeal decided on merits—Special appeal.*—Where a defendant against whom an *ex parte* decree was passed appealed to the District Judge without stating that the case was decided *ex parte*, and the District Judge dismissed the appeal on the merits, *held* that no special appeal lay to the High Court on the ground that he ought to have dismissed it without going into the merits. GHOLAM ESHAK v. HYDER MOOLLAH, **W.R. F.B. 46.**

(24)—*Breach of condition in lease—Suit by lessor to recover premises let—Judgment* ex parte *against lessee—Intervenor—Special appeal.*—Plaintiff sued his lessee under cl. 5 of s. 23 of Act X of 1859 to recover possession of the leased premises on the ground that the lessee had committed a breach of a condition in the lease which entitled the lessor to eject him. The lessee never appeared in the suit. His vendee was admitted to defend as intervenor. The lower appellate Court decreed generally in favour of the plaintiff finding that the lease forbade the alienation of the premises, and declared that any attempt to alienate should be a void act. On both defendants appealing specially, it was *held* that the defendants had neither of them a right of special appeal. The lessee defendant having allowed judgment to go by default was not entitled to appeal but to proceed by the method described for defaulters in Act X of 1859. Further, the intervenor

Special or Second Appeal—continued.

—**7.—Right of Special Appeal**—*continued.*

defendant was admittedly an entire stranger to the subject of the suit taking no rights from the lessee as against the plaintiff, and had only appeared in the suit on his own voluntary application and consequently he could claim no right to appeal. MOOKTADOSSIA v. SHAMA CHURN GHOSE, **3 W.R. Act X, Rul. 164.**

(25)—*Act* VIII *of* 1869—*Suit for rent—Special appeal.*—In a suit for rent not exceeding Rs.100, based upon a kabooleut and a jummabundee, the ryot stated that these documents were forged and that he held under the plaintiff not under these documents, but under a mokururee pottah. The lower appellate Court found that the documents relied on by the plaintiff were forgeries, and, with a view to determine the amount of rent, inquired and decided on the genuineness of the defendant's mokururee pottah. *Held*, that no special appeal lay under s. 102 of Act VIII of 1869. MOULVIE SYUD MAHOMED v. FOUZDAR ROY, **25 W.R. 14.**

(26)—*Special appeal—Rent suit—Act* VIII (*B.C.*) *of* 1869, *s.* 102.—Where, in a suit for arrears of rent, the amount sued for is under Rs.100, and no question to enhance or vary the rate has been determined, nor any question of title as between parties having conflicting claims thereto, there is no special appeal. SHUMBUL SINGH v. BABOO TOONDUN, **24 W. R. 469.**

(27)—*Act* VIII (*B.C.*) *of* 1869, *s.* 102—*Suit for rent—Question of enjoyment—Special appeal.*—In a suit for rent, where the claim is under Rs. 100 and both the lower Courts find on the question of enjoyment of rent, and on that question only, no special appeal lies. BABOO JUGGUR NATH SINGH v. BHIKUN ROY, **24 W.R. 479.**

(28)—*Suit for rent—No question of right to enhance or very rent—Special appeal—Act* VIII (*B.C.*) *of* 1869.—Under s. 102 of Act VIII (B.C.) of 1869, no appeal lies to the High Court where the suit is merely one for rent, and is valued at less than Rs. 100, and no question of right to enhance or vary the rent, nor any question relating to interest in land as between parties having conflicting claims thereto has been determined by the judgment. SREENATH ROY v. AINOODDEEN SHAHA, **25 W.R. 103.**

(29)—*Suit for rent—Special appeal—Act* VIII (*B.C.*) *of* 1869.—In a suit for arrears of rent under Rs. 50, in which no question of title to land or right to enhance or vary rent has been decided, no special appeal will lie to the High Court when the lower appellate Court has not decided any question of title, even though the Court of first instance gave a decision on the question of title. BHUGWAN DUTT MISSER v. NOWNEEDH LALL, **25 W.R. 153.**

(30)—*Suit for rent—Question of title—Special appeal.*—No special appeal lies to the High Court against a decision in a suit for rent of the value of less than Rs. 100 and in which no

Special or Second Appeal—continued.

——7.—Right of Speci Appeal—*concluded.*

right to recover the rent nad been determined. ROY JUNG BAHADOOR v. JUGDEO ROY, 25 W.R. 257.

(31)—*Civ. Pro. Code* (*Act* VIII *of* 1859), s. 372—*Bengal Act* VIII *of* 1869, *s.* 102—*Rent-suits under Rs.* 100—*Second appeal.*—*Held* by the majority of the Full Bench that no second appeal lies to the High Court in suits for rent under Rs. 100, where no question of right to enhance or vary the rent, nor any question relating to a title to land or to some interest in land as between persons having conflicting claims thereto, is involved. 13 B.L.R. 376= 21 W.R. 320, F.B., having settled the law, it should not be disturbed. BUT *Jackson, J.*, held that in such cases, a second appeal would lie. S. 102 of Act VIII of 1869 (B.C.) has not expressly taken away the right of second appeal conferred by s. 372 of the Civ. Pro. Code (VIII of 1859); even if it had done so, the question would arise whether the Bengal Legislature could do so. *Obiter.*—It is wrong to deprive a party of his legal rights merely out of deference to the practice of a Court—*Per Jackson, J., dissentiente.* LUNGESSUR KOOER v. SOOKHA OJAH, 3 C. 151=1 C.L.R. 39, F.B.

(32)—*Rent suit for less than Rs.* 100—*Second appeal*—*Act* VIII *of* 1869 (*B.C.*), *s.* 102.—No second appeal would lie to the High Court in a rent suit of the value of less than Rs. 100, though the defendant set up the title of a third party, so long as such third party did not intervene in the suit. ROMAPROSAD ROY v. SHORUP PARAMANICK, 8 C. 712. [*R.*, 10 C. P.L.R. 33, 14 C.P.L.R. 31, 12 C P.L.R. 1.]

(33)—*Suit by landlord for a moiety of cess paid to Government — Dismissal of suit by lower Courts as being in contravention of* s. 7, *Rent Recovery Act—Second appeal.*—A suit by a landlord for the recovery of a moiety of cess paid to Government was dismissed by the lower Courts on the ground that it was in contravention of the provisions of s. 7 of the Rent Recovery Act. *Held*, no second appeal lay. NARAYANASAWMY NAIDU GARU v. KOLACHINA VENKATAPPAYA, 7 M.L.T. 362. (13 M.L.J. 211, *F.*)

Failure of plaintiff to establish ground of enhancement—Decision settling rent—Second appeal—*See* BEN. ACT VIII OF 1885, ss. 105, 109 (3), 6 Ind. Cas. 501.

See APPEAL—EX-PARTE DECREES, 2 W.R. Mis. 23.

See CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 72, s. 104, O. XLIII, r. 1, 21 C. 789.

Suit against tenant for damages for cutting wood, nature of—Appeal—Second appeal—*See* LANDLORD AND TENANT—PROPERTY IN TREES, ETC., ON LEASED PREMISES, 6 C.L.J. 218.

Incidental determination of question of title, effect of—*See* RES JUDICATA—COMPETENCY OF COURT, A.W.N. 1907, 218=4 A.L.J. 517.

Special or Second Appeal—continued.

——8.—Small Cause Court Suits.

See PRESIDENCY SMALL CAUSE COURTS ACTS.

See PROVINCIAL SMALL CAUSE COURTS ACTS.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF.

See SMALL CAUSE COURT, PRESIDENCY TOWNS, JURISDICTION OF.

(1)—*Small Cause Court suit—Second appeal.*—No second appeal lies to the High Court from a suit which is of the nature of small causes, and where the amount in dispute is less than Rs. 500, s. 586, Civ. Pro. Code, 1882. VASUDEO v. DAMODAR, 6 Bom. L.R. 370. [*R.*, 30 B. 147=7 Bom. L.R. 741.] *See* VINAYAK v. KRISHNA RAO, 3 Bom. L.R. 239=25 B. 625 and KESRISANG v. NARANSANG, 10 Bom. L.R. 733.

(2)—*Act* XXIII *of* 1861, *s.* 27—*Special appeal—Provisions applicable in execution cases as well as in suits.*—The words used in s. 27 of Act XXIII of 1861 clearly bar an appeal in all the cases that are expressly alluded to in that section. The explicit words of the section have the effect of overriding s. 387 of Act VIII of 1859. The provision applies as well to cases in execution of decrees as in suits themselves; and it also applies to suits and to proceedings in execution whether they be commenced before 1861 or even before 1859. RAM JADUB CHATTERJEE v. BASH MONEE DOSSEE, 8 W.R. 321.

(3)—*S.* 647, *Civ. Pro. Code*, 1882—*Second appeal—Suit cognizable by Court of Small Causes—Decree—Execution.*—No second appeal lies from an order passed, in execution of a decree in a suit of the nature cognizable in the Court of Small Causes. NARAYAN v. NAGINDAS, 7 Bom. L.R. 641=30 B. 113.

(4)—*Decree in suit of less than Rs.* 500 *in value before establishment of Small Cause Courts—Order in execution—Second appeal.*—A second appeal would lie from an order made in the execution of a decree of the year 1856 obtained in a suit of less than Rs. 500 in value, the suit not being one of the nature cognizable in Courts of Small Causes which were not established in the year 1856. BHAGWANTI PRASAD v. THE COLLECTOR OF BASTI, A.W.N. 1885, 269.

(5)—*Civ. Pro. Code*, 1882, *s.* 244—*Act* XLIII *of* 1860—*Act* XXIII *of* 1861—*Act* X *of* 1877 (*Civ. Pro Code*), *ss.* 3, 586, 590—*Small Cause execution—Second appeal.*—Where a Small Cause suit was instituted in 1856, and a decree was passed, and the execution application in that suit was made in July, 1883, *held* that there was no second appeal from the order passed in first appeal in the execution petition. Such an application must be held to have been made under the rule of s. 3 of the Civ. Pro. Code of 1877, as amended by Act XII of 1879,

Special or Second Appeal—continued.

—— 8.—**Small Cause Court Suits**—*continued.*

which enacted that nothing in the Code of 1877 should affect " any proceedings in execution of decree that may have been commenced and were still pending at the date of the 1st October, 1877," *i.e.*, any execution proceedings in this case pending on that day would not be affected by anything contained in the Code of 1877. But no proceedings in execution instituted after that date would be thus saved. On the contrary all the rules of the Civ. Pro. Code of 1877 as amended in 1879 would be applicable to them, and, among the rest, the rule of ss. 586 and 590, declaring that no second appeal would lie in such a case. BHAGWATI PRASAD v. THE COLLECTOR OF BASTI, **A.W.N. 1886, 181.**

(6)—*Execution of decree—Order of Small Cause Court — Special appeal.*—No special appeal lies from an order in execution of a decree made in a suit under Rs. 500 in value and of the nature cognizable in a Small Cause Court. DEWAN SINGH v. MITHA, **65 P.R. 1876.**

(7)—*Small Cause Court suit—Decree execution.*—No second appeal lies from an order passed in execution of a decree in a suit of the nature cognizable in the Court of Small Causes. NARAYAN v. NAGINDAS, **7 Bom. L.R. 641 = 30 B. 113.**

(8)—*Act* XXIII *of* 1861, *s.* 27—*Suit of Small Cause nature, orders passed in—Special appeal.*—This was an appeal by the judgment-debtor against an order made for executing the decree, and the High Court accepted as valid the objection taken to the hearing of the appeal, namely, that as the order appealed against was one relating to the execution of a decree passed in a suit of a nature cognizable in Courts of Small Causes under Act XLII of 1860, under the 27th section of Act XXIII of 1861, no special appeal lay from the order passed in regular appeal. The special appellant contended in answer to the above that the suit in which the original decree was passed was antecedent to Act VIII of 1859, and that consequently the section will not apply. But it was held that the words of s. 27 distinctly lay down that no special appeal would lie from any decision passed on regular appeal after the passing of the Act, that is to say, even if the suit had been instituted before the passing of the Act, where the regular appeal was decided after the passing of it, a special appeal would be barred. MOBARUKOONISSA BEGUM v. OZEER JEMADAR, **8 W.R. 107.**

(9)—*Special appeal—Act* XXIII *of* 1861, *ss.* 27, 411—*Act* VIII *of* 1859, *s.* 387 (11).—*Held*, that notwithstanding s. 387, Act VIII of 1859, s. 27, Act XXIII of 1861, bars a special appeal in a suit of the nature cognizable by a Court of Small Causes instituted before Act XXIII of 1861 came into operation. SOORJO COOMAR SURMA ROY v. KRISTO COOMAR CHOWDHRY, **12 B.L.R. 224, F.B. = 14 W.R. 30.** [*F.*, 2 A. 112; *R.*, 7 C. 337.]

Special or Second Appeal—continued.

——8.—**Small Cause Court Suits**—*continued.*

(10)—*Special appeal—Suit of a nature cognizable by a Small Cause Court—Act* XXIII *of* 1861, *s.* 27—*Act* XLIII *of* 1860, *s.* 1.—Under s. 1 of Act XLIII of 1860 and s. 27 of Act XXIII of 1861, a special appeal is prohibited in suits of the nature triable by Courts of Small Causes, instituted prior to the passing of the former Act. *Held*, accordingly, that there was no special appeal from an order, made on regular appeal after the passing of Act XXIII of 1861, in execution of a decree in such suit, instituted before Act XLIII of 1860 came into force. BHICHUK SINGH v. NAGESWAR NATH, **2 A. 112.** (12 B.L.R. 224 = 14 W.R. F.B. 30, *F.*)

(11)—*Act* XXIII *of* 1861, *s.* 27—*Special appeal—Execution of decree in suit of Small Cause nature.*—The provisions of s. 27 of Act XXIII of 1861, would apply to bar a special appeal in execution proceedings arising out of a suit which had been instituted before the passing of Act VIII of 1859, s. 387 of that Act notwithstanding. By that section, the Legislature has intended to allow no special appeal from any decision or order passed on regular appeal in any suit of a nature cognizable by a Court of Small Causes, where the value is below Rs. 500, the words "regular appeal in any suit" meaning the first or general appeal. The analogy of special appeals in execution proceedings follows that of special appeals in regular suits, and when the law itself does not, by any express terms, create a right of special appeal in regard to the suit (that is, on the decree itself in the cause), for the same reasons the special appeal is taken away in execution proceedings as well. ANUND CHUNDER ROY v. SIDHY GOPAL MISSER, **8 W.R. 112.** [*Appr.*, 12 W.R. 86; *R.*, 27 C. 484 = 4 C.W.N. 269.]

(12)—*Review—Act* XXIII *of* 1861, *s.* 27—*Special appeal—Execution*.—No special appeal lies under s. 27, Act XXIII of 1861, in execution-proceedings arising out of the original decree, which was for a sum less than Rs. 500, and in a suit cognizable by the Court of Small Causes. DEBEE PERSHAD SING v. SYUD DELAWAR ALI, **12 W.R. 86.** (8 W.R. 112, *F.*) [*Appr.*, 12 M. 116.]

(13)—*Civ. Pro. Code*, 1882, *ss.* 223, 228, 586 (= *ss.* 38, 42, 102, *new Code*)—*Second appeal—Order in execution of decree—Small Cause suit—Transfer of decree.*—No second appeal lies from an order in execution in a suit of the nature cognizable by a Small Cause Court, where the subject-matter of the suit is less than Rs. 500, whether the execution proceedings are taken in the Court which passed the decree or in that to which the decree may have been transferred for execution. HARAK v. RAM SARUP, **12 A. 579 = A.W.N. 1890, 206.** (12 A. 581, *Appr.*) [*Appr.*, 18 A. 481 = 16 A.W.N. 160; *Appl.*, 25 C. 872; *R.*, 23 M. 547, F.B., 8 O.C. 405.]

(14)—*Civ. Pro. Code*, 1882, *ss.* 584, 586 (= *ss.* 100, 102, *new Code*)—*Execution of decree,*

Special or Second Appeal—continued.

——8.—Small Cause Court Suits—*continued.*

appeal against order passed in—Jurisdiction determined by suit amount—Suit of Small Cause nature—Revision and second appeal.—The pecuniary jurisdiction for purposes of an appeal, whether from a decree in a regular suit or from an order in execution proceedings of such a decree, depends upon the valuation of the original suit in which the decree was passed, and not merely the actual amount affected by the order sought to be appealed. Where, therefore, execution was applied for in a Munsif's Court as regards a sum below Rs. 500, the value of the matter in dispute having been of a Small Cause nature and above Rs. 500 and the order of the Munsif therein was upheld in appeal by the District Court, *held* that a second appeal would lie from such order and proceedings by way of revision could not be taken. NAZAR HUSAIN v. KEZRI MAL, **12 A. 581**= **A.W.N. 1890, 203.** [*Appr.*, 12 A. 579.]

(15)—*Act* X *of* 1859—*Distraint by landlord—Payment by defaulter—Release of property distrained—Misappropriation by ryot—Remedy of owner of property—Act* XXIII *of* 1861, *s.* 27—*Special appeal—Wrong decision as to jurisdiction by Civil Court.*—Where, on payment by the defaulter of the amount due, the property distrained was released and made over by the landlord to the ryot, who misappropriated the same to himself, the real owner of the property distrained had no remedy under Act X of 1859, but was entitled to sue for damages in the Civil Court. Where, in a suit for damages for less than Rs. 500, the lower appellate Court held that the suit was not cognizable by any Civil Court, s. 27, Act XXIII of 1861, did not bar a special appeal, on the ground that the suit was of a nature cognizable by a Court of Small Causes. SHAIKH GUREEBOOLLAH v. SHAIKH SYEFOOLLAH, **7 W.R. 41.**

(16)—*Suit for damages—Small Cause nature—Second appeal.*—A suit for damages amounting to less than Rs. 500, being in its nature a small cause, does not admit of a second appeal, even though a question of title to land has incidentally to be tried and the suit is brought in the District Munsif's Court. The question has reference to the mode of adjudication and not to the forum. MANAPPA MUDALI v. S.T. MCCARTHY, **3 M. 192, F.B.** [*R.*, 17 C. 707, 23 M. 547.]

(17)—*Small Cause suit tried by ordinary Civil Court—Suit for account—Small Cause Court jurisdiction.*— Small Cause suit taken cognizance of by an ordinary Civil Court within the local jurisdiction of a Small Cause Court—Second appeal lay. [*Diss.*, 9 B. 259, 26 A. 358=A.W.N. 1904, 50; *Dist.*, 21 C. 249.] Suit for balance due on account of rents held cognizable by Small Cause Courts, even though accounts, had to be gone into. [*R.*, 6 C. 284.] If a suit is improperly brought in a Civil Court, which has no jurisdiction to entertain it, instead of in a Small Cause Court, it cannot be said that the parties cannot prefer a special appeal to have the matter set right. A special appeal does lie in such cases. DYEBUKEE NUNDEN SEN v. MUDHOO MUTTY GOOPTA, **1 C. 123=24 W.R. 478.** *N.B.*—This was a case when Act XI of 1865 was in force. [*R.*, 6 C.594.]

(18)—*Jurisdiction — Small Cause Court—Detinue—Special appeal*--Plaintiff, a talookdar, sued her late husband's agent for the delivery up of certain account papers and documents, for an account of his agency, and in default of account for Rs. 500 as damages. *Held* that the suit was of a nature cognizable by a Small Cause Court and that, consequently, no special appeal would lie. HURRI NARAIN ROY CHOWDHRY v. JOY DURGA DASSI, **2 C.L.R. 17.**

(19)—*Act* XXIII *of* 1861, *s.* 27—*Act* XLII *of* 1860—*Act* VIII *of* 1859, *s.* 327—*Suits on private arbitration—Special appeal.*—The provision in s. 27, Act XXIII of 1861, that no special appeal shall lie from any decision or order passed on regular appeal "in any suit of the nature cognizable in Courts of Small Causes under Act XLII of 1860," includes not only suits of the nature made cognizable by Act XLII of 1860, but all suits cognizable in Courts of Small Causes constituted under that Act, even such as are made cognizable by s. 327 of Act VIII of 1859. A suit for Rs. 247 upon an award made upon a private arbitration, being one cognizable by a Court of Small Causes, no special appeal will lie to the High Court against the order of an ordinary Civil Court in respect of such award MUSSAMAT BANU v. NARAYAN SAHU, **4 B.L.R. App. 82=13 W.R. 233.** (1 B.L.R.A.C. 43=10 W.R. 85, *F.*).

(20)—*Act* XXIII *of* 1861, *s.* 27—*Suit based on arbitration award—Special appeal, maintainability of, when amount due under award is less than Rs.* 500—*Set off.*—S. 27, Act XXIII of 1861, is inapplicable to a suit which, though seeking to recover a particular sum found due to a plaintiff under an award, is still based on the award generally containing other findings and provisions, and with reference to which important questions have been raised, and which questions could not be considered in a Small Cause Court. And consequently special appeal lies in such cases. The provision in the Civ. Pro. Code, in regard to set-off is one regulating procedure, and is not intended to take away any right of set-off, whether legal or equitable, which parties would have had independently of it; and the right of set-off will be found to exist not only in cases of mutual debts and credits, but also where the cross-demands arise out of one and the same transaction or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit. Where the mutual debts, credits and cross demands, in fact everything relating to the rights and liabilities of both parties, are based on one general right and title, *viz.*, the title given by

***Special or Second Appeal*—continued.**

——8.—Small Cause Court Suits—*continued.*

an award, a right of set-off could be allowed. GAURI SAHAI v. RAM SAHAI, **7 N.W.P. 157.** (1 M.H.C. 396, 2 M.L.J. 296, *F.*) [*F.*, 7 A. 284 = 5 A.W.N. 40.]

(21)—*Suit against law-agent—Suit for money unaccounted for—Special appeal—Act* XI *of* 1865, *s.* 6.—In a suit to recover plaintiff's money in the hands of the defendant unaccounted for, it was admitted that plaintiff retained and employed the defendant as a mukhtear or law-agent, to conduct and look after his law suits, and to receive and disburse monies on his account connected with such law suits, the defendant receiving a monthly salary, *held* that the suit might be brought under the terms "claim for money due under a contract" within the meaning of s. 6 of Act XI of 1865, and that it was also possible to include this claim under the term *damage*, because the plaintiff might claim the amount for which he brought the suit as damages by reason of the wrong done by the defendant in not acting fully up to his instructions. JOOGUL KISHORE ROY v. RUGHOO NATH SEAL, **20 W.R. 4.**

(22)—*Civ. Pro. Code*, s. 586—*Suit impleading sons of living debtor, not one of a Small Cause nature.*—A suit impleading the sons of a living Hindu debtor as defendants along with him was held to be not one of a Small Cause nature so far as it related to the sons. NARASINGA v. SUBBA, **12 M. 139, F.B.**

(23)—*Small Cause Courts Act* (XI *of* 1865), s. 6—*Civ. Pro. Code*, 1882, s. 586—*Second appeal.*—Plaintiff brought a suit upon a *hundi* which was drawn by B and S in May 1882 in favour of M for the acceptance of a firm M. indorsed the *hundi* to the defendants who indorsed it to the plaintiff. The suit as brought was in reality for the recovery of a sum of Rs. 400 principal, and Rs. 49 interest, which in April 1884, the plaintiff was constrained to pay to the last indorsees in consequence of the *hundi* not having been accepted and having been dishonoured. The plaintiff included in his plaint a prayer that the defendants should be ordered to hand over to him another *hundi*, or to obtain from the original drawers a duplicate of the *hundi* drawn in May 1882, because, by reason of the original *hundi* having been lost, the plaintiff was unable to produce it in Court and give documentary evidence in support of his claim. *Held* that in the first place the latter prayer was one which the plaintiff was not competent to make against the defendants, that in the next place, the fact that he included such a prayer in his plaint could not change the suit, which was for the recovery of money due under a contract and as such cognizable in a Court of Small Causes, into a suit of a different nature and not cognizable in such Court, that the suit was therefore of a Small Cause nature so that no second appeal lay to the High Court. BANKEY LAL v. MOHAN, **A.W.N. 1886, 73.**

***Special or Second Appeal*—continued.**

——8.—Small Cause Court Suits—*continued.*

(24)—*Small Cause Court suit—Second appeal.*—Plaintiff sold certain properties to the defendants' ancestors, and the vendees entered into an agreement by which they bound themselves to pay as part of the consideration a certain sum yearly in cash, a proportion of profits, and to give possession of 10 bighas of land. Plaintiff brought a suit to recover arrears for two years of the above cash payment and for Rs. 60 for rents wrongfully realized. *Held* that the suit was of a nature cognizable by a Small Cause Court and that no second appeal lay, as the amount was under Rs. 500. HAYAT ALI v. DAWAN RAI, **A.W.N. 1886, 296.** (A. W.N. 1882, 114, *D.*)

(25)—*Mofussil Small Cause Courts Act* (XI *of* 1865), *s.* 6—*Civ. Pro. Code*, 1882, *s.* 586—*Second appeal.*—A suit brought by a Hindu wife against her husband to recover Rs. 24, being 12 months' arrears of maintenance due to her under a written agreement for maintenance executed in her favour by the defendant, is nothing more nor less than an action to recover money due under a contract, and as the amount is below Rs. 500, s. 586, Civ. Pro. Code, applies, and no second appeal lies in such a suit. HARDEO DAS v. PARBATI, **A. W. N. 1887, 94.**

(26)—*Suit of Small Cause nature—Second appeal—Civ. Pro. Code*, 1882, *s.* 586.—The zemindari estate of R was sold in execution of a money-decree held by the plaintiff who purchased the estate himself at the auction-sale. The sale was subject to a previous mortgage. The mortgagee then obtained a decree on the mortgage in execution of which the property was again sold. After satisfying the mortgage-decree and the expenses of sale, there remained a balance of Rs. 274, which was in deposit with the Collector. Out of this, about Rs. 150 were attached by N in execution of money-decree held by him against R. The plaintiff thereupon brought the present suit against N to recover the amount so attached with interest, on the ground that since he had purchased all the rights and interest of R in the zemindari, he was entitled to the balance of the purchase-money remaining after the satisfaction of the mortgage decree. *Held* that the suit, regarded in its natural aspect was simply one for the refund of Rs. 150 with interest, wrongly taken out of Court by the defendant and belonging to the plaintiff as the substitute, by prior purchase, of the zemindari rights and interests of R, and that whether it fell into the category of cases referred to in the ruling in 8 B. 17, or was to be treated as a claim for money had and received to the use of the plaintiff, it was in the nature of a suit cognizable by a Court of Small Causes and there could therefore be no second appeal. RAM PRASAD SINGH v. NAND KISHORE, **A.W.N. 1887, 213.**

(27)—*Suit by zemindar for dak expenses—Small Cause nature of suit—Special appeal, Act*

Special or Second Appeal—continued.

——8.—Small Cause Court Suits—*continued.*

XXIII *of* 1861, *s.* 27.—A case in which a Zemindar sues a putneedar for dak expenses according to his putnee-jumma, is a case of a nature cognizable by a Court of Small Causes; and as such, by reason of s. 27 of Act XXIII of 1861, no special appeal will lie. MAHARAJAH DHERAJ MAHTAB CHUND BAHADOOR v. RADHA BINODE CHOWDRY, **8 W. R. 517.**

(28)—*Jurisdiction—Suit by Zemindar to recover dak charges—Suit of Small Cause nature.*—A suit by a Zemindar against his putnidar, founded upon a contract between the parties, for the recovery of a sum of money which had been expended by the Zemindar in the way of Zemindaree dak charges, which expenses, it was alleged, the putneedar was bound by his contract to bear, is cognizable by a Court of Small Causes. ERSKINE v. TRILOCHUN CHATTERJEE, **9 W.R. 518.** [*Expl. and D.*, 22 C. 680.]

(29)—*Suit for damages—Jurisdiction of Small Cause Court—Special appeal—Act* XI *of* 1865, *s.* 6—*Act* XXIII *of* 1861, *s.* 27.—Under s. 6 of Act XI of 1865, suits for damages, when the amount claimed does not exceed Rs. 500, shall be cognizable by a Small Cause Court, whether the damage is in respect of moveable property or immoveable property, and under s. 27 of Act XXIII of 1861, no special appeal lies to the High Court in such suits. BHEENUCK LALL MAHTOON v. RUNG LALL MAHTOON, **11 W. R. 369.**

(30)—*Suit for damages — Jurisdiction of Small Cause Court—Special appeal.*—No second appeal can be allowed in a suit for damages where the sum claimed is under Rs. 500, such a suit being one within the cognizance of the SmallCause Courts, although, on account of the absence of a Small Cause Court in the locality, it happened to have been instituted as an original suit in the Court of a Munsiff. KENOO MUNDUL AND DOOKEAH SIRCAR v. MOHWA MAHOMED, **2 W.R. 136.**

(31)—*Suit by landholder against purchaser of produce for rent—Suit for damages— Small Cause suit.*—Where a landholder sues the purchaser of the tenant's land for rent due from the tenant, on the ground that the rent is a first charge on the produce, the liability is one arising not *ex contractu* but *ex delicto*; the suit is therefore, one for damages, and cognizable by a Court of Small Causes; and when the amount claimed is below Rs. 500, there will be no second appeal. SHIBBA v. HULASI, **6 A. 518 = A.W.N. 1883, 114.**

(32)—*Second appeal—Suit by purchaser for possession or damages—Suit instituted on failure to obtain possession from third persons—Suit cognisable by Small Cause Court.*—The purchaser of certain land sued to recover it from third persons who were in possession. The suit having been dismissed, he instituted a suit against the vendor for possession or damages for breach of contract. *Held* that the prayer for possession

Special or Second Appeal—continued.

——8.—Small Cause Court Suits—*continued.*

of the land was a futile one and could not be given effect to, as the land was in the possession of third parties, who had established their right to possession as against the plaintiff. The suit was thus really one for damages and as such one of a nature cognizable by a Court of Small Causes. No second appeal lay from a decision in the suit, where the claim was for less than Rs. 500. VENKATARAMANUJA REDDIAR v. SUBBARAYA PILLAI, **13 M.L.J. 299.**

(33) — *Suit for compensation for illegal distress—Court of Small Causes—Provincial Small Cause Courts Act* (IX *of* 1887), *s.* 15, *sch.* II, *cl.* 35 (*j*)—*Cause of action—Limitation—Rent Recovery Act, Madras* (VIII *of* 1865), *s.* 78. —A suit by tenants against their landlord for compensation for illegal distress or attachment, where the plaint alleged that the plaintiffs had been raiyats for a long time cultivating the land of the defendant and that, while there were no arrears of any kind due to the defendant in respect of the said land, the defendant, without giving any notice of demand to the plaintiffs, unlawfully took possession of two heaps of paddy out of the three heaps raised by the plaintiffs on the said land in a particular year, saying that he had attached the same, and the plaint prayed for an order directing the defendant to deliver to the plaintiffs about five garces of grain worth about Rs. 250 in respect of the two heaps of paddy of which the plaintiff took unlawful possession, was held to be in substance a suit for compensation for illegal distress or attachment and not a suit for the recovery of specific property. It was therefore not a suit of the nature cognizable by a Court of Small Causes, and a second appeal would lie therefrom. (22 M. 457, *D.*) [*R.*, 27 M. 430.] In such a suit as the one mentioned above, *the wrong is complete* and the cause of action arises on the date when the unlawful distress was made, and the suit will be barred under s. 78 of the Madras Rent Recovery Act unless brought within 6 months of the above date. PAMU SANYASI v. ZAMINDAR OF JAYAPUR, **25 M. 540.** (24 M. 339, *D.*)

(34)—*Property leased to plaintiff in putnee as* mal, *found to be another person's* lakheraj *land—Consideration money when recoverable by lessee.*—The first two Courts gave the plaintiff a decree for a sum of money described as the proportion of consideration money paid in respect of a village which was leased as a *mal* to the plaintiff, but which was subsequently discovered to belong to a third party as *lakhiraj*. On special appeal, the High Court *held* that the right of the plaintiff to receive back any portion of the consideration money depended upon his establishing one of two points, namely, either that he had been fraudulently induced by the defendant to pay the sum by false representations that the defendant had a good title to the land or that there was a warranty and covenant of good title made by him. RAJAH NILMONEE SINGH DEO v. MESSRS. GORDON, STUART AND CO., **6 W.R. 162.**

Special or Second Appeal—continued.

——8.—Small Cause Court Suits—*continued.*

(35)—*Special or second appeal—Small Cause Court suits—Suit where claim for damages exceeds Rs.* 500 *but decree is given for less than Rs.* 500—*Act* XXIII *of* 1861, *s.* 27.—Where the damages claimed in a suit exceeded Rs. 500, and the Court gave the plaintiff less than Rs. 500 damages. *Held* that the right of appeal was not taken away by Act XXIII of 1861, s. 27. NEELMONEE SINGH DEO v. GORDON, STUART AND CO., **1 Ind. Jur., N. S, 356=6 W.R. 152.**

(36)—*Act* XXIII *of* 1861, *s.* 27—*Suit for damages—Special appeal.*—A decree-holder who had taken out execution against his judgment-debtor was paid a portion of the decree amount by the latter, and given a surety bond by the plaintiff for the balance. Subsequently, the plaintiff was arrested on the institution of proceedings under s. 204 of Act VIII of 1859, and had to pay the balance due under the decree. Thereupon he sued to recover Rs. 500 as damages for illegal arrest.—*Held*, that it was a suit clearly cognizable by the Small Cause Courts under s. 6 of Act XI of 1865, and that, under s. 27 of Act XXIII of 1861, no special appeal would lie, as the sum claimed was not in excess of Rs. 500. TOOLSEE RAM v. NUND KISHORE LALL, **12 W.R. 471.**

(37)—*Personal injury—Pecuniary loss—Suit for damages—Jurisdiction.*—A suit for damages for personal injury cannot be tried by a Court of Small Causes unless some actual pecuniary damage has resulted from the injury. ALI BUKSH DOCTOR v. SHEIKH SAMIRUDDIN, **4 B.L.R.A.C. 31=12 W.R. 477.** (4 W.R. 7, *R.*; 10 W.R. 115, *D.*)

(38)—*Suit for damages—Absence of allegation of special pecuniary damage—Jurisdiction of Small Cause Court.*—The preliminary objection taken to this second appeal on the ground that no such appeal would lie, the suit being one for damages under Rs. 500 was overruled since there was no allegation in the plaint that any special damage of a pecuniary nature resulted from the injury complained of, and the case was not therefore one of which the Small Cause Court could take cognizance so that no second appeal could be maintained on the merits. The second appeal was dismissed for the following reasons :—This was a suit for damages for a slander upon the plaintiff, and the lower appellate Court had recorded its reasons for holding that the accusation was false so as to imply malice sufficient to constitute the ground for damages, and the contention could not be accepted that the Judge had merely found that there was an accusation of theft against the plaintiff which was not brought home to him, and there was no sufficient ground to hold the defendant amenable for damages. RAJ CHUNDER CHUCKERBUTTY v. PUNCHANUN SURMAH CHOWDHRY, **4 W. R. 7** [*F.*, 4 B.L.R. A.C. 31=12 W.R. 477.]

(39)—*Mofussil Small Cause Courts Act* (XI *of* 1865), *s.* 6, *proviso* 3—*Suit for damages partly for loss of reputation and partly for actual damage, whether a Small Cause suit—Civ. Pro. Code*, 1882, *s.* 586 (=s. 102, *new Code*)—*Second appeal.*—A suit for damages, where part of the claim referred to loss of reputation and part to actual damage, was held, with reference to the Act, to be of the nature cognizable by a Small Cause Court. There cannot, therefore, be a second appeal in such a suit, where the subject-matter is of less value than Rs. 500. JIWA RAM SINGH v. BHOLA, **10 A. 49=A.W.N. 1887 268.** (13 W. R. 434, *R.*)

(40)—*Act* VIII *of* 1859, *s.* 246—*Attachment—Claim—Payment to save property from sale—Suit for damages—Suit of Small Cause nature.*—Where a certain property has been attached in execution of a decree and a claim preferred under s. 246, Act VIII of 1859, is rejected and the unsuccessful claimant pays a certain sum of money to save his property from sale, a suit by him to recover the money so paid is in reality a suit for damages and is a suit of a Small Cause nature. POORSUTTUM CHUNDER v. GOUR SOONDER PANDEY, **18 W. R. 283.**

(41)—*Act* XXIII *of* 1861, *s.* 27—*Special appeal.*—A mortgagor borrowed a certain sum of money below Rs. 500 in order to redeem his property, promising to sell the same to the lender, but as he failed to redeem it, the mortgage was foreclosed. *Held* that the suit by the lender against the mortgagor to recover his money was one for damages as upon a breach of contract, and that no special appeal would lie in such a case under s. 27, Act XXIII of 1861. KHULLEEL MAHOMED v. FURZAM ALLY, **12 W.R. 269.**

(42)—*Breach of private arrangement, damages for—Small Cause Court, jurisdiction of—Special appeal if lies.*—A special appeal does not lie in a suit for damages for breach of a private arrangement when the amount is within the jurisdiction of a Small Cause Court. CHUNDEY PERSAD DOSS v. KASSEENATH DOSS, **W. R. 1864, 346.**

(43)—*Suit for damages below Rs.* 500—*Suit for destruction of crops, cognizable by Small Cause Court under s.* 3 *of Act* XLII *of* 1860—*Special appeal.*—This was a suit to recover damages from the Executive Engineer of the division for not cutting through a certain bund whereby plaintiff's crops were destroyed in consequence of accumulation of water. It was *held* to be cognizable by the Small Cause Court so that no special appeal could lie. The nature of suits cognizable by the Small Cause Court is explained in s. 3, Act XLII of 1860. Suits for damages of any description, when for sums below Rs. 500, are so cognizable, and there is no restriction in the section as to any particular damages personal or otherwise. GOPEENATH PAUL v. LIEUTENANT, S. GEORGE, **6 W.R. 7.**

(44)—*Suit for damages for injury to reputation and pain of body—Suit of Small Cause nature—Special appeal.*—A charged B in the

Special or Second Appeal—continued.

——8.—Small Cause Court Suits—*continued.*

Criminal Court with plotting to murder him. B was arrested accordingly and brought handcuffed before the Magistrate. The charge was dismissed B then sued A for damages on account of "the injury to his reputation and pain of body and mind" caused by the malicious prosecution of him by A on a false charge. The damages were laid at Rs. 100. *Held* that the suit being one of a nature cognizable in Courts of Small Causes, no special appeal lay under s. 27 of Act XXIII of 1861. NADIAR CHAND ROY v. BAIKANT NATH MISSER, **4 B.L.R. A.C. 33, N.** [*R.*, 4 B.L.R. A.C. 31=12 W.R. 477.]

(45)—*Suit for damages—False charge of mischief—Personal injury—Special appeal.*—A suit for damages occasioned to plaintiff by the defendant having brought a false and malicious charge of mischief by fire against the plaintiff in a Criminal Court is not cognizable by a Court of Small Causes, and a special appeal will lie to the High Court although the damages claimed are below Rs. 500. PRANKRISHNA BANNERJEE v. NADIAR CHAND CHATTERJEE, **4 B.L.R. A.C. 35, Note=10 W.R. 115.** [*F.*, 4 B.L.R. A.C. 31=12 W.R. 477.]

(46)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 350—*Question of stamp—Special appeal.*—Under the provisions of s. 350, Act VIII of 1859, when the decision of the lower appellate Court on the question of stamp does not affect the case on the merits, it is not for the High Court to interfere. KHAN MAHOMED SHAHA v. LALL MAHOMED, **15 W.R. 179.**

(47)—*Suit to recover cash paid on defendant's persuasion—Defendant's promise to get lambardar credit money to plaintiff, failure of—Suit cognizable by Small Cause Court as suit for damages—Special appeal.*—The defendants in this case, without claiming any right to collect rent on their own account, persuaded the plaintiff to pay a certain amount of cash and grain to them, promising that they would get the lambardar to give plaintiff credit for the same in the accounts. This they failed to do, and the plaintiff, who was compelled to pay the lambardar the full amount, brought the present suit for recovering the cash and the value of the grain. *Held* that the suit was not a suit for an illegal exaction of rent but, practically, a suit for damages and of a nature cognizable in the Small Cause Court so that no special appeal could be entertained. SYUD YACOOB ALI v. KOOER SINGH, **2 N.W.P. 111.**

(48)—*Suit for money due under an implied contract—Suits of Small Cause nature.*—A suit for money due under an implied contract below Rs. 500 is cognizable in a Court of Small Causes and consequently no second appeal lies. JAGAT RAJ v. JAGRAJ SINGH, **A.W.N. 1881, 96.**

(49)—*Small Cause Courts Act* (XI *of* 1865), *s.* 6—*Suit based on agreement between parties and on a customary right—Second appeal—Civ. Pro. Code*, 1882, *s.* 586.—A suit for the recovery of money (Rupees four) upon the ground of a certain agreement between the plaintiff and the defendant, and of a customary right, falls within the purview of s 6 of the Provincial Small Cause Courts Act (XI of 1865), and therefore, a second appeal in such a suit is barred by the provisions of s. 586, Civ. Pro. Code. SHEODIHAL PANDE v. MAHESH PANDE, **A.W.N. 1887, 228.**

(50)—*Small Cause suits—Suit for money based on "sule-namah."*—In the course of a revenue case between two rival claimants, the parties came to a compromise by which one party renounced all claim to the property and the other agreed to be answerable for all claims, present or future, which might be made against the former. Having been compelled to pay the costs of certain pre-emption suits, the party who renounced all claims, sued the other person for recovery of the amount, basing the suit on the compromise. *Held* that there was no second appeal, as the nature of the suit was merely of the nature of suits cognizable in Moffusil Court of Small Causes. NAIMAL HAQ v. ABDUL LATIF, **A.W.N. 1881, 5.**

(51)—*Haq-i-Chaharum based on contract—Suit of a Small Cause nature—Second appeal.*—A suit by a Zamindar for haq-i-chaharum of one fourth of the price of trees cut down by tenants is, when based upon a *razinama* or agreement, one of a nature cognizable by a Small Cause Court, and consequently, when the amount claimed in such a suit is below five hundred rupees, there can be no second appeal. HARI SINGH v. BALDEO SINGH, **2 A. 905.** (1 A. 444, *F.*)

(52)—*Small Cause Court suit—Suit for plaintiff's share of money recovered by his co-plaintiff in another suit—Act* XI *of* 1865 (*Mufassal Small Cause Courts Act*), *s.*6—*Special appeal.*—A suit for the plaintiff's share of money recovered by his co-plaintiff in another suit is one for money due on a contract within the meaning of s. 6 of Act XI of 1865, and is, therefore, of a nature cognizable by a Court of Small Causes; and where the claim is less than Rs. 500 in value, no second appeal would lie in the suit. DEBI DAS v. LACHMAN SINGH, **7 A. 896=A.W.N. 1885, 292.**

(53)—*Civ. Pro. Code*, 1882, *s.* 586 (=*s.* 102, *new Code*)—*Suit by purchaser at auction sale to recover price paid—Small Cause suit—No second appeal.*—A suit by the purchaser at a sale in execution of a decree, against the decree holder, for a refund of the sale price paid by him, on the ground that the judgment-debtors had no saleable interest in the property sold, is of a nature cognizable by a Small Cause Court; and where the amount does not exceed Rs. 500, a second appeal is barred by s. 586, Civ. Pro. Code. MAKUND RAM v. BODH KISHEN, **20 A. 80=A.W.N. 1897, 198.**

(54)—*Suit for money received by defendant for plaintiff's use—Limitation Act*, 1877, *art.* 62—*Provincial Small Cause Courts Act*, 1887,

***Special or Second Appeal*—continued.**

——8.—Small Cause Court Suits—*continued.*

arts. 8, 31.—Suits for rent are expressly excluded from the jurisdiction of a Court of Small Causes by art. 8. (7 Bur. L.R. 98, *D.*) A suit for rent is essentially a suit by a landlord against a tenant. Respondent plaintiff alleged that she and appellant jointly let certain paddy land and shared the rent equally, and that defendant-appellant received the whole of the rent for the year 1262 and refused to pay respondent her share. Respondent sued to recover her share, Rs.116-1-7. *Held* that the suit was of a nature cognizable by a Court of Small Causes, and that a second appeal was therefore barred by s. 586, Civ. Pro. Code, 1882. MA KA v.MA WIN. BYU, **1 L.B.R. 335.** (23 M. 547, 26 C. 842, *F.*) [*R.*, L.B.R. 1905, 1906, 47.]

(55)—*Act* XXIII *of* 1861, *s.* 27—*Suit for money improperly taken away by defendant from Collector—Small Cause suit—Special Appeal—Small Cause suit filed as original suit—Appeal—Jurisdiction—Charter Act, s.* 15—*Act* XI *of* 1865, *s.* 6—*Some defendants living outside the jurisdiction of Small Cause Court.*—A suit for the recovery of a certain sum of money below Rs. 500 alleged to have been improperly taken away by the defendants from the Collector who held that money deposit on account of certain lands taken by Government for public purposes, is a suit cognizable by the Small Cause Court and no special appeal can lie to the High Court under the express provisions of s. 27 of Act XXIII of 1861. Where a suit cognizable by a Small Cause Court was instituted in a Munsiff's Court having jurisdiction within the local limits of the jurisdiction of the Small Cause Court, and was tried by the Munsiff, and heard in appeal by the District Judge, the High Court, under the powers vested in it by s. 15 of the Charter Act, set aside in special appeal the decision of both the lower Courts as having been passed without jurisdiction. [*R.*, 1 A. 101, F.B.; *Cons.*, 8 P.R. 1883.] Although some of the defendants to a suit are living at a place over which the Small Cause Court has no jurisdiction, if the other defendants are living within the local limits of the jurisdiction assigned to that Court, this fact would be sufficient to bring the suit within the category of "suits cognizable by the Small Cause Court" as described in s. 6 of Act XI of 1865. TARINI CHARAN MOOKERJEE v. RAJA PURNA CHANDRA ROY, **6 B.L.R. 717=15 W. R. 397.**

(56)—*Suit for arrears of* malikana—*Small Cause suit—Second appeal.*—The respondent sued the appellant for Rs. 30, arrears of *malikana*, which were payable to her by the appellant, in respect of certain land held by him, under the terms of the *wajib-ul-arz*. *Held* that the suit fell without the scope of the Small Cause Court, as the claim affected the proprietary interest in immoveable property of the owner, and that there was a second appeal in the case. BHAWAN SINGH v. CHATTAR KUAR, **A.W.N. 1882, 114.**

***Special or Second Appeal*—continued.**

——8.—Small Cause Court Suits—*continued.*

(57)—*Action to recover share of* malikana—*Small Cause Court—Jurisdiction.*—An action for the recovery of the plaintiff's share of *malikana* which the defendant had realized from the Collector, is a suit to recover a certain sum of money, and is therefore cognizable by the Small Cause Court. LASMANI DEBIA v. MAHOMMED HAFEZULLA, **3 B.L.R. App. 96.** [*Expl.*, 8 P.R. 1883.]

(58)—*Suit of a Small Cause nature—Suit for sale-proceeds—Second Appeal—Civ. Pro. Code*, 1877, *s.* 586.—When one creditor sues another for the recovery of sale proceeds wrongly paid over to the latter, by order of the Court in execution proceedings, and for the amendment, of such order, the latter prayer is superfluous and the suit is really one of a Small Cause nature; and if the amount claimed does not exceed Rs. 500, there can be no second appeal in such a suit. MATA PRASAD v. GAURI, **3 A. 59.** [*Diss.*, 10 C. 388.]

(59)—*Provincial Small Cause Courts Act*, IX *of* 1877, *art.* 13—*Suit to recover land cess—Value of suit less than Rs.* 500—*Suit of Small Cause nature—Second appeal.*—A suit to recover land-cess does not fall under art. 13 of the Provincial Small Cause Courts Act. Consequently, where the total amount of rent including the land-cess was less than Rs. 500 in value, no second appeal lay from a decree of the first Court. ZAMINDAR OF TARLA v. LATCHIA, **13 M. L. J. 211.** [*F.*, 7 M. L. T. 362.]

(60)—*Civ. Pro. Code*, 1882, *s.* 586—*Suit on muchalka for kist with prayer for enforcement of charge on land—Suit of Small Cause nature—Second appeal.*—Plaintiff, a zamindar, sued to recover the kist due under a muchalka. The plaint contained a prayer that the amount claimed might be charged on the land to which the muchalka related. The sum claimed was less than Rs. 50. *Held* that the plaint must be read simply as a plaint for the enforcement of the terms of the muchalka and that it was of a Small Cause nature. Consequently, no second appeal lay. HARISCHANDRA DEO v. NARAYANA, **24 M. 508.** (19 M. 329, *F.*)

(61)—*Civ Pro. Code*, 1882, *s.* 586—*Suit for jodi on liability of land—Suit of Small Cause nature—Second appeal.*—Plaintiff sued to recover the jodi due to him on the liability of the land. The amount was less than Rs. 500. *Held*, that as all suits for rent are of a nature cognizable by a Court of Small Causes, the claim for liability of the land, in the present case, did not alter the nature of the suit. Consequently, no second appeal lay. PADMAVATHEMMA v. VENKATAGIRI RAJAH, **24 M. 511, Note.** [*F.*, 24 M. 509.]

(62)—*Suit for damages for cultivation of* sir *land—Jurisdiction of Small Cause Court—Second appeal.*—Where, on partition, certain sir-land belonging to the defendant was assigned to the plaintiffs, but the defendant continued

Special or Second Appeal—continued.

——8.—Small Cause Court Suits—*continued.*

to cultivate it for a certain period without any rent having been fixed. *Held* that a suit for recovery of compensation for the defendant's use and occupation of such land was one cognizable in a Court of Small Causes and that therefore no second appeal would lie. RAM PRASAD v. DINA KUAR, **A. W. N. 1881, 160.**

(63)—*Jurisdiction—Small Cause suit—Suit for division of ascertained debts—Act* XI *of* 1865, *s.* 6.—Where the only question in a suit is as to a sum *certain* and how it is to be divided, the suit is of the description cognizable by Small Cause Courts, and, in such cases, no special appeal lies to the High Court. MUSSUMAT OODEYTA v. GOPAL, **2 Agra 234.**

(64)—*Suit for money—Appeal—Act* XXIII *of* 1861.—A decree in a suit for money and grain due on an adjustment of account is not a declaratory decree, and a special appeal does not lie to the High Court under s. 27 of Act XXIII of 1861. BULDEO SINGH v. RAM SURUN LALL, **25 W.R. 234.** [*R.*, 6 C. 284 = 7 C.L.R. 94; *F.*, 2 C.W.N. 303; *D.*, 28 C. 227.]

(65)—*Act* XXIII *of* 1861, *s.* 27—*Special appeal—Bond suit—Decree for land.*—Where the original suit was for money on a bond under Rs. 500, the fact of its having been decided on a *solehnama* by which the creditor obtained land in lieu of money does not change the nature of the suit with reference to s. 27, Act XXIII of 1861, or make it open to special appeal. SRIMATI TALAN BIBI v. SRIMATI TENU BIBI, **6 B.L.R. App. 82 = 15 W.R. 65.**

(66)—*Jurisdiction of Court of Small Causes—Mesne profits.*—A suit for the recovery of mesne profits not amounting to Rs. 500 is one cognizable by a Court of Small Causes. No special appeal lies in such a case. KAKAJI SAKHARAM v. GOVIND GANESH, **8 B.H.C. A. C. 96.** [*R.*, 25 B. 85.]

(67)—*Mesne profits—Jurisdiction—Court of Small Causes—Act* XXIII *of* 1861, *s.* 27.—A suit for mesne profits is a suit for damages within the meaning of s. 6, Act XI of 1865, and if the demand does not exceed Rs. 500, no special appeal will lie with reference to s. 27, Act XXIII of 1861. SRIMATI RAM PYARI DEBI v. DINANATH MOOKERJEE, **2 B.L.R.S.N. 13 (a) = 10 W.R. 375.**

(68)—*Civ. Pro. Code*, 1882, *s.* 586—*Suit for mesne profits—Second appeal.*—A suit for mesne profits being cognizable by a Court of Small Causes, a second appeal does not lie from a decision in such a suit. SUBBA RAO v. SITARAMAYYA, **24 M. 118.**

(69)—*Second appeal in a suit for less than Rs. 500—Civ. Pro. Code, s. 586—Suit for profits of immoveable property belonging to plaintiff and for profits wrongfully received by defendant—Act IX of 1887, sch. II, art. 31—Small Cause Court, mofussil, jurisdiction of.*—The plaintiff

Special or Second Appeal—continued.

——8.—Small Cause Court Suits—*continued.*

stated in her plaint that under a foreclosure decree she was the proprietress of a 6 annas 2 pies share in a hamlet named pura Kharagman, that she sued the defendants for possession of the aforesaid hamlet and a decree was passed in her favour subject to her paying some mortgage-money; but on appeal a decree was passed in her favour whereby she became entitled to obtain possession of the hamlet without paying any sum of money and thus the plaintiff's right to get the above named hamlet became confirmed; that the defendants held unlawful possession of the aforesaid share of the plaintiff, during the pendency of the suit and they were benefited by the profits thereof which, in fact, the plaintiff should have got; that the mesne profits of the share in suit for three years 1306 to 1308-amounted to Rs. 202-5-6 to which the plaintiff was entitled. The value of the subject-matter of the suit was less than Rs. 500. The point for decision was whether the second appeal in the suit fell within the purview of s. 586, Code of Civil Procedure. *Held*, that the suit fell within the latter portion of art. 31, sch II Act IX of 1887; that the jurisdiction of the Small Cause Court was barred and that s. 586 of the Code of the Civil Procedure did not apply. MUSAMMAT KUSUM KOER v. MUKHDOOM KHAN, **7 O.C. 202.**

(70)—*Special appeal — Jurisdiction — Suit cognizable by Small Cause Court—Act* XXIII *of* 1861, *s.* 27.—The suit brought to recover Rs. 200 paid in respect of the purchase of land which was never completed, is a suit of the description cognizable by the Small Cause Court and consequently no special appeal lies. KHOOB CHUND v. HAZAREE LALL, **1 Agra 275.**

(71)—*Excess rent—Damages—Appeal — Act* XI *of* 1865, *s.* 6—*Act* XXIII *of* 1861, *s.* 27.—Where a tenant sued his landlord to recover a sum paid over and above what was due on account of rent, *held* that the case was not one of contribution for shares of rent as against co-parceners, although originally the transaction may have been connected with payment of rent for co-parceners, but that it was a suit for damages for the non-refund of the over-payment. The suit being cognizable by the Court of Small Causes under s. 6, Act XI of 1865, no special appeal lies to the High Court. SIB SAHAYA SUKUL v. BIR CHANDRA JUBARAJ GOSWAMI, **2 B. L. R. A. C. 172 = 11 W.R. 30.** [*F.*, 1 A. 388.]

(72)—*Act* X *of* 1876, *s.* 15—*Suits excluded from jurisdiction of Small Cause Court—Second appeal—Civ. Pro. Code* (*Act* X *of* 1877), *s.* 586.—Act X of 1876, s. 15, removes suits in which the Collector is a party from the jurisdiction of the Small Cause Court. In such a case, however, the nature of the suit, by which must be understood the jural relations between parties, remains unaltered, so that such a suit, irrespective of the said s. 15, continues to be one of the nature cognizable by a Small Cause

Special or Second Appeal—continued.

——**8.—Small Cause Court Suits**—*continued.*

Court, for the purpose of the prohibition of a second appeal therefrom by reason of s. 586 of the Civ. Pro. Code (Act X of 1877). MUSA MIYA SAHEB v. SYED GULAM HUSEIN MAHAMED, **7 B. 100.** [*R.*, 23 M. 547=10 M. L.J. 329, F.B.]

(73)—*Suit by lessee—Government Revenue—Special appeal.*—Where a lessee sues on a contract for a refund of excess revenue, a special appeal is not admissible if the amount claimed be below Rs. 500. MR. JOHN WHITE v. TRIPORA SUNKUR MOOKERJEE, **W.R. 1864, 297.**

(74)—*Suit for share of profits received by joint owner of land in excess, cognizable by Small Cause Court — Special appeal—Act* XXIII *of* 1861, *s.* 27.—Plaintiff's case was that he and the defendant were jointly entitled to the profits of certain lands and that the defendant had received Rs. 235 more than his share. He accordingly instituted this suit to recover the sum and got a decree. The suit was clearly one cognizable in the Small Cause Court and consequently no second appeal would lie by reason of the provisions of s. 27 of Act XXIII of 1861. JOYNARAIN MANJEE v. MADDOOSOODUN GORAIT, **2 W. R. 134.**

75)—*Suit for profits of grove*—Wajib-ul-arz—*Landlord and tenant—Act* XVIII *of* 1873 (*N. W. P. Rent Act*), *s.* 93 (*a*)—*Suit of a Small Cause nature—Second appeal—Civ. Pro. Code*, 1877, *s.* 586.—A suit by a landlord against a tenant, for a portion of the value of the produce of a grove held by the tenant, based on an agreement contained in the *Wajib-ul-arz* and not based on any custom or right, does not fall within the terms of s. 93 (*a*) of the Rent Act and is not cognizable by a Revenue Court, but is one based upon contract, and therefore of a nature cognizable by a Small Cause Court, and where the amount of it does not exceed Rs. 500, there can be no second appeal in such a case, though it may have been wrongly instituted in a Revenue Court and decided on appeal by the District Judge. SARNAM TEWARI v. SAKINA BIBI, **3 A. 37.**

(76)—*Act* XI *of* 1865, *s.* 6—*Small Cause suit—Act* XXIII *of* 1861, *s.* 27—*Special appeal—Suit against Government.*—When one B was a Nazir in the Judge's Court of Tippera, a sum of Rs. 1,879 was stolen from the Government Treasury and B had been improperly made to pay the same. B died leaving the plaintiff and others his heirs. Subsequently, the police found Rs. 245 of the above sum and it was made over to the plaintiff and the other heirs of B. Plaintiff brought this suit against Government to recover Rs. 408, her share of the amount paid by B to Government. *Held* that the suit was one cognizable by a Court of Small Causes and under s. 27, Act XXIII of 1861, no special appeal lay to the High Court. THE COLLECTOR OF TIPPERA v. MUSSUMAT MAFIZUNNISSA BIBI, **4 B.L.R. App. 46.**

Special or Second Appeal—continued.

——**8.—Small Cause Court Suits**—*continued.*

(77)—*Small Cause Court—Immoveable property—Special appeals—Act* XXIII *of* 1861, *s.* 27.—The original suit in this case was brought to recover the balance of a sum secured by mortgage of immoveable property, and the plaint claimed to recover the same either from that portion of the mortgaged property which had passed into the hands of a purchaser under a decree, or from the residue of the mortgaged property which still remained in the hands of the mortgagor, or from the mortgagor and the purchaser personally. *Held* that this was not a suit of the nature cognizable in a Court of Small Causes, within the meaning of Act XXIII of 1861, s. 27 and that therefore, though the claim did not exceed Rs. 500, the right to file a special appeal was not excluded: and that it did not affect the nature of the suit whether the plaint on the face of it sought to recover in the alternative, either from the mortgagor personally or from the mortgaged property. ATMARAM B. KAGJI v. SADSHIVH MAHAJANI, **2 B.H.C. 1.**

(78)—*Civ. Pro. Code*, *s.* 582—*Suit by assignee of bond hypothecating moveable property, not one of a Small Cause nature so as to preclude second appeal.*—Where the transferee of a debt-bond hypothecating standing crops institutes a suit to enforce his rights, such suit would not be a Small Cause Court suit, within the meaning of s. 65 of Act XI of 1865, so that a second appeal might be precluded by reason of the provisions of s. 586 of the Civ. Pro. Code. KALKA PRASAD v. CHANDAN SINGH, **10 A. 20=A.W.N. 1887, 270.** (7 A. 855, 9 W.R. 136, 2 M.H.C. 474, *R.*) [*R.*, 16 A. 315.]

(79)—*Small Cause Court suit—Suit for enforcement of hypothecation of moveable property—Act* XI *of* 1865, *s.* 6.—A suit for money againt defendants personally and by enforcement of the hypothecation of cattle in the hands of third parties who were added as defendants, cannot lie in a Small Cause Court, as the suit cannot be regarded as falling under the category of a "suit for money due on a bond or other contract," or of a "suit for personal property or for the value of such property" within the meaning of s. 6 of Act XI of 1865. SURAJPAL SINGH v. JAIRAMGIR, **7 A. 855=A.W.N. 1885. 289.** (9 W.R. 136, 7 A. 152, *R.*) [*F.*, 10 A. 20.]

(80)—*Suit of the nature cognizable in a Court of Small Causes — Jurisdiction — Construction of hypothecation bond—Special appeal.*—The defendant executed a bond in favour of the plaintiff in which it was provided that in case of default by the defendant the plaintiff should be entitled to recover his money from three boats pledged and also from the other moveable and immoveable property of the defendant. In a suit on the bond the plaintiff asked for a decree for Rs. 500. "*Bakajalat wa nilam tin munsil kishti mai digar jaedad mankula wa gaer mankula*":—*Held*, that the document executed by the defendant did not create a mortgage of, or

Special or Second Appeal—continued.

——8.—Small Cause Court Suits—*continued.*

confer a lien upon any property of the executant except the boats specifically mentioned in that document, and that the plaintiff was not entitled to a decree for sale of any property other than the boats. *Held further*, that the suit was of the nature cognizable in a Court of Small Causes, and no second appeal lay. DEBI v. KEDAR NATH, **1 O.C. 191.**

(81)—*Mortgage—Suit for sale—Subsequent prayer for simple money decree — Suit not of Small Cause nature—Jurisdiction of Court—Second appeal.*—In this case, a suit was brought for sale upon a mortgage. It having been discovered that there was a prior mortgage upon the property, the plaintiff withdrew his claim against the property and asked for a simple money decree. *Held* that this latter fact did not render the suit a Small Cause suit, and that the jurisdiction of the Court depends upon the nature of the suit as brought, and not upon the character which it ultimately assumes, and therefore, a second appeal lay from the decree in the suit. LALA BISHUN SARUP v. MANGAL SEN, **24 A. 457, Note** [*R.*, 24 A, 456.]

(82)—*Suit against lambardar by assignee of mortgage of share—Suit for money had and received—Small Cause Court suit — Special appeal.*—A suit, by the assignee of a mortgage of a share of an undivided estate, against the lambardar for the profits of such share for a certain year, is a suit for money had and received to the plaintiff's use, and is, therefore, one of a Small Cause nature, in which there is no second appeal when the amount does not exceed Rs. 500. MUHAMDI BEGAM v. ABBAS ALI KHAN, **5 A. 531.**

(83)—*Mortgage of fruit of growing plantain trees—Mortgage of moveable property—Small Cause nature—Second appeal.*—A mortgage of the fruit of growing plantain trees is a mortgage of moveable property, and therefore a suit for the recovery of a sum less than Rs. 500 on such a mortgage is a suit of a Small Cause nature in which there is no second appeal. RANGASAMY KONAN v. SELLAPERUMAL PADAYACHI, **11 M.L.J. 343.**

(84)—*Suit for fallen tree or its value—Small Cause Court suit—Special appeal.*—The plaintiff sued the defendant for a tree or Rs. 20, its value alleging that the latter had wrongfully taken such tree on falling down. *Held* that such a suit was a suit of a Small Cause nature, and no second appeal would lie. SKINNER v. DILDAR KHAN, **A.W.N. 1881, 175.**

(85)—*Landlord and tenant—Suit for fruit of trees or share of proceeds—Claim based on* wajib-ul-arz—*Nature of claim—Jurisdiction of Small Cause Court—Act* XI *of* 1865, *s.* 6—*Second appeal—Civ. Pro. Code*, 1882, *s.* 586.—A suit for recovering an amount below Rs. 500 being the value of half the mangoes produced on a certain land against the defendants who were the tenants under the plaintiffs, the claim

Special or Second Appeal—continued.

——8.—Small Cause Court Suits—*continued.*

being founded on an agreement contained in the *wajib-ul-arz*, is only a suit to recover personal property under a contract, and is, therefore, one cognizable by a Small Cause Court under s. 6 of Act XI of 1865. Under s. 586, Civ. Pro. Code, 1882, no second appeal would lie to the High Court in such a suit. BISHUN v. NAIPAL, **A.W.N. 1885, 299.**

(86)—*Suit for damages for branches of a tree cut and misappropriated—Cognizance by Small Cause Court—Act* XI *of* 1865 (*Mofussil Small Cause Courts*), *s* 6—*Civ. Pro. Code*, *s.* 586—*Second appeal.*—A suit for damages on account of the branches of a tree cut and misappropriated though involving a question of title to immoveable property, was held to be cognizable by a Small Cause Court, and hence no second appeal could lie. The test for jurisdiction is not the nature of the title claimed nor the nature of the property out of which such title arises, but the specific remedy prayed for in the suit. ABDUL KARIM v. LACHHMAN, **A.W.N. 1888, 43.**

(87)—*Suit for the price of trees cut and removed—Damages—Special appeal—Jurisdiction.*—If, in a suit for the value of trees cut and removed, the Court in order to determine whether plaintiff is entitled, as damages, to the value of his trees, has to go into evidence as to whether they belong to the plaintiff or not, such fact does not make it the less a suit for damages. Such a suit is cognizable by the Court of Small Causes and no special appeal will lie. SHIB DEEN TEWARY v. BUKSHEE RAM PROTAB SINGH, **W.R. 1864 Mis. 3.**

(88)—*Suit for price of personal property sold—Claim for price due to one of the joint owners—Liability of buyer—Suit within cognizance of Small Causes Court—Special appeal.*—Plaintiff sued for the value of certain articles alleged to belong to himself and another. Defendant pleaded payment of the whole price to that other. The Sudder Ameen disallowed the objection and the High Court *held* that he was right in doing so. Plaintiff and the co-owner were not partners, nor was there anything to show that the plaintiff had authorized her co-owner to receive her share also as her agent or otherwise. On second appeal by the defendant, plaintiff objected that the suit was one sustainable in a Small Cause Court under Act XLII of 1860, s. 3, and that therefore the right of special appeal was taken away by s. 27, Act XXII of 1861. The suit being one for money due for personal property the High Court was of opinion that the preliminary objection to the appeal was well founded. The High Court observed that if the owners were partners or the suit had been on a necessarily entire contract, plaintiff could not have split the cause of action and sued alone for her own share. In the present case, however, the sale was only of the property of one co-owner made by another. RADHANATH SAHA v. KAMEENEE SOONDEREE DOSSEE, **2 W.R. 37.**

Special or Second Appeal—continued.

——8.—Small Cause Court Suits —*continued.*

(89)—*Act* XI *of* 1865, *s.* 6—*Act* XXIII *of* 1861, *s.* 27—*Jurisdiction—Appeal.*—A suit for the materials, bamboos, post, verandah, etc., appertaining to four thatched huts, wherein plaintiff sought a decree to break up and remove them, or to obtain their value to the extent of Rs. 29 as. 4 was held to come under s. 6, Act XI of 1865, and to be a case in which by s. 27, Act XXIII of 1861, no special appeal would lie. KASI CHANDRA DUTT v. JADU NATH CHUKERBUTTY, **8 B.L.R. 512, Note = 10 W.R. 29.** [*Overruled*, 8 B.L.R. 508, F.B. = 17 W.R. 309.]

(90)—*Act* XI *of* 1865, *s.* 6—*Act* XXIII *of* 1861, *s.* 27—*Special appeal.*—A suit brought by the plaintiff to recover possession from the defendant of a 12 annas-share in a boat by establishment of his right, is a claim for personal property within the meaning of s. 6 of the Small Cause Courts Act. Therefore no special appeal lies in such a case under Act XXIII of 1861, s. 27. MOHOMED AZIM BHOOYAH v. MAHOMED SOMEE, **21 W.R. 413.**

(91)—*Act* XXIII *of* 1861, *s.* 27—*Suit triable by Court of Small Causes—Special appeal.*—A suit brought to recover the price of a tree cut down by the defendant, and the price of fish caught by him in plaintiff's tank (the total value of the claim being only Rs. 45), is triable by a Court of Small Causes, and consequently no special appeal lies to the High Court. SUJJAD ALI v. BHOLA RAM, **5 N.W.P. 24.**

(92)—*Special appeal—Small Cause suit—Suit to recover value of fruits of trees taken by defendant.*—A suit to recover the value of the fruit of certain mango trees alleged to have been misappropriated by the defendants was one of a Small Cause nature and no special appeal lay. SHAMANUND v. NUND KOOMAR, **3 Agra 290 = Agra F.B., Ed. 1874, 153.**

(93)—*Jurisdiction—Widow's suit to recover husband's personal property—Act* XI *of* 1865, *s.* 6—*Construction—Small Cause Court suits.*—A suit by a widow as heiress of her deceased husband for personal property valued at Rs. 200 said to have been taken from him in his life time and carried away by defendants, was *held* to be within the cognizance of a Small Cause Court, under s. 6, Act XI of 1865. The words "a share or part of share in an intestacy" in the second proviso to that section, apply to suits by persons claiming as heirs against other persons similarly entitled, in order to determine their respective rights and interests, and to suits against persons administering the estate of a person who has died intestate where the share or proportion to which the claimant is entitled is in question. KAPAHI BEWA v. KESHRAM KUCH, **2 B.L.R. App. 23 = 11 W.R. 93.** [*F.*, 27 A. 622 = 2 A.L.J. 388 = A.W.N. 1905, 134.]

(94)—*Suit to recover share in produce—Prayer for account of profits—Maintainability in Small Cause Court—Question of title arising,*

Special or Second Appeal—continued.

——8.—Small Cause Court Suits—*continued.*

whether excludes jurisdiction—Second appeal.—A suit to recover, as plaintiff's share in the produce of certain *dhara* and *khote* (immoveable) properties, Rs. 339-14-2 or any other sum found due on taking accounts from the defendant, the managing *khot*, who denied the plaintiff's right to the produce of some of the properties, was held to be a Small Cause, in spite of a question of title being raised and an account having been asked for in the alternative, so that no second appeal lay. The mere fact of a question of title arising does not prevent the suit being triable by a Court of Small Causes, also, by merely asking, in the alternative, for an account of the profits or produce of certain properties, plaintiff cannot convert a Small Cause suit into one of a different nature. NARAYAN v. BALAJI, **21 B. 248.** [*F.*, 25 B. 625, 1 L.B.R. 335, 32 B. 560 = 10 Bom. L.R. 733, 7 Ind. Cas. 390 = 8 M.L.T. 281; *R.*, 137 P.L.R. 1901, 6 Bom. L.R. 370, A.W.N. 1906, 29 = 3 A.L.J. 23, U.B.R. 1908, 3rd Qr., Prov. Small Cause Courts Act, s. 3, 20 P.R. 1911.]

(95)—*Suit for arrears of rents—Small Cause suits—Special appeal—Act* XI *of* 1865, *s.* 6 (4).—Suits of the nature cognizable by Courts of Small Causes must mean, without reference to cl. 4 of s. 6 of Act XI of 1865, and must be, cognizable in general. A suit for arrears of rent when the claim is under Rs. 500, is not cognizable by a Court of Small Causes and a special appeal, therefore, lies to the High Court. RAMACHANDRA RAGHUNATH v. ABAJIBIN RASTYA, **6 B.H C.A.C. 12.** [*F.*, 22 M. 229; *R.*, 23 M. 547 = 10 M.L.J. 329.]

(96)—*Act* XI *of* 1865, *s.* 6—*Small Cause Court—Special appeal.*—Where the plaintiff claimed a sum of money under the name of a zemindari cess, but in point of fact what was claimed was claimed on account of the use of land, *held* that such a suit being one cognizable by a Small Cause Court under s. 6, Act XI of 1865, a special appeal would not lie. The circumstance that a question relating to title has been incidentally decided in the course of a suit does not necessarily take the suit out of the category of suits of a nature cognizable by Small Cause Courts. BUCHOO CHOWBEY v. GHOORLAIT, **4 N.W.P. 56.**

(97)—*Appeal—Suit to recover enhanced assessment and cess.*—A suit by a landlord to recover from his *mulgeni* tenant the enhanced assessment and cess upon the land subsequent to the date of the lease may be regarded as a suit to recover arrears of rent at an increased rate. The suit not being thus cognisable by a Court of Small Causes, a second appeal is maintainable. BAHSHETTI v. VENKATARAMANA, **3 B. 154.**

(98)—*Civ. Pro. Code* (XIV *of* 1882), *s.* 586—*Suits for recovery of rent, of nature cognisable by Courts of Small Causes—Second appeal not maintainable.*—Suits for any rent, whether due

***Specia or Second Appeal*—continued.**

——8—Small Cause Court Suits—*continued.*

for houses or in respect of any other immoveable property, are suits of a nature cognizable by a Court of Small Causes within the meaning of s. 586, Civ. Pro. Code. When the legislature determines that suits of a certain character may be made triable in Courts of Small Causes without further action on the part of the legislature, those suits are *of a nature cognizable* in Courts of Small Causes even though the local Government may not establish Small Cause Courts or invest any Judge with power to try Small Cause suits in particular as Small Cause suits. In cases where such action has not been taken by Government the suits might not become actually cognizable by such Courts, but their nature or character as originally declared by the legislature remains unaffected. SOUNDARAM AYYAR v. SENNIA NAICKAN. **23 M. 547 =10 M.L.J. 329. F.B.** (22 M. 229, *Overruled.*) [*F.*, 1 L.B.R. 69; *R.*, 2 L.B.R. 47; *D.*, 1 L.B. R. 335.]

(99)— *Suit for specific performance of contract— Valuation above Rs.* 500— *Exemption from jurisdiction of Small Cause Court--Special appeal.*—The respondents raised the preliminary objection that, as the suit was valued only at Rs. 500, there cannot be, under s. 27 of Act XXIII of 1861, any special appeal to the High Court, but the High Court overruled the above objection on the ground, that, as the case was one for specific performance of a contract, it was not a suit which, under s. 6 of Act XI of 1865, could be tried by a Small Cause Court, and consequently a special appeal would lie in such a case. NILKANTH SURMAH v. BISHEN BASHEE, **6 W.R. 322.**

(100) — *Default of payment of rent by putneedar—Suit to establish liability of surety— Special appeal not barred—Act* XXIII *of* 1861, *s.* 27.—In a suit to establish the liability of the surety in respect of arrears of rent due from a putneedar, the question whether the putneedar has not paid his rent will have to be decided, and such a question not being one within the cognizance of the Small Cause Court, a special appeal would not be barred in such a case by s. 27 of Act XXIII of 1861. MAHARAJAH MAHATAB CHUND BAHADOOR v. BROJONATH MITTER, **8 W.R. 111.**

(101)—*Question of right to land arising incidentally—Jurisdiction—Small Cause Court— Special appeal.*—This was a second appeal filed by the plaintiff against the lower Court's decision dismissing his suit for the price of certain trees on the ground that he was not entitled to claim the price of such trees. It was objected that, as the suit was one in its nature cognizable by Small Cause Court, no second appeal would lie. The objection was accepted by the High Court which held that the jurisdiction of the Small Cause Court was not affected by the circumstances that it had to enquire into a question of title to land as incident to the question of the value of trees taken

***Special or Second Appeal*—continued.**

——8.—Small Cause Court Suits—*continued.*

off the land. SHUMBHOO CHOWDHRY v. MR. R. COMBS, **2 W.R. 179.**

(102)—*Suit for contribution relating to costs —Question of admissibility of special appeal to be decided by Court itself and not its officer.*— The subject-matter of the present suit was a claim by the plaintiff against the defendants for contribution in respect of costs which the plaintiff had had to pay in a suit in which he and the defendants were jointly interested. On this petition of special appeal, the Deputy Registrar had recorded that the case was one of the Small Cause Court class, in which according to s. 27 of Act XXIII of 1861, no special appeal lay. The High Court directed that the appeal be admitted observing that the admissibility of a special appeal in such a case was a matter which should be decided judicially by the Court itself and not by one of its officers. KISTO COOMAR CHOWDHRY v. ANUND MOYEE CHOWDHRAIN, **6 W.R. Miss. 128.**

(103)—*Decree against several persons jointly— Suit for contribution—Jurisdiction of Small Cause Court – Second appeal.*— A suit for contribution not arising out of contract, but in respect of money due under a decree making both the plaintiff and the defendants jointly liable, is not one cognizable by a Court of Small Causes, which cannot deal with questions of equity, and a second appeal will lie in such a suit. FUTTEH ALI v. GUNGANATH ROY, **8 C. 113=10 C. L. R. 20.** (7 W.R. 377, *F.*; 3 A. 66, *D.*)

(104)—*Act* XXIII *of* 1861, *s.* 27—*'Decision or order,' meaning of, in—Small Cause Court's jurisdiction—Co-sharer paying Government revenue of joint property—Suit for contribution.*— The 'decision or order' mentioned in s. 27 of Act XXIII of 1861 is confined to those decrees which, if made in the Small Cause Court, would be conclusively binding on the parties. It cannot therefore include a decree passed in pursuance of a judgment on an issue affecting the proprietary relations between the parties which, if it had properly arisen incidentally in a suit actually brought in a Small Cause Court, could not then have been finally concluded between the parties. *Held* also that, although the Government revenue payable by each *kullum* may not be separate and specifically defined, it cannot, on that account, be taken that one co-sharer cannot recover from the others the due portion of the jumma for the whole mahal which he had been obliged to pay. BHOOP NARAIN SAHAO v. MEER MAHOMED HOSSEIN, **4 W. R. 60.** [*Diss.*, 18 W. R. 104; *R.*, 6 W. R. Mis. 128.]

(105)—*Special appeal—Suit of Small Cause nature—Question of title necessary for decision.* —In a suit of a Small Cause nature, where a question of title has arisen which must be determined before the plaintiff can get a decree, and the lower appellate Court has failed to determine it, a special appeal is admissible. PACHOO RAREE v. GOOROO CHURN DASS, **15 W. R. 556.**

Special or Second Appeal—continued.

—— 8.—Small Cause Court Suits—*continued.*

(106)—*Small Cause Court—Title to land—Special appeal admissible.*—Where, in a suit of the nature triable by a Small Cause Court, to determine the question at issue, it was necessary for the Court of appeal in the first instance to determine a question of title to land which question, however, was not determined by that Court, *held* that a special appeal lay to the High Court. KISANDRAM v. JETHIRAM, **5 B.H.C.A C. 57.**

(107)—*Small Cause Court—Question of title—Special appeal.*—In this suit, the plaintiff sought to recover a share of one-half of an annuity obtained by the common ancestor of both the parties, laying his claim at Rs.259-9-1. The lower appellate Court went into the question of the plaintiff's title. *Held* that though the suit was of a nature cognizable by a Court of Small Causes, still as the lower appellate Court had gone into and decided a question of title, a special appeallay to the High Court, and the objection as to the maintainability of the appeal under s. 27 of Act XXIII of 1861 was not tenable. W.D. DIKSHIT v. B.V. DIKSHIT, **2 B.H.C. 4.** [*Diss.*, 18 W.R. 104; *F.*, 4 B.H.C. 114, 5 B.H.C. A.C.J. 57; *Appl.*, 15 W.R. 556.]

(108)—*Suit for damages and declaration—Jurisdiction—Special appeal—Act* XLII *of* 1860, *s.* 3—*Act* XXIII *of* 1861, *s.*27.—A suit for damages below Rs. 500 for detention of materials of the plaintiff's house and for a declaration of his title thereto is cognizable by a Court of Small Causes under s. 3, Act XLII of 1860, because such a suit involves no question of title, the claim for declaration of title being in law mere surplusage and without meaning. Consequently, a special appeal in respect of it is barred by s. 27 of Act XXIII of 1861. KISHUB CHUNDER SHAHA v. BROMMO MOYEE DABEA, **I W.R. 35.**

(109)—*Special appeal—Suit of Small Cause nature—Value less than Rs.* 500—*Question of title involved.*—No special appeal lay from the decision of a Court of Small Causes in a suit for less than Rs. 500, being the value of crops misappropriated by the defendants, although the suit involved a question of title, inasmuch as a Court of Small Causes is competent to decide a question of title incidentally. HEDAETOOLLAH v. SHAIKH KARLOO, **7 W. R. 73.**

(110)—*Suit for damages for crops cut and carried away—Denial of plaintiff's title to land—Suit of Small Cause nature—Act* XXIII *of* 1861, *s.* 27—*Special appeal—Additional stamp not leviable by reason of value of land.*—In this suit brought by the plaintiff to recover, from the defendant, damages on account of the latter having cut and carried away her crops, the defendant denied the plaintiff's title to the land and an adjudication on that point became necessary only so far as to enable the Court to decide the plaintiff's claim for damages. The order of the lower Court compelling the plaintiff

Special or Second Appeal—continued.

——8.—Small Cause Court Suits—*concluded.*

to pay additional stamp duty was erroneous, but the character of the suit was in no respect changed by the payment; and the High Court therefore upheld the preliminary objection taken to the defendant's special appeal that it was barred by s. 27 of Act XXIII of 1861, the suit and decree having been merely for damages below Rs. 500. RAM DYAL GANGOOLY v. HURO SOONDUREE DOSSIA, **10 W. R. 272.**

(111)—*Special appeal—Limitation—Objection not taken in Courts below—Suit of Small Cause nature.*—*Special appeal.*—Where the objection as to limitation was never raised in the Courts below, and the decree of which execution is now sought was made in a suit of the nature of a Small Cause Court suit, the special appeal must be dismissed. RAJAH MOKOOND NARAIN DEO v. PERSHAD MUDDUCK, **18 W. R. 252.**

(112)—*Case of Small Cause nature—Decision passed prior to Act* XXVII *of* 1860, *special appeal from, not barred by s.* 27 *of Act.*—In this case, the respondent took the preliminary objection that no special appeal would lie under s. 27 of Act XXIII of 1861, inasmuch as the suit was of the nature of a Small Cause Court case. But, it was *held* that that section is prospective, and the decision sought to be carried out was obtained long before the passing of that Act. The respondent further pleaded that he was entitled to the benefit of s. 7 of Regulation VII of 1832, which barred all special appeals in these cases. But the High Court *held* that the above two laws had no connection and the right preserved to parties in pending suits under s. 387 of Act VIII of 1859 does not refer to or contemplate such provisions as those laid down in Reg. VII of 1832. BHOLANATH DUTT v. MOHADEB SHEET, **3 W. R. Mis. 19.** [*Diss.*, 8 W. R. 107; *R.*, 2 A. 112.]

See APPEAL—ORDERS, 7 B. 292.

See LANDLORD AND TENANT — PAYMENT OF RENT BY TENANT, 11 B.H.C. 106.

Suit by auction purchaser for refund of purchase money on failure of consideration — Cognizability by Small Cause Court—Second appeal—*See* SALE—SALE IN EXECUTION OF DECREE — MISCELLANEOUS, 12 Bom.L.R. 723=7 Ind. Cas. 955.

——9.—Miscellaneous.

(1)—*Finding on issue of fact remanded—Objections—Civ. Pro. Code, ss.* 565, 566, 568, 587.—*Held by the Full Bench (Tyrrell, J., dissenting)* that findings upon issues remanded by the High Court in second appeals, cannot be impeached on the evidence as in first appeals, but objections to such findings must be restricted to the limits within which the original pleas in second appeal are confined. 7 A. 649, *P.*) *Per Petheram, C.J., and Tyrrell, J.*—Ss. 565 and 566 of the Civ. Pro. Code, are, so far as may be, incorporated in the chapter which

Special or Second Appeal—continued.

——**9.—Miscellaneous**—*continued.*

relates to second appeals, and when the evidence for disposing of the real issues in the case has been taken and exists on the record, it is within the powers, and is the duty of the High Court, on the hearing of a second appeal, to itself fix and determine such issues on the evidence on the record, and not to put the parties to the expense and delay involved by a remand. *Per Straight, J.*—It is true that by s. 587 of the Civ. Pro. Code, the provisions of the Chapter regulating first appeals, are declared to be applicable, " so far as may be," to second appeals, but it is obvious that this does not mean that they are to be adopted indiscriminately or in their entirety ; and it cannot be held that the section affords any sanction for the High Court deciding questions of fact in any shape or at any stage of a second appeal. (2 A.W.N. 104 and 158, *R.*) *Per Tyrrell, J.*—. The jurisdiction of Courts of second appeal, in respect of questions of fact is restricted in so much as the appeal may not be entertained on grounds of fact, but under the circumstances of s. 566, no less than under the abnormal circumstances contemplated by the ruling in 7 A. 649, the High Court may take cognisance of omitted issues of fact, and must determine them if there be evidence upon the record sufficient for that purpose. In cases where the Court, still acting under s. 566, has been obliged, in the absence of evidence on the record, to supplement the defect through the agency of the Court below, its jurisdiction in respect of such evidence does not become limited thereby, or by reason only of the circumstance that the evidence is accompanied by a " finding " of the inferior Court. The word " finding " is of course used in s. 566, in its restricted sense of an answer to the proposition referred for inquiry and not of an award or decision on the issue before the Court. BAL KISHEN v. JASODA KUAR, **7 A. 765 F.B. = A.W.N. 1885, 225.** [*Overruled*, 9 A. 147, F.B.; *Appl.*, 8 A. 172, F.B.; *R.*, 24 C. 98]

(2)—*Custom—Evidence—Tenant occupying house in* abadi—*Rights of such a tenant.*—Whether or not a custom prevails whereby tenants of houses are empowered to sell the materials of their houses and the sites of the houses so long as the houses are standing is to some extent a question of law. The High Court, in second appeal, has jurisdiction to consider the evidence given in support of such a custom and determine whether or not that evidence is sufficient in point of law to establish a custom. Where, the tenants of a certain village sold the sites of their houses alleging a custom that they had a right to do so by virtue of a local custom and the Zemindar sued to have those sale-deeds cancelled, and the lower Court found on the evidence that the custom did prevail, *held* that the Court below was right in the conclusion to which it had come. GIRRAJ SINGH v. HARGOBIND SAHAI, **7 A.L.J. 36 = 4 Ind. Cas. 304 = 32 A. 125.** (28 A. 698, 30 A. 311, F.B., *R.*)

Special or Second Appeal—continued.

——**9.—Miscellaneous**—*continued.*

(3)—*Finding of fact—Special appeal.*—A finding of fact by the lower appellate Court was set aside on special appeal and the case was remanded on the ground that the Judge assumed a state of things in favour of the defendant which the defendant had not urged, and which was contradictory to his case, and because the finding of the Judge was opposed to the inference properly arising from the facts. SURBESWAR GOSE v. CHOTO ARIZOLLAH MANDAL, **8 B.L.R. App. 78 = 17 W.R. 213.**

(4)—*Proceeding to enforce decree—Question of fact.*—It is a question of fact whether the action of a judgment-creditor, by which he prevented the attempt of the judgment-debtor to transfer his decree into another name, is a proceeding taken to enforce the decree which the judgment-creditor seeks to execute, and the finding upon that question of fact cannot be disturbed in special appeal. SHEIKH IRSHAD ALI v. RADHU SHAH, **13 B.L.R. App. 1 = 21 W.R. 188.**

(5)—*Court sale—Purchaser's right—Second appeal.*—The question as to what the purchaser at a Court sale actually bargained and paid for is not a mere question of fact, but a mixed question of law and fact, and the High Court can, in second appeal, consider this question, and is not bound by the finding of the lower appellate Court. GNANAMMAL v. MUTHUSAMI, **13 M. 47.**

(6)—*Act* VIII *of* 1859, *s.* 206—*Order in execution of decree—Appeal—Special appeal—Appeal presented after Act* X *of* 1877 *come into force—Power of Court to which decree transferred for execution.*—The question in this case was whether s. 591 of Act X of 1877 precluded an appeal to the Chief Court being preferred on or after the 1st of October, 1877, from an order passed before that date by a Court disposing finally of an appeal from an order in execution of the decree. *Held* that the provisions of the Act do not apply so as to exclude an appeal presented after October 1st, 1877 from an order passed under Act VIII of 1859 when that Act allowed an appeal. *Held* also that the Court to which a copy of a decree is transmitted for execution under the provisions of s. 286 of Act VIII of 1859 is authorised only to execute it within its own jurisdiction. It cannot authorise any other Court to execute the decree. When such authority is requisite, it can be granted only by the Court whose duty it was originally and in the first instance to execute the decree. BHAG SINGH v. BISHAMBAR DAS, **129 P.R. 1879, F.B.** [*R.*, 75 P.R. 1881, 12 P.R. 1900 = (1900) P.L.R. 63.]

(7)—*Act* XXVIII *of* 1868, *ss.* 37, 40—*Suit to eject tenant—Question regrding compensation payable, whether could be raised by tenant on special appeal.*—According to the terms of s. 37 of Act XXVIII of 1868, it is the duty of a person suing to eject a tenant, to declare either that compensation for improvements has been

Special or Second Appeal—continued.

——9.—Miscellaneous—*continued.*

paid to the defendant or that no compensation is payable, or that there is a difference between the parties as to the amount or value of the compensation to be made. The above matters not having been placed before the Court by the plaintiff in the present case, or dealt with by the first Court on its own motion, the defendant had a right to have the omission rectified in special appeal. NATHAL v. SULTAN, **149 P. R. 1879.** [*Appr.*, 96 P.R. 1881.]

(8)—*Evidence — Special appeal.*—Where it was found in special appeal that the lower appellate Court, though considering the evidence of the witnesses in detail, did not meet the first Court's judgment in a single point, the latter Court's decision was restored, and that of the lower appellate Court reversed. SHAIKH ASSANOOLLAH v. SUFFER ALI, **21 W.R. 135.**

(9)—*S.* 13, *Act* I *of* 1872 (*Evidence*)—*Second appeal—Finding of lower Courts on existence of usage based on irrelevant matters—Effect.*—Where the findings of the lower appellate Court are mainly based on what is irrelevant, and though that Court has also referred to what is evidence, it is impossible to say that its conclusions proceed upon a proper consideration of that evidence alone, the case must be remanded for re-trial. PALAKDHARI RAI v. MANNERS, **23 C. 179.**

(10)—*Interference by High Court in special appeal.*—The High Court will always refuse to interfere with the appellate judgment of a lower Court, unless it commits some error of law or is under some misapprehension of law. NOOR ALI MIAN KHONDKAR v. ASHANULLAH, **11 C. 608.**

(11)—*Special appeal to* Sudder Dewanny Adawlut.—Act XVI of 1853, cl. 4, enacts that no special appeal should lie, nor shall any decision be reversed, altered, or remanded by any of the *Sudder* Courts upon the ground that the decision of any question of fact is contrary to, or not warranted by, evidence taken, or any probability deduced from the record. *Held*, that such enactment was to be carried to its full legitimate extent, except where the decree of the inferior Court is founded on an inference of law, when a special appeal lies to the *Sudder Dewanny Adawlut.* Thus, when the Judge of the inferior Court stated that the inclination of his opinion was, that there had been a sale, but that the defendant could not rely upon that defence, because he had attempted to strengthen his case by a forged bill of sale, and that the estate, if not sold, must have been mortgaged, as insisted by the plaintiff, and thereupon decided without further proof that the estate was mortgaged; and such judgment was held not to be a finding of fact, but an inference of law, and analogous to a misdirection of a Judge to a jury, and, in such circumstances, a special appeal to the *Sudder Dewanny Adawlut* lies from such decree. SEVVAJI

Special or Second Appeal—continued.

——9—Miscellaneous—*continued.*

VIJAYA RAGHUNATHA VALOJI KRISTNAN GOPALAR v. CHINNA NAYANA CHETTI, **10 M. I.A. 151=2 Sar. 88.**

(12)—*Right to appeal from decision in appeal in favour of appellant.*—Where an appellant succeeded on the point raised by him and got precisely what he wanted, he could not be permitted to prefer an appeal from the decision in his favour, on the ground that the lower appellate Court was wrong in deciding it in the way it did, as there was nothing for him to appeal against. It is nothing to the purpose that he had since been differently advised by another legal adviser. AMAN AHIR v. NANHEY, **7 C.P.L.R. 141.**

(13)—*Appeal—Return of plaint by appellate Court—Second appeal — Stamp.*— On appeal against the decree of a Munsif, the Judge returned the plaint finding that the Munsif had no jurisdiction. The plaintiff preferred an appeal to the High Court in the shape of a first appeal from an order. *Held* that there was no order from which a first appeal would lie. The lower appellate Court had made a decree from which the remedy was by appeal from that decree on the requisite stamp. CHATTAR LAL v. HAR LAL, **A.W.N. 1883, 165.**

(14)—*Misjoinder of causes of action—Dismissal of the suit in second appeal.*—Where a suit is not objected to on the score of misjoinder of causes of action at or before the settlement of issues in the Court of first instance, under s. 53 (*b*) (*iii*) of the Civ. Pro. Code, 1882, it is not permissible to dismiss the suit on that ground in second appeal. SANNA v. GANAPA, **5 Bom. L.R. 185.**

(15)—*Changing case in second appeal.*—A plaintiff will not be allowed to change his case in second appeal. DASSORATHY HURI CHUNDER MAHAPATTRA v. RAM KRISHNA JANA, **9 C. 526=13 C.L.R. 114.**

(16)—*Second appeal—Question of fraud not raised in lower Courts.*—Where a question of fraud, which might have been a substantial and serious one under s. 53 of the Transfer of Property Act, was not taken in either of the lower Courts, the High Court cannot entertain it in second appeal, although it is raised in the memorandum of appeal. DURGA CHURN ROY CHOWDHURY v. MONMOHINI DASSI, **15 C. 771.**

(17)—*Application to set aside* ex parte *decree—Second appeal—Revision—Civ. Pro. Code, ss.* 588, 622.—No appeal lies against an appellate order reversing a refusal to set aside an *ex parte* decree; nor would the High Court interfere in revision in such a case. AUBINASH CHUNDER MOOKERJEE v. MARTIN, **8 C. 832.**

(18)—*Rent-suit—Intervenor—Special appeal—Act* VIII *of* 1869 (*B.C.*), *s.* 302.—The circumstance that a question has been determined at the hearing of the appeal before the District Court in a rent suit, by which a party who has intervened, may be injuriously affected, will

Special or Second Appeal—concluded.

——9.—Miscellaneous—*concluded.*

not make the appeal cognizable as a special appeal, unless the decision has determined a question of title or interest in land as between parties having conflicting claims thereto. RAJ KISHEN MOOKERJEE v. SREE NATH DUTT, **23 W.R. 408.**

(19)—*Validity of Civil Court's decree—Liability to be questioned in special appeal—Account-books—Evidence.*—A decree that had become final and conclusive by operation of law is not open to be questioned in special appeal as to its validity. Account books of the opposite party can be used as corroborative evidence and not as independent evidence, as it would be highly unjust to bind anybody by entries which the adversary has made against him in books over which he has no control whatever. RAMESSUR SINGH v. ADJODHYA PERSHAD SINGH, **13 W. R. 294.**

(20)—*Order in execution, institution of suit to set aside—Application to file special appeal out of time subsequent to suit, not grantable.*—Where from an order in the Execution Department passed by the lower Court, a special appeal was maintainable, and the applicant, instead of taking that course, brought a regular suit to get rid of the order, the High Court *held* that since he had elected one remedy, it could not, in order to enable him to try another, allow him to file a special appeal out of time. KALEE KISHORE SEIN v. NILAMBUR SEIN, **2 W.R. Mis. 35.**

(21)—*Act* VIII *of* 1859, *s.* 346—*Construction—Appeal dismissed for default—Interest in excess of principal—Decree debts—Reg.* XV *of* 1793.—(*a*) A party seeking to put in motion the stringent provisions of s. 346, Act VIII of 1859, which provides for the dismissal of an appeal for default, is bound to show very distinctly that the procedure under it has been strictly complied with. (*b*) Therefore, assuming that the said section applies to miscellaneous cases, it does not apply to a case in which the appellant did not make his appearance on the day to which the case was adjourned or in which the appellant is unable to show that he had any notice that his appeal would be heard on the day on which the Judge disposed of it. Reg. XV of 1793 which prohibits award of interest in excess of principal, applies to sums *decreed* only, and not to interest which has accumulated through the neglect of the judgment-debtor to pay. SHIB CHUNDER GUPTO v. ALLAD MONEE DOSSIA, **5 W.R Mis. 22.** [*D.*, 4 N.L. R. 166]

(22)—*Jurisdiction—Finding by first Court not appealed against—Right to take objection in special appeal.*—Where the question of jurisdiction based on a question of fact was decided by the first Court against the defendant and the latter did not prefer any appeal against the said decision, it was not competent for him to urge the plea again in special appeal. RAJ NARAIN v. ROWSHUN MULL, **22 W.R. 124.**

Specific Performance.

(1)—*Specific performance—Requisites to entitle party to specific performance—Ability of plaintiff to perform his part of agreement—Absence of default.*—A Court of equity will not decree specific execution of an agreement in favour of a party who is not competent to perform his part of the agreement. To entitle a party to specific performance, he must show that there has been no default on his part, and that he has taken all proper steps towards performance on his own part. BUNGSEEDHUR MULLICK v. CALCUTTA AUCTION COMPANY, **1 Hyde 45.** RAM FUNOO KOONDOO v. MULLICK DOSSEE, **14 W.R. 338.**

(2)—*Decree—Form—Suit for specific performance.*—In drawing up a decree in a suit for the specific performance of an award, the Court should prescribe a time within which the defendants should perform their obligations. If the defendants fail to perform their duties within the time specified and fail also to show sufficient cause for their failure to do so, the Court should direct the imprisonment of the defendants or the attachment of their property or both. SHEORAM v. GANESHI LAL, **A.W.N. 1883, 176.** [*R.*, A.W.N. 1883, 218.]

(3)—*Specific performance of contract—Reasonable time.*—Parties seeking for specific performance of contracts should come to the Court for relief within a reasonable time. SETH SAM v. APPUNDI IBRAHIM SAHIB AND MRS. MARIA VARDEN. **6 M H.C. 75.**

(4)—*Delay in bringing the suit—Specific performance—Court's discretion under s. 22, Specific Relief Act.*—There may be circumstances, under which a Court, exercising the discretion with which it is vested under the Specific Relief Act, may think it right to dismiss a suit brought nearly three years after the contract was entered into, and there may be also circumstances, which may justify a Court in awarding a decree, even when the suit is brought after such a delay; each case must depend upon its own circumstances. But where the objection as to the delay was not taken in the lower Courts, the High Court, in second appeal, will not be justified in directing the dismissal of the suit. MOKUND LALL v. CHOTAY LALL, **10 C. 1061.**

(5)—*Suit for specific performance—Denial of plaintiff's title—Cause of action—Obiter—Per Garth, C.J.*—Cause of action for a suit for specific performance does not arise until the plaintiff's title to specific performance is denied by the defendant. If the suit is brought within three years of such denial it will be in time. AHMED MAHOMED PATTEL v. ADGEIN DOOPLY, **2 C. 323.** [*Obs.*, 19 M. 391.]

(6)—*Suit for ejectment—Plea of contract of sale—Bar of remedy to enforce contract—Plea not available.*—Where the defendant, in a suit for ejectment, sets up the plea of a contract of sale in his favour, the plea cannot be maintained, if his remedy, by way of a suit for specific

Specific Performance—*continued.*

performance, has become barred by limitation. JEYRAM MAHAJAN v. GANPATI MALI, **17 C. P.L.R. 19.** (16 A. 344, 21 M. 291, 13 C.P.L.R. 163, *R.*)

(7)—*Suit for specific performance of contract—Limitation—Cause of action*—Where the plaintiff brought a suit for specific performance of a deed of contract executed in his favour alleging that the deed provided that, on the defendant's obtaining a decree for certain property, a portion of it was to be conveyed to the plaintiff by a deed of sale, *held* that the plaintiff's cause of action commenced from the date the defendant obtained the decree. THACOOR SREENATH SINGH v. AMEER KHAN, **1 W.R. 144.**

(8)—*Property situate out of jurisdiction—Suit for specific performance—Agreement to mortgage lands beyond jurisdiction—Suit for return of money paid thereunder.*—A suit for the specific performance of a mortgage of lands situate beyond the limits of the original jurisdiction of the High Court would not lie, though the agreement to execute it, made in Calcutta, described the parties as then living in Calcutta. [*R.*, 14 B. 353, 19 C. 353, 23 B. 22, 22 B. 701, 27 M. 157, 33 C. 1065=4 C.L.J. 238.] A decree could, however, be made for the amount paid by the plaintiff, in the same case, under the agreement, inasmuch as he was carrying on business in Calcutta and the money was paid there. The defendant would be entitled to redeem the property under the mortgage (if executed) by paying the sum in Calcutta. SREENATH ROY v. GALLY DOSS GHOSE, **5 C. 82.**

(9)—*Specific performance—Relief asked for cancellation of deed—Incidental relief—Appeal to District Judge—Jurisdiction.*—In a suit for specific performance of a contract of sale, if the plaintiff also asks for the cancellation of the sale-deed in favour of the defendant vendee, the relief is merely incidental to the claim for specific performance of contract, and the District Judge is competent to entertain an appeal in respect of such a suit, the value of the main relief being within his cognizance. NITYANAND v. BISHANLAL, **8 A.L.J. 660.** [8 A.L.J. 266, *D.*]

(10)—*Suit for specific performance of a contract to sell land—Essence of specific performance—Misjoinder of causes of action.*—Though a suit for specific performance of a contract to sell land might be "a suit for land" within the meaning of the Charter, it does not come under s. 44, rule (*a*) of the Civ. Pro. Code. In such a case there would be no misjoinder of causes of action within the meaning of s. 44 (*a*) of the Civ. Pro. Code, where the suit is for money in the alternative. [*R.*, L.B.R., 1872—1892, 355.] *Per Pontifex, J.*—It is of the essence of specific performance that, except under special circumstances, part only of an agreement ought not to be deemed to be performed. G. M. CUTTS v. T. F. BROWN, **6 C. 328=7 C.L.R. 171.**

Specific Performance—*continued.*

(11)—*Civ. Pro. Code (Act X of 1877), s. 44, rule (a)—Suit for specific performance of contract to sell land—Suit for the recovery of immoveable property—Joinder of causes of action—Contract—Admissibility of parol evidence to vary written evidence.*—In a suit for specific performance of a contract to sell a share in a house and premises, the plaintiff also sought to recover a sum of money due from the defendant on promissory notes. *Held* that the suit was not a "suit for the recovery of immoveable property or for declaration of title to immoveable property" within the meaning of s. 44, rule (*a*), Civ. Pro. Code, and that the cause of action in respect of the promissory notes which had been jointed without the leave of the Court, was not improperly joined. (1 C. 249, *cited* and *commented on.*) *Per Wilson, J.*—Under s. 44, rule (*a*), Civ. Pro. Code, a suit for the recovery of immoveable property, etc., is a suit founded upon an existing title in which the plaintiff seeks to get possession of the property. The words "to obtain a declaration of title" apply to a case where a title exists and the plaintiff seeks to have that fact declared. Where the plaint in a suit for specific performance of a contract to sell a certain share of a house, set out a written contract, and alleged that, on its having been subsequently discovered that the share was less than it was originally believed to be, the price was reduced by verbal agreement, *held* that the written contract must be taken as intact save as to the price, and that no evidence could be given by the defendants in contradiction of the other terms of the document. BROWN v. CUTTS, 5 **C.L.R. 487** (4 C.L.R 419. *F.*)

(12)—*Plea of purchase for consideration without notice in suit for*—A plea of purchase for consideration without notice in a suit for specific performance must be distinctly raised and proved. GOPAL BALKRISHNA v. GANPAT NAGO RAODESPANDE, **13 C.P.L.R. 172** (10 C.P.L.R. 107, *F.*) [*R.*, 14 C.P.L.R. 117.]

(13)—*Dismissal of purchaser's suit for specific performance—Vendor's right to retain purchase money.*—Dismissal of purchaser's suit for specific performance of a contract of sale on the ground of non-payment of consideration-money would not of itself entitle the vendor to retain the amount deposited with him, and the purchaser would be entitled to a refund of such amount. ALOKESHI DASSI v. HARA CHAND DASS, **24 C. 897=1 C.W.N. 705.**

(14)—*Sale—Payment of purchase-money—Deed not delivered—Re-sale—Specific performance.*—Where the purchaser of property pays earnest money, and a deed of transfer is executed and registered, but not delivered, it being stipulated that the purchaser should pay the balance, and then get the deed, but no time is fixed for payment of the balance, the vendor is bound to wait a reasonable time for payment, and if he re-sells the property within a week, the second purchaser takes nothing and

Specific Performance—*continued.*

the first purchaser is entitled to a decree for specific performance. MUTHUR ALI v. SHEO SAHOY SINGH, **W.R. 1864, 281.**

(15)—*Dismissal of suit for specific performance—Decree for refund of earnest money though not asked for by plaintiff as alternative relief—Civ. Pro. Code (Act V of 1908), O. VII, r 7* —It does not necessarily follow from the dismissal of a suit for specific performance that an order for the refund of the purchase-money should also be denied. (21 B. 927, 24 C. 897, 1 C.W N. 705, 31 A. 68, 9 C.L.J. 512, 11 Bom. L.R. 525, 19 M.L.J. 295, 6 M.L.T. 89, 1 Ind. Cas 890, 27 Ch. Div. 89, 53 L.J. Ch. 1055 50 L T. 573, 32 W R. 802, 48 J.P. 773, *F*) If a suit for specific performance be dismissed the Court can, nevertheless, give the plaintiff a decree for refund of the deposit, although he had not asked for any such alternative relief. RAGHU NATH SAHAY v. CHANDRA PROTAB SINGH, **15 Ind. Cas. 268.**

(16)—*Sale—Deposit of earnest money by vendee—Repudiation of contract—Rights of vendee—Refusal to grant specific performance against vendee—Rights of vendor—Vendee's lien for part of purchase-money paid to vendor.*—Where a purchaser of land, after making a payment by way of deposit, unjustifiably repudiates the contract, or is in any other way goes off through his default, he is not entitled to recover the deposit from the vendor. [*R.*, 33 M. 375=20 M.L J. 230=6 M L.T. 334=6 Ind. Cas. 941.] Where, there are in the above case, circumstances which would require the Court to refuse specific performance, it does not follow that the vendor would be entitled to retain the deposit. From the moment part of the purchase money is paid, the purchaser has a lien upon the property to that extent which lien can only be lost to him by reason of his failing to carry out his side of the contract. BALVANTA v. BIRA, **23 B 56.**

(17)—*Suit for specific performance—Suit for ejectment from a dock—Temporary injunction—Contradictory affidavits.*—In a suit for specific performance of an agreement alleged to have been entered into between the plaintiffs and defendants under which the plaintiffs were, on payment of certain rent, entitled to the use and occupation of a certain mud dock for the repair of two of their vessels, and from which the defendants had threatened to eject them whilst they were making such repairs, the plaintiffs applied for an *ad interim* injunction to restrain the defendants from taking proceedings which they were about to take in the Hooghly Court to recover possession of the dock, pending the decision of the present suit, and from taking any other steps to interfere with the plaintiffs' possession of the dock until the repairs in course of being executed were completed. In support of the application, the plaintiffs' agent filed affidavits stating that, on the faith of the agreement, one of the steamers had been docked and taken to pieces and that the plaintiffs could not remove the said vessel, until the repairs were completed, without great and ruinous expense,

Specific Performance—*continued.*

whereas no loss would accrue to the defendants by the plaintiffs being permitted to remain in occupation of the dock until the repairs of their steamer were completed. The defendants in their affidavits denied the agreement set up by the plaintiffs and set forth another agreement under which they claimed to be entitled to eject the plaintiffs, and did not deny the loss to the plaintiffs involved in the removal of the steamer before the repairs were completed, but stated that it was the plaintiffs' own folly to have taken the vessel to pieces and that they must take the consequences. It was found by the Court that the plaintiffs had acted *bona fide*. The plaintiffs' suit was filed in the High Court at Calcutta The defendants' suit for possession of the dock, which was threatened to be instituted, would be tried by the Hooghly Court, unless it be transferred to the High Court. *Held* by *Markby, J.*, that the suit having been filed first in the High Court, and being a suit in which the High Court could do full justice, it was the Court in which the suit ought to be tried and therefore the plaintiffs were entitled to an *ad interim* injunction restraining the defendants from bringing their suit until the disposal of the plaintiffs' suit. *Held on appeal* that, under the special circumstances of the case, there was an equity which entitled the plaintiffs to be kept in quiet and undisturbed possession of the dock until they completed the repairs of the ship, and that the defendants should be restrained, not from bringing their suit, but from executing any decree or order which they might obtain therein, until the plaintiffs should have had a reasonable time within which to complete the repairs of their ship and remove her. W. MORAN v. THE RIVER STEAM NAVIGATION COMPANY, **14 B. L.R. 352.** [*D.*, 4 C. 380=4 C.L R. 434.]

(18)—*Suit for specific performance of agreement to sell or for refund of consideration—Agreement found not enforceable—Limitation for alternative relief—Contract Act, s. 65—Limitation Act, sch. II, art. 97.*—If, in a suit for specific performance of an agreement to sell, or for a refund of the consideration money paid, the High Court, in a second appeal finds the agreement to be unenforceable, the cause of action for the refund arises on the date of such finding, and would be governed by art. 97 of the Limitation Act. UDIT NARAIN MISR v. MUHAMMAD MINNAT-UL-LAH. **25 A. 618= A.W.N. 1903, 117.** (11 A. 47, *F*) [*Appr.*, 31 A. 68, P. C.=9 C.L.J. 512=11 Bom. L. R. 525.]

(19)—*Registration—Remedy for refusal—Act XX of 1866, s. 84.*—The remedy for refusal to register an instrument is by a petition to the Judge under s. 84, Act XX of 1866. A regular suit to enforce registration does not lie. TULSI SAHU v. MAHADEO DAS, **2 B.L.R A.C. 105= 10 W R. 483.** (10 W.R F B. 51, *Relied on.*) [*F.*, 12 W. R. 385=4 B.L.R.A.C. 65]

(20)—*Act XX of 1866, ss. 2, 49, 84—Registration of deeds—Denial of execution.*—An instrument acknowledging the payment of the

Specific Performance—*continued.*

consideration-money for what was to be ultimately an absolute sale of the property in question—for what, in equity, did presently operate as a sale of the property—is an instrument, which by Act XX of 1866, s. 2, is required to be registered, and cannot be received in evidence under s. 49 if it had not been registered. Where a person who is alleged to have executed a deed denies before the Registering officer that the deed was executed by him, the Zilla Judge, having regard to the provisions of s. 84 and the form of the petition given in the schedule to the Act, has jurisdiction to determine such a question. FATI CHAND SAHU v. LILAMBAR SING DAS, **9 B L. R. 433, P. C. =16 W.R. P.C. 2=14 M.I.A 129 =2 Suther** (1) **467=2 Sar. 709.** [*F.*, 20 W.R. 291, 22 W R. 309, 1 B. 190, 2 B. 489; *R.*, 4 B. 126, 7 B. 310; *D.*, 12 B.H C. 175, 2 C. 131, P.C. =3 I.A. 221=26 W.R. 50, 9 A. 108, F.B]

(21)—*Suit for—Agreement to lease—Registration if necessary—Indian Registration Act* (III *of* 1877), *ss.* 3, 17 (*d*) *and* 49—*Transfer of Property Act* (IV *of* 1882), *s.* 54—*Present demise—Interest in land.*—Unless an agreement to lease certain premises operates as a present demise, it does not, of itself, create any interest in or charge on the property agreed to be demised, and can, therefore, be given in evidence for the purpose of enforcing specific performance of it, without its having been registered under the provisions of the Indian Registration Act. An unregistered agreement to lease provided for the grant of lease for a period of five years commencing from the day following the day on which the agreement was entered into, and also provided that the proposed lessee would get a proper *kabuliyat* granted to him to be registered at his own cost: *Held*, that, on the day the agreement was come to, there was no present demise, and, therefore the agreement could be adduced in evidence for the enforcement of specific performance thereof. SATYENDRA NATH BOSE v. ANIL CHANDRA GHOSE, **14 C.W N. 65=5 Ind. Cas. 38.** (10 B. 101, 17 M.L.J. 218, *F.*)

(22)—*Contract—Specific performance—Unregistered document—Right of suit.*—Where a party taking a part of the consideration-money in advance retains the deed of sale, the other party may bring a suit to recover the deed or compel the execution of a fresh document. *Held* (*Mookerjee, J., dissenting*) that plaintiff could not sue for possession in the same suit. TRIPURA SUNDARI v. RASIK CHANDRA KANUNGUI, **6 B.L R. App. 134=15 W.R. 189.**

(23)—*Specific performance—Sale of land in exchange for other land—Breach of contract—Remedy—Suit for damages.*—Where a piece of land was sold in consideration of receiving in exchange another piece of land, which was not given, the seller's remedy, having regard to the terms of the contract made, was not by a suit to get back the land sold, but by a suit for damages for the breach of the contract, by a suit for specific performance of the contract or so much of it as was left unperformed. NASIR ALI v. GOVERNMENT, **3 Agra 394.**

(24)—*Specific performance—Contract—Public policy.*—The plaintiff Company engaged the first defendant, an Inspector of Land Records, to purchase certain land in the name of the second defendant as their agent, and agreed to pay a certain remuneration. The lower Court dismissed the suit for specific performance on the ground that the contract was against public policy: *Held*, reversing the decree, that the District Judge had invented a new head of public policy, and the dereliction of duty on the part of the first defendant was not a thing contrary to law or something having the force of law. GEORGE GILLESPIE AND CO., LD. v. MAUNG MAUNG, **8 Ind. Cas. 441.** (7 O.C. 268, *R.*)

(25)—*Suit for specific performance of contract to purchase land—Amount of balance of purchase-money specified in decree—Application for rectification of decree.*—This suit was brought by the plaintiff for specific performance of a contract by the defendant Company for the purchase of a piece of land of about 5280 sq. yds. in extent at the rate of Re. 1-1-6 per sq. yd. Setting forth the agreement the plaint prayed "that the defendant Company may be decreed specifically to perform the contract and to pay to the plaintiff the balance of purchase-money due to him, *viz*, the sum of Rs. 4,475." The decree was drawn up in terms of the above prayer of the plaint. Subsequently, finding that on calculating the price on the 5280 sq. yds. of the land, the balance of purchase-money after deducting the Rs. 1,000 paid as earnest money was Rs 4,775, and not Rs. 4,475, and that the latter figure had been entered in the plaint through clerical error, plaintiff moved to get the decree amended accordingly. *Held* that the decree should be rectified by striking out the words "the sum of Rs. 4,475 being." The prayer in the plaint for payment of the sum erroneously mentioned therein was superfluous and so was the direction in the decree to pay that same amount. The essential part of the judgment was that the defendant was specifically to perform his contract and if the decree made mention of a sum of rupees, the payment of which cannot by itself amount to performance of the contract, it could not be retained as correctly representing the intention of the judgment. PHEROZSHA P. RANDERIA v. THE SUN MILLS, **22 B. 370.** [*F.*, 5 N.L.R. 159.]

(26)—*Necessity for plea and proof of transfer in good faith for value without notice by defendant in suit for.*—In a suit for specific performance of a contract for sale, the defendant is bound to set up distinctly the plea that he is the transferee for value in good faith without notice and to give *prima facie* evidence in support of that plea. Unless and until he does this, the plaintiff is entitled to succeed from the

Specific Performance—*continued.*

mere priority of his contract. HIRA SINGH v. NARAIN GOND, **10 C.P.L.R. 107.** [*R.*, 13 C.P.L.R. 172, 2 N.L R. 57, 1 N.L.R. 147.]

(27)—*Contract of sale—Intention of parties regarding fixing of price.*—Where the intention of the parties to a contract to sell was that the price should be fixed at a fair and reasonable valuation and the mode of ascertaining the price was subsidiary and non-essential, specific performance of the contract could be enforced. BUDHIA BHOYER v. HARI RAM TELI, **14 C.P.L.R. 117.** (7 I.A. 107, *R.*)

(28)—*Suit for, delay short of limitation in the institution of, when bars the relief.*—In a suit for specific performance of an agreement to sell certain premises to plaintiff, the question arose whether the delay on the plaintiff's part, in the institution of the suit, was evidence of abandonment by plaintiff of his admitted rights under the agreement. *Held*, delay is not material, so long as matters remain in *statuquo* and it has neither prejudiced the defendant, nor amounted to a waiver of the plaintiff's right by acquiescence. In such cases, any lapse of time, short of the period allowed under the Limitation Act, cannot disentitle the plaintiff to the proper relief. Further, the defendants, in this case, having failed to establish abandonment of plaintiff's admitted rights, the *onus* of proving which lay upon them, any delay, on the plaintiff's part short of the period of limitation, could not be held to deprive him of his right to a decree for specific performance. KISSEN GOPAL SADANEY v. KALLY PROSONNO SETT, **33 C. 633.** (2 B. 133, *R.*)

(29)—*Specific performance of contract—Contract for sale - Building upon it before completion of sale—Rights of vendee.*—Where the contract is for the performance of a certain act with a sum annexed whether by way of penalty or damages, to secure the performance of that act specific performance may be decreed. But where the contract is that one of two things shall be done at the election of the party who has to perform the contract, *viz*, the performance of the act or the payment of the sum of money, the contract is satisfied by the payment of the sum of money, and there is no ground for providing against the party having the election to compel the performance of the other contract. If the promisee chooses to begin building on the land, the subject-matter of the contract, before completing his title, he does so at his own risk, and cannot, by such precipitate action, deprive the promisor of the option which the latter has reserved to himself. RAM DHAN v. MOHAN LAL, **1 A.L.J. 688.**

(30)—*Contract to sell — Subsequent sale to another with notice of previous contract—Suit for possession—Stipulation of penalty for non-performance of contract—S. R. Act, s. 18.*—A person who has entered into a contract for the purchase of a certain property can sue for possession of the property and specific performance of the contract, although it is subsequently sold to another who has had notice of the previous

Specific Performance—*continued.*

contract. The stipulation of a penalty for the non-performance of the contract to sell, *per se*, does not avoid a suit for specific performance under s. 18 of the Specific Relief Act. HUKAN CHAND v. NIKKA SINGH, **15 P.R. 1908 = 27 P. W.R. 1908 = 97 P.L.R. 1908.** (10 C. 710, 2 C. 468, 6 C. 534, 31 P.R. 1897, 2 P.R. 1885, *R.*)

(31)—*Contract—Undivided* Mitakshara *family, suit against the father of—Breach of trust—Legal necessity.*—Where a suit is brought against the father of an undivided *Mitakshara* family, having sons, for the specific performance of a contract to sell land, the Court would not ordinarily decree specific performance of the contract with full knowledge that the vendor's powers of alienation are limited and can be exercised, without a breach of trust, only when there exists a necessity sufficient to justify the transfer, in the absence of which the sons might at any moment interdict the sale. In such a case, the Court would ordinarily require the plaintiff to give some proof of the necessity for the sale. BAIKUNTHA BARIK v. SHIB DASS, **2 C L.J. 321.** (5 M. 337, 4 M.L. J. 9, *F*)

(32)—*Specific performance of contract of sale entered into before passing of Punjab Alienation of Land Act* (XIII *of* 1900) *not barred by the Act.*—*Held*, that a suit for specific performance of a contract of sale of land, entered into before the date the Punjab Alienation of Land Act came into force, filed after that date, is maintainable and possession of the land can be allowed to the plaintiff without regard to the provisions of the Act. HARI CHAND V. BURA MAL, **27 P.L.R. 1906.**

(33)—*Contract for sale—Specific performance—Mother guardian of minors—Contract with—Collector's permission—Form of decree.*—The mother of the defendants, who were minors at the time, agreed to sell a particular share in lieu of a debt due by the father of the defendants to the plaintiff. The permission of the Collector was obtained and a sale-deed was executed. The mother refused to register it, but no suit was brought for compulsory registration. Plaintiff sued the defendants for specific performance of the contract. *Held* that a Court has jurisdiction to direct specific performance of the contract and do require the defendants to do all necessary acts for the purpose of fulfilling the obligation into which through their guardian they had entered, and that the plaintiff was entitled to have a fresh sale-deed executed and registered. AMER CHAND V. NATHU, **7 A.L.J. 887. = 7 Ind. Cas. 408.**

(34)—*Sale of land by receiver—Misdescription—Purchaser personally acquainted with property sold—Title to land below high and low water mark.*—Where a purchaser is personally acquainted with the real estate of the property sold, he cannot, on account of a circumstance of which he was all along perfectly aware, and which was patent, either reject the contract, or demand an abatement of price. If persons, without satisfying themselves as to the real

Specific Performance—*continued.*

title to property, choose to buy at sales where the party selling professes to sell merely his "right, title and interest," such as it is, they have no one but themselves to blame if they afterwards find they do not get such a title as they could have wished. At such a sale, it is before he bids, and not afterwards, that an intending purchaser should inquire into the nature of the title which the vendor can make (*Coles* v. *Gadsden*, 34 Beav. 416, *F.*). [*D.*, 21 B. 827.] Those who have a grant of the land down to low-water mark will have all subsequent accretions. GANGADHARSIRKAR v. KASINATH BISWAS, **9 B.L.R. 128.** (*Scratton* v. *Brown*, 4 B. and C. 485, *F.*)

(35)—*Contract for sale--Breach—Suit for specific performance — Damages.*—The plaintiff contracted with defendant to purchase from him eight-annas share of certain landed estates; but as regards certain lands in those estates situated within a detailed boundary, it was agreed that those lands should be excluded from the contract, and the defendant bound himself to make over to the plaintiff other lands in exchange for them. The plaintiff asserted that the defendant had not made over any lands in exchange under the term of the contract, and he, therefore, sued to recover the lands which were excepted from the contract. *Held* that, if the defendant had broken his contract, the plaintiff might sue him either for specific performance or for damages, but he could not, under the contract, sue to recover the lands which he did not buy. KISHOREE DEBIA v. JUGUNNATH ACHARJEE, **9 W.R. 269.**

(36)—*Specific performance—Contract to sell – Subsequent sale to stranger—Registration Act* (XIX *of* 1843, *Agreement to sell—Registration.*—The first defendant agreed to sell certain property to the plaintiff and received certain sums of money as advances for the consideration money. Subsequently he obtained an offer of a larger sum from the second defendant, for the property, and so sold the same to him. Plaintiff now sued for the specific performance of the contract of sale. It was found that the plaintiff did not in any way neglect to carry out the agreement. *Held* that the plaintiff was entitled to specific performance of the contract, and to obtain possession of the disputed estate on paying down the correct amount of consideration money, unless the defendant who had purchased the property can show a better title. [*R.*, 7 W.R. 258, 4 B. 126, F.B.] A deed of agreement to sell at some future period may be registered under Act XIX of 1843. SHIB KISHEN DOSS v. SHEIKH ABDUL SOBHAN CHOWDHRY, **3 W.R. 103.**

(37)—*Act* XXIII *of* 1861, *s.* 11—*Decree—Adjustment—Specific performance.*—The parties to a decree entered into an arrangement by which the plaintiff was to obtain possession from defendants of certain premises not in the decree and the defendant was to obtain possession from the plaintiff of certain other premises also not in the decree. This arrangement was not certified to the Court. The Court therefore rejected the arrangement under s. 206 of Act VIII of 1859. The plaintiff then sued for specific performance of the arrangement. *Held* that the adjustment might fairly be looked upon as a contract entered into by the parties subsequent to, and, by its terms for property not in the decree, and therefore a suit for specific performance would lie. The subject-matter being beyond the decree, s 11 of Act XXIII of 1861, which relates to subject-matters relating to the decree, would not apply. RAM LUCHUN BUBRA v. MADHUB CHUNDER BUBRA, **3 W.R. 118.**

(38)—*Specific performance—Cause of action—Suppression of sale-deed by vendor after execution.*—Where, in pursuance of an agreement for sale of lands, a sale-deed has been executed, but the vendor makes away with it before registration, and suppresses it, the purchaser who has paid consideration for it is entitled to have a fresh deed executed and registered, just as he would have if the document had been accidentally lost or destroyed. CHINNA KRISHNA REDDI v. DORASAMI REDDI, **20 M. 19.**

(39)—*Suit for—Civ. Pro. Code*, 1882, *s.* 244—*Right of suit—Estoppel.*—The plaintiff had previously sued the defendant for *khas* possession of certain land, and the suit was compromised and dismissed, the defendant agreeing to execute a *kabuliyat* in favour of the plaintiff for a term of ten years at a certain rate of rent. Defendant did not execute the *kabuliyat* and assigned the land. Plaintiff sued the defendant for ejectment on the ground that the defendant had forfeited his tenancy by such assignment. That having been dismissed, the present suit was brought by the plaintiff for specific performance of the contract to execute the *kabuliyat*: *held*, (1) that, as there was no direction in the previous decree for the execution of any *kabuliyat*, the present suit was not barred by s, 244 of Civ. Pro. Code, (2) that in suing to eject the defendant, the plaintiff had not acted in contravention of the compromise and was not precluded from suing on that compromise. CHUNI LAL DUTTA v. HIRA LAL DUTTA, **7 C.W.N. 258.**

(40)—*Suit for—Pleadings—Practice—Plea in defence—Omission of material term in written contract*—Onus—*Duty to examine himself—Agreement to take lease on lessor erecting suitable buildings—Time, if essence of contract—Reasonable time—Witness—Evidence—Credibility.*—In a suit for specific performance, it is important to distinguish between negotiation and contract, and to ascertain what the contract is, when and by whom it was made, and who the parties are who are bound by it. Where a party concluded a contract with another party, without at any time disclosing that he was acting in the matter as agent for some other person, whether he was really acting as such agent or not, the burden of the contract rested on him, the other party not being concerned with his undis-

Specific Performance—*continued.*

closed intentions. If the plaintiff's case is clear and the written statement of the defendant raises no defence, the practice in English Courts allows the plaintiff, in a suit for specific performance, to move for a decree on the written statement being put in, and to get such a decree at once and as a matter of course. It is incumbent on a party, who seeks to make out that, by inadvertence or mistake, an important term has been omitted from a contract drawn up by himself with his own hand and signed by him, to pledge his oath to the truth of his story, specially when the other party comes forward and swears that the suggestion is without foundation. G. & Co. agreed to take a lease of certain premises from H, at a certain rent, upon the latter undertaking to erect new buildings (on a plan which G. & Co. approved), to replace existing ones, which were, to the knowledge of both parties, in the occupation of tenants, whom it might take time to eject. *Held* that time was not made the essence of the contract, though it was clear that, in the contemplation of both parties, the buildings were to be completed without unreasonable delay. In case of undue delay on the part of H, the other parties (G. & Co.) might have made time the essence of the contract, by giving notice that they would not hold themselves bound to complete, unless the buildings were finished within a specified time, provided the time allowed were such as the Court would hold to be reasonable und r the circum tances. It is not incumbent upon a party to give corroborative evidence of statements, which are not challenged by the other party. MOULVIE MAHOMED IKRAMULL HUQ v. WILKIE, **11 C.W.N. 946 P.C.=17 M.L J. 454 =4 A.L J. 740=6 C.L.J. 682=2 M.L.T. 448.**

(41)—*Suit for—Lease—Covenant for renewal —Construction of document—Time, whether or not of the essence of contract.*—The plaintiff sued for specific performance of a covenant or renewal contained in a lease, the material clause of which was as follows :—' After the expiration of the said term, if the lessee shall so desire, the executant shall have no objection whatever to renew the lease for a further term of twenty years on the terms and in consideration of the payment of the rent mentioned in the lease.' There was nothing in the lease to indicate that notice of intention to renew was to be given before its expiration. *Held*, on a construction of the lease, that time was not of the essence of the contract, and that the plaintiff had not forfeited his right to have the lease renewed by reason of having allowed some months to elapse, after the expiration of the original term, before he gave notice to the defendants of his intention to take advantage of the covenant for renewal. JAGGI LAL v. SIR W. E. COOPER, **A.W.N. 1905, 154=27 A. 696.**

(42)—*Suit for—Agreement to lease—Lease not registered—Contract, if divisible.*—Although a document, which has been executed, is inoperative in law and wholly ineffectual to

Specific Performance—*continued.*

create title in the intended lessee, it is nevertheless evidence of a valid agreement to execute a lease and may consequently form the foundation of an action for specific performance. It is not an inflexible proposition of law that every contract to grant a lease is an indivisible contract. SURENDRA NATH NAG CHOWDHURY v. GOPAL CHUNDER GHOSH, **12 C.L. J. 464=8 Ind. Cas. 794.**

(43)—*Suit for specific performance of agreement to lease—Lease to third party without notice of agreement—Right to specific performance after termination of lease.*—Plaintiff complained that the defendant No. 1 had agreed to lease certain property to him, but granted to the defendants, second party, a lease for some years. On the allegation that the latter took their lease with knowledge of the plaintiff's claim, he instituted this suit for specific performance of his contract and the cancellation of the above lease to the defendants second party. It having been found that these defendants had no notice of the plaintiff's claim, and had taken their lease in good faith, the Court maintained their rights under such lease and decreed that, at the termination of the same, the first defendant should execute a lease to the plaintiff as originally agreed upon. The defendant No. 1 had by his own action rendered himself temporarily unable to perform the contract, and his position cannot, in any way, be better than that of a person who laboured under a disability before he entered into the contract. SARJU PRASAD SINGH v. WAZIR ALI, **23 A. 119=A.W.N. 1901, 11.**

(44)—*Grounds for review—Implied contract in lease.*—A party contracting and failing to perform his contract may be sued, at the pleasure of the other party, either for specific performance or for damages. A lessor, when he gives a lease, enters into an implied contract to give his lessee peaceable possession of the land which is the subject of the lease (affirming on review, (11 W.R. 278.) MUNNEE DUTT SINGH v. WILLIAM CAMPBELL, **12 W.R. 149.** [*R.*, 25 B. 269.]

(45)—*Oral contract to execute lease—Subsequent registered lease with notice—Suit for specific performance of oral agreement.*—Where, in pursuance of an oral agreement to grant a lease of property, A executed a lease in B's favour, but did not complete it by delivery and registration ; he, afterwards, executing a registered lease of the same property to C, who had notice of the prior oral agreement, it was *held* that B could specifically enforce the oral agreement and that he was entitled to a declaration that the subsequent registered lease was void as against him. NEMAI CHARAN DABAL v. KOKIL BEG, **6 C. 534=7 C L.R. 487.** [*F.*, 15 P.R. 1908=97 P.L.R 1908=27 P.W R. 1908, 10 C. 710; *Appl.*, 13 C. 70 ; *R.*, 6 B. 168, F.B., 13 M. 324, 27 B. 452.]

(46)—*Agreement in lease—Construction—Suit for specific performance by assignee of lease —Specific performance of agreement to sell land —Character of property.*—Where a mokurari

Specific Performance—*continued.*

lease of ancestral village lands, granted for certain defined purposes, provided the leasing out of further extra land according to the lessee's requirements, at a proper rate, *held*, in a suit for specific performance of the lease of the entire extra land by the assignee of the lease, that, on the construction of the patta, the lessors would be bound to settle with the lessee or his assigns only so much land as might be necessary for the purpose of carrying out of the original objects of the lease. The assignees in the above case would not be entitled to a grant of a lease of the extra land, at a proper rate, if their purpose was simply to sell it. [*D.*, 36 C. 675=9 C.L.J. 523.] A decree for specific performance of an agreement to sell land cannot be refused merely on the ground of the peculiar character of the property (as containing coal or other valuable minerals, for example), and the consequent difficulty in arriving at a fair valuation. THE NEW BEERBHOOM COAL COMPANY v. BULARAM MAHATA, **5 C. 932=7 I A. 107=7 C.L.R. 247=4 Sar. 145** (*On appeal from* **5 C. 175.**)

(47)—*Contract for benefit of minor—Specific performance.*—A decree for specific performance of contract relating to property of a minor, can be given against the minor, when it is for his benefit that the contract should be performed. KHAIRUNNESSA BIBI v. LOKE NATH PAL, **27 C. 276.** (18 M. 415 *Appr.*; 20 C. 509, *Diss.*) [*F.*, 26 B. 326=3 Bom. L.R. 898; *Appr.*, 11 C.W.N. 207; *R.*, 4 Bom. L. R. 587, 34 C. 168 F. B.=11 C.W.N. 34=4 C.L.J. 431=1 M. L. T. 360.]

(48)—*Contract of lease to enable lessor to obtain money to evict another tenant in possession.*—Specific performance of a contract of lease may be decreed though the lease was intended to enable the lessor to obtain money for commencing legal proceedings against the then tenant of the property comprised under the lease. PITCHUKUTTI CHETTI v. KAMALA NAYAKKAN, **1 M.H.C. 153.**

(49)—*Specific performance—Addition of defendant—Plaint not amended—Petition treated as part of plaint—Agreement to be specifically performed to be definite—Degree of certainty—Extrinsic evidence—Claim of specific performance found to be excessive—Where original claim found to be unsustainable—Specific Relief Act* (I *of* 1877), *s.* 22—*Discretion of Court, what means.*—The plaintiffs brought this suit against defendant No.1 for the specific performance of a contract. Subsequently, they prayed that defendant No. 2 might be added as a defendant, because he had, with full notice of the prior contract in favour of the plaintiffs, taken a conveyance of the property from defendant No. 1. The application was granted and defendant No. 2 was added as a defendant. The plaint, however, was not amended. It was objected on the part of defendant No. 2 that, as the plaint stood, it did not disclose any cause of action against him and ought to be dismissed: *Held*, that, as no objection was taken on this ground by defendant No. 2 in his written statement, and as the application may be treated as part of the plaint, the suit should not be dismissed against defendant No. 2 on that ground. All agreements, in order to be executed in a Court of equity, must be certain and definite. But that is sufficiently certain which can be made certain. Therefore, the principle is that the description must be such as to enable the Court to determine with certainty, with the aid of such extrinsic evidence as is admissible under the rules of evidence, what property was intended by the parties to be covered thereby. Where the plaintiff has asked for specific performance of an agreement and it is found that the claim was excessive, he may be allowed to succeed on the basis of an alternative claim for a more limited right. But if the plaintiff gives evidence in support of the original claim which is found unsustainable, he cannot succeed on a different claim contrary to his own evidence. S. 22 of the Specific Relief Act provides that the jurisdiction to decree specific performance is discretionary; but the discretion is neither arbitrary nor capricious, but a sound judicial discretion regulated by the established principles of equity. The circumstances stated in s. 22 are illustrative and not exhaustive. A contract which, although not illegal, is detrimental to the public welfare, should not be enforced in equity. The relief lies in the discretion of the Court only in so far as it must necessarily judge whether, under the circumstances of the case, the contract is or is not an equitable one; but if it is determined that the contract is fair and reasonable, and that the conduct of the plaintiff has not been unconscientious, there is no room for the application of judicial discretion. GAJ KUMAR CHAND v. LACHMAN RAM, **10 Ind. Cas. 503.**

(50)—*Suit for specific performances of contract—Damages—Jurisdiction of High Court—Court of Equity in England—Cause of action, statement of.*—In England, a Court of Equity can entertain a suit for specific performance of a contract, and grant specific performance of part only, with an award of damages, if necessary, for the remainder. The High Courts in India have a similar power under the provisions of the Charter Act and Act VIII of 1859. *Held* that, in a suit for specific performance of a contract, a statement of the terms of the contract and the refusal of the defendants to perform their part of it and of plaintiff's readiness to do his part in it will suffice to indicate the cause of action. UNUNTORAM DOSS v. RAMLOCHUN AITCH, **14 W.R. O J. 15.**

(51)—*Mesne profits—Possession under invalid lakheraj claim—Specific performance—Lapse of time.*—Where defendants who were ordered to pay *wasilat* for certain lands which they had possessed under an invalid lakheraj claim, enter into a compromise with the plaintiff, who is their zemindar, and agree that if they default in paying rent, or if the lands become khas of the zemindar, or are, by any means whatsoever, to be alienated, they will point out the lands,

Specific Performance—*continued.*

or if they fail to do this, will pay damages for the same, plaintiff may obtain a decree for specific performance, notwithstanding lapse of time and surrender of the lands. RAJAH PROTAP CHUNDER SINGH v. GOOROO DOSS ROY, **W.R. 1864, 76.**

(52)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 192—*Decree for specific performance of contract and damages in the alternative—Ascertainment of amount of damages a necessary preliminary—Specific performance—Contract of partnership—Grant of injunction restraining partner from excluding co-partner.* — S. 192, Civ. Pro. Code, Act VIII of 1859, applied to cases in which, action having been brought for damages for breach of contract, the Court, with the assent of the plaintiff, decreed, as an alternative, that the contract was to be specifically performed. It was therefore necessary that as a preliminary to such a decree the amount of damages should be ascertained. Specific performance is a branch of the jurisdiction of the English Courts of Equity not taken from the Roman Law, and its application to partnerships is governed by precisely the same rules as those which govern it in other trasactions. The natural remedy for the breach of an agreement to enter into a partnership is an action for damages. There were only two classes of cases in which the specific performance of such an agreement had been granted :—First, where the parties had agreed to execute some formal instrument which would have conferred rights which would not have existed unless it had been executed ; secondly, where there had been an agreement which had come to an end, to carry on a joint adventure and the decree that the agreement was a valid agreement, prefaced by the declaration that the contract ought to have been specifically performed, was made merely as the foundation of a decree for an account. In decreeing specific performance, the Court has always to consider whether it can enforce the whole of the agreement, and where it cannot do so, this peculiar relief will always be refused. Plaintiff sued the defendants to compel specific performance of an agreement by which the parties contracted to work in partnership an Abkari farm of certain taluks for a certain number of years. Some time after the date of the said agreement, in consequence of a default (for which none of the parties were to blame) in regard to the payment of the deposit money for a taluk, the farm of that taluk was re-sold by the Collector and purchased by the second defendant, one of the contracting partners in the agreement. The first defendant contended that the agreement had been cancelled by the re-sale by the Collector and consequently there had never been a partnership between the plaintiff, the second defendant and himself. *Held* that the plaintiff was equitably entitled to an injunction to restrain the first defendant from doing anything to exclude the plaintiff, from participating in the contract and benefits of the partnership under the agreement. VIRUDACHALA NATTAN v. RAMASAMI NAYAKAN, **1 M.H.C. 341.** [*R.*, 32 M. 76=19 M.L.J. 10=1 Ind. Cas. 384=4 M.L.T. 456.]

Specific Performance—*continued.*

(53)—*Civ. Pro. Code. s.* 375—*Transfer of Property Act, s* 83.—Where a sum of money is deposited in Court under s. 83, Transfer of Property Act, by the vendee of the mortgagor, and the mortgagee raises objections, which however, are subsequently withdrawn in pursuance of a compromise, the mortgagee is not precluded from enforcing the terms of the compromise by the fact that those terms were not brought to the knowledge of the Court. TATAYYA v. PICHAYYA, **13 M 316.**

(54)—*Suit to recover money under a contract is a suit for—No claim for damages for breach of contract—Jurisdiction of Small Cause Court.* —The defendant agreed to pay to the plaintiff Rs. 60, upon which the latter was to transfer 4 pattahs to the former. He subsequently failed to so pay the money and take a transfer, as agreed upon. The plaintiff then brought a suit to recover the sum due under the contract. *Held*, that the suit as thus brought, is one, for specific performance of the contract, nothing being said about damages for breach of contract, and that the Small Cause Court had therefore no jurisdiction to try the suit. NARIGIRI VEERASALINGAM v. SUTHAPALLY SATHIRAZU, **5 M L.T. 296.** (28 B. 1, *D.*)

(55)—*Partition deed partly acted upon—Suit to enforce rights as previously existing.*—Where a partition deed is admitted and it has been acted upon as to one of the parties, and it is shown that if anything has been left incomplete this is not owing to the defendant's unwillingness, but owing to the plaintiff's neglect, and she asserted nothing against the deed in the way of undue influence, the plaintiff's right is not to treat the partition deed as a nullity and to sue for her rights as they existed previously, but a right to enforce performance. MUSST. BHOWANEE KOONWER v. THAKOOR DASS, **2 Agra 277.**

(56)—*Reg.* XIX *of* 1814—*Application by putteedars for butwarrah—Breach of stipulation at time of butwarrah—Suit for specific performance—Jurisdiction — Civil Court.*— At the time when the putteedars in this case applied for a butwarrah under Reg. XIX of 1814, it was stipulated by an agreement between the putteedars of a seven anna and a six anna share, that, in the event of a certain village falling by division wholly to either of those putteedars, they would re-unite and hold the 13 annas share joint as heretofore. One of the parties having resiled from the agreement, the other party brought this suit in the Civil Court for specific performance. *Held* that plaintiffs were entitled to sue for specific performance, and that such a suit would lie only in a Civil Court. It was objected that the agreement cannot be enforced, inasmuch as there was no consideration, and it was never acted upon. But it was held that although no money consideration was mentioned in the agreement, that could not by itself bar the agreement being enforced, inasmuch as the parties had swaived all objections

Specific Performance—*continued.*

with reference to the particular village specified or any other falling wholly or in part to their respective shares, and had agreed that, however the butwarrah might turn out, they would, as between themselves, re-unite. NUCKCHAD SINGH v. HUNOOMAN DUTT SINGH, **10 W.R. 69.**

(57)—*Specific performance—Contract to build dwelling-house—Sale of land—Vendor's successor failing to act—Ekrarnama, construction of—Indian contracts, construction of.*—The contracts of the people of India should be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses. A certain property was sold by the mother of the plaintiff to the father of the defendant, a near relation. On the same date, the purchaser entered into an agreement to re-sell the property to the plaintiff on the following terms: "I do therefore hereby execute this *ekrar* and agree that, if you erect a family dwelling-house on the said land within 10 years from this day, then I would execute a deed of absolute sale in your favour in respect of the said land, etc., on receiving from you the said consideration...And I, my heirs or representatives in succession, shall never be competent, to raise any objection to the same, and, if we do so, then you shall be competent, by depositing in the proper Court the said consideration money, to get a *kobala* executed through the Court and take possession of the said land." Within the 10 years, the plaintiff endeavoured to secure the benefit of that contract, but his endeavours were resisted by the defendant:—*Held*, that the condition of building a dwelling-house was one which required the concurrence of the vendor or his successors: that, when the vendor's successors failed to act up to that common agreement, the condition of building was made impossible of performance by them, and that the case fell within the latter part of the contract which described the relations of the parties, in case an objection was made to the performance of the contract by the vendor. That, as the consideration-money was deposited in Court, the plaintiff was entitled to a decree for specific performance of the contract of sale. NARAIN v. MOHENDRA, **15 C.L.J. 332=14 Ind. Cas. 820.**

(58)—*Right of stranger to demand performance*—Cestui que trust.—Ordinarily, a stranger to the contract cannot demand performance. But a person, beneficially entitled under the contract (*i.e.*) a *cestui que trust*, although he was no party to it, may enforce the obligation arising under it. SURENDRO KESHUB ROY v. DOORGA SOONDARY DOSSEE, **19 C. 513=19 I.A. 108, P.C.=6 Sar. 150.**

(59)—*Specific performance, suit for—Possession, whether can be claimed — Agreement to finance litigation and get conveyance upon payment of certain sum—Litigation successful in first Court—Litigation compromised in appeal by defendant with knowledge of agreement—Suit for specific performance, if should be decreed.*—

Specific Performance—*continued.*

Defendant No. 1 brought a suit for recovery of possession of certain property against defendants Nos. 2 and 3. During the pendency of that suit, the present plaintiff entered into an agreement with defendant No. 1 to the effect that he would finance the litigation and that the defendant No. 1 upon receipt of Rs. 2,000 would execute a conveyance of the property to the present plaintiff. The suit was successful in the primary Court, but on appeal a compromise decree was made by which the decree of the first Court was set aside. The defendants Nos. 2 and 3 obtained the assent of defendant No. 1 to that compromise by paying him Rs. 1,500. The defendants Nos. 2 and 3, at the time of the compromise decree, were aware of the agreement between the present plaintiff and the defendant No. 1. The plaintiff sued for a declaration that the compromise decree was fraudulent and collusive and did not affect his rights and for specific performance of the agreement between himself and defendant No. 1: *Held*, (1) that the propriety of an agreement of this nature could be questioned only by the parties thereto. (12 C.W.N. 393=35 C.420=10 Bom.L.R. 230=7 C.L.J. 335=5 A.L.J.184=18 M.L.J. 100=3 M.L.T. 344=14 Bur.L.R. 49, P.C., 27 A. 271=9 C.W.N. 477=15 M.L.J. 197=32 I.A. 113, P.C., 2 Ind. Cas. 385=14 C.W.N. 191, *Rel.*); (2) that the principle that a decree by consent was operative between the parties so long as it was not set aside in a proper judicial proceeding, in the same manner as if it were a decree upon contest, could not be applied to the prejudice of a stranger to the decree; (3) that the plaintiff was entitled to show that the decree was fraudulent and collusive and does not affect his legal rights; (4) that a decree for specific performance ought to be made in favour of the plaintiff against all the defendants who should execute a conveyance and Rs. 2,000 should be deposited to their credit; (5) that a prayer for possession might be coupled with a prayer for specific performance. FATEH CHAND v. NARSINGH DAS, **16 Ind. Cas. 988.** (14 C.L.J. 159=11 Ind. Cas. 228, *F.*)

(60)—*Mortgage—Agreement to convey mortgaged property in case of default—Contract for sale—Suit for specific performance—First and second mortgagees—Act I of* 1877, *s.* 27 (*b*).—A bond hypothecating immoveable property, in which the obligor agrees that, on default of payment of the money by the appointed date, he would execute a conveyance of such property, and that, if he failed to do so, the obligee might sue to get a conveyance executed, is not a deed of conditional sale, and it would not be necessary for the obligee under it to take proceedings to foreclose the mortgage; its terms amount to no more than an ordinary contract to do a particular act at a time appointed, of which specific performance may be enforced by the promise. Where, under the above circumstances, a prior mortgagee sues the mortgagor and a subsequent mortgagee or a purchaser in execution of a decree obtained on the subsequent mortgage for specific performance of a contract for sale

Specific Performance—*continued.*

contained in the prior mortgage, it is doubtful whether it is competent to the latter (even on the assumption that he had no notice of the agreement for sale), to claim, under s. 27 (*b*) of the Specific Relief Act, that specific performance of the agreement should not be granted; for the contest in such a case really lies between a prior and a subsequent lien created upon the same property which has passed to the transferee under a sale in execution of a decree for enforcement of the subsequent lien. BADRI PRASAD v. DAULAT RAM, **3 A. 706 = A.W.N. 1881, 61.** [*R.*, U.B.R. 1897-1901, Vol. II, 573.]

(61)—*Specific performance of contract, suit for —Execution of agreement denied—Proof of agreement—Consistency with proved facts and conduct of the parties—Onerous bargain, but not unconscionable— Fraud or misrepresentation absent—Court's duty to grant specific performance.*—The defendant on the 30th September 1905 drew five bills for Rs. 10,000 each payable at three months after date in favour of the plaintiff who endorsed them over to the Bank of Bengal to enable the defendant to obtain Rs. 50,000 from the Bank. For this accommodation defendant was to pay plaintiff interest at 6 per cent. on the amount of the bills. The defendant further executed, as security for the money which he received from the Bank, a mortgage of certain lands which he hoped to sell for much above a lakh of rupees. Being unable to meet the bills when they fell due on the 2nd January 1906 or the interest due thereon, he entered into a further arrangement with the plaintiff, under which the bills were renewed on 3rd January 1906, for a further term of three months on the same terms, the defendant executing a promissory note for the interest paid by the plaintiff to the Bank and the interest due by the defendant to the plaintiff. Defendant failed to meet the bills or the interest on 6th June 1906, the due date, and the plaintiff's case was that, in consideration of plaintiff agreeing to renew the bills for a further period of three months, the defendant signed a letter sent to him by the plaintiff whereby he agreed to convey the land mortgaged to the plaintiff for one lakh, should he fail to meet the interest due on the bills a third time. The defendant having so failed, plaintiff brought this suit for specific performance and in the alternative for damages. The defendant denied that he signed this last agreement and suggested that there was another arrangement according to which plaintiff consented to wait for six months for his interest (which the evidence showed he had been demanding all the time) with a right of pre-emption at an indefinite price far above one lakh of rupees which the defendant knew was the plaintiff's limit. *Held*, that, in dealing with a case of this kind, in which the parties are at issue on a vital question of fact, the safe principle is to consider which story fits in with the admitted circumstances: That the defendant's story could not be believed without overlooking the fact that the whole question of the renewal of the bills was

Specific Performance—*continued.*

involved in whatever arrangement was arrived at on 4th April 1906, and that neither the conduct of the defendant nor the acts of the plaintiff were consistent with the arrangement alleged by the defendant but appeared to be in accord with the agreement as alleged by the plaintiff; that in the absence of any evidence of fraud or misrepresentation on the part of the plaintiff which induced the defendant to enter into the contract, the Court would not be justified in refusing to make a decree for specific performance; that the contract, though onerous was not unconscionable, and it would be difficult to say in the circumstances disclosed that the plaintiff took an improper advantage of his position or the difficulties of the defendant. G.W. DAVIS v. MAUNG SHWE GO, **15 C.W.N. 934, P.C.**

(62)—*Agreement between husband and wife —Separate property of wife—Agreement in English form, specific performance of—Concealment of fact.*—Case where their Lordships of the Judicial Committee of the Privy Council decreed specific performance of an agreement in the English form, made between husband and wife (Armenian Christians) in the nature of a family compromise, respecting the wife's separate property. The wife alleged that property purchased by the husband had been concealed by him from her when she executed the agreement; *held*, in the circumstances, that that fact, if proved, was not sufficient to entitle the wife to treat the agreement as a nullity. GREGORY v. COCHRANE, **8 M.I.A. 275 = 1 Sar. 779.**

(63)—*Specific performance—Plaintiff to carry out material part of agreement—Variation of written agreement by parol evidence.*—A party who comes into Court to ask for the specific execution of an agreement must show that he is willing and able to carry it out in all its material parts so far as he had himself stipulated for, and also that no act of his own in relation to the agreement has in any material degree damnified his opponent. And he cannot be allowed to select one stipulation for breach and another for performance. He must be prepared to carry out in its entirety his own part of the contract before he can call upon his adversary, through the instrumentality of the Court, to specifically execute the latter portion of the agreement. In resisting specific performance of an agreement, it is competent to the defendant to show by oral evidence that the real intention of the parties to the agreement has not been correctly expressed in the written document. VISHVANATH ATMARAM v. BAPU NARAYAN, **1 B.H.C. 262.**

(64)—*Contract suit to enforce—Conditions.* —Where plaintiff did not act up to the original terms of a contract and broke it, the defendant was not bound to deliver over or ratify the document which it was contended should be executed between them. RAM TUNOO KOONDOO v. MULLICKA DOSSEE, **14 W.R. 338.**

(65)—*Specific performance of contract, when enforceable.*—Specific performance can be enforced only when there is a completed and final

Specific Performance—*continued.*

contract between the parties and binding on the defendant. Where a deed was executed for the sale of certain immoveable properties, but at the same time it was found that certain terms and conditions had been arranged between the parties for embodiment in a formal sale-deed, and that it was only upon these terms and conditions that the defendant was prepared to complete the transaction, and that these terms and conditions were intentionally and fraudulently omitted from the sale document executed by the defendant, *held* that specific performance of the sale cannot be enforced. BARU MAL v. DHUM SINGH, **A.W.N. 1884, 161.**

(66)—*Breach of contract—Liquidated damages—Penalty—Specific performance—Pleadings.*--If an indenture or memorandum of agreement contains covenants or promises for the performance of various acts and duties, and then provides for the payment of one large sum by way of compensation in case of the non-performance of all or of any one of the things stipulated to be done, and the damages in every case of non performance are altogether uncertain and incapable of accurate valuation, the sum agreed to be paid will be treated as liquidated damages, and not as a penalty. A plaintiff who sues for damages and is entitled to them, cannot be likewise entitled to specific performance or to an injunction against the further breach of the agreement. The defendant in a suit for breach of contract can plead, without being obliged to bring a fresh suit, that the plaintiff, being the first to break the agreement, cannot now sue for damages for something subsequently done by the defendant in contravention of it. MUSSAMAT ASHRUFOONISSA BEGUM v. STEWART, **7 W.R. 303.**

(67) — *Contract for purchase— Subsequent mortgage by vendor--Suit for—by vendor—Legality of objection by vendee on ground of subsequent mortgage.*—Plaintiff sued for specific performance of a contract to purchase land. Defendant took the objection, among others, that, after the contract had been entered into, plaintiff had created an incumbrance by way of mortgage of the land in question together with other property. The lower Court dismissed the suit, holding that, by having created the said mortgage subsequent to the contract, plaintiff had rendered himself incapable of conveying the land free from incumbrances, that his case falls under cl. (*b*) of s. 24 of the Specific Relief Act and that specific performance could not, therefore, be "enforced in his favour." *Held*, reversing the lower Court's decree, the incumbrance does not afford an objection to the title, but is a matter of conveyance only. Therefore, though, if the plaintiff had sold away the property outright and thus disabled himself from performing his part of the contract, his suit for specific performance would have been rightly dismissed, yet, as in this case, he had created only a mortgage of the land, he is entitled, before his suit for specific performance can be dismissed, to be allowed an opportunity to show that he was able to convey a title free from

Specific Performance—*continued.*

incumbrances. MEGHRAJ MARWARI v. CHUNI LAL MARWARI, **1 N.L.R. 190.**

(68)—*Contract of sale—Specific performance—Covenant for title.*—Under ordinary circumstances. it is an accepted principle of law that "in every contract for the sale of land, a condition is implied for a good title, and the failure to mention it does not necessarily render such contract incomplete." And the Court will carry into effect a contract framed in general terms, where the law will supply the details. But where the vendee is fully aware of the precise character of the rights possessed by the vendor in the property contracted to be sold, and the vendor has undertaken to sell only his rights and interests whatever they might be, and where the vendee was also aware of the fact that other persons besides the vendor had interests in the property, the Court will not decree that the vender should give a covenant for good title. BINDESHRI PRASAD v. JAIRAM, **A.W.N. 1884, 169.**

(69) —*Specific performance—Sale—Payment of purchase-money—Rescission of contract.*—Plaintiff agreed to purchase certain property belonging to the first defendant, paid a portion of the price to him and sent the balance to his brother who misappropriated it. The first defendant sold the property to the second defendant. Now the plaintiff sued the vendor and the purchaser for specific performance. *Held* that the brother's misappropriation of the money intended for the vendor did not relieve the plaintiff of the obligation of payment. There was nothing which attached fraud to the vendor or vendee as against the plaintiff. The vendor was at liberty to consider the agreement for sale at an end when he found the plaintiff not ready to fulfil the condition of payment of the purchase money. TAFAZZUL HUSAIN v. ALI HUSAIN, **A.W.N. 1883, 146.**

(70) —*Specific Relief Act* (I *of* 1877), *s.* 25—*Vendor and vendee—"Title free from reasonable doubt," meaning of—Effect of plaintiff's failure to show title—Vendor deriving title through will of former owner—Four days' notice given to vendor to produce and prove will, if sufficient to entitle vendee to rescind contract of sale—Clause in contract requiring vendor to hand over deeds relating to property, Construction of—Good title must be shown by vendor.*—On a contract by the plaintiff to sell land to defendant, the former cannot obtain specific performance unless he is able to give the latter a good title, *i.e.*, a "title free from reasonable doubt," since, in the absence of any special contract that plaintiff should show only such title as he could give, the general law laid down in s. 25 of the Act must prevail. [*R.*, 21 B. 827; *D.*, 19 B. 828.] On the dismissal of a suit for specific performance for the reason that the defendant could not be required to carry out the contract of sale, as the plaintiff failed to show a good title to the property, the defendant was held entitled to the return of the earnest money he had given and to have a lien for the amount. *Quære*:—Where a vendee ascertained that the

Specific Performance—*continued.*

title to property sold to him was derived through the will of a former owner which had not been proved, *held* that it was doubtful whether a notice given by the vendee to the vendor to produce the will and give satisfactory proof of its being the last will of the said owner within four days, would be a reasonable notice so as to entitle the vendee afterwards to rescind the contract. A contract of sale provided as follows:—"At the time of the execution of the deed of sale, you (the vendor) are duly to give us (the purchasers), the title deeds, vouchers and bills, whatever there may be relating to the said property." *Held* that this clause referred to whatever documents of title were required, under the terms of the contract or under the general law, to be handed over by the plaintiff to the defendant at the execution of the deed of sale. Where the words were coupled with the clause at the end of the bargain paper, providing that within two months the vendor is "duly to have everything cleared," *held* that the contract or covenant for the title made by the vendor with the purchaser was really a contract that there was no claim to the property; and that the vendor cannot obtain specific performance of the contract by showing only such title as he could give. In the present case, plaintiff sued for specific performance of a contract of sale. By an agreement in 1888, defendant purchased a certain house in Bombay from the plaintiff for Rs.6,000 and it was provided therein that, at the time of the execution of the sale-deed which was fixed at two months from the date of this agreement, the plaintiff should hand over to the defendant "the title-deeds, vouchers and bills, whatever there may be relating to the said property" and also that within this time of two months, "we are to have everything cleared." In 1890, plaintiff filed this suit for specific performance and the defendant contended that the plaintiff had failed to show good title to the property. The facts were as follows:—N, the original owner of the property, mortgaged it to V in 1880. Then, in 1882, N and his mortgagee V sold it to C; but *this deed was not registered.* However C entered into possession somehow and retained the property till 1885. N died in 1883, but he left a will in 1883, by which he bequeathed his property to the said V and appointed him his executor. *No probate of the will had been obtained.* In 1885, C sold the property to H, and a deed of conveyance was duly executed by C, in which V also joined as a conveying party, both in his own right and *as executor of N's will.* H sold the property to the present plaintiff. The question was whether, under the aforesaid circumstances, the plaintiff had a good title to give to the defendants. *Held* that the title shown by the plaintiff was not a good title. In consequence of the non-registration of the deed of 1882, the equity of redemption of the property was not conveyed by it to C, but remained in N up to the time of his death. On his death, it passed to his executor V, and it was clear that unless V joined as executor in the

Specific Performance—*continued.*

conveyance, C could not give a complete title to H in 1885, *i.e.*, the plaintiff must show not only that V did convey, but also that he had a right to convey the equity of redemption to H. By s. 187 of the Indian Succession Act X of 1865, the only mode of proving this is by the probate of N's Will, and this admittedly had never been obtained. This was the flaw in the plaintiff's title of which the defendant complained. Supposing an heir of N were to sue the person in possession to redeem the property from the mortgage of 1880, the defendant in such a suit would have no defence as against the heir, unless he could prove that he had acquired the equity of redemption. This, however, he could not do, unless he proved that V as N's executor, had conveyed the equity of redemption to his predecessor in title. For this purpose, under s. 187 of the Succession Act, 1865, probate would be necessary, and he would consequently be obliged to prove the will and pay duty upon all the property included in it. That would be a liability which the Court could not impose upon a defendant resisting specific performance of a contract like this, but that would be the effect of giving the plaintiff the decree prayed for in his plaint. The suit was, therefore, dismissed. HAJEE MAHOMED METHA v. MUSAJI ESAJI, **15 B. 657.**

(71)—*Contract to sell not registered*—Bona fide *purchase*—*Valuable consideration*—*No notice of prior contract*—*Effect*—*Sale to third party*—*Specific performance*—*Act* XIX *of* 1843.—The defendant agreed to sell certain property to the plaintiff on payment of a certain sum at a future time. Instead of carrying out his bargain the defendant sold the property to C. Then the plaintiff sued for the specific performance of the contract of sale. It was contended that the deed of sale to C was registered whilst the contract in favour of the plaintiff was not registered, and therefore under Act XIX of 1843 the former was entitled to precedence over the latter. *Held* that Act XIX of 1843 refers to deeds of sale or gift of land; but the deed propounded by the plaintiff was merely a contract to sell land at some future time. The want of registration, therefore, of the first deed to the plaintiff was no bar *per se*, to his preferential claim. If C can prove that he bought the share in good faith for valuable consideration, without notice, his possession cannot be disturbed in consequence of the defendant's non-fulfilment of his contract with the plaintiff. The only remedy for the plaintiff in that case would be an action for damages. RAMTONOO SURMAH SIRCAR v. GOUR CHUNDER SURMAH SIRCAR, **3 W.R. 64.** [*F.*, 7 W.R. 463; *R.*, 6 W.R. 234, 7 W.R. 142, 4 B. 126, F.B.]

(72)—*Specific performance--Prior sale-deed not registered--Subsequent* bona fide *purchase under registered deed*—*Remedy open to prior purchaser.*—Where property was purchased by a person by means of a registered sale-deed *bona fide* and in ignorance of the existence of a prior unregistered deed of sale, the prior purchaser can-

Specific Performance—*continued.*

not seek his remedy against the executants by a suit for specific performance of the contract, but must sue them for damages only. NUND KISHORE LALL v. MOHUN LALL, **22 W.R. 164.**

(73)—*Contract—Specific performance of part of contract—Sale.*—In a suit under an agreement by the defendant to recover possession of one half of a patni taluk and to get a conveyance executed therefor in plaintiff's favour, where the defendants' share was found to be at most one-fourth and plaintiff could therefore, get one-eighth share only, it was *held* that, even if the agreement were binding on the defendant, the Court could not compel such partial performance which was all that could take place. NUFFUR CHUNDER CHUNDER v. KHOODEERAM PORAMANICK, **24 W.R. 434.**

(74)— *Contract of sale—Right to demand warrant of title.*—The plaintiff sued for specific performance of a contract of sale, and prayed that a judgment might be passed ordering the defendant to execute and get registered a sale-deed in favour of the plaintiff in respect of the property claimed, by entering a guarantee of good title. He had withheld payment of the purchase-money beyond the stipulated time, insisting on a warranty of title being given. *Held*, that the contract of sale did not give the plaintiff a right to demand warrantee of title, that there was no proper excuse for his delay in the payment of the purchase-money, and that a decree for specific performance could not therefore be passed. BINDESHRI PRASAD v. MAHANT JAIRAM GIR, **9 A. 705, P.C.=14 I.A. 173=5 Sar. 61.**

(75)—*Contract to sell land at a fair valuation.*—A contract to sell land at a fair valuation will be specifically enforced by a Court when there is no difficulty in ascertaining, by the usual means, what a fair valuation would be. But it is otherwise if, on account of the peculiar character of the property, as when the land contains coal or valuable minerals, the ordinary methods would not help the Court in arriving at a proper determination of the value which must, in such a case, greatly depend upon guess and speculation. In such a case, the Court cannot grant specific performance. THE NEW BEERBOOM COAL CO. v. BHULORAM MAHATA, **5 C. 175=2 C.L.R. 268.**

(76)—*Agreement to sell land by guardian of minor contingent upon leave of Court—Specific performance—Specific Relief Act*, 1877, *s.* 26.—Where an agreement to sell certain land belonging to certain minors, for a fixed price, entered into on their behalf by their certificated guardian, was made contingent upon the leave of the Court, but the permission was granted for a higher price, *held* that, as the contract as it stood was never a complete contract at any time as it was contingent upon the leave of the Court, and as such leave did not extend to the whole contract as agreed upon between the parties, the contract could not be specifically enforced, and s. 26, Specific Relief Act, did not apply. NARAIN PATTRO v. AUKBOY NARAIN MANNA, **12 C. 152.**

(77)—*S.* 18, *Act* XL *of* 1858—*S.* 31, *Act* VIII *of* 1890 (*Guardian and Wards*)—*Specific performance of voidable contracts.*—A contract, so long as it is voidable, cannot be specifically enforced. As it is open to an infant, on attaining majority to question the transaction made by his guardian, a decree for specific performance cannot, or at all events, should not, be made against him while an infant. The jurisdiction to decree specific performance is discretionary, although the discretion must be judicially exercised. No Court would, even if it could, make a decree for the specific performance of a contract affecting an infant, unless the contract was shown to be for the infant's benefit. JUGAL KISHORI CHOWDHURANI v. ANUNDA LAL CHOWDHURI, **22 C. 545.** (5 C. 363, *R.*) [*F.*, 26 B. 326=3 Bom. L.R. 898; *R.*, 4 Bom. L.R. 587, 11 C.W.N. 34=34 C. 163=4 C.L.J. 431=1 M.L.T. 360; *Cons.*, 11 C. W.N. 207.]

(78)—*Contract for sale by mother as guardian of infant son, incapable of performance by infant's death—Specific Relief Act* (I *of* 1877), *s.* 18—*Transfer of Property Act* (IV *of* 1882), *s.* 43.—The defendant, as the mother and guardian of her infant son, contracted to sell a piece of land to the plaintiff, undertaking to take out a certificate of guardianship and permission to sell from the District Judge, within five months. The agreement further provided for the refund of the earnest money in case of the defendant's failure to obtain the necessary permission. The infant son died within the five months, before the certificate could be applied for, the defendant succeeded to the property by right of heirship and refused to sell the property. In a suit for specific performance of the contract, *held*, that there can be no decree against the defendant for specific performance of the contract for sale. S. 18 of the Specific Relief Act has no application to a case where the defendant does not contract to sell the property as if it were his own nor does s. 43 of the Transfer of Property Act apply to a case where there is no erroneous representation made by the defendant. RASHMONI DASI v. SOORJA KANATA ROY CHOWDHURY, **2 C.L.J. 6=9 C.W.N. 1019=32 C. 832.**

(79)—*Conveyance, registered and delivered, if operative—Consideration not paid, effect of—Agreement to sell—Not enforceable—Limitation.*—If A executes a conveyance in favour of B by way of *mokarari*, and the document is registered and delivered, it is operative, even though it is proved that the consideration agreed upon has not been paid. Its validity cannot be questioned by a third party. A agreed to sell property to X and, subsequently, conveyed it to B, who took with notice of the prior contract. X obtained a decree for specific performance against A, but did not make B party to the suit; X then sued B to recover possession. *Held*, that X had no enforceable title as against B, because at the date of the institution of the suit, his

Specific Performance—*continued.*

equitable right had been barred by limitation. MANOGI SINGH v. SARAT LAL MAHTO, **4 C. L.J. 334.**

(80)—*Specific performance—Infant—Contract for purchase of immoveable property by guardian or manager—Mutuality, want of—Position and powers of guardian and manager, if similar.*—It is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property. The minor in such a case not being bound by the contract, there is no mutuality in it, and he cannot on attaining majority obtain specific performance of it. (11 C.W.N. 34, P.C.) *Quære.*—Whether the position and powers of a manager and those of the guardian are the same. MIR SARWARJAN v. FAKHRUDDIN MAHOMED CHOWDHRY, **16 C.W.N. 74, P.C.**

(81)—*Member of joint Hindu family governed by Mitakshara—Contract to sell his own share, whether may be specifically enforced—Contract to sell one's own and co-sharer's share—Specific performance of his share, whether may be decreed—Right to damages.*—Three members of a joint Hindu family, governed by the Mitakshara, made a contract with the plaintiff to give him a lease in respect of 8 annas-share held by themselves and their joint brother R. *Held*, that, as the four brothers were members of a joint family governed by the Mitakshara law, the three brothers who made the contract had no definite share before partition and could not be compelled to make an alienation which would be invalid in law: that, therefore, they could not be compelled to execute a lease in respect of a 6 annas-share in the joint property; for such a lease would be invalid and the Court will not order that to be done which when done would be invalid. Where a person is jointly interested in an estate with another person and purports to deal with the entirety, specific performance will not be granted against him as to his share, the plaintiff's only remedy being by way of damages. JADU NANDAN SINGH v. ABDAL RAHMAN, **11 Ind. Cas. 892.** (1895) 1 Q. B. 683, 64 L.J.Q. B. 441, 14 R. 347. 72 L. T. 382, 43 W. R. 584, 59 J. P. 279, *Rel on.*)

(82)—*Specific performance — Agreement to convey land to three persons—One of them alone suing for specific performance—Absence of right—Contract Act, s.* 45.—Where a person entered into an agreement with the plaintiff and two others to convey certain land, *held*, that the plaintiff alone had no right to demand specific performance of the agreement when the other two were not willing to do so. KORIPALLI RAMIAH v. SAJJA SUBBIAH, **11 M.L.T. 192=M.W.N. 1912, 415=13 Ind. Cas 315.** (24 C. 832, *F.*)

(83)—*Contract for sale of house—Agreement to complete sale within stipulated time—Default by purchaser—Extension of time given by seller—Effect—Final notice by vendor to vendee to complete purchase—Suit for specific performance.*

Specific Performance—*continued.*

—This was a suit for specific performance of a contract to sell a house under the following circumstances:—Under an agreement, dated 23-6-1886, the defendant undertook to sell the plaint house to the plaintiff and made it a condition that the sale should be completed in 12 days. At the time of the agreement, the house in question was in a dangerous condition, requiring urgent repairs. The house had been purchased by the defendant from X in February 1886. Part of the purchase-money only was paid by the defendant and the conveyance to him had not been completed. The object of the defendant in re-selling the house to the plaintiff was to get rid of all responsibility and liability to repair. The plaintiff having made default in completing the sale within the stipulated time, time was extended till 10th August. The plaintiff took no steps, and a letter of warning was sent by the defendant on 24-7-1886 to the former that, in case the sale was not completed within the time extended (10th August), the agreement of 23rd June would be null and void. The plaintiff was inactive without taking any steps till after the expiry of the extended time. The defendant, thereupon, served a notice on the plaintiff, dated 7-9-1886 calling on him to carry out the agreement of 23-6-1886, and gave him 4 days within which to do the same. The four days expired without the plaintiff doing anything in respect of the matter. Thereupon the defendant completed his own conveyance from X and repaired the house at his cost. The present suit was thereupon brought by the plaintiff enforcing specific performance of the agreement of 23-6-1886. *Held* (1) that, considering the circumstances under which the house was contracted to be sold to the plaintiff and the nature of the property, the time stipulated for performance was not "a formal term immaterial in the contract," but was of the essence of the contract; (2) that the extension of time granted at the request of plaintiff, to the 10th August, operated only as a waiver to the extent of substituting the extended time for the original time and did not effect a destruction of the essentiality of the time; and (3) that the plaintiff was not entitled to specific performance he having taken no steps to complete the sale in spite of the defendant's letter of 24th July which was a timely warning to him that the contract would not be kept in suspense after the expiry of the extended time. With reference to the contention raised on behalf of the plaintiff that the defendant's letter of 7-9-1886 treated the contract as subsisting at that time and gave the plaintiff a fresh starting point, the defendant having waived under the letter all the plaintiff's previous default, it was *held* that the letter was only a qualified and conditional waiver of the performance within the stipulated time, the condition being that the plaintiff should complete the sale within 4 days. That condition not having been complied with, the waiver could not be relied on. *Quære*—Whether the 4 days' time limited by the letter of 7-9-1886

Specific Performance—*continued.*

was unreasonable, considering all the circumstances of the case, and assuming that time was not originally of the essence of the contract? HAJI FAKIR MAHOMED v. SHAIK ABDULLA, **12 B. 658.**

(84)—*Contract to convey*—Bona fide *purchaser for value*—*Specific performance*—*Specific Relief Act* (I *of* 1877), *s.* 27, *cl.* (*b*).—Specific perfomance of a contract to convey property cannot be enforced against a person who subsequently purchased the property in good faith and without notice of the prior contract. TRAILOKYA NATH BISWAS v. JOYKALI CHOWDRAIN, **11 C L R. 454.**

(85)—*Suit for specific performance--Unreasonable delay.*—A purchased with his own money certain land for himself and B. He remained in sole possession in the hope that B would pay him his *quota* of the purchase-money. B, however, did not do so, and allowed A to continue in possession for 24 years. *Held* that B, by allowing an unreasonably long time to elapse without paying his *quota* of the purchase-money, had precluded himself from claiming specific performance of the original arrangement, and under the circumstances, the fact that B's name also was entered in the Settlement record would not help him or deprive A of the plea of long delay on the part of B. MOTI RAM v. LUCHMAN SINGH, **106 P. R. 1868.**

(86)—*Agreement between Government and Zemindar—Specific performance of one of the terms.*—Where the Government undertook, in an agreement with a Zemindar, to retain in its own hands the construction of certain *khals* and other things, the Zemindar could not, though the Government would, partly in consideration of the agreement and partly in consideration of its duty, as paramount power, no doubt, be desirous of taking all steps necessary for the object with a view to the comfort and health of the population, seek to compel it by a plaint filed in Court to re-excavate and clear the water-passage of a certain *khal*, it being against the policy of the law, even before the Specific Relief Act, to enforce specific performance of such contracts. CHUNDER SEKHUR MOOKERJEE v. THE COLLECTOR OF MIDNAPORE, **3 C. 464 = 1 C.L.R. 384.**

(87)—*Champerty—Suit for specific performance*—Mahomedan mooktear *interfering with affairs of Hindu family.*—An agreement under which a *Mahomedan mooktear* interfering in the affairs of a Hindu family advanced money to carry on a suit by members of that family to set aside alienations made by their father, on the understanding that he was to be entitled to the share of the estate recovered from the purchasers in the event of success, savours of champerty and a suit by him for specific performance of such agreement could not be countenanced. SHEIKH ABED HOSSEIN v. LALLA RAMSARAN, **13 B.L.R. 516, Note = 13 W.R. 426.** [*D.*, 8 B.H.C. 1.]

Specific Performance—*continued.*

(88)—*Specific performance of contract—Contract executed in exercise of power given by will—Will found false—Enforcement against executant as heir—Delay in suing, not amounting to waiver, or acquiescence, if bar to relief.*—The widow of the deceased owner, jointly with another who as executor had obtained probate of a will alleged to have been left by the deceased, executed an agreement for sale of land, the widow purporting thereby to exercise a power given by the will to assent to conveyances executed by the executor. The probate subsequently having been revoked: *Held*, that the contract was specifically enforceable against the widow to the extent of her interest. Delay which did not amount to waiver, abandonment or acquiescence, and in no way altered the position of the defendant, did not disentitle the plaintiff to sue for specific performance. (33 C. 633, *F.*; 10 C. 1061, *R.*) In the special circumstances of the case, specific performance of the contract was refused. KEDAR NATH SAMANTA v. MANU BIBI, **16 C.W.N. 247 = 13 Ind. Cas. 879.**

(89)—*Of contract—Futile attempts to rescind agreement—Right to specific performance—Failure of consideration.*—It cannot be laid down as an abstract proposition that there is any necessary inconsistency in a person, who has unsuccessfully tried to rescind an agreement, afterwards claiming performance of it. In a suit between a person claiming an estate by virtue of an alleged adoption and another person disputing the truth and validity of such adoption, a compromise was entered into, whereby the latter admitted the adoption and agreed to refrain from questioning the truth and validity of the adoption of the former; the object of the former in entering into the compromise was to obtain a clear admission of his title to the estate from the latter and to secure himself from attacks from that quarter. The latter, however, contrary to the terms of the compromise, repudiated the validity of the adoption, and tried to rescind the agreement of compromise in a subsequent litigation, but without success. The second party claimed, in a subsequent suit, to enforce the terms of the compromise. *Held*, under the circumstances, that the principal consideration for the compromise being an abstention, on the second party's part, from questioning the legality of the adoption of the first party, and there having been a failure on the part of the second party to keep up to the terms of the compromise and the conduct of the second party having been at variance with, and having amounted to a subversion of, the relation intended to be established by the compromise, there was such a failure of consideration for the agreement of compromise as to disentitle the second party to a specific performance of the same. SRISA CHANDRA ROY v. ROY BANOMALI RAI BAHADUR, **2 A.L.J. 31, P.C. = 8 C.W.N. 594 = 31 C. 585 = 6 Bom. L. R. 501 = 14 M.L.J. 185 = 31 I.A. 107 = 8 Sar. 677.**

(90)—*Suit for recovery of money agreed to be paid on a mortgage-debt—Specific performance of*

Specific Performance—*continued.*

contract to lend money—Specific Relief Act (I *of* 1877), *s.* 21, *cl.* (*a*).—The plaintiff mortgaged certain property to the defendants for Rs. 12,000. He received Rs. 4,000 in cash. Rs. 7,000 were left with the defendants to pay off a prior mortgage and the balance, Rs. 1,000, was to be paid to the plaintiff after a month and half. This was a suit to recover this sum of Rs. 1,000. The defence was that the defendants had to pay Rs. 9,400 to the prior mortgagee so that instead of there being a sum of Rs. 1,000 due to the plaintiff he owed them Rs. 400. *Held* that, it being a contract to lend money, a suit for specific performance of such a contract was not maintainable. *Held*, further, that such a contract does not create a debt. MEHDI ABBAS v. MUHAMMAD FAKHR-UD-DIN. **11 O. C. 217.** (8 O.C. 5, A.W.N. 1908, 105, *R.*)

(91)—*Unpaid balance of mortgage.*—A Court ought not to make a decree for specific performance of an agreement to lend money on mortgage. The proper remedy is to obtain compensation or damages for breach of contract. ANAKARAN KASMI v. SAIDAMADATH AVULLA, **2 M. 79.**

(92)—*Suit for specific performance of contract—Expiration of stipulated time before decree—Hypothecation bond.*—Where it was stipulated in a hypothecation bond that in default of payment of interest as agreed, and within a fixed period from the date of the bond, the obligee might sue for possession of the property hypothecated, and default having occurred, a suit was brought for possession within the period mentioned in the bond, *held* that nevertheless a decree for possession should not be given if, before passing of decree, such period had expired, for such decree could not give the obligee possession within the period mentioned in the bond. BALWANT SINGH v. GUMANI RAM, **3 A. 591 = A.W.N. 1883, 142.**

(93)—*Suit to enforce award—Suit for specific performance of contract.*—A suit founded on an award is not a suit for the specific performance of a contract, any more than is a suit based upon a sale-deed a suit for the specific performance of the contract of sale, and the mere fact that the title of the parties to the property had been declared by the award sued on could not make any difference. SHEO NARAIN v. BENI MADHO, **23 A. 285 = A.W.N. 1901, 83.** (23 M. 593, *F.*; 5 A. 263, 16 A. 3, *D.*) [*F.*, 15 C.P.L.R. 115, 7 O.C. 369, 33 C. 881 = 4 C.L. J. 162; *R.*, 10 O.C. 218, U.B.R. 1909, Limitation, 9; *D.*, 26 A. 497 = A.W.N. 1904, 72.]

(94)—*Suit founded on award not one for specific performance.*—A suit founded on an award is not a suit for the specific performance of a contract. DALSING BRAHMAN v. MT. SARASWATI, **15 C.P.L.R. 115.** (23 A. 285, 23 M. 593, *F.*)

(95)—*Agreement to execute bond after some months to secure payment of money—Suit for money, without suing for specific performance of agreement to execute bond—Appeal—Improper admission of document.*—By an agreement the defendant agreed to pay to the plaintiff within six months a sum of Rs. 4,000; and that, if this were not paid within that time, he would give the plaintiff a bond for payment of the same with interest at 8 annas per mensem at the end of another six months. The money was not paid and the bond was not executed. After the lapse of more than 12 months from the date of agreement, he sued for the amount with interest. *Held* that the plaintiff was entitled to sue for the amount with interest, without suing for the specific performance of the agreement to give a bond at the end of the six months. The improper admission of a document is no ground of appeal. RAHIMUNISSA v. MOHAMED MIRZA, **10 C.L.R. 103.**

(96)—*Specific performance—Lease by some of several proprietors of a village—Right to enforce lease.*—The plaintiff sued for specific performance of an alleged contract to gave him a lease of a village. Plaintiff applied by petition to the proprietors of the village for the lease and tendered payment in advance, but payment was not received. These proprietors, however, wrote upon the petition their approval by the word "munjoor." Subsequently one of the proprietors, who represented a certain share in the village, instead of giving a lease of that portion, renewed the old lease of the previous lessee: *Held* that, under the above circumstances, there was not such a contract, on consideration received, as to make this a case where a suit for specific performance rather than a suit for damages was the correct form of action. BAL GOBIND MUHTOON v. MEER LUTAFUT HOSSEIN, **7 W.R. 142.**

(97)—*Contract—Specific performance of contract—Contract to lease land—Lessor's lease determined by Municipality to whom land belonged—Contract impossible of performance.*—Plaintiff sued defendant for specific performance of a contract to lease land, for which he alleged he had paid defendant Rs. 500 as advance. Defendant pleaded that he was himself a lessee under the Municipality, who had determined his lease, and that plaintiff was aware of it. *Held*, that, as the contract had become impossible of performance by the defendant, it could not be specifically enforced. T. SESHADRI IYENGAR v. C. RAMANUJA IYENGAR, **4 Ind. Cas. 96 = 6 M.L.T. 375.**

(98)—*Specific performance—Grant of Kutkina pottah to one person—Subsequent grant with possession to another—Remedy open to first grantee—Damages.*—Where a Kutkina pottah of certain lands was granted first to a certain person and subsequently another, with possession, was granted in favour of another person, the former was not entitled to claim specific performance of the contract, but was entitled only to claim damages for breach thereof, unless the latter did not raise any objection to his recovering possession of the lands. BUJRUNGEE DUTT PATTICK v. SHAIKH MOORAD ALI, **22 W.R. 7.**

(99)—*Contract—Damages.*—Where plaintiff having agreed to assign to defendants for a

Specific Performance—*continued.*

consideration certain arrears of rent due to him brings a suit in which he tenders the *kobala* of assignment, and claims the consideration money with interest, *held*, that he had misconceived the shape in which his suit was brought; and as his claim is purely for money, he should sue for damages for breach of contract. Where, in a former suit, brought by the present defendant for specific performance of the same contract, plaintiff, who was defendant (there), resisted successfully, and without qualification, he could not afterwards treat the contract as subsisting. SHEO PERGAH ROY v. INJORE TEWAREE, **21 W.R. 433.**

(100)—*Land required for public purposes—Act* VI *of* 1857, *s.* 32—*Correspondence between Government officer and owner of land held to create contract enforceable at law—Manufactory includes well inside.*—With reference to the acquisition of the defendants' mill for a public purpose, the B.B. and C I. Railway, the defendant's letter stating that they had appointed an arbitrator on their behalf was held to create a contract of which specific performance could not be enforced. *Held*, further, that the defendants had, by appointing their arbitrators to determine the compensation for the land required, waived any irregularity in the previous proceedings, and precluded themselves from claiming to have the whole manufactory taken under s. 32 of Act VI of 1857, though no proceedings were taken in the arbitration for nearly twelve months subsequently, and the defendants had shortly before such proceedings made such a claim. A well in a mill compound wherefrom the mill's engine is supplied with water, is part of a manufactory. KHAR SHEDJI NASARVANJI CAMA v. THE SECRETARY OF STATE, **5 B.H.C.O.C. 97.** [*R.*, 14 C. 423.]

(101)—*Suit for possession based on compromise—Limitation—Adverse possession.*—In a suit for possession based on a compromise between the parties in a previous litigation, it was contended for the defendants that the suit was barred by limitation, and adverse possession, and that the plaintiff was not entitled to any relief, as, under the compromise, he was entitled to the property only so long as his character as lessee had not changed in the meanwhile. *Held* that the suit was not a suit for specific performance of a contract of sale: but a suit for immoveable property, and would be covered, not by art. 113 of the schedule to the Limitation Act, but by art. 145. *Held*, further, that the possession by the defendants at the time when they entered into the compromise to deliver over the land to the plaintiff cannot be taken to be hostile to the plaintiff, but can only be adverse to him from and after the date of the agreement by reason of their having refused to carry out that promise. *Held*, also, that the agreement could not be regarded as personal to the plaintiff in his original character of lessee when the character of his lease had been changed, because

Specific Performance—*continued.*

it had been renewed by the superior landlord since the first ageeement had been made between him and the defendants, if it was through defendants' failure to surrender possession that plaintiff was not in possession at the time of the renewal of his lease. The zemindar must be taken to have renewed on the understanding that it covered the same lands that he would have been entitled to hold under the previous lease. MR. C. G. D. BETTS v. MAHOMED ISMAEL CHOWDHRY, **25 W.R. 521.**

(102)—*Act* VIII *of* 1859, *s.* 93—*Injunction to restrain marriage — Betrothal — Hindu law—Specific performance.*—S. 93 of the Civ. Pro. Code (Act VIII of 1859) was never meant to apply to a case where the petitioner applied for an injunction to restrain a Hindu widow from giving her minor daughter in marriage to a third party pending the decision of a suit brought by the petitioner to enforce specific performance of a contract of marriage made between his son and the defendant's daughter. A Court cannot order specific performance of a contract of marriage (the girl not being a party to the suit), or compel the father to carry out a marriage with the person to whom the daughter had been betrothed. A betrothal is not, according to Hindu Law, an actual and complete marriage. GUNPUT NARAIN SINGH v. MUSSAMUT RAJUN KOOER, **24 W.R. 207.**

See U. P. ACT XVII OF 1876, s. 219, cl. (*d*), 5 O.C. 140.

Agreement to lease—Time of commencement not fixed—See AGREEMENT, 13 C.W.N. 326=6 M.L.T. 368=4 Ind. Cas. 85.

Suit for specific performance of award—Assessment of compensation impossible—*See* AWARD, 24 A. 164=A.W.N. 1901, 208.

See AWARD, 7 O.C. 369.

Benami transfer of property for illegal purpose not carried into execution—Contract to sell by transferee—Suit for specific performance of contract--Right of transfer or to resist suit—*See* BENAMI TRANSACTION—GENERAL, 3 M.L.T. 244=18 M.L.J. 151=31 M. 97.

Suit for—, whether necessary for recovery of Chakran land on its resumption and transfer to zemindar—*See* CHAKRAN LAND, 12 C.W.N. 459=7 C.L.J. 439=35 C. 346.

See CHAMPERTY, 150 P.R. 1889.

Of contract for sale of land—Parties to suit for.—*See* CIV. PRO. CODE, 1908, s. 11, O. I, rr.3,10 (2), 13, O.II, rr.3, 6, 7, O. XIV, r. 1(5). O. XVIII, r. 1, 13 Bom. L.R. 1061.

Agreement for sale—Vendee put in possession subsequently ejected by vendors—Sale not completed—Suit by vendee for possession and injunction — Similar suit by vendors — Subsequent suit by vendee for specific performance—Omission to set up grounds of defence—*Res judicata—See* CIV. PRO. CODE 1908, s. 11, O. II, r. 2, 24 M. 491=6 C.W.N. 17, P.C.

Specific Performance—*continued.*

Suit for, and possession against certified purchaser—Maintainability— *See* CIV. PRO. CODE, 1908, s. 66, 8 Ind. Cas. 258.

See CIV. PRO. CODE, 1908, O. I, rr. 8 (2), 10 (2), (3), (4), (5), 11, O. VII, rr. 1, 2, 4, 5, 6, s. 107 (2), O. XXII, r. 11, 1 L.B.R. 252.

Cause of action whether same for suit for specific performance of contract to reconvey land and for mesne profits—*See* CIV. PRO. CODE, 1908, O. II, r. 2, 13 C.W.N. 669=4 Ind. Cas. 534.

Contract to sell—Decree for specific performance—Failure of suit for possession—Subsequent suit for recovery of amount paid—*See* CIV. PRO. CODE, 1908, O II, r. 2, 24 M. 27=10 M.L J. 217.

Dismissal of suit for, of agreement to renew kanom—Suit for renewal fees paid on agreement, not barred—*See* CIV. PRO. CODE, 1908, O. II, r. 2, 27 M. 380.

Suit for, of contract of sale dismissed—Subsequent suit for recovery of money paid as part price—*See* CIV. PRO. CODE, 1908, O. II, r. 2, 8 M.L J. 61.

Suit for, of contract for lease of immoveable property is one relating to the property—*See* CIV. PRO. CODE, 1908, O. XXXIX, r. 1, 2 Ind. Cas. 266.

Suit for, of an award—*See* CIV. PRO. CODE, 1908, sch. II, r. 20, U.B.R. (1897-1901), Vol. II, 293.

See CONTRACT—CONSTRUCTION OF CONTRACTS, 10 C. 588.

Right of beneficiary to enforce performance of contract—*See* CONTRACT—MISCELLANEOUS, 14 C.P.L.R. 22.

Of contract—Decree for damages—Discretion—*See* CONTRACT—MISCELLANEOUS, 28 P.L.R. 1905=49 P.R. 1905.

Suit for, of contract of sale and for delivery of possession—Court fee—*See* COURT-FEES ACT, 1870, s. 7, cls. 5, 10, 14 C.L.J. 159.

Contract of Sale—Prayer—*See* DECLARATORY DECREE, SUIT FOR—SUITS CONCERNING DOCUMENTS, 18 M. 324.

See DECREE—ALTERATION OR AMENDMENT OF DECREE, 15 C. 211.

Suit for ejectment—Right of defendant to set up claim for—*See* EJECTMENT, SUIT FOR, 13 C.P.L.R. 163.

Of an agreement in writing—Admission of parol evidence—*See* EVIDENCE—PAROL EVIDENCE, 6 C. 328=7 C.L.R. 171.

Contract subsequently varied by parol contract—Evidence Act, s. 92 (4)—*See* EVIDENCE—PAROL EVIDENCE, 7 C.L.R. 577.

Decree upon a compromise for execution of a conveyance to be proceeded with as a decree for specific performance—*See* EXECUTION OF DECREE—EXECUTION OF DECREE ON OR AFTER AGREEMENTS OR COMPROMISE, 10 C.W.N. 845.

Specific Performance—*continued.*

Of contract by guardian—*See* GUARDIAN—DUTIES AND POWERS OF GUARDIANS, 11 C.W.N. 34=34 C. 163=1 M.L.T. 360=4 C.L.J. 431.

Contract by certificated guardian on behalf of minor for sale to plaintiff—Subsequent sale to a third person—Suit by plaintiff for—*See* GUARDIAN—DUTIES AND POWERS OF GUARDIANS, 10 C.W.N. 763.

Contract to sell by guardian with Court's permission—Subsequent sale with permission for higher price—Whether first contract is specifically enforceable—*See* GUARDIAN—MISCELLANEOUS, 4 A.L.J. 24=A.W.N. 1907, 25=29 A. 213.

Hindu Law—Decree for, against father—Right of son born after contract to sell, but before suit—*See* HINDU LAW—ALIENATION, 20 M. 354=7 M.L.J. 240.

Contract to sell ancestral estate—Specific performance—Rights of infant son, protection of—*See* HINDU LAW—ALIENATION, 5 M. 337, F.B.

Minor—Doctrine of mutuality—Hindu Law—*See* HINDU LAW—GUARDIANSHIP, 18 M. 415=5 M.L.J. 164.

See HINDU LAW—JOINT FAMILY, 26 M. 74=12 M.L.J. 400.

Of contract to sell his share by a member of a joint Hindu family—Parties to suit—*See* HINDU LAW—JOINT FAMILY, 3 N L.R. 160.

Contract to give girl in marriage—Injunction—*See* HINDU LAW—MARRIAGE, 1 C. 74.

See HINDU LAW—MARRIAGE, 7 B.H.C. O.C. 122, 5 N.W.P. 102.

Agreement between divided brothers as regards estate of a deceased divided brother—Widow of deceased not a party to the agreement—Specific performance—Limitation—*See* HINDU LAW—REVERSIONERS, 17 M.L.J. 505=30 M. 486=2 M.L.T. 443.

See JURISDICTION—SUITS FOR LAND, 14 B. 353.

Suit for abatement of rent—Jurisdiction of Civil Courts—Putneedar—*See* JURISDICTION OF CIVIL COURTS, 1 B.L.R., F.B., 93=10 W.R., F.B., 41.

Suit for specific performance or condition of lease—*See* JURISDICTION OF CIVIL COURT, 2 Agra 392.

See LAND TENURE—IN BOMBAY, 4 B.H.C. O.C. 1.

See LANDLORD AND TENANT—EJECTMENT, 18 B. 110.

See LEASE—GENERAL, 5 M.H.C. 251.

Suit for—*See* LEASE—GENERAL, 9 C.L.J. 523=36 C. 675=1 Ind. Cas. 626.

Lease—Possession not given as per covenant—Suit for recovery of money—Suit for—*See* LEASE—ZURIPESHGI LEASE, 6 Ind. Cas. 704.

Specific Performance—*continued.*

See LIMITATION ACT, 1908, art. 113, 5 A. 263=A.W.N. 1882, 16, 11 A. 27=A.W.N. 1888, 254, 5 C. 175=2 C.L.R. 268.

Suit for — No time fixed for performance — Demand and refusal — Limitation — *See* LIMITATION ACT, 1908, art. 113, 11 Ind. Cas. 25.

See LIMITATION ACT, 1908, arts. 113, 136 144, 2 A. 718.

See LIMITATION ACT. 1908, arts. 113, 144, 6 A. 231=A.W.N. 1884, 42.

Suit for—*See* LIS PENDENS, 13 C.W.N. 226 =9 C.L.J. 96=3 Ind. Cas. 696.

Gift to a female member and her children—Contract by mother alone to sell the gifted property without the children's consent—Right to claim—*See* MALABAR LAW—GIFT, 4 Ind. Cas. 90=6 M.L.J. 373=20 M.L.J. 134.

Mortgagee with right of pre-emption—Suit by third party for, of contract to sell—Specific Relief Act, s. 27 (*b*)—*See* MORTGAGE—GENERAL, 2 L.B.R. 108.

Foreclosure—Partition—Agreement by parties—Specific performance—Suit for possession —Limitation — *See* MORTGAGE BY CONDITIONAL SALE, 217 P.L.R. 1911=138 P.W.R. 1911=11 Ind. Cas. 299.

Suit for specific performance and possession —Subsequent purchaser — Misjoinder — *See* MULTIFARIOUSNESS, 18 M. 415=5 M.L.J. 164.

See PARTIES TO SUIT—GENERAL, 19 M. 211, 2 C.W.N. 42.

Agreement to pay agent a permanent annuity —Suit for, by agent—Want of consideration *See* PRINCIPAL AND AGENT—REVOCATION OF AGENT'S AUTHORITY, 5 B. 253.

See RES JUDICATA—MATTERS IN ISSUE, 18 B. 537.

See RES JUDICATA—MISCELLANEOUS, 6 C.W.N. 314.

Payment of part consideration—Delay in paying balance—Suit for—Discretion of Court. —*See* SALE—GENERAL, 7 Ind. Cas. 568.

Suit for specific performance or alternative damages—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 1 B.L.R. A.C. 91=10 W.R. 130.

Of agreement to give share in subject-matter of litigation—Burden of proof — Limitation— *See* TRANSFER OF PROPERTY ACT, 1882, s. 6, 9 Ind. Cas. 243.

Prior unregistered contract of sale—Subsequent registered sale—Notice—Suit for—*See* TRANSFER OF PROPERTY ACT, 1882, *s.* 54, A. W.N. 1887, 15.

Suit by vendor for—Parties—*See* VENDOR AND PURCHASER—GENERAL, 11 Bom. L.R. 545=6 M.L.T. 200.

Specific Performance—*concluded.*

Distinction between vendor's suit and purchaser's suit for—*See* VENDOR AND PURCHASER—GENERAL, 19 C. 358.

See VENDOR AND PURCHASER—BILLS OF SALE, 2 B.L.R.P.C. 111=12 M.I.A. 275=12 W.R.P.C. 6.

See VENDOR AND PURCHASER—COMPLETION OF TRANSFER, 17 C. 919, 5 B. 554.

Specific Relief Act (I of 1877).

[REP. IN PT., ACT XII OF 1891; (LOCALLY), ACT II OF 1882; ACT IV OF 1882. S. 21; APPLICATION RESTRICTED, AND REP. IN PT. (LOCALLY), ACT IX OF 1899, SS. 3, 21. DECLARED IN FORCE IN UPPER BURMA (EXCEPT THE SHAN STATE), ACT XIII OF 1898, S. 4, S 9 DECLARED IN FORCE IN BRITISH BALUCHISTAN, REG. I OF 1890, S. 3.]

See SPECIFIC PERFORMANCE.

(1)—*Mistake of law—Mistake of fact—Undue delay in seeking performance—Refusal thereof—discretion.*—It is well-established that the delay of either party to a contract in not prosecuting his right to the interference of the Court by the institution of a suit may constitute such laches as well disentitle him to the aid of the Court. For the purpose of specific performance, undue delay may amount to an abandonment of the contract by an aggrieved party. "A party cannot call upon a Court of Equity for specific performance unless he has shown himself ready, desirous, prompt and eager. The rule is specially applicable when the subject-matter of the contract is of a speculative or fluctuating value. Where a provision of a contract is invalid, *e.g.*, a power to sell to be exercised by a simple mortgagee without the intervention of the Court, due to a common mistake of law and not of facts, *held*, that a Court of Equity will not, in general, relieve against a mistake in a contract which was a mistake of law; but there are cases in which the Court does not hold itself strictly bound by this rule, but relieves against a mistake of law if there be any equitable ground, which makes it, under the particular facts of the case, inequitable that a party benefited by the mistake should retain that benefit. NAWAB BEGAM v. A. H. CREET, A.W.N. 1905, 147=2 A.L.J. 405=27 A. 678.

(2)—*Injunction, permanent and temporary—Specific relief.*—*Quære*—Relief by injunction is a form of specific relief. Whether the principles governing the grant of a perpetual injunction under the Specific Relief Act and the grant of a temporary injunction under s. 493, Civ. Pro. Code, are identical. SUBBA NAIDU v. HAJI BADSHA SAHIB, 26 M. 168=13 M.L.J. 13.

(3)—*Temporary injunction—Permanent injunction—Civ. Pro. Code, ss.* 492, 493.—*Per Sargent, C.J.*—The Specific Relief Act purports to deal only with perpetual injunctions, leaving temporary injunctions to be regulated by chapter XXXV of the Civ. Pro. Code, ss. 492,

Specific Relief Act (I of 1877)—*continued.*

493 of that Code state the particular cases in which a temporary injunction may be granted. In the latter section, it is provided that an application may be made for a temporary injunction to "restrain a breach of contract." It is plain, however, that, apart from the special circumstances which determine whether the Court should, in its discretion, grant an injunction before the hearing of the suit, the same general principles must equally apply to the granting of a temporary injunction as to a perpetual injunction, and those principles must, therefore, be sought in the Specific Relief Act. NUSSERWANJI MERWANJI PANDAY v. GORDAN, **6 B. 266.** [*F.*, 17 P.L R. 1900; *R.*, 26 M. 168.]

(4)—*Injunction—Removal of timber by landlord—Grant of injunction.*—Injunction will not be granted preventing a landlord from cutting and carrying away timber standing on the leased land, where pecuniary compensation will afford adequate relief. PUNA PATIL v. GANGJI MOKASI, **1 C.P.L.R 151.**

(5)—*Warrant of execution—Seizure of immoveable property not described in decree—Illegal possession.*—Where a warrant was issued to the Sheriff to seize certain specific immoveable property not coming within the description in the decree, it was held that possession under such warrant would not be an illegal possession under the meaning of s. 15. JADUB CHUNDER CHECHKY v. HEERALOLL SHAHA, **1 Ind. Jur., N.S., 21=Bourke, O.C., 384.**

(6)—*Act X of 1859, s. 15—Suit for possession of lands forming part of village.*—A suit under s. 15 of Act X of 1859, to recover possession of certain lands from which the plaintiff alleged himself to have been dispossessed by the defendant was dismissed on the ground that, as the suit was not in respect of the possession of the entire village, but only of a parcel of land forming part of the village, the Court could neither declare the plaintiff's possession regarding the entire village, nor give him a decree for possession of the particular parcel on proof of his possession. On application to the High Court under s. 15 of the Charter Act, *held* there was no reason why the lower Court should not try whether the land in suit was in plaintiff's possession and whether he was dispossessed as alleged, and whether he should not have possession. *In the matter of* OMAR CHAND MAHATA v. THE NAWAB NAZIM OF BENGAL, **11 W.R. 223.** [*R.*, 1 A. 101. 18 A. 4, *D.*, 14 W. R. 212.]

(7)—Suit for correction or alteration of Record of Rights—Maintainability.—*See* BEN. ACT VIII OF 1885, ss. 50, 111. 111-A, 5 Ind. Cas. 266.

(8)—Buildings affected by nuisance and smoke of adjacent mill—Awarding of combined relief of injunction and damages to occupier—Plaintiff when barred by laches.—*See* INJUNCTION—SPECIAL CASES, 8 B. 35.

(9)—*See* INJUNCTION—SPECIAL CASES, 78 P.R. 1901, 21 B. 502.

Specific Relief Act (I of 1877)—*continued.*

(10)—*See* POSSESSION—SUITS FOR POSSESSION, 26 M. 514.

(11)—*See* TRADE MARK, 98 P.L.R. 1902=55 P.R. 1902.

(12)—Ch. VIII—Injunction against Municipality.—*See* INJUNCTION—SPECIAL CASES, 21 A. 348=A.W.N. 1899, 97.

(13)—Ss. 3, 21 (*e*)—Agreement by administrator in excess of his powers—Not specifically enforceable.—*See* COMPROMISE — MISCELLANEOUS, 14 C.W.N. 451=5 Ind. Cas. 236=11 C.L.J. 346.

(14)—*Ss. 8, 9—Suit for possession based on title—Title not proved—No decree for possession can be given—Defendant trespasser—Plaintiff in continuous peaceful possession.*—When a plaintiff brings a suit for possession on the basis of title and fails to establish title, he cannot be granted a decree under the first paragraph of s. 9 of the Specific Relief Act, 1877. *Obiter*—In some instances previous possession may afford evidence of title, and where the defendant is a trespasser and the plaintiff has been in continuous and peaceful possession, he would be entitled to retain such possession. LACHMAN v. SHAMBU NARAIN, **7 Ind. Cas. 495=7 A.L.J. 1078=33 A. 174.** (15 A. 384, *Overruled*; 25 M. 448, 11 M.L J. 403, A.W.N. 1884, 39, A.W.N. 1889, 89, *Rel.*; A·W.N. 1897, 145, *D.*)

——S. 9.

See POSSESSION—SUITS FOR POSSESSION.

(15)—*S. 9—Object and application of—Suit for possession by person wrongfully ejected—Joinder of claim for damages.*—The first para. of s. 9 of the Act has a most salutary object in view, *viz.*, to discourage persons forcibly or otherwise than in due process of law, turning persons in possession of property out of possession thereof, and the Courts should give effect to it in all cases to which it applies, whether it is expressly pleaded or not. It is not illegal to join a claim for damages and for establishment of title with a claim for recovery of possession under s. 9 of the Specific Relief Act. RAM HARAK RAI v. SHODIHAL JATI, **13 A. 384=A.W.N. 1893, 163.** [*Overruled*, 33 A. 174=7 A.L.J. 1078=7 Ind. Cas. 495; *Not F.*, 25 M. 448=11 M.L.J. 403; *F.*, A.W.N. 1907, 244=4 A.L.J. 601.]

(16)—*S. 9—Object of section—Constructive possession by receipt of rents—Non-payment of rent—Possessory suit under s. 9.*—The object of s. 9 is to provide a speedy remedy for that class of cases, where a person in physical possession of property is forcibly dispossessed from it against his will and consent. [*Appr.*, 19 C. 544, F.B.; *R.*, 57 P.L.R. 1903=13 P. R. 1903, 13 C. W. N. 307, Note, 13 C. W. N. 305; *D.*, 13 C. W. N. 303.] Where a person was in the receipt and enjoyment of the rents from the ryots, the mere discontinuance of the payment of that rent would not constitute a dispossession without his consent within the meaning

Specific Relief Act (I of 1877)—*continued.*

of the Specific Relief Act. TARINI MOHUN MOZUMDAR v. GUNGA PROSAD CHUCKERBUTTY, **14 C. 649.** [*R.*, 5 M. L. J. 95, 24 C. 296, 16 C. P. L. R. 154.]

(17)—*S.* 9—*Suit for proprietary possession—Defendant originally let into possession by act of the plaintiff.*—*Held* that s. 9 of the Specific Relief Act, 1877, could not be applied to a case in which the plaintiff sued for proprietary possession and alleged that he had himself let the defendant into possession, but that the defendant had subsequently done acts indicating his intention to interfere with the plaintiff's ownership. BALDEO DAS v. MANGNI RAM, **A.W.N. 1900, 7.**

(18)—*S.* 9—*Possessory suit—Point for determination — Dispossession within six months before suit—Finding that plaintiff not in possession—Suit to be dismissed—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 3.—It is not a point requisite for the purposes of a suit under s. 9 of the Specific Relief Act, that the plaintiff was in possession of the land in suit within six months from the date of dispossession. All that has to be determined is, whether the plaintiff was dispossessed and whether his suit was brought within six months from when the dispossession occurred. Where a Court finds that there was no dispossession, because there was no possession by the plaintiff, the suit should be dismissed. JNAN CHANDRA NAG DAS v. LOCHH MOHAN BASAK, **13 Ind. Cas. 341.**

(19)—*S.* 9—*Suit on dispossession by person having better title, to be brought within six months under the section.*—A party ousted by a person who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster, even though that possession was without any title. But where a plaintiff, having been in possession without any title, seeks to recover possession of which he has been forcibly deprived by a defendant having a good title, he can do so only under the provisions of s. 9 of the Specific Relief Act. So, where the defendants had held the property under a lease from a person found to have title to it as the true owner, a suit to recover possession of such property from them would lie only under the provisions of the said s. 9, and such a suit could not therefore be brought beyond six months from the date of dispossession by the defendants. MUSTAPHA SAHEB v. SANTHA PILLAI, **23 M. 179.** (16 I.A. 186, 12 A. 51, 20 I.A. 99, 20 C. 834, *R.*; 26 C. 579, *D.*) [*R.*, 26 M. 514, 137 P. L.R. 1902, 5 Bom. L.R. 264, U.B.R. 1905, fourth quarter, Evidence, p. 7, 3 S.L.R. 149.]

(20)—*S.* 9, *Act* I *of* 1877 (*Specific Relief Act*)—*Suit by person not in juridical possession.*—Possession of a certain room with the plaintiff, as representing his father and uncle, who were alive, but were not parties to the suit. was held not to be juridical possession in the plaintiff so as to entitle him to maintain a suit under s. 9,

Specific Relief Act (I of 1877)—*continued.*

Act I of 1877. NRITTO LALL MITTER v. RAJENDRO NARAIN DEB, **22 C. 562.** [*R.*, 21 B. 98, 31 C. 48, F.B.]

(21)—*S.* 9—*Possessory suit—Partial dispossession.*—A possessory suit, under s. 9 of the Specific Relief Act, lies when possession has been disturbed partially as well as wholly. SABAPATHI CHETTI v. SUBRAYA CHETTI, **3 M. 250.**

(22)—*S.* 9—*Dispossession in execution of decree obtained against third party, if in due course of law.*—Where the *burgadars* of a tenant were dispossessed from their land in execution of a decree against the tenant to which the *burgadars* were not parties, and which was obtained upon a false admission by the tenant himself: *Held*—That the dispossession was in due course of law within the meaning of s. 9 of the Specific Relief Act. HARAN CHANDRA PAL v. MADAN MOHAN BANIKHYA, **15 C. W. N. 956.**

(23)—*S.* 9—*Suit for possession—Plaintiff dispossessed without his consent, otherwise than in due course of law.*—In a suit for possession of immoveable property, if the finding is that the plaintiff was dispossessed of his immoveable property, without his consent, otherwise than in due course of law he is entitled to possession under s. 9 of the Specific Relief Act, although the suit was not expressly brought under that section. MUSAMMAT MAKTULA v. KULESWAR MISRA, **5 Ind. Cas. 482.** (A.W.N. 1907, 244, 4 A.L.J. 601, 15 A. 384, A.W.N. 1897, 145, *F.*)

(24)—*S.* 9—*Alluvion—Chur lands—Dispossession by Government—Settlement—Suit for possession—Limitation—Prescription—Title not made out—Previous possession.*—In a suit for the recovery of possession of certain chur lands of which the plaintiffs were dispossessed by the Government by taking up the whole of the lands as the property of the Government, the principal defendant in the suit, and setting them with the other defendants, the plaintiffs failed to establish the main ground upon which the suit was brought, *viz*, re-formation on old or former sites belonging to them, but the Judge gave the plaintiffs a decree on the ground that their title by prescription was made out. *Held* that the title by prescription would not avail the plaintiffs inasmuch as their possession was not of sufficient duration to extinguish the title of Government. Lands to which a person is unable to make out title cannot be recovered by him on the ground of previous possession merely, except in a suit under s. 15. Act XIV of 1859, which must be brought within six months from the time of dispossession. AMEEROONNISSA KHATOON v. J. P. WISE, **24 W.R. 435.** [*R.*, 2 B. 19.]

(25)—*S.* 9—*Dispossession in due course of law—Suit by tenant of judgment-debtor against auction-purchaser—Delivery of possession—Civ. Pro. Code* (*Act* XIV *of* 1882), *ss.* 318 *and* 319.—When, on obtaining delivery of possession of immoveable property under s. 318 of the Code of Civil Procedure, the auction-purchaser dispossessed a tenant of the judgment-debtor

Specific Relief Act (I of 1877)—*continued.*

held, that the auction-purchaser, not having proceeded under s. 319 of the Code, the dispossession was not in due course of law, and a suit under s. 9, Specific Relief Act, was maintainable. MULUK PATOONI v. BHARAT CHANDRA DAS, **12 C.W.N. 694.**

(26)—*S.* 9—*Dispossession—Ouster of tenant, if dispossession of landlord.*—The ouster of a tenant is an ouster of the landlord for which the landlord can sue under s. 9 of the Specific Relief Act. AKHIL CHANDRA DEY v. AKHIL CHANDRA BISWAS, **15 C.W.N. 715.** (13 C.W.N. 303, 307 N, 305, 835, 12 C.L.J. 483. *F.*; 6 C.W.N. 616, *Not F.*)

(27)—*S.* 9—*Dispossession of tenant—Right of landlord to sue under s.* 9.—The right to receive rent is "immoveable property" within the meaning of s. 9 of the Specific Relief Act; therefore the dispossession of a tenant entitles the landlord to sue under the section. RANGASWAMY IYENGAR v. KRISHNA GOVINDEN, **8 Ind. Cas. 344=9 M.L.T. 205.** (5 M.L.J. 95, *Appl.*; 21 M. 288, *D.*)

(28)—*S.* 9—*Dispossession—Possession through tenant—Possessory suit, whether lies at landlord's instance.*—A landlord holding possession through a tenant can bring a suit under s. 9 of the Specific Relief Act to recover possession of land of which he has been dispossessed by the act of a third party. NOBIN DAS v. KAILASH CHANDRA DEY, **7 Ind. Cas. 924=12 C.L.J. 483.** (13 C.W.N. 303, 1 Ind. Cas. 150, 28 M. 238, *F.*; 13 C.W.N. 307, Note, 1 Ind. Cas. 151, 13 C.W.N. 305, 1 Ind. Cas. 152, *R.*; 14 C. 619, 6 C.W.N. 616, 19 C. 544, F.B., *D.*)

(29)—*S.* 9—*Possessory suit—Tenant holding over—Dispossession of the tenant by land-lord—Dispossession not in "due course of law."*—A tenant holding over is indeed a tenant on sufferance, but it is not competent for the landlord to *suo motu* dispossess such a tenant without his consent. And such a dispossession is not one in "due course of law" within the meaning of s. 9 of the Specific Relief Act, 1877. The phrase "due course of law" in s. 9 of the Act means the regular, normal process and effect of the law operating on a matter which has been laid before it for adjudication; in other words, it refers to the process and operation of the law invoked by the ordinary method of a Civil suit. RUDRAPPA v. NARSINGRAO, **7 Bom. L R. 12=29 B 213.**

(30)—*S.* 9—*Decree against landlord for* khas *possession—Ouster of tenants in execution—Tenant's remedy—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 332.—Where, in execution of a decree for *khas* possession obtained against the landlord, the plaintiffs who were tenants were dispossessed. *Held*, that the plaintiffs were not dispossessed otherwise than in due course of law, within the meaning of s. 9 of the Specific Relief Act. KAMINI SUNDARI DASSYA v. SABED SHEIK, **14 C.W.N. 403=5 Ind. Cas. 798.**

(31)—*S.* 9—*Thicca tenant, ejectment of—Civ. Pro. Code* (1908), *s.* 115—*Jurisdiction—Error of law.*—Where, in a suit, brought within six months from the date of dispossession, under s. 9 of the Specific Relief Act, to recover lands from which the plaintiff was dispossessed by the end of 1218, B S., the Munsif found that the plaintiff was in possession of the lands for the year 1318, B.S., as thicca tenant or tenant-at-will, but, holding that the said thicca right ceased after 1318, dismissed the plaintiff's suit. *Held* that the tenant was entitled to a decree for possession of those lands. *Held*, also, that the Munsif's decision was a refusal to exercise jurisdiction vested in him, and the High Court could interfere under s. 115 of the Civ. Pro. Code. RAMDOYAL SHAMANTA v. UPENDRANATH SHAMANTA, **17 C.W.N. 501=18 Ind. Cas. 298.**

(32)—*S.* 9—*Tenant holding over—Illegal dispossession—Suit for possession—Act* XIV *of* 1859, *s.* 15.—A tenant in possession, holding over under an expired lease if dispossessed without his consent of the land otherwise than by due coure of law, is entitled to sue and recover possession, notwithstanding a pottah set up by the defendant. SOFAOLL KHAN v. WOOPEAN KHAN, **9 W R. 123.** [*R.*, 29 B. 213=7 Bom. L.R. 12.]

(33)—*S.* 9—*Dispossession of tenant by person other than landlord—Right of landlord to maintain possessory suit.*—Where the person in actual physical possession of land is a tenant, the landlord is not competent, on his being ousted by a third person to bring a suit for possession under s. 9 of the Specific Relief Act. DINKARSHA BAPU ZAMINDAR v. ANANTSHA BAPU ZAMINDAR, **16 C P.L.R. 154.** (14 C.P. L.R. 649, 20 B. 260, 13 C.P.L.R. 62, *R.*)

(34)—*S.* 9—*Suit by non-occupancy raiyat for recovery of possession—Limitation.*—S. 9 of the Specific Relief Act applies to a suit to recover possession by a non-occupancy raiyat who has been dispossessed of his holding by his landlord, otherwise than in due course of law, and so the limitation applicable to such a suit is six months from the date of dispossession. BHAGABATI CHARAN ROY v. LUTTON MONDOL, **7 C.W.N. 218.** (17 C. 926, *Diss.*) [*Overruled*, 8 C.W.N. 446, F.B.=31 C 647; *D.*, 9 C.W.N. 56.]

(35)—*S.* 9—*Dispossession of tenant—Landlord if may sue*—Adhiars *of Bhutan Duars, if tenants—High Court's power to revise—Civ. Pro. Code (Act* V *of* 1908), *s* 115.—The decision in 13 C.W.N. 303 is in direct conflict with that in 6 C.W.N. 616. *Semble*, (approving of the former decision): when a landlord is deprived of the possession of the benefits arising out of the land demised, by reason of the dispossession of the tenant, he should be entitled to obtain recovery under s. 9 of the Specific Relief Act. *Adhiars* of Bhutan Duars are tenants. When a Munsiff refused to make a decree under s 9, Specific Relief Act, in favour of a landlord, because he thought that the land was not in his possession but in that of his tenants, and so he was not dispossessed within the meaning

Specific Relief Act (I of 1877)—*continued.*

of s. 9, Specific Relief Act. *Held*, that he merely committed an error of law, and the High Court in revision could not interfere with his decision. SHYAMA CHURN GHOSH v. MAHOMED ALI, **13 C.W.N. 835=10 C.L.J. 30=3 Ind. Cas. 466.** (11 C. 6, 1 C.W.N. 633, 19 C. 544, 13 C.W.N. 303, *R.*)

(36)—*S. 9—Tenant, dispossession of by third party — Suit by landlord, maintainability of, under.*—Where a tenant in possession was dispossessed immediately before his tenancy terminated by the wrongful act of a third party a landlord holding possession through that tenant can bring a suit under s. 9 of the Act. JAGANNATHA CHARRY v. RAMA RAYER, **28 M. 238.**

(37)—*S. 9--Landlord and tenant.*--The remedy indicated by s. 9, Act I of 1877, is not the only remedy which the Legislature has provided for a non occupancy raiyat who has been dispossessed otherwise than in due course of law. (*Prinsep. J. contra.*) TAMIZUDDIN v. ASHRUB ALI, **31 C.647, F.B.=8 C.W.N. 446.** (7 C.W.N. 218, *Overruled*). [*R.*, 7 C.L.J. 72, 12 C.W.N. 899.]

(38)—*S. 9 — Landlord holding constructive possession — Applicability of section — Specific portions of Survey numbers — Whether immoveable property.*—S. 9 of the Specific Relief Act applies to the constructive possession of the landlord. (28 M. 238, *F.*) Specific portions of survey numbers do amount to immoveable property. SAHIBRAKHIO WD. JUMO v. JUMROMAL SAHSANOMAL, **5 S.L.R. 42.** (19 C. 544, 23 B. 67, *R.*)

(39)—*S. 9—Chota Nagpur Tenancy Act* (VI *of* 1908, *B.C.*), *ss.* 68, 71 *and* 139—*Suit to recover possession of lands, whether barred under s.* 139 *of the Act—Civil Court, jurisdiction of —"Suits" and "applications" distinction of, in the Act—Chota Nagpur Landlord and Tenant Procedure Act* (I *of* 1879, *B.C.*), *s.* 37 (*b*)—*Rent Recovery Act* (X *of* 1859), *s.* 23, *cl.* (*b*).—A suit under s. 9 of the Specific Relief Act, to recover possession of lands from which the tenant has been unlawfully ejected by the landlord, is not barred by s. 139 of the Chota Nagpur Tenancy Act, inasmuch as the latter is a bar only in respect of *applications* and not of *suits*. *Per Woodroffe, J.*—The Civil Court has the jurisdiction to try such a suit, as it is competent for a party, under the general law contained in the Specific Relief Act, to take the benefit of its provisions and to bring a suit thereunder, unless there is some special law which deprives him of the benefit of the general provisions of the Specific Relief Act. *Per Carnduff, J.*—The words "suits and applications" in the Chota Nagpur Tenancy Act are not interchangeable terms. Where the words of an Act, as enacted, are clear, the Legislature only, and not the Courts, can correct any mistake involved in their use. KHETRA NATH GHATAK v. PIRU BAMRI, **13 C.L.J. 250=15 C.W.N. 387.**

(40)—*S. 9—Suit under, by mortgagee in possession—Proper defence.*—In a suit for possession under s. 9 of the Specific Relief Act by a mortgagee with possession who has been forcibly dispossessed by the mortgagor, the mortgagor cannot escape liability by pleading that the mortgage and possession under it were obtained by the fraud of the mortgagee. The proper remedy for the mortgagor was by way of a suit to set aside the mortgage and to recover possession, and he has no right to dispossess the mortgagee without the intervention of a Court of Justice having jurisdiction for the purpose. SAYAJI *Bin* NIMBAJI v. RANJI *Bin* LINGAPA, **5 B. 446.** [*R.*, 2 C.P.L.R. 173, 7 C.P. L.R. 3].

(41)—*S. 9—Possession through tenant—Dispossession—Possessory suit if lies at the landlord's instance—Total diluviation of land during suit if ousts Court's jurisdiction.*—*Quære*, whether a person, who holds possession of land through tenants and is dispossessed, is precluded from instituting a suit under s. 9, Specific Relief Act. (13 C.W.N. 303, 6 C.W.N. 616. *R.*) *Quære*, whether the total diluviation of the land in the course of a suit under s. 9, Specific Relief Act, ousts the jurisdiction of the Court. JANOKI NATH ROY CHOUDHURY v. DINA MANI CHAUDHURANI, **13 C.W.N. 305=1 Ind. Cas. 152.**

(42)—*S. 9—Possessory suit — Possession of plaintiff, if must have been physical possession—Possession through tenants—Ouster of tenants—Tenants not made parties—Jurisdiction.*—S. 9, Specific Relief Act, is not confined in its application to cases in which the plaintiff has been deprived of actual bodily possession. *Held*, that, in this case, the complete ouster of the tenant in actual occupation of the land amounted to the ouster of his immediate landlord to whom rent used to be paid. In a suit under the section, instituted by the immediate landlord of the dispossessed tenants, who were not made parties to the suit, the Court made a decree in the plaintiff's favour. *Held*, that the non-joinder of the tenants did not affect the jurisdiction of the Court, and the High Court would not interfere. BINDUBASHINI CHAUDHURANI v. SRIMATI JAHNAVI CHAUDHURANI, **13 C.W.N. 303=1 Ind. Cas. 150.** [*F.*, 13 C.W.N. 835= 10 C.L.J. 30; *R.*, 13 C.W.N. 305=1 Ind. Cas. 152.]

(43)—*S. 9—Possession, physical or constructive—Collusion by tenant with trespasser—Right of suit.*—S. 9 of the Specific Relief Act contemplates the case of a person who, being in physical possession of property, is dispossessed. So, where plaintiff was in constructive possession of a plot of land through his tenant, and the latter was dispossessed, plaintiff had no right to maintain a suit under s. 9 of the Act. Plaintiff is also not entitled to bring a suit even where, subsequent to such dispossession, the tenant in collusion with the person who dispossessed him refused to bring a suit. SONATON SHOME v. SHEIKH HELIM, **6 C.W.N. 616.** [*Disappr.*, 13 C.W.N. 835=10 C.L.J. 30; *Expl.*, 13 P.R. 1903=57 P.L.R. 1903; *R.*, 13 C.W.N. 305.]

Specific Relief Act (I of 1877)—*continued.*

(44)—*Ss.* 8, 9—'*Possession,*' *meaning of*—*Possession of a priest, custodian and menial, of a temple belonging to others, whether can be protected.*—The plaintiff was the officiating priest, custodian and menial of a temple which belonged to the Wawa community, and it was his duty to officiate at religious services, to lock up the building when not required, to sweep the floor, to repair, etc. All Hindus including the defendant can go into the temple when they like, to worship the idol there, can walk into the garden there, etc. Plaintiff sued for possession under s. 9, on the ground of dispossession by defendants. *Held*, possession must imply, first, some actual power over the object possessed, and, secondly, some amount of will to avail oneself of that power, or, as it is called in Roman Law, the *corpus* and *animus* respectively. *Held*, also that the *animus* of a servant or manager or any dependent, who exercises control in a purely representative capacity, is not sufficient to make his control amount to juridical possession, his possession being the possession of the person in whose behalf the control is exercised. Possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title, and where a person has, in his own right, and not merely as representative of another, such control over immoveable property as to be able to exclude others from it, and has the intention of exercising such power of exclusion, he has a right, if dispossessed without his consent, otherwise than in due course of law, to seek relief under s. 9 of the Specific Relief Act. *Held* also, that the possession in this case did not amount to juridical possession under s. 9. BAWA CHHATAGIR v. MATANOMAL, **3 S.L.R. 149=4 Ind. Cas. 359.** (23 M. 179, *Appl.*)

(45)—*S.* 9—*Persons dispossessed whether must be co-plaintiffs*—*Possession, act of*—*Nature of property*—*Grazing cattle whether act of possession.*—Where a person enters wrongfully upon any land, it is open to any one of the persons dispossessed to maintain an action for his ejectment, and it is no substantial grievance that all the persons dispossessed have not been joined as plaintiffs. He is sufficiently protected if the person dispossessed are on the record either as plaintiffs or as *pro formâ* defendants. Whether a particular act may be treated as an act of possession, depends upon the nature of the property and the special circumstances of the case. The fact that the cattle of a person occasionally grazed on a piece of land is not by itself sufficient to show that the land was in the possession of that person. DEBENDRA NATH SARKAR v. BINDHUBALA DASI, **13 Ind. Cas. 125.** (7 Ind. Cas. 700, 12 C.L.J. 605, *F.*)

(46)—*S.* 9—*Suit in ejectment by licensee against trespasser, maintainability of.*—A licensee of land, if dispossessed by a trespasser, is entitled to maintain not merely a suit under s. 9 of the Specific Relief Act, but also a regular suit on the basis of his title as lessee. SITA RAM v. JAGAN NATH, **17 Ind. Cas. 469.**

(47)—*S.* 9, *applicability of*—*Suit to recover possession against trespasser*—*Limitation Act, art.* 142, *applicability of*—*Cause of action, accrual of.*—S. 9 provides that a person dispossessed, without his consent, of immoveable property, otherwise than in due course of law, can institute a suit for the recovery of possession within six months from the date of dispossession. But this section is inapplicable to the case of a person, who, although he cannot show a better title to the property, is dispossessed by a trespasser, who has no title at all to the property. In such a case, the plaintiff must prove his possession prior to the time when he was admittedly dispossessed by the trespasser and the suit to recover possession is governed by art. 142 of the Limitation Act, the cause of action arising from the date of dispossession. WA THA v. PE HLAW, **3 L.B.R. 27.** (8 B. 371, 6 B. 215, *F.*; 2 L.B.R. 56, 16 C. 473, 7 I.A. 73, *R.*; 17 C. 256, *Diss.*)

(48) *S.* 9—*Trespasser*—*Previous possession*—*Title.*—Where plaintiff has been dispossessed of land by a tresspasser and does not sue under s. 9 of the Specific Relief Act within six months of the dispossession, he is still entitled to recover possession on the more ground of his previous possession unless the defendant can show some title or can prove that plaintiff had unlawfully dispossessed the defendant. The Specific Relief Act gives the plaintiff the rights within six months to sue for repossession, quite irrespective of questions of title. The decision that where neither party prove title, plaintiff can succeed on proving previous possession from which he has been wrongfully ousted within 12 years considered with reference to s. 110 of the Evidence Act, amounts to a ruling that possession by plaintiff not shown to be unlawful, is a sufficient proof that defendant is not the owner when all the evidence on defendant's behalf is that he is in possession as a trespasser. MAUNG SHWE THI v. MAUNG SO BON, **U. B. R. 1892—1896, Vol. II, 619.** [*R.*, U.B.R. 1897—1901, Vol. II, 360, 421, U.B.R. 1892—1896, Vol. II, 377.]

(49)—*Possession*—*Dispossession*—*Wrong-doer.*—A person in possession has a good title as against every stranger, and one who dispossesses him, having no title in himself is a wrong-doer and cannot defend himself by showing that the title is in some third person. In such cases, proof of previous possession is without more evidence of the plaintiff's title to recover from the defendants who are proved to be wrong-doers. There is a difference between such a suit and a suit under s. 9 of the Specific Relief Act, 1877. In the former, the Court awards the claim only when it finds that the plaintiff had peaceable possession before dispossession and that the defendant has no title and is a wrong-doer, the plaintiff's previous possession being in law sufficient proof of his title; in the latter,

Specific Relief Act (I of 1877)—*continued.*

the Court can only go into the question of dispossession within six months before suit and cannot enquire into the defendant's title. ALI v. PACHUBIBI, **5 Bom. L.R. 264.** [*R*, 13 C. L.J. 649.]

(50)—*S.* 9—*Suit on title—Dispossession within six months before suit.*—In a suit for possession as usufructuary mortgagee of an occupancy holding, it was found that the plaintiff obtained possession in January, 1905. The defendants dispossessed the plaintiff in July 1905, who, next month, instituted a suit in the Civil Court for possession of the fields. The plaintiff never pleaded s. 9 of the Specific Relief Act in the Courts below which dismissed the suit. The plaintiff appealed to the High Court. *Held*, that the plaintiff was entitled to be put back into possession of the fields in suit. PARBHU LAL v. RAM CHARAN, **4 A. L. J. 601 = A. W. N. 1907, 244.** (A.W.N. 1893, 163, A.W.N. 1897, 145, *F*). [*F.*, 5 Ind. Cas. 482.]

(51)—*S.* 9—*Summary suit by person dispossessed of immoveable property—Suit for declaration of title.*—A plaintiff, alleging that upon the death of a Hindu widow, he had obtained possession of certain immoveable property as heir of her husband, but had been wrongfully dispossessed by the defendants, sued for declaration of his title as such heir, and to have the defendants ejected as trespassers, and for recovery of possession. The lower appellate Court treated the case as falling within s. 9 of the Specific Relief Act (I of 1877), and directed the Court of first instance, which had dismissed the suit on the ground that the plaintiff had failed to prove his title, to deal with it as a summary suit under that section. *Held* that this view was erroneous, as s. 9 of the Specific Relief Act referred only to cases in which no title was set up, but only the fact of dispossession established, and the plaintiff in this case sought a declaration of his title. CHUTHAN RAI v. SHEOGHULAM RAI, **A.W.N. 1889, 89.**

(52)—*S.* 9—*Suit in ejectment on possessory title—Suit brought after six months from dispossession*—Notwithstanding s. 9 of the Specific Relief Act, which provides a summary remedy, a suit may be brought by a person dispossessed of immoveable property, against a trespasser, more than six months from the date of dispossession, and the plaintiff may succeed on the sole ground of his previous possession and without proving his title. (*Davison* v. *Gent*, 26 L.J., Exch., 122; *Asher* v. *Whitloch*, L.R. 1 Q.B. 1, 7 I.A. 73, 6 B. 215, 8 B. 371, A.W.N. 1337, 55, *R.*) *Per Mahmood, J.* (*dissenting.*) Such a suit can be brought only within six months from the date of dispossession; if brought more than six months after dispossession, the plaintiff cannot succeed unless he proves title. WALI AHMAD KHAN v. AJUDHIA KANDU, **13 A. 537 = A.W.N. 1891, 196.** [*R.*, 7 C.P.L.R. 3, U.B.R. 1892—1896, Vol. II, 619, 12 C.P.L.R. 59, U.B.R. 1897—1901, Vol. II, 270, 78 P.R. 1902 = 137 P.L.R. 1902, 29 B. 213 = 7 Bom. L.R. 12. 8 C.W.N. 446, 29 A. 52 = 3 A.L.J. 775 = A.W.N. 1906, 264.]

Specific Relief Act (I of 1877)—*continued.*

(53)—*S.* 9—*Suit to establish title to immoveable property and to recover possession—Section not applicable.*—A suit to establish title to immoveable property and to recover possession is not one under s. 9 of the Specific Relief Act, and the Court must therefore decide it with reference to the title of the plaintiff and not on the basis of mere possession. WAJID ALI v. RAM SARAN SAHAI, **A.W.N. 1884, 39.** [*R.*, 7 A.L.J. 1078, F.B. = 7 Ind. Cas. 495 = 9 M.L.T Sup. 95.]

(54)—*S.* 9—*Practice—Suit for possession on title—S.* 9 *applied, though not specifically pleaded.*—A Court should in all casses where it applies give effect to the first paragraph of s. 9 of the Specific Relief Act, 1877, although that section may not have been relied on by the party in whose favour it is applicable, but he may have brought a suit for possession based on a plea of title. MOUSI v. KASHI, **A.W.N. 1897, 145.** (A.W.N. 1893, 163, *F.*) [*F.*, A. W.N. 1907, 244 = 4 A.L.J. 601.]

(55)—*S.* 9—*Possessory suit—Question of title not to be gone into—Possession to be proved—Acts of trespass over property not sufficient—Juridical possession, what constitutes.*—The question of title is not to be determined in a suit under s. 9 of the Specific Relief Act. It is immeterial, if the plaintiff was in possession, that such possession was without title. But the plaintiff will have to prove juridical possession and not mere isolated acts of trespass. He must prove that he exercised acts which amounted to acts of dominion, the nature of which must vary with the nature of the property. Acts of dominion, though exercised over a part only of the property, may be evidence of possession of the whole. Acts of dominion should be exclusive. If the plaintiff's occupation has been peaceable and uninterrupted and has extended over a sufficient length of time, the possession would be sufficient for a possessory decree. RAJ KISHANA PARUI v. MUKTARAM DAS, **7 Ind. Cas. 700 = 12 C.L.J. 605.** (15 B. 685, 7 B.H.C. A.C. 82, *Rel.*)

(56)—*S.* 9—*Ouster of trespasser without recourse to law—Decree under—obtained by trespasser—Suit for title by owner—Limitation—Starting point—Limitation Act* (XV *of* 1877), *sch. II, art.* 142.—Where a rightful owner of lands was dispossessed, but succeeded in ousting the trespasser without recourse to law, and continued in possession, until dispossessed under a decree obtained by the trespasser under s. 9 of the Specific Relief Act. *Held*, that possession so obtained by the rightful owner was possession within the meaning of art. 142, sch. II, Limitation Act. JONAB SHEIKH v. MAHARAJA SURAYA KANT ACHARYYA, **10 C.W.N. 1081 = 33 C. 821.** (2 C.L.J. 1, 9 C.W. N. 1061, *F.*) [*R.*, 6 C.L.J. 472.]

(57)—*S.* 9—*Act* XIV *of* 1859, *s.* 15—*Long anterior possession—Title.*—Where a plaintiff sues to recover possession after ouster, *held* that long anterior possession only, without

Specific Relief Act (I of 1877)—*continued.*

proof of title, cannot avail him, if he fails to sue within 6 months of the alleged ouster, as prescribed by s. 15 Act XIV of 1859. AMEER BIBEE v. TUKROONISSA BEGUM, **7 W.R. 332.**

(58)—*S.* 9—*Decree—Possessory decree—Joinder of a claim for damages—Question of title—Appeal.*—A claim for damages ought not to be joined with a claim for recovery of possession under s. 9 of the Specific Relief Act, inasmuch as the claim for damages necessarily puts in issue the plaintiff's title. A decree for possession under s. 9 of the Specific Relief Act, and for damages is a bad decree, one liable to be set aside altogether, and not capable of being split up into two portions—(*a*) a valid decree for possession, (*b*) a bad decree for damages. An appeal, if any, would lie from the whole of the decree and not from a part of it. NAZIR AHMAD v. ABID ALI, **8 A.L.J. 910.**

(59)—*S.* 9—*Suit to recover possession—Proof of title—Mere proof of possession, without proof of title, whether sufficient.*—The plaintiff in a suit to recover possession from a trespasser brought more than six months after dispossession must prove title, mere previous possession for any period short of the statutory period of 12 years being insufficient for the purpose. (9 C. 130, 139, 17 C. 256, 3 C.W.N. 158, *Appr.*; 8 W.R. 386, 7 C. 591, *Diss.*; 7 I.A. 73, *R.*; 20 C. 834, P.C., *Expl.*) To a person wishing to recover possession merely on previous possession, without proof of any title, the remedy prescribed is to be found in s. 9, Specific Relief Act. If the does not avail himself of that remedy by bringing a suit within six months, it becomes barred. NISA CHAND GAITA v. KANCHIRAM BAGANI, **26 C. 579=3 C W.N. 568.** [*R.*, 137 P.L.R. 1902=78 P.R. 1902, 31 C. 647=8 C.W.N. 446; *Diss.*, 26 M. 514=13 M.L.J. 146; 5 Bom. L.R. 264; *D.*, 23 M. 179.]

(60)—*S.* 9—*Suit for land based on title—Court treating it partly as summary suit for possession and partly as based on title*—A suit to recover possession of lands with mesne profits on the allegation of title to them where the defence is that the plaintiff has no title and that the defendant has been in possession all along ought not to be regarded by the Court partly as one under s. 9, Specific Relief Act, and partly as one based on the plaintiff's title, so as to be decreed with regard to possession and dismissed with regard to the title, as the suit as laid by the plaintiff is a suit in ejectment and is founded on plaintiff's title, and as it is not a suit brought under the special provisions of s. 9 of Specific Relief Act. RAMASAMI CHETTI v. PARAMAN CHETTI, **25 M. 448=1 M. L. J. 403.** (15 A. 384, *Not F.*)

(61)—*S.* 9—*Civil Court, competency of, to decree possession in suit on allegation of illegal dispossession—Defendant's failure to prove title—Adverse possession for statutory period, title even against rightful owner—Prior possession for shorter period, sufficient title against mere wrong-doer.*—Notwithstanding the provisions of s. 15 of Act XIV of 1859, it is competent to Civil Courts

Specific Relief Act (I of 1877)—*continued.*

to give a decree for immoveable property on the bare ground of illegal dispossession in a suit brought after six months from the date of such dispossession, where the defendant has failed to prove his own title to the same. Irrespective of the said s. 15 of Act XIV, the High Court *held* that possession for a period of sixty years and upwards is sufficient to create a title in the possessor which no other person can question or repudiate. Also, adverse possession, for any period sufficient under the Limitation Act, is itself a title, even against the rightful owner himself, and against a mere wrong-doer, prior possession however short will itself support title. Illegal dispossession is itself a good cause of action such as the Civil Courts are bound to recognize. In the case of suits for recovery of immoveable property on allegation of dispossession, the Civil Courts have to determine the particular cause of action that has arisen between the parties to the suit; and it is with reference to this cause of action only that their determination would be final and conclusive as provided for by s. 2, Act VIII of 1859. They cannot look beyond the parties to the suit, and proceed to find out who is the rightful owner if the plaintiff and defendant are not. Such an enquiry would be not only useless in its practical result, but also illegal as declared by the Privy Council in 5 W.R.P.C. 69. The High Court therefore did not uphold the contention of the defendant that the lower appellate Court has committed an error in law in decreeing the julkur in dispute, to the special respondent, solely on the ground of prior possession and illegal dispossession without any proof of title, and dismissed the appeal, holding that such objection of the defendant was itself erroneous in law and that the decision of the Principal Sudder Ameen in favour of the plaintiff had not been shown to be erroneous at all. KHAJAH ENAETOOLLAH CHOWDHRY v. KISHEN SOONDUR SARMA, **8 W.R. 386.** [*Not F.*, 17 C. 256; *Diss.*, 26 C. 579=3 C.W.N. 568; *R.*, 11 W.R. 550, 5 C.L.R. 278, 29 B. 213=7 Bom. L.R. 12; *D.*, 9 W.R. 259.]

(62)—*S.* 9—*Suit for right to collect rent—Suit for immoveable property—Maintainability of suit.*—Plaintiff sued for restoration of possession of his right to collect rent. The suit was instituted under s. 9 of the Specific Relief Act. *Held* that, as the expression "immoveable property" used in s. 9 of the Specific Relief Act has to be construed, under the provisions of s. 2 of the Act, to be what it is defined to be in the General Clauses Act, the plaintiff was entitled to a decree in his favour if he made out his case. An order to pay rent as heretofore to plaintiff and not to pay rents to defendants until the latter dispossessed the former in due course of law was sufficient to restore possession. INNASI PILLAI v. SIVAGANGA DESIKAR, **5 M.L.J. 95.**

(63)—*S.* 9—*Right of ferry—Immoveable property.*—A right of ferry is immoveable property or an interest therein within the meaning of s. 9, Specific Relief Act. KRISHNA v. AKILANDA,

Specific Relief Act (I of 1877)—*continued.*

13, M. 54 [*Appr.*, 5 M.L.J. 95 ; *R.*, 19 C. 544, F.B., 12 C.P.L.R. 52.]

(64)—*S.* 9—*Right of way—Immoveable property—Easement.*—A right of way is not immoveable property within the meaning of s. 9 of the Specific Relief Act. *Per Fulton, J.*—A right which cannot be transferred apart from the dominant heritage does not appear to come within the term "property" as used in s. 9 of the Specific Relief Act. Right of way is an interest in land, but it is an interest entirely dependent on the possession of the property to which it appertains, and cannot be possessed apart from it. It is a right appurtenant to property but taken by itself does not come within the term property which, under the section, must be property capable of separate enjoyment as an independent right. S. 9 of the Specific Relief Act is inapplicable to easements. MANGALDASS v. JEWANRAM, **1. Bom. L. R. 167=23 B. 673.**

(65)—*S.* 9—*Easement—Right of way—Suit to enforce—Act* XIV *of* 1859, *s.* 15.—The provisions of s. 15, Act XIV of 1859, are not applicable to a suit to enforce a right of way. HARO DYAL BOSE v. KRISTO GOBIND SEIN, **17 W.R. 70.** [*Appr.*, 23 B. 673 ; *R.*, 12 B. 221 ; *D.*, 19 C. 544, F.B.]

(66)—*S.* 9, *right to hold a 'hat' not immoveable property under—'Hat,' suit to recover possession of.*—Immoveable property intended to be dealt with by s. 9, Specific Relief Act, is something of which actual physical possession can be given and taken. That expression cannot include an incorporeal right. A mere right to hold a *hat*, the possession of which is held by collecting tolls and rents, is not an immoveable property under s. 9. A suit to recover possession of such a right is not entertainable under that section. FUZLUR RAHMAN v. KRISHNA PRASAD, **29 C. 614.** (19 C. 544, *Rel. on.*)

(67)—*S.* 9—*Private right of fishery whether immoveable property under.*—A suit for the possession of a right of fishery in a *khal*, the soil of which does not belong to the plaintiff, does not come within the provisions of s. 9 of the Specific Relief Act. So, a person who has for a time exercised the exclusive right of fishing in water, which covers the land which does not belong to him and who is forcibly prevented from fishing in such water, cannot maintain an action for such prevention under s. 9 of the Act. By the Full Bench, (*Prinsep and Pigot, JJ, dissenting*). FADU JHALA v. GOUR MOHAN JHALA, **19 C. 544, F.B.** [*F.*, 5 M.L.J. 95, 24 C. 449 ; *Appr.*, 23 B. 673 ; *Rel. on*, 29 C. 614 ; *R.*, 29 C. 1=5 C.W.N. 821, F.B. ; *Diss.*, 12 C.P.L.R. 52.]

(68)—*S.* 9—*Right to fish—Suit for possession of.*—S. 9 of the Specific Relief Act does not refer to a suit for the possession of a jalkar or a right of fishery over land belonging to a stranger. Where the plaintiffs had no right to the land, nor were they in possession of the land, but that for certain parts of the year they had power or license to fish, their suit for possession of a fishery in a khal would not come within the purview of s. 9, Act I of 1877. NATABAR PARUE v. KUBIR PARUE, **18 C. 80.** [*F.*, 19 C. 544.]

(69)—*S.* 9—*Civ. Pro. Code* (1882), *s.* 43 (=*O. II, r.* 2, *new Code*)—*Summary suit for possession — Plaintiff restored to possession—Subsequent suit by plaintiff for mesne profits—Burden of proof.*—One L.N. died possession of certain immoveable property. He left him surviving a widow, M.K. One N.D. obtained possession of some portion of the said immoveable property, as he alleged, under a lease from M.K., and held possession, at any rate, for some months, down to the 27th of November 1897. After the death of M.K., one S.K. who claimed to be the adopted son of M.K. by some means other than legal process, dispossessed N.D.N.D. thereupon instituted a suit under s. 9 of the Specific Relief Act, and, having obtained a decree in that suit was restored to possession. He then instituted a suit against S.K. to recover mesne profits for the time during which he was out of possession. As to this suit it was *held* (1) that the suit was not liable to be defeated by reason of s. 43 of the Civ. Pro. Code ; and (2) that as to the other issues arising in the suit the first was, whether the defendant was the true owner, of the property, the burden of proving which was on him ; and, secondly, if the defendant established his title, whether the plaintiff had such an interest in the property under the lease set up by him or otherwise, as would entitle him to remain in possession as against the defendant. SHEO KUMAR v. NARAIN DAS, **24 A. 501=A.W.N. 1902, 139.**

(70)—*S.* 9—*Possession, suit for—Act* XIV *of* 1859, *s.* 15—*Award under—Possession and dispossession*—Onus *of proof.*—In a suit for possession, where the defendant sets up an award under s. 15, Act XIV of 1859, in his favour, the *onus* of proving possession and dispossession alleged in the plaint lies, in the first instance, on the plaintiff before the defendant could be called upon to prove his case. JUGGURNATH DEB v. MAHOMED MOKEEM, **17 W.R. 161.**

(71)—*S.* 9—*Mode of proof required in suit under—Sufficiency of proof of prior juridical possession.*—In a suit under the section all that is necessary for a plaintiff to prove is that he was in juridical possession and that he has been dispossessed otherwise than in due course of law. BALRAM MISAR v. BAIRAGI MALI, **12 C.P.L.R. 52.** (5 B. 208, 15 B. 685, *R.*) [*R.*, 16 C.P.L.R. 154.]

(72)—*S.* 9—*Evidence—Possessory suit, decree in, if evidence of title.*—A decree in a suit for possession under s. 9 of the Specific Relief Act proves possession and possession is evidence of title. It cannot, therefore, be said that such a decree is no evidence of title. The value to be attributed to it is a matter to be determined by the final Court of fact. Such a decree, though based upon a possessory title, is *prima*

Specific Relief Act (I of 1877)—*continued.*

facie evidence of title to the land as against a stranger. KOILASH CHANDRA SANTRA v. GAJENDRA NATH MISRA, **15 C.L.J. 1=13 Ind. Cas. 407.**

(73)—*S. 9—Evidence of title—Proof of nature of possession—Evidence of kind of possession—Exclusion—Material irregularity—Jurisdiction—Remedy by way of suit—Revision—S. 115, Civ. Pro. Code*, 1908.—In a possessory suit under s. 9, Specific Relief Act, 1877, evidence of title is admissible for the purpose of ascertaining the nature of possession, and the exclusion of evidence of the nature of possession itself is not justifiable and amounts to a material irregularity in the exercise of jurisdiction. Where another remedy by way of suit is open to parties for settling their disputes, the Courts will decline to exercise powers of revision under s. 115, Civ. Pro. Code, 1908. H. BAWA CHATAGIR v. MATANOMAL DEWANMAL, **4 S. L.R. 80=8 Ind. Cas. 215.**

(74)—*S. 9—Previous possession—Dispossession—Judgment of District Judge reversing Munsif's judgment, upon credibility of witnesses—Effect.*—Except in a suit under s. 9, Specific Relief Act, which must, under art. 3, Limitation Act, be brought within six months from the date of dispossession, mere previous possession will not entitle the plaintiff to obtain a decree for recovery of possession. (8W.R. 389, 9 C. 130, 9 C. 39, 5 C.L.R. 278, 7 I.A. 73, 8 B. 371, 6 B. 215, 7 C. 591, *R.*) [*Cons.*, 3 C.W.N. 158, 12 C.P.L.R. 59; *R.*, 7 C.P.L.R. 3, U.B.R. 1892—1896, Vol. II, 619, U.B.R. 1897—1901, Vol. II, 270, 26 C. 579, 25 B. 287, 8 C.W.N. 446=31 C. 647; *Doubted*, 137 P.L.R. 1902=78 P.R. 1902; *Diss.*, 3 L.B.R. 27, 10 Bom. L.R. 571.] The judgment of a District Judge, setting aside a carefully considered judgment of a Munsif, upon the credibility of the witnesses, did not fulfil the proper conditions that a judgment reversing a decision ought to fulfil. A judgment, which does not in the body give reasons for its conclusion is not a judgment at all. In such a case the decree of the District Judge was formally set aside, the case was remanded to him and called up to the High Court to be tried as a Regular Appeal. PURMESHUR CHOWDHRY v. BRIJO LALL CHOWDHRY, **17 C. 266.**

(75)—*S. 9—The Mamlatdars' Courts' Act (Bombay Act III of 1876)—Suit by trespasser to recover possession.*—A mere trespasser who has been dispossessed is not entitled to bring a suit for possession under s. 9 of the Specific Relief Act; nor can he invoke the aid of the Mamlatdar under the Mamlatdars' Courts' Act. (7 B.H.C. 82, 8 B. 371, 5 B. 208, *R.*) In the present case, plaintiff sued to recover possession of a certain room from the defendant under s. 9 of the Specific Relief Act, alleging that he had been in possession up to the 3rd June 1890. The defendant contended that he had been in possession of the room in question, and that about 30th May, 1890, the plaintiff put a padlock on the room and went to Bombay, and that as he, the defendant, wanted the use

Specific Relief Act (I of 1877)—*continued.*

of his room, he removed a window two days afterwards and effected an entrance. The question was whether, assuming the defendant's story to be true, the plaintiff's possession was such as to enable him to avail himself of the above section. *Held* on a reference to the High Court that, assuming the defendant's statement was true (as to which no opinion was expressed), even if the plaintiff can be said to have been in possession by what he did, still, such possession, not having been acquiesced in by the defendant, never became a judicial possession which could give him the right to invoke the aid of the Mamlatdar or the Court under s. 9 of the Specific Relief Act. AMIRUDIN v. MAHAMAD JAMAL, **15 B. 685.** [*R.*, 12 C.P.L.R. 52, 7 Ind. Cas. 700=12 C.L.J. 605.]

(76)—*S. 9—Suit under Mamlatdars Courts Act (Bom. Act III of 1876)—Subsequent suit under s. 9 of the Specific Relief Act (I of 1877).*—A Mamlatdar's decision, in a possessory suit brought under the Bombay Mamlatdars Courts Act, 1876, respecting the possession of immoveable property, is not conclusive in a subsequent suit even though it be brought under s. 9 of the Specific Relief Act, 1877. RAMCHANDRA v. NARASIMHACHARYA, **1 Bom. L.R. 660=24 B. 251.**

(77)—*S. 9—Possessory decree, direction in.*—A direction in a decree passed in a suit under s. 9, Specific Relief Act, that the costs of removal of certain huts should be paid by the defendant, must be set aside as being beyond the scope of a possessory decree under the section. TILAK CHANDRA DASS v. FATIK CHANDRA DASS, **25 C. 802.**

(78)—*S. 9—Possessory suit—Execution of decree—Appeal from order in execution proceedings.*—In execution of a decree for possession of land in a suit under s. 9 of the Specific Relief Act, a third person applied for postponement of the delivery of possession until the sugarcane crop standing on the land and sold to him by the judgment-debtor had been first removed by him. The first Court disallowed the application. On appeal, the District Court reversed the order of the lower Court. *Held* that, by the last clause of s. 9 of the Specific Relief Act, no appeal lay from any order or decree passed in any suit under the section. According to the explanation to s. 647, Civ. Pro. Code, applications for execution of decrees were proceedings in suits. Consequently, no appeal lay from an order passed in execution of a decree in a suit under s. 9 of the Specific Relief Act. THOMAS SOUZA v. GULAM MOIDEEN BEARI, **26 M. 438.** [*R.*, 3 C.L.J. 276.]

(79)—*S. 9—Civ. Pro. Code*, 1882, *ss.* 32, 588—*Second appeal.*—The plaintiff brought a possessory suit under s. 9 of the Specific Relief Act, and the Court ordered a party to be added as defendant, apparently acting under s. 32, Civ. Pro. Code. The plaintiff appealed from the order to the District Judge. The Judge admitted the appeal as made under cl. 2, s. 588, Civ.

Specific Relief Act (I of 1877)—*continued.*

Pro. Code, and cancelled the order of the first Court. The original defendant preferred a second appeal to the High Court. *Held* that the Judge's order under s. 588, Civ. Pro. Code, by the last paragraph of s. 588, was final and that no second appeal lay to the High Court. SKINNER v. KINLOCK, **A.W.N. 1886, 138.**

(80)—*S.* 9—*Civ. Pro. Code, ss.* 622 *and* 103 —*Rehearing—Review.*—The High Court can interfere under s. 622, Civ. Pro. Code, without an application from a party. An application for a rehearing under s. 103, Civ. Pro. Code, is not prohibited by the terms of s. 9 of Specific Relief Act. A rehearing differs widely from a review. ANDREW ANTHONY v. THE REV. J. M. DUPONT, **4 M. 217.**

(81)—*S.* 9—*Revision—Another remedy open.* —In a suit under s. 9 of the Specific Relief Act, which is dismissed, a remedy by way of a suit for declaration of title is open to the aggrieved party, and consequently no revision will lie. RAM KISHAN DAS v. JAI KISHAN DAS, **8 A. L.J. 791.** (30 A. 331=5 A.L.J. 297, *F.*)

(82)—*S.* 9—*Suit for possession—Criminal proceedings—Effect of—Revision—Other remedy open—Not entertainable.*—Criminal proceedings, if any, taken under s. 145 of the Crim. Pro. Code in no way interfere with the plaintiff's right under s. 9 of the Specific Relief Act, which accrued so soon as his possession was interfered with by the defendant. The High Court will not interfere in revision where other remedies are open to the aggrieved party. JWALA v. GANGA PRASAD, **5 A.L.J. 297=A.W. N. 1908, 142=30 A. 331.** (10 A. 119, *R.*) [*R.*, 13 C.W.N. 305=1 Ind. Cas. 152.]

(83)—*S.* 9—*Civil Court—Criminal Court—Jurisdiction—S.* 145, *Crim. Pro. Code.*—Under s. 9, Specific Relief Act, the Civil Court is authorised to restore a party into possession, if he has within the last six months, been dispossessed without his consent, otherwise than by due course of law, whereas the Criminal Court can only maintain a person in possession, if he is found to be in such possession upon the date of the institution of a proceeding under s. 145, Crim. Pro. Code, or if he was in possession within two months antecedent to that date. LOLIT MOHAN MOITRA v. SURJA KANTA ACHARJEE, **28 C. 709=5 C.W.N. 749.** (23 C. 495, 25 C. 727.)

(84)—*S.* 9—*Crim. Pro. Code* (*Act* V *of* 1898), *ss.* 144, 145, 192 (2) *and* 529—*Proceedings under s.* 145, *if may be instituted during the pendency of a suit under s.* 9 *of the Specific Relief Act* (I *of* 1877)—*Prohibitory order under s.* 144, *how far invalidates findings of possession in s.* 145 *proceeding—Transfer of proceeding under s.* 145 *by Subordinate Magistrate—Legality—S.* 529—*Curing of defect in transfer.* —A Magistrate is not incompetent to proceed under s. 145, Crim. Pro. Code, with regard to properties which form the subject-matter of a pending suit under s. 9 of the Specific Relief Act. A prohibitory order under s. 144, Crim. Pro. Code, was passed against certain landlords

Specific Relief Act (I of 1877)—*continued.*

with respect to certain lands in a proceeding to which the tenants were not parties. Subsequently in a proceeding under s. 145, Crim. Pro. Code, the Magistrate found that the landlords were in possession of the lands through their tenants at a date when the prohibitory order was still in force. *Held*, that, as the tenants were not parties to the proceeding in which the prohibitory order under s. 144, Crim. Pro. Code, was made, the subsequent finding, in the proceeding under s. 145, Crim. Pro. Code, that the landlords were in possession through the tenants, was not bad in law. A Subordinate Magistrate cannot be empowered under s. 192 (2), Crim. Pro. Code, to transfer proceedings under s. 145, Crim. Pro. Code. But a transfer of such proceedings made by a Subordinate Magistrate empowered under s. 192 (2) is a legal defect curable by s. 529, Crim. Pro. Code. KISHORI LAL ROY CHOWDHURY v. SRINATH ROY, **13 C.W.N. 530=36 C. 370= 9 Cr. L.J. 399=1 Ind. Cas. 817.** (4 C.W.N. 821, *Rel. on.*)

(85)—S. 9—Action of ejectment not under s. 9—Whether plaintiff entitled to decree for possession on account of previous possession—*See* BEN. ACT VIII OF 1885, s. 85, sub-ss. (1) and (2), 13 C.L.J. 649.

(86)—S. 9—What amounts to taking possession in due course of law—Suit by tenant for recovering possession—*See* BEN. ACT VIII OF 1885, s. 87, 11 C.L.J. 433=6 Ind. Cas. 553.

(87)—S. 9—Dispossession of tenant by landlord— Remedy open to tenant—*See* C. P. ACT XVII OF 1889, s. 92, 16 C.P.L.R. 41.

(88)—S. 9—Party entitled to bring suit under—Failure—Effect—*See* PUN. ACT XVIII OF 1884, s. 70 (*a*), 13 P.R. 1910=20 P.W.R. 1910=5 Ind. Cas. 808.

(89)—S. 9—When applicable—*See* U.P. ACT XII OF 1881, s. 9, 8 A.L.J. 404.

(90)—S. 9—Proceedings under s. 331, Civ. Pro. Code, 1882, open to appeal—*See* APPEAL —ORDERS, 22 C. 830.

(91) — S. 9 — *See* BUDDHIST LAW — ECCLESIASTICAL, U.B.R. 1892—1896, VOL. II, 82.

(92)—S. 9—*See* CIV. PRO. CODE, 1908, O. II, r. 2, 137 P.L.R. 1902=78 P.R. 1902.

(93)—S. 9— Compromise of suit under — Effect of — *See* CIV. PRO. CODE, 1908, O. XXIII, r. 3, 3 L.B.R. 243.

(94)—S. 9—*See* EASEMENT, 1 Bom. L.R. 167=23 B. 673.

(95)—S. 9—Failure to institute summary suit—No bar to suit for ejectment — *See* EJECTMENT, SUIT FOR, 12 C.P.L.R. 59.

(96)—S. 9—*See* EVIDENCE — DECREES, JUDGMENTS AND PROCEEDINGS IN SUITS, 23 C. 693.

(97)—S. 9—*See* EVIDENCE ACT, 1872, s. 33, 23 C. 441.

Specific Relief Act (I of 1877)—*continued.*

(98)—S. 9—*See* EVIDENCE ACT, 1872, s. 110, 2 Bom.L.R. 1111=25 B. 237.

(99)—S. 9—Suit by tenant against landlord for recovery of possession on alleged unlawful dispossession—Jurisdiction—*See* LANDLORD AND TENANT—MISCELLANEOUS, 14 O.C. 60 =9 Ind. Cas. 748.

(100)—S. 9—*See* LIMITATION ACT, 1908, s. 28, 1 M.H.C. 85.

(101)—S. 9—Effect of wrongful dispossession of trespasser by rightful owner, for purposes of limitation—*See* LIMITATION ACT, 1908, art. 142, 2 C.L.J. 1.

(102)—S. 9—Suit under — Ejectment by several persons—Parties to suit—*See* PARTIES TO SUIT—GENERAL, 5 B. 208.

(103)—S. 9—Suit for possession of exclusive right of fishing in creek — Right of fishing whether immoveable property within s. 9—*See* PARTIES TO SUIT—SUITS BY REPRESENTATIVES OF A CLASS, 12 B. 221.

(104)—S. 9—*See* POSSESSION— EVIDENCE OF POSSESSION AND TITLE, 5 Bom L.R. 264.

(105)—S. 9—*See* POSSESSION—NATURE OF POSSESSION, 15 B. 238.

(106)—S. 9—Suit in Mamlatdar's Court — Dismissal for default — *Res judicata* — Suit under—*See* RES JUDICATA—ADJUDICATIONS, 6 B. 477.

(107)—S. 9—*See* REVISION—GENERAL, 57 P.L.R. 1903.

(108)—S. 9—*See* TITLE, 5 C.L.R. 278.

(108-*a*)—S. 9—*See* No. 14, *supra*.

(109)—*Ss.* 9, 39, 42—*Concurrent suit under s.* 39 *for cancellation of deed of gift—Splitting of causes of action.*—Where a suit for possession is laid under s. 9 of the Specific Relief Act and, during its pendency, a suit is instituted under s. 39 for cancellation of a deed of a gift under which the defendant claims, *held* that there is no splitting of causes of action and that the second suit was not bad as one for a declaration of title under s. 42. JAI GOPAL MUKERJI v. LALIT MOHAN, 26 A. 236=A.W.N. 1904, 7.

(110)—Ss. 9, 42 — *See* DECLARATORY DECREE, SUIT FOR— DECLARATION OF TITLE, 20 C. 834, P.C.=20 I.A. 99.

(111)—Ss. 10, 11—*See* DECREE—DECREE, FORM OF, 22 M. 478.

(112)—S. 11—*See* No. 111, *supra*.

(113)—*S.* 12—*Specific performance — Case where pecuniary damages not an adequate relief.*—Specific performance of any contract may in the discretion of the Court be enforced when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief. Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money. In an agreement to sell immoveable property, if the defendants (vendors) without any good reason, refuse to complete their part of the contract, the Court may, in its discretion, compel them to comply with the terms of s. 12 and enforce specific performance. MAUNG PE v. KIN KAUK, U.B.R. 1897—1901, Vol. II. 539.

(114)—*S.* 12—*Specific performance—Unilateral mistake.*—The Courts are reluctant to refuse specific performance on the ground of unilateral mistake unless the defendant prove something further. What this further evidence should amount to, has been thus expressed: "that a hardship amounting to injustice would be inflicted upon the defendant by holding him to his bargain." HUNSRAJ v. RANCHHODDAS, 7 Bom. L.R. 319.

(115)—S. 12 — *See* TRANSFER OF PROPERTY ACT, 1882, s. 68, cl. (*c*), 2 O.C. 24.

(116)—Ss. 12 and 21 (*a*)—Suit for recovery of property based on title acquired under a mortgage deed—Whether suit for specific performance—Whether money compensation an adequate relief—*See* SUIT, 10 O.C. 218.

(117)—*Ss.* 12, 21, 22—*Suit for execution of fresh bond for money—Suit for specific performance—Suit to restore terms of lost bond for money—Nature of evidence required.*—A suit is not maintainable for the execution of a fresh bond for money, where the original bond, handed over to the defendant for registration, is either withhold or destroyed by him; for the plaintiff could obtain his full remedy by suing for the money in respect of which a fresh bond is claimed. In a suit for the execution of a fresh instrument under the above circumstances or for the restoration of the terms of a lost instrument, the evidence adduced must contain sufficient materials to enable the Court to find with reasonable certainty that the bond was of the tenor and in the terms alleged by the plaintiffs. MAYA RAM v. PRAG DAT, 5 A. 44= A.W.N. 1882, 154.

(118)—*Ss.* 12, 21, 24—*Agreement to execute gift deed in favour of third party—Specific performance whether can be enforced.*—A suit for pre-emption of a shop brought against the defendant was withdrawn on an agreement being entered into between the parties that they should unite in gifting the shop to a Dharm Sala. Defendant having failed to carry out the agreement, plaintiff brought a suit wherein he prayed that the first defendant jointly with plaintiff should, in accordance with the agreement, execute a registered deed of the shop in favour of the manager of the Dharm Sala and should deliver possession. A decree was finally made against the first defendant directing him to execute a deed of gift in respect of the shop in suit in favour of the said manager and to have the same duly registered. It was contended that the instrument of agreement could not be received in evidence because

Specific Relief Act (I of 1877)—*continued.*

it required registration. *Held*, that, so far as it was an agreement, it needed no registration, being merely an agreement, not of itself purporting or operating to create, declare or assign any right, title or interest to or in immoveable property, but that certain act should be done *in future* by the defendant. It was further objected that s. 24 of the Specific Relief Act was a bar to the present suit, the ground of the objection being that the plaintiff could recover no damages for a breach of the contract and that he had no personal interest in its performance since it was for the benefit of a third party; but it was held that the argument was based on a misconception of the object of s. 24 of the Specific Relief Act. That section deals with objections not derived from the nature of the contract, but solely from the acts or conduct of the claimant, that is, with objections personal to the plaintiff seeking relief by specific performance, and in the present case there was no personal objection such as to deprive the plaintiff of his title to the relief sought. On the point whether the plaintiff was entitled to a decree in regard to the defendant's undertaking to register the deed, the Chief Court pointed out a distinction between a suit to compel registration of an executed deed, of which the registration was by law compulsory, and a suit to obtain specific performance of a promise to execute and register such a deed, a suit which necessarily implies that the deed has not been executed. The reason why a suit to compel specific performance of a promise to register a deed does not lie is that the plaintiff cannot succeed without offering the deed in evidence, and s. 49 of the Registration Act forbids it to be admitted in evidence. The same reason does not apply when the suit is to compel performance of a promise to execute and register the deed. There is nothing in the Registration Act to prevent a Court from decreeing against a promisor specific performance of his promise to execute and register a deed, so far as the performance of his promise can be obtained by his personal obedience. SHIB DIAL v. HIRA NUND, **100 P.R. 1890.**

(119)—*Ss.* 12, 54, *cls.* (*b*), (*c*) *and* (*d*)—*Injunction—Sale of shares.*—The plaintiff's firm, which admittedly owed a very large amount to the defendant's firm, sued for an injunction to restrain the latter from realizing the securities which it held by sale. *Held*, that pecuniary compensation would afford adequate relief and the suit for injunction should be dismissed. SOLIAPPA CHETTY v. SOLIAPPA CHETTY, **11 Ind. Cas. 607.**

(120)—*S.* 14—*Agreement to sell land—Portion of land found impossible to be conveyed, subsequently—Specific performance—Not allowable.*—Where A agreed to sell certain plots of land mentioned in a sale-proclamation under a decree in his favour, but he did not acquire a portion of those plots under the Court-sale and was not in a position to convey them: *Held*, that specific performance cannot be enforced under s. 14, Specific Relief Act. KOTA KRISHNAYYA v. MATOORI SUBBRAYA, **9 M.L.T. 318.**

Specific Relief Act (I of 1877)—*continued.*

(121)—*S.* 15—*Specific performance of contract of sale—Agreement by manager of joint family—Other members not parties—Enforcibility of the contract.*—S. 15 of the Specific Relief Act applies where a member of an undivided Hindu family agrees to sell part of the joint property in which he has only a share. Where the managing member of a Hindu family agrees to sell the family property and the other co-parceners are not parties to the agreement, and it is found that the agreement is not binding on the latter, specific performance of the contract cannot be enforced. JUTURI NAGIAH v. ARIPARALA VENKATARAMA SASTRULU, **15 Ind. Cas. 623.** (26 M. 74, 12 M.L.J. 400, 32 M. 320, 4 Ind. Cas. 506, 33 M. 359, 7 M.L.T. 137, 20 M.L.J. 328, 5 Ind. Cas. 79, *Expl. and D.*; 1912 M.W.N. 87, 11 M.L.T. 87, 22 M.L.J. 257, 13 Ind. Cas. 471, *R.*)

(122)—*Ss.* 15, 16, 17—*Agreement to sell land—Agreement on behalf of minors—Contract not for purposes binding on minors—Adult parties cannot be compelled to specifically perform the contract on behalf of minors—Specific performance permissible as against adult parties to the extent of their shares in the property.*—The defendants Nos. 1 and 4 for themselves and also as guardians of defendants Nos. 2 and 3 agreed to sell certain lands to plaintiff for Rs. 1,400. Plaintiff sued defendants for specific performance of the contract. It was found that the agreement was for purposes not binding on the minor defendants: *Held* (1), that no decree could be passed compelling a conveyance of the interest of second and third defendants as well by the first and fourth defendants; (2) that plaintiff was, however, entitled to a conveyance, by first and fourth defendants, of their interest in the property agreed to be sold, on payment of the full consideration stipulated without abatement or compensation. PONAKA SUBBA RANI REDDY v. VADAMADI SESHACHELLAM, **5 Ind. Cas. 79=7 M.L.T. 137=20 M.L.J. 328.** (5 M. 337, 32 M. 320, 4 Ind. Cas. 506, *D.*; 26 M. 74, *R.*)

(123)—*Ss.* 15, 17—*Agreement to sell by undivided Hindu father—Absence of son's concurrence—Power of father to sell—Suit for specific performance—Proper form of decree.*—Where a father, first defendant, the managing member of an undivided Hindu family consisting of himself and his son (the second defendant), agreed to sell to the plaintiff a piece of land belonging to the family, without the concurrence of his son, and plaintiff sued for specific performance, *held*, that s. 15 of Act I of 1877 would be applicable only if the first defendant had no interest in any portion of the property agreed to be conveyed as in illustration (*a*) or is unable to convey such portion as in illustration (*b*) to that section. An undivided father has an interest in, and power of disposal over, for certain purposes, every portion of the undivided property. *Held*, that the proper decree in the present case, would be one for specific performance of the contract to sell the whole of the plaint land, without determining whether such sale

Specific Relief Act (I of 1877)—*continued.*

would bind the second defendant. SRINIVASA REDDI v. SIVARAMA REDDI, **32 M. 320=4 Ind. Cas 506.** (26 M. 74, *F.*) [*Doubted and D.*, 7 M.L.T. 137=5 Ind. Cas. 79=20 M. L.J. 328.]

(124)—*S.* 16—*Single contract to sell land to different persons.*—In a suit to enforce specific performance of a single contract to convey land to several persons, the parties on each side must be marshalled as plaintiffs and defendants, and it is not open to some only of the joint-contractees to institute such a suit where the others refuse to have specific performance. SAFIUR RAHMAN v. MAHARAMUNNESSA BIBI, **24 C. 832.**

(125)—S. 16—*See* NO. 122, *supra.*

(126)—*S.* 17—*Performance of contract—Document signed by only one of the executants on the understanding that others would join it—Proposed agreement—Imperfect contract.*—A deed of sale purporting to have been executed by three persons was signed by only one of the executants. The other two executants did not sign it. The contract embodied in the deed was to take effect only on its execution by all the parties: *Held*, that the document constituted merely a proposed agreement which had never been perfected, and one of the executants having executed it on the understanding that the others would join in its execution, the contract could not be enforced. MARHA SINGH v. MOHAMMAD UMAR, **7 Ind. Cas. 393.** (25 M. 389, 12 M.L.J. 17, *R.*)

(126-*a*)—S. 17—*See* NOS. 122, 123, *supra.*

(127)—*Ss.* 17 *and* 15—*Hindu family — Divided brother — Agreement to sell — Part performance — Court's power — Execution of sale-deed.*—In a case of divided Hindu family, specific performance of a part of a contract, affecting some of the properties, cannot be ordered by Courts, as s. 17, Specific Relief Act, expressly prohibits it. In cases falling under s. 15, it is open to the Courts to grant a decree or not, for part-performance, the term "may" indicating their discretion (33 M. 359, 32 M. 320, 26 M. 74, *Expl. and D.*) The Court cannot compel the defendant to execute a deed of sale for the whole property and, on his failure to do so, to issue one in his name under the seal of the Court, as it cannot sanction a transaction devoid of any legal effect. The Court cannot ask a party to do a certain act which would in effect drive a third party to suit. GOVINDA NAICKEN v. APATHSAHAYA IYER, **M. W. N. 1912, 87 11 M.L.T. 87=22 M.L.J. 257=13 Ind. Cas. 471.**

(128)—*S.* 18—*Suit for specific performance—Contract of sale of mortgaged property—Mortgage undisclosed—T.P. Act, s.* 55 (5) (*b*).—In a suit by the plaintiff for the specific performance of a contract of sale of a piece of land or, in the alternative, for the return of the earnest money and for damages for breach of the contract, it was *held*, (1) that the plaintiff was entitled to a decree for specific performance of the contract of sale, under s. 18 of the Specific Relief Act, (2) and, that, as the land contracted to be sold was burdened with a mortgage, which fact was not disclosed to the plaintiff when the oral contract for sale was made, the plaintiff was entitled under s. 55 (5) (*b*) of T.P. Act, to retain out of the purchase-money, the amount payable to the mortgagee, if the defendant did not pay off the mortgage before executing the conveyance. BA PE v. MA MA, **4 L.B.R. 86.** (11 Bur. L.R. 257, *R.*)

(129)—S. 18—*See* BENAMI TRANSACTION—GENERAL, 7 Ind. Cas. 218.

(130)—S. 18 (*a*)—*See* HINDU LAW—GIFT, 14 M. 459.

(131)—*S.* 18, *cl.* (*c*)—*Right of the purchaser of a mortgage-decree to compel the vendor to pay off incumbrance thereon.*—Where a mortgage-decree was sold free from incumbrances, the purchaser has a right under—to compel the vendor to pay off any incumbrance upon the decree and make over the decree to him free of such incumbrance. KHETSIDAS AGARWALA v. SHIB NARAYAN MURDA, **9 C.W.N. 178.** (15 W.R. 545, *R.*)

(132)—*S.* 18 (*b*) *and* s. 21 (*f*)—*Contract for sale of immoveable property with cultivating rights in sir lands—Sanction of Revenue authorities necessary under Central Provinces Tenancy Act—Failure to obtain sanction—Remedy not by way of specific relief—Damages—S.* 18, *cl.* (*b*) *and* s. 21 (*b*), *not applicable—Central Provinces Tenancy Act, IX of* 1883, *s.* 42—*Scope and object of.*—R sued M for specific performance of a contract to sell a share of a *mouza*, with cultivating rights in the *sir* land, or for any other relief to which he may be entitled. *Held*, that, the sanction of the Revenue authorities being, under the provisions of the Central Provinces Tenancy Act, necessary for transferring the cultivating rights on *sir* land, the defendant cannot be compelled to do his best to obtain such sanction, but that failure to obtain such sanction, will afford good ground for the award of damages. Neither s. 18, cl. (*b*), nor s. 21, cl. (*b*), Specific Relief Act, would apply to such a case. The policy of s. 45, Central Provinces Tenancy Act being the protection of the proprietor, the application contemplated by it is one voluntarily made by him, and the Revenue authorities would not be likely to grant an application which they found he was making under compulsion. MANSING v. RAMPIRE, **6 N.L.R. 185=8 Ind. Cas. 1184.**

(133)—*Ss.* 18 *and* 22—*Sale of reversionary interest—Right of vendee—Surety—Undue influence—Inadequacy of price.*—Though a sale of reversionary interest does not at the time effect a transfer of the property, it creates a right which can be enforced when it falls into possession. The relation of suretyship does not give rise to the presumption of undue influence. In considering the inadequacy or otherwise of consideration, the Court will have to take into account the circumstance that it will not come

Specific Relief Act (I of 1877)—*continued.*

into possession for an indefinite time. MALIK ALA BAKSH v. GULAM, **13 P.R. 1899.**

(134)—*S.* 19—*Alternative prayer—Specific performance—Compensation.*—A mourasi patta having been granted by one of several share-holders, the others refused to ratify the contract and ejected the grantee, who thereupon sued all the share-holders to enforce the contract, or, in the alternative, to recover the salami paid by him. *Held* that the alternative claim for the salami might be treated as a claim for compensation for breach of the contract, and that the plaintiff was entitled to join such claim to the main claim for specific performance. RAJDAUR CHOWDHRY v. KALI KRISTNA BHATTACHARJYA, **8 C. 963=11 C.L.R. 330.** [*R.*, 29 C. 257.]

(135)—*S.* 19—*Specific performance—Plaintiff's failure to ask for compensation—Court's power to grant—Civ. Pro. Code*, 1877, *s.* 49 (*e*).—Although the plaintiff might not have asked in his plaint in so many words in accordance with the requirements of the section for compensation, in substitution for the performance by the defendant of his part of the contract, yet, if it be clear from the circumstances of the case that the plaintiff has in effect asked for compensation also in the alternative, it is equitable and competent to the Court to give him a decree for money by way of compensation under this section. SHEO NIWAJ v. GOPAL, **A.W.N. 1881, 22.**

(136)—Ss. 19 and 21 (*g*)—*See* CONTRACT—MISCELLANEOUS, 28 P.L.R. 1905=49 P.R. 1905.

(137)—Ss. 20, 21, 57—*See* INJUNCTION—SPECIAL CASES, 14 M. 18.

(138)—*S.* 21—*Agreement to refer matters in dispute to arbitration—Applicability of, to pending suits.*—In a suit for pre-emption, after service of summons on the defendants, the parties agreed to refer the matters in dispute between them to arbitration and an arbitration agreement was drawn up and signed. *Held*, the agreement was a bar to the suit. S. 21 of the Specific Relief Act applies to an agreement before suit, as well as to one made during pendency of a suit. It would be most inconvenient if two simultaneous proceedings in respect of disputes were allowed, namely, arbitration proceedings and proceedings before a Court of justice. SHEO DAT v. SHEO SHANKAR SING, **27 A. 53=1 A.L.J. 398.**

(139)—*S.* 21—*Partners, agreement amongst, to refer disputes to arbitration—Withdrawal of one without cause, from arbitration—Suit to recover a share in debt realised by the other partner, if lies.*—Where a person has agreed with another that all matters in controversy between them should be referred to arbitration, it is not open to that person to resile from the agreement unless for good and sufficient cause. A dispute between partners, whose business has come to an end, regarding the division of assets, can only be finally settled in a proper

Specific Relief Act (I of 1877)—*continued.*

suit for dissolution of partnership and for adjustment of accounts, and it is not proper that each of the parties should proceed by separate suits in order to recover from the other any sums due to the partnership business which he alone may have realised.—Where, on the termination of a partnership business, the partners agreed to refer all matters in dispute between them relating to the partnership to arbitration, and then one of the partners withdrew from the arbitration without sufficient cause, and instituted a suit in the Small Cause Court to recover a half share of a partnership debt realised by the other partner:—*Held*, that the debt in suit being one of the matters which the plaintiff had contracted to refer to arbitration, s. 21, Specific Relief Act, was a bar to the continuance of the suit. That the suit was not maintainable at all. RAM CHANDRA PAL v. KRISHNA LAL PAL, **17 C.W.N. 351=17 Ind. Cas. 600.**

(140)—*S.* 21—*Reference to arbitration—How far bar to suit.*—Where an agreement was to refer the dispute to three named arbitrators without any provision for the appointment of other arbitrators, and two of them refused to act, there is no subsisting agreement capable of being carried into effect, and s. 21 of the Specific Relief Act is no bar to a suit in respect of any subject which was referred to arbitration. JAITUM BI v. NABI SAHIB, **12 M.L.T. 346=M.W.N. 1912, 957=24 M.L.J. 15=17 Ind. Cas. 389.**

(141)—*S.* 21—*Reference to arbitration of matter in suit—Award therein, bar to further proceedings.*—Where the parties to a suit refer the matter of such suit to arbitration, without the intervention of the Court, and an award is passed dismissing the plaintiff's claim, such award is a bar to further proceedings in the suit. (S. 21, Specific Relief Act). SALIG RAM v. JHUNNA KUAR, **4 A. 546=A.W.N. 1882, 135.** [*Not Foll.*, 4 O.C. 17; *F.*, 27 A. 53=A.W.N. 1904, 160=1 A.L.J. 389.]

(142)—*S.* 21—*Agreement to refer to arbitration—Plea in bar of suit.*—Before s. 21 of the Specific Relief Act could be pleaded in bar of a suit for damages for breach of a contract according to whose terms the parties had agreed to refer any disputes between them to arbitration; it must be shown that the plaintiff had refused to refer to arbitration. The filing of the plaint is not such a refusal. KOOMUD CHUNDER DASS v. CHUNDER KANT MOOKERJEE, **5 C. 498=5 C.L.R. 284.** [*F.*, 80 P.R. 1906; *R.*, 11 B. 199, U.B.R. 1897—1901, Civ, 542.]

(143)—*S.* 21—*Reference to arbitration—Bar to suit—Refusal to bring a case within s.* 21.—The mere existence of a contract to refer to arbitration does not bar a suit without regard to refusal. Refusal is essential to bring a case within s. 21 of Specific Relief Act. MAUNG SHWE NYO v. MAUNG AUNG HMO, **U.B.R. 1897—1901 Vol. II, 542.** (5 C. 500, 8 A. 60, 11 B. 109, 17 C. 200, *Rel on.*)

Specific Relief Act (I of 1877)—*continued.*

(144)—*S.* 21—*Effect of agreement to refer to arbitration after institution of suit.*—S. 21 of the Specific Relief Act, applies when the agreement to refer to arbitration is made after the institution of suit. KALU RAM v. NANAUK CHAND, **U.B.R. 1897-1901, Vol. II, 541.** (9 A. 168, *F.*) [*Com. upon*, U.B.R. 1897—1901, Vol. II, 542.]

(145)—*S.* 21—*Arbitration out of Court--Pending suit—Specific Relief Act, s.* 21, *last clause, applicable.*—As has been held in 130 P.R. 1882, the last clause of s. 21 of the Specific Relief Act is inapplicable to a case in which a reference to arbitration has been made during the pendency and not before the institution of a suit. In this case there was no sufficient reason for refusing to follow the abovementioned ruling, especially as the ultimate result would be the same, even assuming that s. 21 of the Act as applicable, since the plaintiff had not refused to perform the agreement to refer to arbitration, but it had rather remained in abeyance, if not been allowed altogether to lapse, by mutual consent. FAKIR v. JAIMAL. **50 P R. 1891.** (132 P.R. 1882, *F.*) [*F.*, 115 P.R. 1912=1912 P.L.R. Sup. 6=191 P.W.R. 1912=15 Ind. Cas. 140.]

(146)—*S.* 21—*Agreement to refer to arbitration.*—On the 13th December 1897 the parties referred the matter in dispute regarding the plaintiff's right of pre-emption to arbitration. On the 25th December the arbitrator gave his award, but on the 23rd December 1897, before the award was given, the plaintiff instituted the suit to enforce his right of pre-emption which was dismissed by both the Lower Courts, as barred by s. 21, Specific Relief Act, 1877. On further appeal, it was contended that no question of law was involved, since it was found by the Lower Court that the plaintiff had refused to perform the contract to refer, and the finding being on a question of fact, no further appeal lay. *Held*, overruling the contention, that the main facts being admitted, the real question was whether s. 21, Specific Relief Act, 1877, as a matter of law barred the suit. *Held* further that the suit was not barred by s. 51 Specific Relief Act, 1877, or by the award given on the 25th December 1897. MUHAMMAD KAMAR-UD-DIN v. AHMAD JAN, **P.L.R. 900, p. 481.** (19 P.R. 1896, *concurred.*)

(147)—*S.* 21 — *Arbitration — Agreement to refer to arbitration future dispute— Maintainability of suit—Burden of proof.*—The parties to the suit entered into an agreement, which contained a condition that, if any dispute arises between the parties regarding the agreement, it shall be settled by a certain person and his decision shall be binding on the parties. The plaintiffs sued the defendants for recovery of money basing their claim on the agreement. It was contended that, since the plaintiffs had refused to refer the dispute between them to the arbitration of the person named, their suit was barred by s. 21 of the Specific Relief Act. *Held*, that the burden of establishing the plea was on the defendants

Specific Relief Act (I of 1877)—*continued.*

and that they had failed to discharge it. UDHE SINGH v. SARDAR BISHEN SINGH. **35 P.L.R. 1911=26 P.R. 1911=55 P.W.R. 1911 =9 Ind. Cas. 736.**

(148)—*S.* 21—*Contract to refer to arbitration —No time fixed for award—Revocation of the contract—Just cause*—Onus—*Revocation inferred from conduct of parties—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 523—*Right to enforce decision by arbitrators—Limitation—Existence or non-existence of the contract to refer after limitation.*—The plaintiff and the defendant agreed to refer their disputes to arbitration. The defendant attended the meetings of the arbitrators, but the plaintiff did not, and gave a notice to the arbitrators not to proceed with the award. The arbitrators dropped further proceedings. The defendant did not attempt to put in force the provisions of the Code of Civil Procedure to force on the award, and allowed the limitation to expire: Then the plaintiff sued and the defendant resisted the claim on the strength of s. 21 of the Specific Relief Act: *Held* (1) that a contract to refer disputes to arbitration implies a contract to do all things necessary to the making of a valid award, so far as the parties were concerned; (2) that a contract to refer to arbitration could be rescinded by mutual agreement of both parties or by one of them for a just cause; that the burden of proving the existence of just cause for revocation lay upon the party who revoked the contract. *Per Richards, J.*—If, after a contract to refer is entered into, nothing is done for a long time, the Court might infer that the parties rescinded it by mutual consent. But this is not a necessary inference. If the contract to refer was never rescinded, it must be in existence the mere fact that there might be difficulty in applying the provisions of the Code of Civil Procedure to the case does not render the contract non-existent. *Per Tudball, J.*—If one of the parties to a contract to refer refuses to go on with the arbitration, the other party might resort to one of the following courses open to him: (*a*) He might take action within the period of limitation, under the provisions of the law as contained in the Civ. Pro. Code, to enforce a decision by the arbitrators, or (*b*) he might sue for damages for breach of contract. If the party entitled to the above remedies has resorted to neither of the two courses within the period of limitation, the contract can no longer be said to be in existence in the eye of the law. RAM KUMAR SINGH v. JAGMOHAN SINGH, **6 Ind. Cas. 420.**

(149)—*S.* 21—*Arbitration—Reference during progress of suit—Civ. Pro. Code, s.* 523.—Where parties in the course of a suit referred the matters in dispute to arbitration, *held* that the last part of s. 21 of the Specific Relief Act, 1877, bars the further hearing of the suit that the section is not confined to cases of pre-existing reference alone at the institution of suit. SHIB LAL v. HIRA LAL, **A.W.N. 1888, 133.** [*F.*, 1 A.L.J. 398=27 A. 53, A.W.N. 1904, 9, A.W.N. 1904, 160.]

Specific Relief Act (I of 1877)—*continued.*

(150)—*S.*21—*Arbitration—Agreement to refer made pending suit—Such agreement a bar to the continuance of the suit.*—*Held* that where parties to a suit have agreed to refer the matters in dispute between them to arbitration such an agreement ousts the jurisdiction of the Court, whether it is filed in Court under s. 523 of the Code of Civil Procedure or not. SHEO SHANKAR SINGH v. SHEO DAT, **A.W.N. 1904, 9.** (A.W.N. 1888, 133,*F.*; 23 C. 956, *Diss.*) [*Confirmed on appeal*, 27 A. 53.]

(151)—*S.* 21—*Contract to refer to arbitration—Refusal*—A refusal to carry out a submission to arbitration once fully made is not a "refusal to perform the contract to refer" within the meaning of this section. KARAM CHAND v. RAM DAS, **19 P.R. 1896.**

(152)—*S.* 21—*Suit referred to arbitration—Withdrawal of suit with liberty to bring fresh suit—Subsequent suit for same matter, maintainability of.*—The wording of s. 21 of the Specific Relief Act is wide enough to include contracts to refer any matter which can legally be referred to arbitration. One of such matters is a suit which is proceeding in Court. Where the matters in difference between the parties to a suit have been referred to arbitration, this section bars a fresh suit between the parties in respect of the same matters, notwithstanding that the Court has permitted the first suit to be withdrawn with liberty to bring a fresh suit. SHEOAMBAR v. DEODAT, **9 A. 168= A.W.N. 1887, 13.** [*R.*, U.B.R. 1897—1901, Vol. II, 541; *D.*, 4 O.C. 17.]

(153)—*S.* 21—*Reference to arbitration—Withdrawal of suit before award with liberty to bring a fresh suit.*—An order of reference to arbitrators was made by a Court, but before the date fixed for the delivery of the award, the plaintiff withdrew his suit under s. 373, Civ. Pro. Code, with leave to bring a fresh suit. *Held* that the plaintiff was competent to bring a fresh suit. KASHI BAI v. RAM KRISHNA, **1 A.L.J. 257.** (9 A. 168, *D.*)

(154)—*S.* 21—*Withdrawal of party from submission to arbitration—Refusal to perform contract to refer.*—In this case, the defendant also pleaded that the plaintiff had agreed to refer the disputes between them to arbitration, but that the plaintiff prohibited the arbitrators from proceeding by giving them a notice not to make the award and thereby precluded herself from maintaining this suit, but it was held that the suit was not on that account barred. Even if the withdrawal of a party from a submission to arbitration be a refusal to perform a contract to refer a controversy to arbitration within the meaning of s. 21 of the Specific Relief Act I of 1877, the defendant relying upon that as a ground of defence is bound to bring his case within the wording of the section. It was not proved that the subject of the plaintiff's claim to maintenance was laid before the arbitrators at all and that the plaintiff refused to perform her agreement to refer. Nor was there any evidence to show the time at which the plaintiff withdrew from the arbitration,

Specific Relief Act (I of 1877)—*continued.*

whether it was before or after the time allowed to the arbitrators to make and publish their award, because it could not, in the latter case, in any view of the section, be held that there was a refusal on her part to perform her agreement to refer. Further, the defendant took no steps to have the agreement to refer filed in Court under s. 523 of Civ. Pro. Code, and thus render the plaintiff's attempt to withdraw from it nugatory, and there was nothing under the circumstances to show that the defendant did not acquiesce in such withdrawal. ADHIBAI v. CURSANDAS NATHU, **11 B. 199.** [*R.*, 4 O. C. 17.]

(155)—*S.* 21—*Arbitration—Refusal to refer—Suit in respect of matter agreed to be referred.*—One of the parties to an agreement to refer matters in controversy to arbitration brought a suit in respect of a part or the subject-matter thus referred. The defendants pleaded that the suit bas barred by s. 21 of the Specific Relief Act, but without alleging that the plaintiff had refused to perform his part of the contract. *Held* that the mere fact of filing the suit did not amount to a refusal on the plaintiff's part to perform his contract, within the meaning of s. 21 of the Specific Relief Act. The contract, the existence of which would bar a suit under the circumstances contemplated by s. 21 of the Specific Relief Act, must be an operative contract, and not a contract broken up by the conduct of all the parties to it. TAHAL v. BISHESHAR, **8 A. 57=A.W.N. 1885 331, 333.** [*Appr.*, 11 B. 199; *R.*, U.B.R. 1897—1901, Vol. II, 542, 29 A. 13=3 A.L.J. 613=A.W.N. 1906, 253.]

(156)—*S.* 21—*Refusal to arbitrate, to be before suit—English Judicature Act, O.* XXIV, *r.* 1—*Applicability.*—A refusal to arbitrate, so as to bar a suit under s. 21, Specific Relief Act, must be before the action is brought, in order that such refusal and the arbitration clause may constitute a defence to an action on the agreement. [*R.*, 4 O.C. 17, 70 P.L.R. 1906=80 P.R 1906; *Diss.*, A.W.N. (1904) 9.] O. XXIV, r. 1, under the English Judicature Act, applies to defences on the merits which arise after the institution of a suit. CRISP v. ADLARD, **23 C. 956.**

(157)—*S.* 21—*Suit for damages for breach of contract—Agreement to refer to arbitration any dispute arising under the contract.*—Plaintiff sued for damages for breach of a contract. The defence was that the suit was unsustainable, on the ground that there was a stipulation in the contract in question, to refer the dispute arising thereunder to arbitration, and that the plaintiff ought not to have sued in the face of that stipulation. There was no evidence to show, either that the defendant proposed to refer to arbitration before the suit was brought or that the plaintiff refused to proceed to arbitration. *Held*, that s. 21 of the Specific Relief Act can be relied on as bar to a suit on a contract, only in case of a refusal by plaintiff to refer the dispute to arbitration, and that, in this case, no such refusal on the part of the plaintiff

Specific Relief Act (I of 1877)—*continued.*

having been proved, the defence was unsustainable. RALLI v. WALAITI RAM, **80 P.R. 1906 = 70 P. L. R. 1907.** (5 C. 493, 5 C. L. R. 284, *F.*)

(158)—*S.* 21—*Agreement to refer to arbitration—Omission by arbitrators to do anything for a long time—Suit whether barred.*—Where the parties to a suit agreed to refer the matter in dispute to arbitration and a submission to arbitration was accordingly executed on the 17th April 1877 and the arbitrators had done nothing under such agreement till the institution of the present suit on the 8th November 1880, *held* that such an agreement was no bar to the present suit, as it had lapsed, not having been acted on within a reasonable time. ATMA RAI v. SHEOBARAN RAI, **A.W.N. 1882, 58.**

(159)—S. 21—Suit to compel signature to reference to arbitration—*See* ACT XI OF 1899, ss. 4 (*b*), 19, 4 S.L.R. 149.

(160)—S. 21, effect of—*See* HIGH COURT, JURISDICTION OF BOMBAY, 11 Bom. L. R. 273 = 34 B. 13 = 3 Ind. Cas. 837.

(161)—S. 21—*See* JURISDICTION OF CIVIL COURTS, 27 A. 53 = 1 A.L.J. 398.

(162)—S. 21—Contract to perform which permission of Court is necessary cannot be specifically enforced—*See* PROBATE AND ADMINISTRATION ACT, 1881, s. 90, cl. 2, 1 Ind. Cas. 364.

(163)—*S.* 21 (*a*)—*Contract to lend money on mortgage—Suit for money, agreed to be lent—Specific performance, suit for, maintainability of—Suit for breach of contract.*—Plaintiff's property was subject to a mortgage. It was agreed between the plaintiff and defendant that the former was to mortgage the property to the defendant for a certain sum, that the defendant was to retain, in his hands, a certain sum of money to pay off the mortgage and to pay plaintiff the remaining amount of consideration in cash. A mortgage-deed embodying these terms was given to the defendant. The defendant not having paid off the mortgage or the remaining amount to the plaintiff, as agreed upon, the latter sued for the recovery of the amount agreed to be paid to him. *Held*, that the suit, viewed as one for specific performance of a contract to lend money, was opposed to cl. (*a*) of s. 21 of the Act and it was not maintainable (*a*). *Held*, also, that, viewed as a suit for compensation for breach of contract, it failed because there was no evidence of any damage to the plaintiff. *Held*, further, that a mere recital in a deed that the consideration had been paid could not be construed as a contract in writing to pay the consideration-money. RAMANAND v. NAKCHED, **8 O.C. 5.** (24 M. 288, 25 M. 55, 25 M. 587, *R.*; 18 A. 200, *Diss.*) [*R.*, 10 O.C. 69; *R. and Expl.*, 11 O.C. 217.]

(164)—*S.* 21 (*a*)—*Specific performance—Agreement to pay money in instalments—Suit not maintainable.*—A suit for specific performance of an agreement to pay a certain sum

Specific Relief Act (I of 1877)—*continued.*

of money by instalments is not maintainable, as compensation in money for the non-performance of it is an adequate relief. HUKUM SINGH v. KHUNI LAL, **8 A.L.J. 1282.**

(165)—S. 21 (*a*), ill. (2)—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, sch. II, art. 15, U. B. R. 1908, 3rd Qr., Provincial S.C. Court Act, 3.

(166)—*S.* 21 (*e*)—*Registration Act* (1908), s. 17 (*h*)—Amalnamah, *unregistered—Oral evidence—Admissibility to prove contract—Breach of trust—Contract to sell trust property, whether specifically enforceable.*—An unregistered *amalnamah* and also oral evidence are admissible to prove the terms of an alleged contract, when the object of the suit is to secure specific performance thereof. (6 Ind. Cas. 634 = 11 C.L.J. 548, 6 Ind. Cas. 346 = 12 C.L.J. 25 = 15 C.W.N. 375, 12 C.L.J. 464 = 8 Ind. Cas. 794, *Rel. on.*) Where it is clear from the *amalnama* that the parties intended that a proper document should be executed and registered in order to perfect the title of the lessee: *Held* that, under cl. (*h*) of s. 17 of the Registration Act, the *amalnama* was not compulsorily registrable. (16 I.A. 233 = 17 C. 291, *R.*) Before a decree for specific performance of contract is made, the Court must ascertain whether the contract is specifically enforceable, and one of the elements to be taken into consideration is whether the specific performance of the contract would involve a breach of trust. (1805, 2 Sch. and Lef. 29 = 9 R.R. 98 (1721), 1 Bro. Q.C. 186, 1 W.R. 4, 12 C. 152, 5 Ind. Cas. 236 = 11 C.L.J. 346 = 14 C.W.N. 151, *Rel. on.*) If the property, intended to be leased, is trust property, and the proposed lease is beyond the authority of the trustee lessor, a Court of equity will not grant specific performance of the contract. MAHOMED ESMAT KHAN v. NUNDA DULAL CHAKRABARTI, **16 Ind. Cas. 390.**

(167)—*S.* 21, *last clause—Applicability—Agreement to refer to arbitration—Institution of suit in Presidency town—Ss.* 2, 3, 19, *Act* IX *of* 1899—*Arbitration—Application for stay of suit—Sch.* II, *s.* 18, *Civ. Pro. Code* (1908).—The last 37 words of s. 21 of the Specific Relief Act do not apply to the agreement to refer to arbitration, in cases where, if the matter submitted to arbitration were the subject of a suit, the suit could have been instituted in a Presidency town. The provisions of the arbitration Act IX of 1899 are applicable to such a case. *Held* also that, as no application under s. 19 of the Arbitration Act or under s. 18 of the second schedule of the Civ. Pro. Code, was made for stay of suit, the suit was not barred by the last clause of s. 21 of the Specific Relief Act, at the time the suit was instituted. TAPESSIER AND CO. v. NASIR-UD-DIN, **37 P.R. 1912 = 130 P.W.R. 1912 = 15 Ind. Cas. 402.**

(168)—S. 21—*See* Nos. 13, 116, 117, 118, 132, 136, 137, *supra.*

Specific Relief Act (I of 1877)—*continued.*

(169)—*Ss.* 21 *and* 30—*Suit to enforce award—Specific performance of award.*—Where in a suit on an award to recover a certain sum of money allowed by the arbitrator, it was contended among other things that having regard to ss. 21 and 30 of the Specific Relief Act, 1877, the plaintiff was not entitled to have the award enforced: *Held*, that the objection proceeded on the assumption that the suit was one for specific performance, which, in fact, it was not; but it was a suit for the recovery of money and for relief incidental thereto. FARDUNJI v. JAMSEDJI, **5 Bom. L.R. 705=28 B. 1.**

(170)—*Ss.* 21, 39—*Mortgage deed executed for fraudulent purpose—Cancellation of—Fraud not effected—Estoppel—Arbitration.*—A person, although a party to a fraud, is not debarred from suing for the cancellation of a deed, executed by him, provided the intended fraud has not been carried into effect. MA ME v. MAUNG SIN, **U. B. R. 1897, Vol. II, 544.** (11 B. 708, 18 B. 372, 23 B. 406, 23 C. 460, 962, 18 M. 378, 20 M. 326, 3 C.W.N. (Notes) CCXXXII, 9 C.L.R. 64, 12 C.L.R. 64, 11 M.I.A. 551 as cited in Field's Law of Evidence 511, 13 M.I.A 551, 585, 600, 6 W.R. 287, 13 W.R. 87, 20 W.R. 112, 21 W.R. 422, 23 W.R. 42, 24 W.R. 391, *R.*) [*R.* and *F.*, U.B.R. 1897—1901, Vol. II, 400; *R.*, U.B.R. 1908, 3rd Qr, Benami Transaction 1.]

(171)—*Ss.* 21, 57—*Joint Stock Company if may be restrained from dismissing its Managing Agent—Shareholders of Company if may be restrained from considering proposal of removal of Managing Agents — Injunction — Contract of service.*—Under ss. 21 and 57 of the Specific Relief Act, a Limited Liability Company cannot be restrained by injunction from dispensing with the services of Managing Agents, even when the contract of service provides that the Managing Agents are only to be removed in a specified manner and after a specified period. Nor can the share-holders be restrained by injunction from considering the question of such removal at an Extraordinary General Meeting. The remedy of the Managing Agents for dismissal, if wrongful, lies in a suit for damages. SIRCAR v. THE BARABONI COAL CONCERN, LD., **16 C.W.N. 289=13 Ind. Cas. 868.** (25 Ch. D. 320, 1883, *Rel. on.*)

(172)—*S.* 22—*Specific performance—Discretion of Court.*—A party cannot call upon a Court of Equity for a specific performance unless he has shown himself ready, desirous, prompt and eager. This rule of law is not in so many words expressed in s. 22 of the Specific Relief Act, 1877, but the first paragraph of that section which gives the Court a judicial discretion must be read as implying and including it. The following paragraph of the section which points out the cases in which specific performance may not be decreed is not intended to be exhaustive but merely illustrative of the general principle, which is embodied in the first paragraph. The second clause of the section no doubt contemplates that, as a general rule, the question of the hardship of a contract is

Specific Relief Act (I of 1877)—*continued.*

to be judged of *at the time at which it is entered into* but it also contemplates an exception to the general rule in cases where events involving hardship have occurred subsequent to the contract due in some way to the party who seeks specific performance. PEER MAHOMED v. MAHOMED, **6 Bom. L.R. 1013=29 B. 234.**

(173)—*S.* 22—*Negative agreement—Breach—Suit for enforcing agreement—Discretion of Court in granting injunction.*—This was a suit for obtaining an injunction restraining the defendant from carrying on business as a cutter or tailor for ten years from the date of the plaint agreement between the parties. The defendant was for a long time in the service of the plaintiff, a milliner carrying on business in Bombay, and left his service in 1890, being at that time indebted to him to a large amount. Criminal proceedings were taken against him by the plaintiff and during the time when he was on bail, he was in the service of a rival milliner, T. The plaint agreement was thereupon entered into between the plaintiff and defendant on 1-2-1893 in writing which provided (1) for payment of Rs. 1,950 by the defendant in full satisfaction of the plaintiff's claim, (2) for the defendant entering plaintiff's service as cutter for ten years from date of agreement. The agreement also prevented the defendant from carrying on business as a cutter or tailor, either on his own account or as a partner or servant of another until the expiry of the said period of 10 years in case of the defendant's dismissal from plaintiff's service for any fault before the period had run out. After the criminal proceedings were thrown out, the plaintiff sought to enforce the agreement, because the defendant entered the service of the rival milliner. Hence the suit: *Held*, that the Court, in the exercise of the discretion given to it under s. 22 of the Specific Relief Act (I of 1877), would not grant the injunction. The parties were not on equal terms, and by refusing to take any action, the Court would relegate the parties to their original position. CALLIANJI HARJIVAN v. NARSI TRICUM, **18 B. 702.** [*R.*, 23 B. 103, 5 Bom. L.R. 878.]

(174)—*S.* 22—*Suit and specific performance—Delay of 7 years to bring suit—Limitation—Time wherefrom it runs.*—Where there was no time fixed for the execution of a conveyance, time begins to run only from the time when demand was made and performance refused. Even where the plaintiff is guilty of undue delay in instituting a suit for specific performance, the suit will be decreed if it is not shown that the delay has in any way prejudiced the defendant. ABDUL KHADIR v. NAGASARUPU, **M.W.N. 1912, 1004=17 Ind. Cas. 399.**

(175)—*S.* 22—*Agreement by way of compromise, decree for specific performance of.*—This was an appeal by the defendants in the Court below, against an order of that Court decreeing specific performance of an agreement by way of compromise alleged to have been entered

Specific Relief Act (I of 1877)—*continued.*

into by the defendants on the one side, and by the Collector of Bareilly for the Court of Wards on the other side on behalf of certain minors under the guardianship of the Court of Wards. The Collector had instituted the suit for the specific performance of the compromise alleging that he had performed his part of the agreement by withdrawing from the defence in the suit compromised, and by admitting the claim made by the defendants in that suit, and praying that the defendants be directed to carry out their promise. Defendants contended that even if there had been a completed agreement between the parties, it was void as a *nudum pactum* for which no consideration had been given, and that the agreement was of such a nature that the Court below in the exercise of its judicial discretion ought to have refused to enforce it. As to the question whether that which the Collector undertook to do under the compromise and actually did do amounted to sufficient consideration, it was held that it should be decided with reference to the state of things at the time irrespective of subsequent events. Though the result of a judicial decision pronounced some years afterwards, showed that the consideration given by the Collector was in the result worthless, that was no reason why the Court should not support the agreement arrived at between the parties. The compromise was a good consideration for the contract at the time when it was entered into, and it might therefore be enforced without any enquiry as to the validity of the claim. In respect of the objection that the lower Court in decreeing specific performance had not exercised its discretion properly, the case of the compromise was held to come under case III in s. 22 of the Specific Relief Act providing that where the "plaintiff has done substantial acts.....the Court may properly exercise a discretion to decree specific performance." The Collector had done the "substantial act," namely, the withdrawal from the defence on behalf of his ward and confessing judgment, and it was, therefore, competent to the Court to have decreed specific performance of the contract under the compromise. SHIB LAL v. THE COLLECTOR OF BAREILLY, **16 A. 423=A.W.N. 1894, 161.** [*R.*, 6 Bom. L. R. 1018.]

(176)—*S. 22—Specific performance of contract—Circumstances under which performance may be refused*—Where in a suit for specific performance of a contract, the circumstances under which the contract is made are such as to give the plaintiffs an undue advantage over the defendant, though there may be no fraud, and where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff, *held* that the Court should exercise its discretion and refuse to grant specific performance of the contract. BALLA MAL v. CHUNNI LAL, **16 A.L.J. 498=17 Ind. Cas. 782.** (16 A. 423, *R.*)

Specific Relief Act (I of 1877)—*continued.*

(177)—S. 22.—*See* CIV. PRO. CODE, 1908, O. XLI, r. 22, 31 P.R. 1897.

(178)—S. 22—Agreement among rival bidders at Court-sale not to bid against each other—Consideration not unlawful—Contract valid—Suit for specific performance of the contract, maintainability of—*See* CONTRACT ACT, 1872, s. 23, 1 C L J. 85.

(179)—S. 22—*See* Nos. 117, 133, *supra.*

(180)—*Ss. 22, 56, 57—Injunction—Specific performance—Discretion of Court—Agreement not to work for rival tradesman—Damages.*—The plaintiff carried on business in Bombay as milliner and the defendant had been formerly a cutter in the plaintiff's service, but left it in 1890. The defendant was then largely indebted to the plaintiff in respect of moneys not accounted for and also in respect of loans made by the plaintiff to him. The plaintiff instituted criminal proceedings in the Police Court on a charge of criminal breach of trust, and procured a warrant for his arrest. The defendant surrendered and at the time of the agreement hereinafter mentioned, the proceedings in this matter were going on. The defendant was out on bail, and was then in the service of a rival milliner B. On the 1st February, 1893, an agreement in writing was made between the plaintiff and the defendant whereby the defendant agreed as follows:— (1) to pay the plaintiff Rs. 1,950 in full settlement of the plaintiff's claim; (2) to enter the plaintiff's service as cutter and to serve him for ten years from the date of agreement; (3) to serve plaintiff honestly; (4) in case plaintiff was obliged to dismiss him for some "fault," then, until the expiration of the said period of ten years the defendant should not carry on the business of a cutter or tailor either directly or indirectly, on his own account or as partner or servant of another, and in case he should do so, the plaintiff should be at liberty to stop him. On the 15th February, 1893, the charge of criminal breach of trust, which had been brought by the plaintiff against the defendant, was dismissed by the Magistrate, the plaintiff offering no evidence in support of it. The plaintiff subsequently called on the defendant to enter into his employment in accordance with the said agreement, but the defendant refused to do so and remained in the service of B. The plaintiff, therefore, filed this suit praying that the defendant should be restrained by injunction from carrying on business as a cutter or tailor for a period of ten years from the date of the above agreement. The lower Court dismissed the suit. *Held*, on appeal, that the lower Court was right in refusing either to grant specific performance of the agreement or an injunction against the defendant, but that inasmuch as the lower Court held in its discretion that pecuniary compensation was the plaintiff's remedy, it ought not to have dismissed the suit, but ought either itself to have awarded damages to the plaintiff, or to have ordered an inquiry as to damages. Since the plaintiff was held entitled to a remedy, the appropriate remedy

Specific Relief Act (I of 1877)—*continued.*

should be awarded. The appellate Court accordingly passed a decree against the defendant and awarded the plaintiff Rs. 10 as nominal damages but without costs. CALLIANJI HARJIVAN v. NARSI TRICUM, **9 B. 764.** [*R.*, 26 B. 735.]

(181)—*S.* 23—*Right of third party on contract.*—The general rule that a person who is not a party to a contract can neither be bound by nor take advantage of it is subject to some marked exceptions. One of such exceptions arises where the agreement in question is a family settlement of doubtful rights. For such exceptions, s. 23, Specific Relief Act, and the case of *Williams* v. *Williams* and cases collected in Collett's edition of the Specific Relief Act may be referred to. AVADH SARJU PRASAD SINGH v. SITA RAM SINGH, **1 A. L. J. 329.** [*R.*, 3 A.L.J. 785=A.W.N. 1906, 261.]

(182)—*S.* 23, *cl.* (*b*)—*Sale—Mortgage—Contract to re-sell—Specific performance.*—On the sale of land with an agreement to re-purchase the same within a certain number of years, *held*, that such agreement does not operate to constitute a mortgage of such land. Although such agreement may not contain an express reservation of the right of re-purchase to the vendor's heirs, yet in the case of the vendor's death his representatives in interest can claim specific performance of the contract to re-sell under s. 23, cl. (*b*) of the Specific Relief Act. VERAPPA UDIAN v. MAZAN, **1 L. B. R. 25.**

(183)—*S.* 23, *cl* (*c*)—*Family arrangement—Compromise of doubtful rights—Person beneficially entitled under compromise—Suit to enforce compromise by person not a party thereto.*—A suit to set aside a deed of partition between the members of the same family was compromised. By the deed of compromise it was stipulated that certain of the parties to the compromise should pay to the plaintiff Rs. 5000. The plaintiff was not a party to the suit or compromise. *Held*, that plaintiff, being a person beneficially interested under the compromise, was entitled to sue for the recovery of the money, if the compromise was a compromise of doubtful rights. PROTAP NARAIN MUKERJEE v. SARAT KUMARI DEBI, **5 C. W. N. 386.**

(184)—*S.* 23, *cl.* (6)—*Personal quality of party, material ingredient of contract—Plaintiff to be prompt to perform his part.*—Where the personal quality of the party with whom a contract is made, is a material ingredient in the contract, the right to enforce specific performance ceases upon the death of the person with whom the contract is effected. His legal representative is not entitled to claim such right. A party cannot call upon a Court of equity for specific performance unless he shows himself ready, eager and prompt; and the right to specifically enforce the contract would be lost by the party guilty of laches in performing his part of the contract, although time is not mentioned in the contract as the essence of it. MOHENDRA NATH MOOKERJEE v. KALI PROSHAD JOHURI, **30 C. 265=7 C.W.N. 229.**

Specific Relief Act (I of 1877)—*continued.*

(185)—S. 23 (*c*)—Partition deed beneficial to minor member of joint Hindu family—His right to sue on the deed—*See* HINDU LAW—PARTITION, A.W.N. 1906, 261=29 A. 37=3 A. L.J. 785.

(186)—Ss. 23, cl. *h*, 27, cl. *e*.—Applicability of—*See* ACT VI OF 1882, s. 45, 13 B. 415.

(187)—*S.* 24, *cl.* (*b*)—*Suit by mortgagee to recover mortgage money not a suit for specific performance—Damages arising from failure to pay off a prior mortgagee, separate suit for—Undue influence—Void or voidable contract—Contract Act, ss.* 39 *and* 54—*Set-off.*—A mortgagee brought a suit to recover his mortgage money, principal and interest, according to the terms of his mortgage bond. It was found that the mortgagee had not paid a portion of the mortgage-money to a prior mortgagee as stipulated in the bond. The defendants, mortgagors, contended that the suit should be considered to be one for specific performance under s. 24, cl. (*b*) of the Specific Relief Act and that, as the plaintiff mortgagee had failed to perform his part of the contract by not paying off the prior mortgage, the defendants were not bound to carry out their part of the contract, and all that the plaintiff was entitled to recover was the balance of the principal amount found to be actually due and such interest as the Court might consider fair, the provision as to compound interest being unenforceable as having been obtained by undue influence. *Held*, that this was a suit for recovery of money, based on a mortgage-bond, and could not be regarded as one for specific performance under s. 24 (*b*) of the Specific Relief Act. *Held*, *further*, that there being no evidence of undue influence and the deed not having been shown to be either void or voidable, the provision to pay compound interest according to the terms of the deed must be enforced. *Held*, *also*, that the defendants could, in a separate suit, sue the plaintiff mortgagee for recovery of such damages as may have accrued to them owing to the mortgagee not having paid off the prior mortgage. RANI RAGHUBANS KUAR v. RAUNAK ALI, **10 O.C. 69.** (8 O.C. 5, 18 M. 126, *R.*)

(188)—S. 24—*See* No. 118, *supra*.

(189)—*S.* 25 (*b*).—"*Reasonable doubt*" *what is.*—The words "reasonable doubt" in cl. (*b*) of s. 25 contemplate a reasonable decent probability of litigation. MAHOMEDALLY v. JEHANGIR, **2 Bom. L.R. 59.**

(190)—*S.* 27—*Misjoinder of causes of action.*—In a suit for the specific performance of an agreement to execute a deed of sale of certain immovable property and for possession of the same which impleaded not only the party to the agreement but also persons who, subsequent to the agreement purchased the property at an execution sale, on the ground that they did so in bad faith with notice of the agreement, *held*, considering the terms of s. 27 of the Specific Relief Act, that the suit was not necessarily bad for misjoinder of causes of action. GUMANI v. RAM CHARAN, **1 A. 555.**

Specific Relief Act (I of 1877)—*continued.*

(191)—*S.* 27—*Registration, effect of—Notice.*—"Notice" is not defined in the Specific Relief Act. The doctrine of constructive notice has been pushed to its extreme limit in England, and in this country, it requires even more careful application against a purchaser for value. Registration of an *ekrarnamah* is not sufficient notice of a contract within the meaning of s. 27, Specific Relief Act. PREONATH CHATTOPADHYA v. ASHUTOSH GHOSE, **27 C. 358=4 C.W.N. 490.** (23 C. 790, *F.*; 7 C. 199, *Cited.*; 15 M. 268, *R.*; 6 B. 168, *Diss.*) [*Appr.*, 7 C.W.N.21; *Not F.*, 26 B. 538; *Diss.*, 6 Bom. L.R. 1043.]

(192)—*S.* 27—*Trusts Act*, 1882, s. 91—*Purchaser with notice of prior contract to sell.*—The claim of a vendee with notice of a prior agreement to sell cannot, under s. 27 of the Specific Relief Act, prevail as against the prior promisee's right to specific performance. Further, under s. 91 of the Trusts Act, the vendee must be held to have the property for the benefit of the prior promisee. NAMASIVAYAM PILLAI v. NELLAYAPPA PILLAI, **18 M. 43.**

(193)—*S.* 27—*Contract—Agreement to sell—Specific performance of contract—Subsequent sale to other persons under registered deed of sale—Prior equity of plaintiff—Subsequent purchaser to prove purchase for value*, bona fide *and without notice—Person selling property subject to charge cannot give a higher title to his vendor—Trusts Act* (II *of* 1882), *s.* 91—*'Acquire,' meaning of.*—Defendants 1 and 2 agreed to sell their property to the plaintiff. Subsequently, they sold the property to defendants Nos. 3 and 4 under a registered sale-deed. The plaintiff sued defendants Nos. 1 and 2 for specific performance of his contract and to recover possession of the property. The first Court awarded his claim. *Held*, confirming the decree, that the plaintiff having, under his contract, a prior equity, was entitled to succeed. Where *bona fide* contract, whether oral or written, is made for the sale of property, and a third party afterwards buys the property with notice of the prior contract, the title of the party claiming under the prior contract prevails against the subsequent purchaser, although the latter's purchase may have been registered and although he has obtained possession under his purchase. Notice before actual payment of the whole of the purchase-money, even although it may have been secured, or before the conveyance is actually executed, is binding in the same manner as notice had before the contract; for although the purchaser had no remedy at law against the payment of the residue, for which he gave his security, yet he would be entitled to relief in equity, on bringing his bill and showing that, though he has given a security for payment of the residue of his purchase-money, yet he had since had notice of an incumbrance, under which circumstances the Court would stop payment of the money due on the security. The word "acquire" in s. 91, Indian Trusts Act, 1882, is quite consistent with the English rule that the purchase

Specific Relief Act (I of 1877)—*continued.*

should be complete both by payment and conveyance before notice in order to defeat a person having a prior equity. HIMATLAL v. VASUDEO, **14 Bom. L.R. 634=36 B. 446=16 Ind. Cas. 490.**

(194)—S. 27—*See* MORTGAGE—REDEMPTION, A.W.N. 1883, 159.

(195)—S. 27—*See* REGISTRATION ACT, 1908, ss. 17 (*h*). 50, 27 C. 468.

(196)—S. 27—*See* REGISTRATION ACT, 1908, s. 48, 13 M. 324.

(197)—S. 27—*See* RES JUDICATA—MISCELLANEOUS, 6 C.W.N. 314.

(198)—S. 27—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 54, 60, 24 M. 449.

(199)—S. 27 (*b*)—*See* CIV. PRO. CODE, 1908, O.I, r. 8 (2), 1 L.B.R. 252.

(200)—S. 27 (*b*)—Mortgagee with right of pre-emption—Suit by third party for specific performance of contract to sell—*See* MORTGAGE—GENERAL, 2 L.B.R. 108.

(201)—S. 24 (*b*)—Sale by registered deed to one person—Prior verbal sale to another—Notice—*See* SALE—GENERAL, 4 L.B.R. 26.

(202)—S. 27 (*b*)—*See* VENDOR AND PURCHASER—NOTICE, 10 C. 710.

(203)—S. 27—*See* No. 186, *supra.*

(204)—*S.* 28—*Specific performance—Contract by mother as guardian of minor—Enforceability.*—There is nothing in s. 28 of the Specific Relief Act to support the position that specific performance cannot be decreed against a minor. KRISHNASAMI v. SUNDARAPPAYAR, **18 M. 415=5 M.L.J. 164.** [*Appr.*, 27 C. 276.]

(205)—*S.* 28—*Agreement to sell reversionary interest—Purchase-money less than market value of reversion—Specific performance.*—It was the rule in England, until the passing of 31 Vic., C. 4, that the Court would not decree specific performance of an agreement to sell a reversionary interest, when the purchase-money was less than the market value of the reversion. Such cannot be held to be the rule in India. No mention of it is found in the Specific Relief Act, and if it had been intended to give effect to it, it should have been found in s. 28 of the Specific Relief Act. GITABAI v. BALAJI KESHAV, **17 B. 232.**

(206)—*S.* 28 (*a*)—*Specific performance—Inadequacy of consideration—Mutuality.*—The fact that the consideration is inadequate is not a bar to the granting of specific performance of a contract to sell immoveable property, when the price is not so grossly inadequate as to justify the inference of fraud having been practised. [*F.*, 2 C.L.J. 321.] *Quære*:—Whether, having regard to the express provision of the Specific Relief Act, the principle of mutuality is one which ought to be recognised here? RAMACHENDRA AIYER v. SUNDRA MURTHI MUDALI, **4 M.L.J. 9.**

Specific Relief Act (I of 1877)—*continued.*

(207)—*S.* 30—*Maintainability of suit under, to enforce an award made out of Court.*—Where a reference to arbitration and an award thereon were made, under proceedings out of Court, during the pendency therein of legal proceedings, it was *held*, that it was competent for a party to it to enforce the award by means of a suit under the provisions of s. 30 of the Specific Relief Act; and the fact that the matter of the arbitration and the award thereon was kept back from the knowledge of the Court, till the determination of the proceedings pending therein, could make no difference. WATHAWA *alias* NGA TUN MIN v. NGA PO, **U.B.R., 1st Qr., Specific Relief, p. 3.** (24 W.R. 41, 4 M.H. C. 119, 15 M. 99, 19 M. 290, 20 M. 490, *R.*)

(208)—S. 30—*See* LIMITATION ACT, 1908, art. 113, 5 A. 263 = A.W.N. 1883, 16, 16 A. 3 = A.W.N. 1893, 179.

(209)—S. 30—*See* No. 169, *supra.*

(210)—*S.* 31—*Contract of tenancy—Suit for rectification.*—A party to a contract of tenancy, desiring to have it rectified or altered, must sue under s. 31 of the Specific Relief Act. ANARULLAH SHAIKH v. KOYLASH CHUNDER BOSE, **8 C. 118.**

(211)—*S.* 31 — *Mortgage-bond — Mistake unilateral—Rectification, suit for, not mantainable—Specific performance, suit for, proper remedy—Unilateral mistake good defence.*—A suit for the rectification of a mortgage-bond on the ground that the share mortgaged has been wrongly described, cannot be maintained as the mistake is only unilateral and not mutual. A mistake on one side may be a ground of defence or a ground for rescinding, but not for correcting or rectifying an instrument. To rectify a contract, where the mistake was unilateral and not mutual, is, in effect, to make for one party a new contract different from what he intended. Where the mistake is only unilateral, a suit for specific performance would be the proper remedy. (*Wells, A.J.C., doubting*). THAKUR JAWAHIR SINGH v. ARJUN SINGH, **8 O.C. 1.**

(212)—*S.* 31—*Terms which the parties to a document intentionally omitted to insert therein—Whether the document may be rectified in respect of such terms.*—Where the parties to a contract deliberately omitted certain terms relating to it, from the deed embodying the contract, under the mistaken idea that, though oral and excluded from the deed, those terms could be enforced, to hold that subsequent resiling by one of the parties entitles the other to rectification of the deed would be to depart from the express terms of s. 31 of the Act, to nullify the provisions of s. 92, Indian Evidence Act, and to overlook the presumption that every one is supposed to be acquainted with the law. There can be no rectification, if it was by the intention of the parties that the written instrument did not comprise all the terms of the actual agreement, since that party, who deliberately and gratuitously ran the risk involved in trusting to the other's honour must continue to

Specific Relief Act (I of 1877)—*continued.*

abide by such previous determination. The Court cannot, and ought not to, interfere for the rectification of such an instrument by the introduction, into it, of the intentionally omitted terms because what is done on purpose is evidently not done by mistake. LATCHMAN RAO v. GANPAT RAO, **2 N.L.R. 49.**

(213)—*S.* 31—*Objections by respondent against a party not appellant in the appeal and having distinct interest—Rectification of sale-deed upon which plaintiff's title rests.*—A respondent has no right to file objections against a party who is not an appellant in the case and whose interest is entirely distinct from those of the appellants. In a suit for possession, the plaintiff's title to the plots in suit rested upon a sale-deed. Those plots did not appear in the deed, but it was said that, by mistake, other numbers were inserted. Another sale-deed was subsequently executed by the defendant in favour of the plaintiff with the object of rectifying the mistake in the first deed, but the numbers in suit did not appear in the second deed: *Held*, that the deed, upon which the plaintiff's claim rested, not having been rectified in accordance with the provisions of s. 31 of the Specific Relief Act, the plaintiff's suit was not maintainable. SAJJAD HUSAIN v. BAKAR ALI, **11 O. C. 93.** (23 A. 93, 30 C. 655, *F.*)

(214)—*S.* 31 — *Instrument—Rectification — Mistake—Court—Jurisdiction.*—The use of the word "contract" in s. 31 of the Specific Relief Act, 1877, is apt to mislead. What the Court has to rectify is the instrument: to do which, it has jurisdiction to ascertain what the real contract was. If that is established, then the instrument purporting to embody it may be rectified. The Court will only act on parol evidence when satisfied that there is no existing writing which contains the original instructions or contract. JIWRAJ v. THE NORWICH ASSURANCE COMPANY, **5 Bom. L. R. 853.**

(215)—S. 31—*Relief on the ground of mistake—Mutual mistake—Rectification of instruments.*—To establish a right to rectification of a document it is necessary to show that there has been either fraud or mutual mistake. To afford a relief on the ground of mutual mistake under the terms of s. 31 of the Specific Relief Act, 1877, it is necessary that the Court should find it clearly proved that there was such mistake. It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case one can only act upon the mutual and concurrent intention of all parties for whom

Specific Relief Act (I of 1877)—*continued.*

the Court is virtually making a new written agreement. MADHAVJI v. RAMNATH, **8 Bom. L.R. 354=30 B. 457.**

(216)—S. 31—Wrong survey number in mortgage-deed—Rectification of error in decree—Suit for rectification—Rights of third parties—*See* DECREE—ALTERATION OR AMENDMENT OF DECREE, 8 N.L.R. 13.

(217)—S. 31—*See* DEED—RECTIFICATION OF DEEDS, 14 C. 308, P.C.=14 I.A. 18.

(218)—S. 31—*See* EVIDENCE ACT, 1872, s. 92, proviso 1, 3 L.B.R. 227.

(219)—S. 31—*See* EVIDENCE ACT, 1872, ss. 93 and 94, 130 P.L.R. 1910=8 Ind. Cas. 554.

(220)—*S.* 32, *proviso—Consequential relief not claimed—Dismissal of suit.*—Where a person is forcibly turned out of his house, he is entitled to claim, in addition to a relief for declaration of his right, a relief as to possession. Where he only seeks a declaration, which the Court, in consequence of the proviso to s. 42 is unable to make, the necessary result is that the suit should be dismissed. In such cases no other relief can be granted. KEDAR SAHU v. BHAGWANTI, **8 A.L.J. 462.** (28 B. 567, *Not F.*)

(221)—*S.* 35—*Rescission of contract—Condition of recission.*—The condition on which a contract would be rescinded under s. 35 of the Specific Relief Act (I of 1877) is that the plaintiff should be shown to have been less to blame in the transaction than the defendant. It is not sufficient to show that the plaintiff and the defendant were both *in pari delicto*. HARI BALAKRISHNA v. NARO MORESHWAR, **18 B. 342.**

(222)—*S.* 36—*Injunction—Discretion of Court.*—It is open to the Court to refuse an injunction where the state of things complained of is the outcome of the plaintiff's own conduct, and where he does not satisfy the Court that his own acts and dealings in the matter have been fair and honest. SEENI CHETTIAR v. SANTHANATHAN CHETTIAR, **20 M. 88, F.B.=6 M. L.J. 281.**

(223)—*S.* 38—*Rescission of contract—Contract Act, s.* 12.—If a party to a contract seeks to enforce a contract which is void under s. 12 of the Indian Contract Act, 1872, on account of the absence of capacity to contract in the other contracting party, it is not permissible to give equitable relief. However, statutory relief can be given under ss. 38 and 41 of the Specific Relief Act when rescission of a contract is asked for on this ground. MONOSSEH v. SHAPURJI, **10 Bom. L.R. 1004.**

(224)—S. 38—*See* MINOR—CONTRACT BY MINOR, 25 C. 616=2 C.W.N. 330.

(225)—*Ss.* 38, 41—*Equity to repay consideration money.*—Where money has been advanced to an infant on mortgage with full knowledge of his infancy, a Court can, in the exercise of

Specific Relief Act (I of 1877)—*continued.*

discretion conferred on it by ss. 38, 41, Specific Relief Act, refuse to order its return by the infant to the other party. A Court of equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which as against that person the Legislature has declared to be void. (*Thurston* v. *Nottingham Permanent Benefit Building Society* L.R. (1902), 1 Ch. 1, *F.*) MOHRI BIBEE v. DHARMODAS GHOSE. **30 C. 539. P.C.=30 I.A. 114=7 C.W.N. 441=5 Bom. L.R. 421=8 Sar. 374.** [*R.*, 3 C.L.J. 260, 10 Bom. L.R. 1004, 52 P.R. 1904=85 P.L.R. 1904; *F.*, 33 P.R. 1904; *Appr.*, 28 B. 181=5 Bom. L.R. 916, 1908 A.W.N. 267=5 A.L.J. 674, 1 S.L.R. 221; *D.*, 5 A.L.J. 674.]

(226)—Ss. 38, 41—*See* LUNATIC, 10 Bom. L. R. 1004.

(227)—Ss. 38, 41—*See* MINOR—GENERAL, 33 P.R. 1904.

(228)—*S.* 39—*Limitation Act*, 1877, *art.* 91—*Suit for possession.*—A suit for possession of property could not be treated as barred, for the simple reason, that a decree declaratory of the plaintiff's right to have a material document, relating to the property, cancelled, might have been, but was not, sued for, and that such suit had became barred by time under art. 91, Limitation Act. BENI PERSHAD KOERI v. DEEDHANATH ROY, **27 C 156, P.C.=26 I.A. 216=4 C.W.N. 274=7 Sar. 580.**

(229)—*S.* 39—*Suit for cancellation of document—Suit based on non-registration of document—Discretion of Court.*—In a suit under s. 39 of the Specific Relief Act (I of 1877), the plaintiff, in the lower appellate Court, resiled from the position taken up by him in the first Court to the effect that the instrument in suit was a forgery, and only contended that it was of no avail, for non-compliance with s. 17 of the Registration Act (Act III of 1877). The lower appellate Court dismissed the suit. *Held* that the exercise of the discretion of a Court under s. 39 of the Specific Relief Act ought not to be interfered with except on strong grounds that the plaintiff had failed to show grounds, for any reasonable apprehension of serious injury within the meaning of the section, and that it was not for a Court acting under the section to go into the question whether the instrument required registration, or would be admissible in evidence. BHAWAR RAI v. JAHANDAR KHAN, **A.W.N. 1889, 147.** (1 A. 622, *R.*)

(230)—*S.* 39—*Sale of property with covenant for title—Third party claiming encumbrance—Suit by vendor for cancellation of encumbrance—Maintainbility.*—Where the plaintiff sold certain property with a guarantee to his vendees that the property was free from encumbrances, and the defendant, subsequent to the sale, obtained a decree enforcinga mortgage of the same property, a suit by the plaintiff (as vendor) against the defendant to have the deed of mortgage and the decree cancelled on the

Specific Relief Act (I of 1877)—*continued.*

ground of fraud, was held maintainable under s. 39 of the Specific Relief Act, I of 1877, because the encumbrance set up, if left unchallenged, would affect his pocket (the plaintiff standing in the shoes of the vendee for the purpose of meeting the incumbrance). JHUNA v. BENI RAM, **A.W.N. 1885, 192.**

(231)—*S.* 39—*Declaratory suit—Court Fees Act, sch, II, art.* 17 (iii).—*Held*, that cases under s. 39 of the Specific Relief Act are in the nature of simple declaratory suits, and are chargeable with Court-fees under sch. II, art. 17 (iii), Court Fees Act. DURGA BAKHSH v. MIRZA MOHAMMAD ALI BEG, **10 C. 123.** (5 A. 331, A.W.N. 1889, 124, *F.*)

(232)—*S.* 39—*Cancellation of instruments—Discretion—Court.*—When the exercise of the Court's discretion under Chapter V of the Specific Relief Act is invoked, it is obviously material to see whether the plaintiffs have acted with promptness and whether any delay on their part has altered the position of the defendants, as well as to consider what is the nature of their claim. *Held*, on the facts of the case, that the plaintiffs had not shown that they had reasonable apprehension that the award in dispute if left outstanding would cause them serious injury, nor was their conduct such as to call for an exercise of the Court's discretion under s. 39 of the Specific Relief Act in their favour. VALLI v. DATTOOBHOY, **2 Bom. L.R. 907=25 B. 10.**

(233)—*S.* 39—*Void or voidable instrument, suit for cancelling—Test—Reasonable apprehension of injury.*—Under s. 39 of the Specific Relief Act (I of 1877), any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue for cancellation thereof. The test to be applied in such cases is "reasonable apprehension of serious injury." Whether that exists or not, must depend upon the circumstances of the particular case with which the Court has to deal. It is not a fixed rule of law that a man, who has parted with the property, in respect of which a void or voidable instrument exists, cannot, in any case, sue to have such instrument cancelled. KOTRABASSAPPAYA v. CHENVIRAPPAYA, **23 B. 375.**

(234)—*S.* 39—*Landlord and Tenant—Suit for cancellation of deed—Suit for possession—Limitation.*—Where a landlord sues a tenant for the cancellation of an instrument under which the latter purports to hold his tenement, and the recovery of possession of the tenement is only put in as a consequential relief, the suit would come within s. 39 or s. 42 of the Specific Relief Act, and the relevant article of limitation would be either art. 91 or art. 120 of the Limitation Act. RAJA RAMPAL v. BALBHADAR, **4 Bom. L. R. 832=25 A. 1, P.C=29 I.A. 203=6 C.W.N. 849=8 Sar. 340.**

(235)—*S.* 39—*Cancellation of instruments—Another suit.*—On the 12th March 1899, C brought a suit against D to recover on a bond

Specific Relief Act (I of 1877)—*continued.*

passed by D to C: to this suit the defence was that the bond was void being passed for the balance due on wagering transactions. While this suit was pending, D brought a suit on the 13th June 1899, to have the bond mentioned above cancelled and delivered up to him, under the provisions of s. 39 of the Specific Relief Act, 1877: *Held*, that the form of specific relief under s. 39 of the Specific Relief Act, 1877, was founded upon the administration of a protective justice for fear; that, in this case, there could be no fear that D would suffer serious injury if he did not bring the second suit, for the plea which was the foundation of the second action was raised by him in the defence to the first suit, and that, therefore, no necessity for the bringing of the second action had arisen. CHHAGANLAL v. DHONDU, **5 Bom. L. R. 575=27 B. 607.**

(236)—*S.* 39—*Suit for cancellation of a forged receipt—Maintainable—Receipt whether on "instrument."*—*Held* that, under s. 39, a suit may be brought for the cancellation of a forged instrument [*Vide* III, (*b*)] since, if it is not cancelled and left outstanding, it may cause serious injury. *Held* also that a receipt is an instrument within s. 39 of the Act. VENKATA SRINIVASACHARLU v. KADAMBI KUNDALAM ANDALAMMA, **7 M.L.T. 270=5 Ind. Cas. 240.**

(237)—*S.* 39—*Balance struck in account book, whether a 'written instrument' within s. 39, Specific Relief Act—Suit for cancellation—Reasonable apprehension of injury.*—An entry of a balance in an account book binding, as an acknowledgment, the person referred to in it, is a written instrument within the meaning of s. 39 of the Specific Relief Act and such an entry may cause a person professedly bound to reasonable apprehension of serious injury. The question whether a suit for cancellation is maintainable depends on whether, in the particular case, the possible injury is so serious and the apprehension of it so reasonable that the Court ought to allow the suit. In the present case, the suit was not justified by reasonable apprehension of serious injury, and if the first Court had exercised its discretion and refused to enquire into the case on the merits it would have acted rightly. As, however, that Court had gone into the merits and come to a distinct finding on them, the appellate Court was held to be not justified in rejecting the suit *in limine*. Where the first Court has gone into the merits of the case and come to a finding in favour of a party, such party is entitled to ask that his suit should not be dismissed without a consideration of the merits by the appellate Court. GAUSA v. GANGA RAM, **12 P.R. 1890.**

(238)—*S.* 39—*Burden of proof—Suit for cancellation of document on the ground of forgery—Defendant bound to prove—Presumption against misconduct—Non-applicability—Evidence Act, ss.* 102, 114.—Where a person institutes a suit under s. 39 of the Specific Relief Act, to have a bond purporting to have been

Specific Relief Act (I of 1877)—*continued.*

executed by him adjudged a forgery and delivered up for cancellation, *held* that the *onus* of proof in the strict sense of the term is on the defendant, inasmuch as the defendant would fail if no evidence at all were given on either side (s. 102 of the Evidence Act). (3 C.P.L.R. 159, 7 C. 736, *R.*). There is no doubt a general presumption against misconduct of all kinds, but the value of this cannot but be small where the misconduct alleged is the very foundation of the suit. MAHADEO v. VITHOBA, **9 N.L.R. 8=18 Ind. Cas. 853.** (1 N.L.R. 169, *R.*).

(239)—*S.* 39—*Sale-deed — Consideration—Non-payment or inadequacy of—No ground for cancellation.*—The non-payment or inadequacy of the consideration mentioned in a sale-deed is not sufficient to justify the cancellation of the deed of sale. KILARU KOTTAYYA v. POLAVARAPU MALLAYYA, **13 M.L.T. 521=M.W.N. 1913, 637=19 Ind. Cas. 746.**

(240)—S. 39—Suit to set aside an award, maintainability of—*See* CIV. PRO. CODE, 1882, ch. XXXVII, 3 L.B.R. 4.

(241)—S. 39, suit under—Whether which party is in possession, if material—*See* CIV. PRO. CODE, 1908, s. 47, U.B.R. 1905, Civ. Pro. Code, 36.

(242)—S. 39—*See* COURT FEES, A.W.N. 1889, 124.

(243)—S. 39—*See* COURT FEES ACT, 1870, s. 7. IV, cl. (*c*), 5 A. 331=A.W.N. 1883, 55.

(244)—S. 39—Suit for cancellation of a document—Valuation—Court-fee payable on plaint in such suit—*See* COURT FEES ACT, 1870, s. 7, para 4, cl. (*c*) and art. 17, sch. II, 29 B. 207 =6 Bom. L.R. 1125.

(245)—S. 39—Proceedings before District Registrar ordering registration of document—Civil suit to cancel the document—Maintainability—*See* DECLARATORY DECREE, SUIT FOR—SUITS CONCERNING DOCUMENTS, 7 C. 736=9 C.L.R. 471.

(246)—S. 39—*See* HINDU LAW—ALIENATION, 3 Bom. L.R. 682.

(247)—S. 39—*See* LIMITATION ACT, 1908, art. 91, 5 A. 322=A.W.N. 1883, 49.

(248)—S. 39—Suit for cancellation of sale-deed as a sham—Cause of action—*See* LIMITATION ACT, 1908, art. 91, 15 M.L.J. 228=28 M. 349.

(249)—S. 39—Suit for declaration that a deed is inoperative—Cause of action—Limitation—*See* LIMITATION ACT, 1908, art. 91, 5 Ind. Cas. 497.

(250)—S. 39—*See* PRACTICE AND PROCEDURE, 5 Bom. L.R. 575.

(251)—Ss. 39, 40—*See* PARTITION—MISCELLANEOUS, 44 P.R. 1894.

(252)—Ss. 39 and 40—*See* PLAINT—AMENDMENT OF PLAINT, 186 P.R. 1882.

Specific Relief Act (I of 1877)—*continued.*

(253)—*Ss.* 39, 42—*Cancellation of instrument—Declaration of title—Sale-deed executed—Executant cannot obtain declaration of his title unless he gets the deed set aside.*—The executant of a sale-deed cannot obtain a declaration of his title to the property sold, unless and until he first gets the sale-deed set aside. PANNA BIBI v. HABIBA, **6 Ind. Cas. 891.**

(254)—*Ss.* 39 *and* 42—*Secondary evidence of a document the loss of which is not proved—Right of mortgagee in possession—Cancellation of leases by mortgagor.*—A mortgagee brought a suit under s. 39, Act I of 1877, for cancellation of leases executed by the mortgagor in favour of certain persons. A certified copy of the deed of mortgage was filed by the plaintiff. Having failed to prove the conditions and terms of the mortgage, the plaintiff in appeal admitted that the prayer under s. 39, Act I of 1877, could not be maintained, and prayed for a decree under s. 42, that the documents were not binding on him: *Held*, that having failed to prove the conditions of the mortgage which according to the plaint entitled the plaintiff to a decree for the cancellation of the lease under s. 39, Act I of 1877, he was not entitled to a mere declaratory decree under s. 42 of that Act, based solely on his admitted status as mortgagee, irrespective of the conditions and terms of the mortgage, and to the effect that the leases, having been executed by the mortgagor subsequent to the mortgage, were not binding on him. ASHGAR HUSAIN v. DURGA, **1 O.C. 18.**

(255)—*Ss.* 39, 42—*Declaratory decree—Principle to be followed in giving such decrees—Cancellation of an instrument where allowable.*—Under s. 39 of the Specific Relief Act, the mere fact that a person executes a deed by which he purports to convey to another property which in fact belongs to himself but is in the possession of a third party would not give such third party a cause of action for a suit for the cancellation of the instrument in question. Under s. 42 of the Specific Relief Act, the granting of a declaratory decree is a matter of discretion with the Court and such discretion would not be properly exercised by giving a declaration about a mere truism in law. NARENDRA BAHADUR SINGH v. BASUDEO MISRA, **14 Ind. Cas. 81.** (17 C. 933=17 I.A. 107, *R.*).

(256)—Ss. 39, 42—Suit for declaration that a document is void—Possession—Discretion—Appeal filed where no appeal lay—Cross objections—*See* CIV. PRO. CODE, 1908, O. XLI, r. 22, 8 A.L.J. 1297.

(257)—Ss. 39 and 42—*See* DECLARATORY DECREE, SUIT FOR — GENERAL, 1 O.C. Sup. 5.

(258)—*S.* 40—*Interest necessary to support suit.*—A person who has assigned all his interest in property, cannot maintain a suit for the cancellation of a document apparently executed by him and affecting the same property. IYYAPPA v. RAMALAKSHMAMMA, **13 M. 549.** [*R.*, 23 B. 375, 1 O.C. 175.]

Specific Relief Act (I of 1877)—*continued.*

(259)—*S.* 40—*Suit for cancellation of instrument—Power of Court to cancel same in part.*—Where a suit is instituted for the cancellation of án instrument it is competent to the Court to cancel the instrument in part and allow it to stand for the rest. KHUB SINGH v. JHAU LAL, **12 C.P.L.R. 13.**

(260)—S. 40—*See* CONTRACT ACT, 1872, s. 56, 7 C. 474=8 C.L.R 501.

(260-*a*)—S. 40—*See* Nos. 251, 252, *supra.*

(261)—*S.* 41—*Cancellation of instrument—Compensation to injured party.*—The ruling in *Mohori Bebee* v. *Dhurmodas Ghose* (5 Bom. L.R. 421) proceeds upon the principle that a Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which against that person the legislature has declared to be void. That decision is also an authority for the proposition that the circumstances of a particular case may be such, that having regard to s. 41 of the Specific Relief Act, 1877, the Court may, on adjudging the cancellation of an instrument, require the party to whom such relief is granted to make any compensation to the other which justice may require. DATTARAM v. VINAYAK, **5 Bom. L.R. 916=28 B. 181.**

(262)—*S.* 41—*Rescission of contract—Equitable relief.*—If a party to a contract seeks to enforce a contract which is void under s. 12 of the Contract Act, 1872, on account of the absence of capacity to contract in the other contracting party, it is not permissible to give equitable relief. However, statutory relief can be given under ss. 38 and 41 of the Specific Relief Act, 1877, when rescission of a contract is asked for on this ground. MONOSSEH v. SHAPURJI, **10 Bom. L.R. 1004.**

(263)—*S.* 41—*Sale by minor vendee deceived and acting in good faith—Refund of purchase-money—Equity—Ss.* 64, 65, *Contract Act.*—Plaintiff, when within 39 days of being *sui juris*, sold some land for Rs. 400 to the defendant, who was not aware that the vendor was an infant, but was deceived and acted in good faith. In a suit for possession of the land, *held* that plaintiff was liable to refund the purchase-money as a condition precedent to obtaining a decree for possession. The fact that ss. 64 and 65 of the Contract Act do not apply to the facts of this case does not exclude the application of s. 41 of the Specific Relief Act and the rule of equity therein contained. BALUK RAM v. DADN, **76 P.R. 1910=112 P.W.R. 1910=98 P.L.R. 1910.** (26 A. 342, 28 B. 181, 30 C. 539, 31 A. 21, *F.*)

(264)—*S.* 41—*Instrument executed by minor—Cancellation—Plea for compensation not taken in first Court—Second appeal—High Court's discretion to remand case for determination of question of compensation.*—The policy of law is not to encourage persons to take transfers and alienations from minors. A sale-deed was executed by minors, who afterwards sued for the cancellation of sale-deed and possession. In the first Court the defendants did not raise the plea that they were entitled to compensation under s. 41 of the Specific Relief Act. This point was, therefore, not gone into by the first Court, nor was the evidence taken upon it. The plea was taken in appeal before the District Judge for the first time, but he also did not consider it: *Held*, under the circumstances, that the High Court did see no reason in second appeal to remand the case to the lower Court for determination of the question of compensation. GOKUL v. KARAN SINGH, **8 Ind. Cas. 782.**

(265)—*S.* 41—*Minor—Mortgage by de facto guardian—Existence of just debt by deceased father—Invalidity of mortgage—Restoration of benefit received by father — Not allowed—Muhammadan Law—Compensation to defendant—When granted.*—Where a minor sued for the cancellation of a mortgage made after his father's death by his paternal uncle as his *de facto* guardian in order to pay off a just debt incurred by the father. *Held* that the paternal uncle had no authority, as the *de facto* guardian, to make the mortgage. Where the father himself, during his lifetime, did not charge the land in his possession with the payment of that debt, there was no legal liability enforcible against the minor plaintiff or against the estate in his hand to pay his father's debt, and he should not be compelled to restore the amount of his father's debt to the defendant before he is granted any relief (144 P.R. 1883, 4 P.R. 1913, F. B. and 74 P.R. 1910, *R.*) Under s. 41, Specific Relief Act, the Court has ample power, on adjudging a cancellation of a mortgage debt in favour of the plaintiff, to require the latter to make any compensation to the other which justice may require. But where the defendant, as in his instance, has been in possession of the land for the last 12 years and has been enjoying its produce during that time, and has been sufficiently compensated, nothing further can reasonably be demanded of the plaintiff as compensation to the defendant. CHOGHATTA v. ASA MAL, **30 P.R. 1913=17 Ind. Cas. 371.**

(266)—S. 41—Contract by minor—Suit upon contract—Restoration of benefit—Costs—*See* CONTRACT ACT, 1872, ss. 11, 64, 65, 9 Ind. Cas. 124=4 S.L.R. 250.

(267)—S. 41—Applicability—Promissory note—Minority—*See* MINOR—GENERAL, 8 A.L.J. 1058.

(268)—S. 41—*See* Nos. 225, 226, 227, *supra.*

(268-a) S. 42—*See* DECLARATORY DECREE, SUIT FOR.

(269)—*S.* 42—*Scope of section.*—Where the right is of a remote and speculative nature, s. 42 of the Specific Relief Act does not apply. NAIPAL v. BACHANI, **A.W.N. 1886, 140.**

(270)—*S.* 42, *application of.*—*Held* that the proviso to s. 42 of the Act would not bar a suit for a declaration, in a case where the Civil

Specific Relief Act (I of 1877)—*continued.*

Court, if the plaintiff was found to be out of possession, was not competent to grant consequential relief in the shape of a decree for possession as a tenant at fixed rates. BRIJ BHUKHAN v. DURGA DAT, 20 A. 258=A.W.N. 1898, 41.

(271)—*S.* 42—*Declaratory decree — When may be granted.*—The plaintiffs, zemindars, got possession of the suit land from the defendant (the tenant), because the latter cut down the trees on the land contrary to the terms of the tenancy. The defendant took proceedings under s. 95, cl. (*n*), of Act XII of 1881 (Rent Act) and made an application to the Revenue Court to be replaced in possession, and the latter Court made an order awarding possession to him, but he did not take any steps to execute the order. Thereupon, the plaintiffs instituted the present suit in the Civil Court for a declaration of their right to the land in suit and for the setting aside of the Revenue Court's order awarding possession to the defendant. The defendant contended that the suit was not maintainable under s. 42 of the Specific Relief Act, I of 1877. *Held*, allowing the contention of the defendant, that the suit could not be maintained. S. 42 of the Specific Relief Act, I of 1877, is intended to provide a remedy only where no other remedy exists. The order of the Revenue Court awarding possession to the defendant did not affect the plaintiffs' right, and it was open to the latter to bring a suit to eject the defendant without resorting to the extreme legislation of s. 42 of Act I of 1877. Moreover, the defendant did not put the Revenue Court's decree in force, and so long as he did not put it in force, the plaintiffs might remain in possession of the land. And even if he puts his decree in force, the questions between the parties might be tried by instituting proceedings under s. 35 of the Rent Act or by an action in the Civil Court. RAM DIHAL v. UDASI, A.W.N. 1885, 176.

(272)—*S.* 42—*Declaratory relief under, when granted by Courts—Cause of action.*—The declaratory relief contemplated by s. 42 of the Specific Relief Act, I of 1877, is to be given to the person seeking it only when no other kind of relief is available to him. The proviso to the section means that the declaration is not to be made unless it is necessary for the ends of justice. So, where the reversioners of a Hindu widow (who inherited her husband's property as his heir) sued for a declaration that a mortgage executed by her deceased husband had been paid off (the suit having been brought at a time when the mortgagee, having obtained a decree on the mortgage, attached the mortgaged property in execution), *held* that there was no cause of action for the suit, and that it could not be maintained under s. 42 of the Specific Relief Act, because it was open to the plaintiffs either to set up their case when the mortgage decree was sought to be executed, or if they fail, to bring a regular suit by way of appeal. JHARI SINGH v. GANGA KUMAR, A.W.N. 1885, 215.

Specific Relief Act (I of 1877)—*continued.*

(273)—*S.* 42 — *Declaratory suit—Cause of action.*—There were two brothers J and H. J had a son D, the plaintiff. H had two sons, the defendants in the suit. J and H were possessed of self-acquired shares in certain villages. In 1875, J applied to the Revenue Court that the name of his son D might be recorded in respect of his villages, and the petition went on to say that, as D was of weak intellect, any sale or mortgage that he might execute without the permission of his cousins should be invalid and that, upon his death, his cousins should be entitled to succeed to the property. Both J and D were examined before the Revenue officer who disposed of the petition, and, in the result, D's name was recorded with the name of H's sons as owners of an eight-annas share in the villages. Then, in 1885, D of his own motion and without being instigated by any other person, went before the Revenue authorities and applied for the amendment of the *khewat* and the *jamabandis* by a separate record of his name being made in respect of four annas out of the eight annas share. Nothing was done by the defendants before the application to throw a cloud upon the right asserted by D. The Revenue officer passed orders that until steps were taken by D, for a partition of the property, so that the share might be ascertained, no such amendment could be made. Treating this order as the ground for a suit, plaintiff came to the Civil Court and sought relief against the defendants in the shape of a declaratory decree. *Held*, that no sufficient materials were shown on the face of the plaint to entitle the plaintiff to come into Court for a declaratory decree, that nothing was described as having been done by the defendants in contravention of the rights which the plaintiff asserted and that those rights were never denied before suit. *Held*, further, that even if there were a cause of action, the suit would still fail, because the plaintiff could have sought further and better relief than a bare declaration and he might have gone and could even go and ask the Revenue Court for partition of the immoveable property. BAIJ NATH v. DUDH NATH, A.W.N. 1886, 93.

(274)—*S.* 42—*Butwara proceedings after private partition—Declaratory decree, nature.*—A declaratory decree, simply declaring that the plaintiff's lands are separate, without at the same time determining where those lands are, and how they are bounded, is not warranted by the provisions of s. 42 of the Specific Relief Act. Under that section, the plaintiff can only obtain a declaratory decree with reference to *specific* property. CHURAMAN SINGH v. ANOOP SINGH, 11 C.L.R. 533.

(275)—*S.* 42—*Suit for declaration.*—The grantee of a village from a Zamindarni had the grant made to him ratified by her successors. He then applied to the Collector for separate registration of the village in his name according to the terms of the grant and the ratification. The Collector registered his village separately, but, on appeal to Government, the

Specific Relief Act (I of 1877)—*continued.*

separate registration and assessment was ordered to be cancelled. The grantee now sued the Secretary of State for a declaration that the Government's order directing the cancellation of the separate registration and assessment was illegal and *ultra vires*. Long before the suit, the order of Government had been carried out by the Collector. *Held*, in these circumstances and with reference to s. 42 of the Specific Relief Act, that a suit for a declaration did not lie. The plaint contained also a prayer "for such other relief as the circumstances of the case may require," and even if this could be held to refer to a prayer for consequential relief, the suit was bad for non-joinder, as in such a suit the zemindar was a necessary party. FISCHER v. SECRETARY OF STATE FOR INDIA IN COUNCIL, **19 M. 292** [*Reversed*, 22 M. 270, P. C., 26 I.A. 16=3 C.W.N. 161.]

(276)—*S.* 42, *Specific Relief Act*—"*Legal character*," *scope of*.—The words "legal character" are wide enough to include the right of franchise and also the right of being elected as a Municipal Commissioner. SABHAPAT SINGH v. ABDUL GAFFUR, **24 C. 107.**

(277)—*S.* 42—*Suit under*—*Parties*.—A stranger to a contract, of which specific performance is sought, cannot be a party to the suit. LUCKUMSEY OOKERDA v. FAZULLA CASSUMBHOY, **5 B. 177.**

(278)—*S.* 42—*Declaratory decree*—*Discretion of Court*—*Judicial exercise of discretion*.—*Held* that, where an appellate Court in a suit brought by a minor for declaration that a sale made by the minor's mother of property which had come to her from her father was void as against the minor, dismissed the suit without going into the merits thereof solely on the ground that it appeared to be collusive, this was not a judicial exercise of the discretion given to the Court by s. 42 of Act I of 1877, but that the Court ought to have heard the appeal on the merits. JHANDU v. RAMJI LAL, **A.W.N. 1895, 148.**

(279)—*S.* 42—*Civ. Pro. Code*, s. 578—*Declaratory decree*—*Improper or irregular exercise of discretionary power*—*Objection thereto*.—An improper or irregular exercise of the discretionary power conferred on a Court by s. 42 of the Specific Relief Act does not, in itself, constitute a sufficient ground for the reversal of a decree which is not open to any objection upon the ground of jurisdiction or of the merits of the rights of the parties. Such an error is covered by s. 578, Civ. Pro. Code. MUHAMMAD MAHSHUK ALI KHAN v. KHUDA BAKHSH, **9 A. 622=A.W.N. 1887, 226.** (8 A. 365, *R.*) [*R.*, 6 O.C. 324.]

(280)—*S.* 42—*Grant of declaratory decrees under*—*Discretionary with Courts*—*Inherent power in Courts to stay or dismiss vexatious suits*—*Court-fees Act*—*Plaints for mere declaration* ad valorem *fees not leviable on*.—One, D, was the common ancestor, through whom the parties to this suit traced their relationship. His eldest son, who was the last holder of the Zemindari, succeeded him as Zemindar and died, having adopted his daughter's son, the second defendant, and leaving a will in his favour. The third and fourth defendants were the sons of a deceased son of D. The first defendant was a surviving son of D and plaintiff was the son of the first defendant. In the present suit plaintiff prayed for the following declaration:—(1) that the will in favour of the second defendant was not binding on him; (2) that the adoption of the second defendant was not valid and (3) that the proceedings in a previous litigation in which the plaintiff's father, the present first defendant, had unsuccessfully disputed the said adoption were not binding on the plaintiff. As to the prayer in respect of the will, *held*, on the plaintiff's own allegations, the will would be but a *brutum fulmen* so far as his rights were concerned. It might be that, if the will were not declared invalid, it could be used as a piece of evidence against the plaintiff's case, that the estate was inalienable; but the bringing into existence of any and every piece of evidence against the plaintiff's rights could not entitle him to get relief by way of declaration (31 I.A. 67, *R.*) As to the adoption, the prayer for a declaration that it was not valid was equally unsustainable. Where the conditions warranting the validity of the adoption were in truth wanting, but the party alleging the adoption pretends that those conditions existed, a person, whose rights would in law be affected by the adoption so set up, will have the right to sue for, and obtain, a declaration that that adoption was invalid in order that the cloud sought by the adoption to be cast upon the plaintiff's title might be removed. But, in the present case, the transaction of gift and acceptance in adoption of the second defendant was so totally nugatory and ineffective in relation to the Zemindari, that it would be futile to make the subject of judicial investigation for the purposes of the grant of specific relief by way of declaration. As to the remaining prayer in respect of the prior litigation, plaintiff hereby seeks to re-open questions definitely settled by decisions pronounced upon the amplest materials and after the most careful consideration, during litigation covering three-quarters of a century and comes forward with fictitious allegations invented to bolster up a totally baseless claim which is liable to be dismissed as vexatious. When a Court of competent jurisdiction holds that a suit has been instituted vexatiously, it is competent for the Court to stay the suit or to dismiss it without proof, in exercise of the Court's inherent power to prevent abuse of its process. On the question of court-fees payable on the plaint in this suit, *held*, upon the face of the plaint, it is one for a mere declaration and the proper stamp-duty is that due in respect of the declarations sought for and not the *ad valorem* duty calculated with reference to the value of the Zemindari, the property in regard to which the declarations are sought. VIJAYASAWMY THEVAR v. SASIVARNA THEVAR, **15 M.L.J. 469=28 M. 560.**

Specific Relief Act (I of 1877)—*continued.*

(281)—*S.* 42—*Right to relief of declaration under, whether affected by delay in suing.*—Inasmuch as a period of limitation has been prescribed even for suits where the grant of the relief sought is within the discretion of the Court, mere lapse of time short of the period of limitation should ordinarily be held not to be a good ground by itself for refusing such relief. So, where a Court finds that a mortgage in question in the suit is not binding on the plaintiffs therein, it ought to give them a declaratory decree to that effect, and not refuse the same on the ground of a delay of some years in bringing the suit filed, however, within the prescribed period of limitation. ATHIKARATH NANU MENON v. ERATHANIKAT KOMU NAIR, **21 M. 42.**

(282)—*S.* 42—*Dismissal of declaratory suit under s. 42 of the Specific Relief Act—Subsequent suit for possession—Civ. Pro. Code, s. 43.*—S. 43 of the Civ. Pro. Code does not apply so as to bar a suit for recovery of possession of land in relation to which the plaintiff had previously brought a suit under s. 42 of the Specific Relief Act for a declaration of title, which suit had been dismissed on the ground that the plaintiff was not in possession. MOHAN LAL v. BALASO, **14 A. 512=A W.N. 1892, 80.** (8 C. 819, *F.*) [*R.*, 7 C.P.L.R. 63, 17 A. 174.]

(283)—*S.* 42—*Crim. Pro. Code (Act V of 1898), s. 146—Order under, effect on possession—Suit by one party against the other for declaration, if lies—Specific Relief Act (I of 1877), s. 42.*—Where, in a proceeding under s. 145, Crim. Pro. Code, between the plaintiff and the defendants, the Magistrate being unable to decide which party was in possession passed an order under s. 146 of the Code, and appointed the Collector as Receiver to take possession of the land. *Held*, that the plaintiff was justified in instituting a suit for declaration of title against the defendants and was not bound to ask for recovery of possession of the land. The suit was therefore not bad under s. 42 of the Specific Relief Act. THE ADMINISTRATOR-GENERAL OF BENGAL v. BHAGWAN CHANDRA RAY CHAUDRY, **15 C.W.N. 758.**

(284)—*S.* 42—*Declaratory decree—Denial of title to specific rights*—Under s. 42 of the Specific Relief Act, I of 1877, any person whose title to any right as to any property is denied can sue for a declaration of his title and may obtain a declaration of his title if he does not omit to seek further relief which he may be able to seek. KALIDAS JIVRAM v. GOR-PARJORAM HIRJI, **16 B. 309.**

(285)—*S.* 42—*Denial of plaintiff's title—Cause of action—Declaratory suit—Agreement—Document of legal value*—Nudum pactum.—A suit for the declaration of an abstract right cannot be maintained. There must be some infringement or threatened infringement of the plaintiff's right. The plaintiff must allege and prove a denial of his right before his plaint is filed; the cause of action must be antecedent to the suit, and not subsequent. An agreement between representative Hindus and Mahomedans, by which the Hindus undertook to stop the playing of musical instruments during their festivals, and the Mahomedans promised that there would be no dispute about the slaughter of cows, cannot be interpreted as a denial of the title of a Mahomedan to slaughter cows, so as to enable him to maintain his suit for a declaration of his title. Some Mahomedans signed a document in which they promised that they would not create any quarrel or disturbance or litigation in connection with the sacrifice of cows; *Held*, that the document was a mere *nudum pactum* of no legal force or efficiency. MAHOMED YAKUB v. MANGRU RAI, **7 Ind. Cas. 318.**

(286)—*S.* 42—*Title and possession—Suit for declaration of, as to possession only.*—A person who alleges title as well as possession cannot be allowed to ask for a declaration as to his possession only as it would leave the real matter of dispute, *i.e.*, the question of title undealt with and undisposed of. MUTA ALI v. MEHTAB RAI, **48 P.R. 1892.**

(287)—*S.* 42—*Suit for declaration of fact of plaintiff's possession—Absence of allegation of plaintiff's title.*—S. 42 of the Specific Relief Act will not admit of a plaintiff asking for a declaration, not that he had any title in the ordinary sense of the word to the property in dispute, but merely that he was in possession of it and that he was entitled to the legal benefits and consequences of such possession, not against all the world, but merely against the defendant who had no title. SAYAD BADR-UD-DIN v. SAYAD ABDUL KARIM, **12 P.R. 1888, F.B.** [*R.*, 48 P.R. 1892.]

(288)—*S.* 42—*Declaration—Denial of title—Practice and procedure.*—S. 42 of the Specific Relief Act entitles a person to institute a suit against any person denying or interested to deny his title to such character or right as the section describes. Hence, where there has been no denial no suit for declaration can be instituted. CHINTAMAN v. MAHADEV, **6 Bom. L.R. 283.**

(289)—*S.* 42—*Rent-decrees obtained by defendant against plaintiff's tenants, if amount to dispo session—Throwing cloud on title—Declaratory suit, proper remedy.*—Where the plaintiff sued for declaration of title to certain lands, alleging that the same were in possession of his tenants, but that the defendant had thrown a cloud on his title by recovering rent-decrees against some of the tenants:—*Held*, that the plaintiff could not in this suit ask for any further relief than a mere declaration of title, and was proceeding in the right manner in suing for declaration of title only. SATISH CHUNDER BHUTTACHARYA v. SATYA CHURN MAJUMDER, **14 C.W.N. 576=5 Ind. Cas. 531.** (13 C. 147, 15 M. 307, 26 C. 11, *Rel.*)

(290)—*S.* 42—*Suit for declaration of title by zamindar against tenants who had got their own names recorded as owners in the khewat—Further relief for ejecting tenants not asked—Suit*

Specific Relief Act (I of 1877)—*continued.*

not barred—Agra Tenancy Act (Local, II of 1901), s. 56—Ejectment—Verbal denial of landholder's title by tenants.—Defendants, who were occupancy tenants of a certain grove land, managed to have their own names recorded in the *khewat* as proprietors in respect of the plot of land. The *zamindar* sued for a declaration of his title. Defence was that the suit was barred by the proviso to s. 42, Specific Relief Act, inasmuch as the plaintiff had omitted to ask for the further relief of ejectment of the defendants. *Held*, that the mere fact that the tenants had got their names recorded in the *khewat* and had thereby denied the landholder's title, did not give the landholder a right to sue for ejectment in a Civil Court (21 A. 143, *R.*) and that the suit was not barred by the proviso to s. 42, Specific Relief Act, as no further relief under the circumstances could have been asked for by the *zamindar*.—*Obiter dicta.*—Tenants cannot be objected otherwise than under the provisions of s. 56, Agra Tenancy Act (II of 1901). A mere verbal denial of landholder's authority by tenant is not sufficient ground for ejectment under the Act. INAYAT ULLAH KHAN v. KHUDA BAKSH, **1 Ind. Cas. 635.**

(291)—*S.* 42—*No prayer for possession of land of which plaintiffs were not in possession-Punjab Tenancy Act* (XVI *of* 1887), *s.* 98 (1)—*Suit under, for a declaration of title.*—B died leaving his properties by his will to his brothers, the plaintiffs, and his sons, the defendants. On the death of B, mutation was effected in favour of the sons, and the plaintiffs who were in possession of a certain land were recorded as tenants-at-will in respect of it. The defendants got a notice of ejectment issued against the plaintiffs. The brothers then sued in the Revenue Court to contest the notice of ejectment, and the Revenue Court directed them to establish their title in a Civil Court, under s. 98 (1) of the Punjab Tenancy Act. The plaintiffs accordingly sued for a declaration that the will was valid and that the defendants had no right to oust them from the land of which they (the plaintiffs) were in possession. *Held*, that the proviso to s. 42 of the Specific Relief Act was no bar to the suit, since the plaintiffs' suit related to the validity of the will, only so far as it referred to the lands with regard to which the Revenue Court directed them to have their title established, and the fact that there were other properties covered by the will, of which possession was not asked for did not affect the question at issue at all. BISHAN DASS v. MASSU, **82 P. R. 1909=130 P. W. R. 1909=3 Ind. Cas. 600=143 P. L. R. 1909**, (182 P. R. 1883. 12 P. R. 1899, 16 B. 608; 28 B. 567, *R.*)

(292)—*S.* 42—*Suit for declaring that a customary right does not exist—Maintainability—Cause of action.*—A suit for a declaration that a customary right does not exist entitling the defendants to take a certain portion of the fruit crops in a certain grove cannot be maintained under s. 42 of the Specific Relief Act (I of 1877). Such a suit was held to have no cause of action. CHANDAN SAHU v. RAM PRASAD SINGH, **A. W. N. 1885, 293.**

Specific Relief Act (I of 1877)—*continued.*

(293)—*S.* 42—*Suit for declaration of invalidity of marriage between co-defendants, whether maintainable.*—In a suit by the brothers and uncle of second defendant for a declaration that her (2nd defendant's) marriage with the 1st defendant, which admittedly took place with the usual ceremonies, but with the consent only of the maternal grandfather of the girl, was null and void, *held*, that the suit must be dismissed on the ground that the plaintiffs had no *locus standi*, they being not entitled to such a declaration under s. 42 of the Specific Relief Act, inasmuch as the declaration sought, if granted, would be inoperative as regards the persons whom it would profess to affect as any decree obtained by third parties with reference to the marriage of the co-defendants would not make the question a *res judicata* in any future suit between themselves. Whatever may be the effect, as a judgment *in rem* under s. 41 of the Evidence Act, of a decree passed in a suit between Hindus and Muhammadans to have a marriage declared valid or invalid, such a decree should only be passed when the suit is instituted by one party to the marriage against the other party to it. SOHEL SINGH v. MT. SADI, **99 P.R. 1888.**

(294)—*S.* 42—*Suit by the plaintiff for a declaration that the defendant is not his lawful wife—Crim. Pro. Code (Act V of 1898), s. 488.*—A suit by a person against whom an order for maintenance in favour of defendant has been made by a Magistrate under s. 488 of the Crim. Pro. Code, is maintainable in a Civil Court for a declaration that the defendant is not his wife. MUSSAMMAT BAKHAN v. ALA BAKHSH, **100 P.L.R. 1903=26 P.R. 1903.** (21 P.R. 1894 (Cr.), 18 A. 29, 20 W.R. 58 (Cr.), 41 P.R. 1876, *R.*)

(295)—*S.* 42—*Suit for declaration of the invalidity, on the ground of fraud, of an arbitration award and of decrees based thereon—No further relief claimed—Suit held to be maintainable.*—The plaintiff brought her suit to have an arbitration award, alleged to have been made on the basis of an invalid agreement, declared null and void as against her; that if for any reason the award, so far as it related to the two suits referred to as Nos. 2 and 9 of 1899, be considered binding upon the plaintiff, the remaining portion of the arbitration award might be held invalid as against the plaintiff; also that the decrees which had been passed in the suits Nos. 2 and 9 of 1899 might be declared invalid. No further relief was claimed, nor did it appear that for the present in that suit any further relief could be claimed by the plaintiff. The basis of the suit was the allegation that the plaintiff's consent to the arbitration had been obtained by fraud. *Held* that s. 42 of the Specific Relief Act had no application to such a suit and that under the circumstances the suit was maintainable. GOMTI KUNWAR v. DARAB KUNWAR, **A.W.N. 1902. 187.** (7 A. 884, *D.*; 218 A. 9, *R.*)

Advocate High Court
Jammu & Kashmir

Specific Relief Act (I of 1877)—*continued.*

(296)—*S.* 42—*Suit for a bare declaration that he was entitled to collect debts due to the estate of a deceased, a succession certificate having been granted to another.*—Plaintiff, alleging that he was the undivided paternal uncle of one S, deceased, brought this suit for declaration that he was entitled to collect the plaint mentioned debts payable to S in respect of which debts defendant, widow of S, had already obtained a succession certificate authorising her to collect them. Overruling the decision of the Court of first instance that, inits discretion, it ought to refuse to make the declaration, asked for, *held*, there is no reason for refusing to grant a decree merely on the ground that the plaintiff asks for a mere declaration that he was entitled to collect the debts and asked for nothing else. It might be that he required nothing more and in those circumstances to refuse to make the decree asked for would be a denial of the justice and the suit as framed was maintainable under s. 42 of the Specific Relief Act. CHINNAPPA CHETTIAR v. THULASI AMMAL, **15 M.L.J. 399.**

(297)—*S.* 42—*Suit for declaration of abstract right—Cause of action—Succession Certificate Act* (VII *of* 1889), *s.* 8.—Where a Hindu widow applied for a succession certificate to enable her to collect the debts of her deceased husband and was opposed by the next reversioners, upon the ground that they had no objection to her enjoying only the interest on the money during her life, and an order to that effect was passed, whereupon she brought a suit for declaration that she was entitled to the whole sum of money, *held*, that the suit was maintainable ; the limitation upon her power to get in the money, having been placed at the instance of the reversioners. KESHO RAM SINGH v. RAM KUAR, **7 A.L.J. 311 = 5 Ind. Cas. 593 = 32 A. 316.**

(298)—*S.* 42—*Act* VIII *of* 1859, *s.* 15—*Power to adopt—Declaration, suit for, that power is invalid—Maintainability.*—S. 42 of the Specific Relief Act has been substituted for s. 15 of Act VIII of 1859. No suit will lie by a reversionary heir for a declaration that a certain letter, alleged to have been written by the deceased husband of the widow, giving the widow authority to adopt a son, is a forgery, and for an injunction restraining the adoption. RUN BAHADUR SINGH v. MUSSUMUT LUCHO COOWAR, **4 C.L.R. 270.** (1 Boul. 137, *F.*)

(299)—*S.* 42—*Suit for declaration that defendant is not adopted son—Who can bring suit.*—A suit to set aside an adoption made by a Hindu widow could only be brought by the nearest reversioner. It is only when he colludes or refuses without sufficient cause to sue that more distant heirs can sue. (10 B.H.C. 351, 8 I.A. 14, *R.*) The principle of this rule is that every declaratory decree must be ancillary to some consequential relief obtainable thereby, and it is plain that no such relief is possible in the case of distant and contingent, and not presumptive reversionary heirs. (2 I.A. 169.) And also because a mere contingency, which confers no present or certain interest, will not suffice as a basis for such a declaration. The grant of relief in declaratory suits being not a matter of right but of discretion, a claim so obviously stale cannot be entertained where no right to bring the suit has been clearly established. ANYABA v. DAJI, **20 B. 202.**

(300)—*S.* 42—*Hereditary trust held by father, right of adopted son to—Nature of the devolution of the trust—Suit for mere declaration not maintainable.*—Plaintiffs sued for a declaration that, as the adopted son of the first defendant, he had acquired an interest in the management of the hereditary trust held by his adoptive father. *Held* if the devolution of the office of hereditary trustee vested in the first defendant is to be held as governed by the rules bearing on the holding of the joint family property, plaintiff could have claimed joint possession and management and the present suit for a mere declaratory decree was unsustainable with reference to s. 42 of the Act. Further, if the devolution of the trust followed the descent of separate property, plaintiff was not entitled to claim any right inherent in the office so long as his father held it. In either view, therefore, the present suit was unsustainable NATARAJA CHETTY v. KOLANDAVELU CHETTY, **15 M.L.J. 456.**

(301)—*S.* 42—*Declaratory suit, for declaration that defendant is not the adopted son of the plaintiff--Maintainability.*—Where an adoption alleged to have been made by the plaintiff has been set up under circumstances, which would operate to the prejudice of the plaintiff if he did not take steps to have it declared not true, there is such an infringement of the plaintiff's rights, if he is a sole owner, as to entitle him to sue for, and obtain, a declaration that the defendant, the alleged adoptee was never taken by him, the plaintiff, in adoption. To enable plaintiff to institute such a suit, it is not necessary that the claim must have been set up by the adoptee himself as by his having said or done anything with reference to the adoption. CHINNASAWMY MUDALIAR v. AMBALAVANA MUDALIAR, **29 M. 48.**

(302)—*S.* 42--*Suit for a declaratory decree that a certain boy was the adopted son of the plaintiff's husband.*—Plaintiff's right of guardianship of a boy based on the allegation, that he was the adopted son of the plaintiff's husband, was disallowed by the District Judge under s. 48, Guardian and Wards Act, VIII of 1890, on the ground that the adoption was not proved. Plaintiff filed a suit to obtain a declaration that the boy was the adopted son of her husband, and the prayer was that the plaintiff should get the custody of the boy in virtue of a declaration, that he was the adopted son of the plaintiff's husband, or some other relief. *Held*, that the suit did not fall within the purview of s. 42, Specific Relief Act, 1877, and the declaratory decree could not be granted. *Held*, further, that though an appellate Court when fully accepting the findings of fact and the deductions to be drawn from them should not-

Specific Relief Act (I of 1877)—*continued.*

capriciouly interfere, yet when it takes a different view of the facts or draws different deductions from them, it is bound to exercise its discretion and to uphold or upset the judgment of the first Court as may be proper in the particular case before it. MUSSAMMAT KAMRANI v. MUSSAMMAT KALWANTI, **24 P.L.R. 1900.** (13 C. 3, *F.*)

(303)—*S.* 42—*Buddhist Law—Will—Adoption of son.*—It has been ruled that a Buddhist has no power to make a will. As pointed out in several of the cases in the High Courts of India the power of granting declaratory decrees has to be exercised with great caution so as to prevent useless and mischievous litigation. The *kittima* adopted children of Maung Lu Tha sued his natural children by a divorced wife for a declaration of title on the ground that they had reason to believe that the defendants would make a claim to the inheritance on Maung Lu Tha's death. A decree was given declaring that the defendants had no right in the property that might be left by Maung Lu Tha, and that, as far as they were concerned, the plaintiffs had a right to the whole of such property. *Held*—that the lower Courts were wrong in deciding what were the contingent rights of the plaintiffs as against the defendants in the estate of Maung Lu Tha in the event of his death, and that there should merely be a decree declaring on the issue raised that plaintiffs possessed the legal character of the adopted children of Maung Lu Tha. MA MIN KIN v. MAUNG PO THEIN, **U.B.R. 1892—1896, Vol. II, 623.** (9 W.R. 460, 12 W.R. 26, 23 W.R. 150, 1 A. 688, 1 M. 65, 8 A. 60, 5 C. 512, 8 C. 12, 21 W.R. 430, *R.*) [*R.*, U. B.R. 1897—1901, Vol. II, 116.]

(304)—*S.* 42—*Declaration, suit for — Consequential relief— Suit for declaration, that defendant not* mutwali *or not legally appointed* mutwali—*No prayer for possession or appointment of another* mutwali—*Whether suit maintainable.*—The plaintiff asked (1) for, a declaration that a certain *wakfnamah* was invalid, and that the defendant had not acquired any valid title as *mutwalli* under that document, or (2) that, if the *wakfnamah* be valid, then the defendant had not been legally appointed *mutwalli*. But the plaintiff did not ask for recovery of possession or for the removal of the defendant and the appointment of a trustee duly appointed: *Held*, that, under s. 42, Specific Relief Act, the suit was incompetent, as the plaintiff, being able to seek further relief, had not done so. (4 C.L.J. 568, 13 C. 147, 1 M. 40, 3 B. 230, *R.*) The further relief referred to in the proviso to s. 42, Specific Relief Act, is further relief in relation to the legal character or right to any property to which the plaintiff is entitled and whose title to such character or right the defendant denies or is interested in denying, and it must be relief appropriate to and consequent on the right or title asserted. ERFAN MANDAL v. SAMIRUDDIN MANDAL, **15 Ind. Cas. 552.** (13 M. 324, *R.*)

(305)—*S.* 42 — *Monastery and monastery land* — Poggalika *gift of such property to pongyi—Whether such gift gives donee any right to property—Where donee's right is disputed—Whether donee in such case has a cause of action—Whether suit lies to protect the rights of pongyi—Where such gift was made before* 1876—*Whether jurisdiction of Civil Courts is barred—Lower Burma Land and Revenue Act* (*No.* II *of* 1876), *ss.* 4 (*b*) *and* 56.—U sued A for a declaratory decree, under s. 42 of the Specific Relief Act, to declare his right with respect to certain land, alleging that, in the year 1236 B.E., a monastery was built on it, and that it and the land around it was given him as a *poggalika* gift; that, in the year 1261 B.E., the monastery fell into disrepair, and he tried to pull it down and build a new one on the site and that the defendants tried to prevent him from so doing. The defence was that the monastery was given as a *poggalika* gift but not the monastery land. *Held* that, as the gift appeared to have been made in 1226 B.E., or before that date and long before the Lower Burma Land and Revenue Act came into force, by s. 4 (*b*) of the Act, nothing in Part II of the Act applied to the land and that the land did not come within the provisions of s. 56 of the Act; and that, therefore, the jurisdiction of the Civil Court was not barred with respect to it. *Held* also that, as the plaintiff alleged that he was forcibly prevented from building a fresh monastery by certain persons, whom or whose representatives he sued and that, as the defence did not allege that he was not forcibly prevented, but that the land did not belong to him, in other words, that his claim to the land was contested, there was a cause of action, which was peaceful possession for the future. It was also urged that the second Court was wrong in holding that, when the gift of the monastery was made, the land was included in the gift. *Held* that the second Court agreed with the first Court in its view of the evidence, and that, as there was a concurrent finding of fact, that finding could not be questioned on second appeal. It was further urged that the plaintiff could not sue in his personal capacity. *Held* that, as in *poggalika* gifts the person to whom the offering is made has a right to keep it, a priest, who has received a *poggalika* gift, has a right to sue to protect his rights in it. MRA PAW v. U PYIN NYA, **14 Bur. L.R. 277.**

(306)—*S.* 42—*Plaintiff out of possession of temple and its properties—Right to manage in alternate years—Suit for mere declaration—No prayer for possession—Maintainability of suit.*—A plaintiff who is out of possession of a temple and its properties cannot maintain a suit for declaration alone. The facts that the plaintiff would be entitled to possession only in alternate years, and that as the Court could not give him relief by way of possession (on the date of hearing) all that he would be entitled to is a mere declaration of his rights, do not in the least affect the question. APPU PILLAY v. PERUMAL PILLAY, **23 M.L.J. 118=12 M. L.T. 168=16 Ind. Cas. 630.**

Specific Relief Act (I of 1877)—*continued.*

(307)—*S.* 42—*Mahomedan Law*—Waqf—*Persons entitled to use the property—Declaration of right—Code of Civil Procedure* (*Act* V *of* 1908), *ss.* 92, 93—*Permission to sue.*—The plaintiffs, without permission of the Legal Remembrancer, brought a suit for declaration that a certain *Idgah* and the lands adjoining were *wakf* property. The Court below found the property in dispute to be endowed property. *Held* that the plaintiffs were entitled to maintain the suit, as they were Mahomedans resident in the district and had a right to frequent and use the mosque for devotion, and the lands adjoining were appurtenant to the mosque. MUHAMMAD ALUM v. AKBAR HUSAIN, **7 A.L.J. 797 =6 Ind. Cas. 835=32 A. 631.** (5 A. 497, 7 A. 178, *F.*; 8 A. 31, *D.*)

(208)—*S.* 42.—*Suit for declaration—Religious endowment*—Wakf—Mutuwalli—*Assignment by the* mutuwallis—*Services performed by the sons of a* mutuwalli—*Suit by the sons to have the alienations declared illegal—Civ. Pro. Code* (XIV *of* 1882), *s.* 539—*Mosque, service of.*—The plaintiffs brought this suit against their father (defendant 3), his cousins (defendants 4, 5) and their mortgagors and purchasers defendants 1, 2) to recover possession of certain lands; alleging that the lands were granted in *inam* to the Kazi family, to which the plaintiff and defendants 3, 4, 5 belonged, that the *inam* was granted to defray the expenses connected with the service of a certain mosque, that as the defendants ceased to perform the services of the mosque, the service was latterly performed by the plaintiffs, and that eight annas share in the hands of the defendants 3, 4, 5, was at first mortgaged and then sold to defendants 1, 2 by defendants 3, 4, 5. The plaintiffs, therefore, claimed that as the lands were held in *inam* for mosque service and as the service was not performed by defendants 3, 4, 5, the plaintiffs who performed the service were entitled to recover possession of the lands. The lower Court held that the claim was not maintainable, because plaintiffs' father was still alive and had not transferred his right to his son; and as long as defendants 3, 4, 5, had not been removed from their office in the mosque, the plaintiffs were not entitled to claim possession in the suit as framed. *Held*, reversing the decree of the lower Court that the claim was maintainable.—*Per Parsons, J.*—"The result of the authorities seems satisfactorily to establish the right of the plaintiffs to bring a suit to have the alienations made by their father and uncles set aside and the *wakf* property restored to the service of the mosque. They are not merely beneficiaries, they are members of the family of the *mutuwallis* and the persons on whom on the death of the present *mutuwallis* the office of *mutuwalli* would fall by descent, if indeed, it has not already fallen by abandonment and resignation. The plaintiffs as beneficiaries and members of the family and next heirs, are entitled to sue the *mutuwallis* and their assignees to have the alienations set aside and the *wakf* property restored to the *wakf*. If they are also the holders of the office or *mutuwalli*, they can obtain the possession of the *wakf* property themselves to be by them applied to the purposes of the *wakf*."—*Per Ranade, J.*—"A person to be entitled to bring a suit in respect of *wakf* property must have a beneficiary interest as a *wakf* in this case was given partly for service and partly for maintenance in which latter case the plaintiffs have an interest along with defendands 3, 4, 5; they are beneficiaries and are not utter strangers. The plaintiffs have thus a legal character and are entitled to a right to sue under s. 42 of the Specific Relief Act. As far as their suit seeks a declaration against strangers they are entitled to sue, and s. 539 does not come in their way. The suit, therefore, is maintainable for the declaratory relief which is their principal cause of action, and which is included in the larger relief prayed for. The relief about possession might also be claimed under certain circumstances if it is proved that they have succeeded to the office of the *mutuwalli*." KAJI HASSAN v. SAGUN, **1 Bom. L.R. 649=24 B. 170.**

(309)—*S.* 42—*Declaratory suit—Plaintiff's chance of succession to the property in suit very remote—Dismissal of suit.*—Where the plaintiff, whose claim of succession to the property in the suit was a very remote one, sued to set aside a mortgage of the property, and the suit was dismissed, the Chief Court declined to make an order of remand for further enquiry in the case. TARA SINGH v. MUSSAMMAT CHANDI, **51 P. L.R. 1908.**

(310)—*S.* 42—*Suit by a remote reversioner—Nearer reversioner alive—Death—Collusion.*—Plaintiff sued for a declaration of the invalidity as against his interest, of a mortgage executed by defendant No. 1, a Hindu widow, to defendant No. 2, plaintiff, being a reversioner of 1st defendant's husband, M. M's daughter's son, a nearer reversioner, was alive, when the suit was brought, but died pior to the disposal of the appeal. *Held*, that, as a nearer reversioner was alive at the date of suit, plaintiff's suit was unsustainable, in the absence of an allegation or proof that the nearer reversioner and the widow colluded; the fact that the nearer reversioner died after suit, could not better the position of plaintiff so far as the maintainability of suit in its inception was concerned. SHEOPAL SINGH v. MUSSAMMAT BUNDOO KUAR, **8 O C. 81.** (26 A. 238, *R.*; 1 A.L.J. 380, *Diss.*; 8 I.A. 14, *Expl.*)

(311)—*S.* 42—*Hindu widow—Alienation of property to her daughter—Suit for declaration by reversioner.*—When a Hindu widow succeeding to the separate landed estate of her deceased husband makes a gift of such estate to her daughter, the reversioners are entitled to sue for a declaration that the person alleged to be the daughter is not the daughter of the deceased and that they are reversionary heirs. SHEORATAN RAI v. LAPPU KUAR, **A.W.N. 1881, 160.**

Specific Relief Act (I of 1877)—*continued.*

(312)—*S.* 42—*Declaration of title, suit for—remote reversioner—Limitation—Setting up adverse right—Cause of action.*—D, a separated Hindu, and his son A, died in 1891 on the same day, the father dying first. A's son, S M, died a week later, leaving his mother H and his grandmother M; M got possession of the property, and in 1908 executed a will in favour of her daughter S. The reversioners of D brought a suit in 1908 for declaration that the will would have no effect on their reversionary right. S set up her right to the property, ignoring that of H. *Held*, that, even during the lifetime of H, the plaintiffs were entitled to institute a suit for declaration only under the provisions of s. 42, Specific Relief Act. *Held*, further, that the suit was not barred by limitation. Mutation of names in M's favour was more or less an equivocal act and might possibly have given a cause of action, but when, in 1908, M specifically declared that the heir to the property was S, and S herself asserted her title, the plaintiffs acquired a cause of action sufficient to entitle them to sue. SHEORAJI v. RAMJAS PANDY, **8 A.L.J. 454=9 Ind. Cas. 501.**

(313)—*S.* 42—*Alienation—Widow of occupancy tenant—Suit for declaration by deceased's collaterals whether maintainable—Punjab Tenancy Act* (XVI *of* 1887), *s.* 60.—The collaterals of a tenant with rights of occupancy can sue for a declaration that an alienation by his widow is of no effect on their reversionary interest; and s. 60 of Act XVI of 1887 relates only to objections by landlords to alienations, and the making of special provisions for these does not even imply that no one but a landlord can object. GAMI v. MUSSAMMAT KHIO, **205 P. R. 1889.** (159 P.R. 1879, *D.*) [*Appr.*, 4 P.R. 1900, Rev.; *R.*, 31 P.R. 1896, F.B., 39 P.R. 1898.]

(314)—*S.* 42—*Declaratory decree—Reversioner suit by, against Taluqdar's widow—Discretion of Court—Oudh Estates Act I of* 1869.—I S died on the 4th June 1877 possessed of a Taluka, governed by the Oudh Estates Act (I of 1869). He left three widows and the first appellant as the first married of the widows succeeded to the taluka. The other widows subsequently died. On the 25th December 1896 the first appellant executed a will by which she purported to declare the second appellant, her sister's son as her heir and successor to the estate, and the will was subsequently duly registered. The respondent sued the appellants, alleging himself to be the next reversionary heir to the estate. He contended that the first appellant's will was invalid for the purpose of transferring the estate, and he asked for a declaratory decree to that effect. The appellants denied that the first appellant was in possession as a Hindu widow and contended that she was absolute owner of the estate under an oral will of her husband, and that the mere execution of a will did not give the respondent a cause of action to obtain a declaratory decree. The Court of first instance granted the decree as prayed, and that decree was affirmed on appeal

Specific Relief Act (I of 1877)—*continued.*

by the Court of Judicial Commissioner. Under s. 42 of the Specific Relief Act, 1877, a claim to a declaratory decree is not a matter of right but rests with the judicial discretion of the Courts. Considering the circumstances of the present case it was *held* that the decisions of the Courts below made in the deliberate exercise of a discretion entrusted to them by law should not be interfered with. THAKURAIN JAIPAL KUNWAR v. BHAYIA INDAR BAHADUR SINGH, **7 O.C. 239=26 A. 238, P.C.=8 C.W.N. 465=14 M.L.J. 149=6 Bom. L.R. 495=31 I.A. 67=8 Sar. 625.** [*R.*, 8 O.C. 21.]

(315)—*S.* 42—*Declaratory suit—Reversionary rights.*—In a suit by G under s. 42 of the Specific Relief Act for a declaration that a certain transaction, and a decree and a subsequent conditional sale by his mother M, which flowed out of it, were ineffectual as against his reversionary rights which, by his plaint he alleged, would come into existence as a present right upon the death of M, it appeared that the property in respect of which the declaration was sought originally belonged to M's father, that the latter died a separated Hindu and left behind him five daughters, one of whom was M. *Held* that, according to the Hindu Law, all the five daughters took the share of their father jointly on his death, that, though, for the purposes of their own enjoyment, they might divide the estate among themselves and enjoy it in severalty for their own convenience, they could not by such division interfere with or alter the rules of Hindu Law as to the succession thereto on the death of all or any one of them, that on the death of the plaintiff's mother M, her interest in the estate would go to her surviving sisters, that on the death of any one of them, the surviving sisters would succeed to the interest of the last deceased until by the death of all of them the succession to the estate in its entirety passed elsewhere, and that the probability of the plaintiff ever succeeding to this property was of so deferred and remote a kind that this was not a case in which the Courts would exercise in favour of the plaintiff the discretion vested in them by s. 42 of the Specific Relief Act. MANIK RAM v. GAUPATA MISR, **A W.N. 1886, 22.**

(316)—*S.* 42—*Compromise by Hindu widow—Declaratory suit.*—A Hindu woman K, on the death of her widowed mother, succeeded to the immoveable properties left by her father. She executed a deed of gift in favour of a person. Then P and B sued her and her donee to have it declared that they were entitled to succeed her. The suit was compromised. According to the compromise, the woman agreed that the property, then in her possession should be taken by the plaintiffs and her co-defendant in moieties at her death. Then G and Z brought this suit for a declaration that the terms of the compromise were not binding upon them and were inoperative so far as they were concerned. They alleged in the plaint that they were persons entitled to maintain this action under s. 42, Specific Relief Act,

Specific Relief Act (I of 1877)—*continued.*

being entitled to a legal character or right of property which had been denied by the defendants. *Held* that, assuming the plaintiffs had a legal character or right to succeed as heirs to the woman K, the effect of the compromise and the suit was practically to deny that there were any persons more nearly entitled to the property in question than the particular persons named, that, in the event of the death of the parties, and if litigation should arise in the future, it would be easy to argue that that was a declaration by one who was a member of the family, which showed that no one was entitled to take the property nearer than the parties to the former action, and therefore the case was remanded to the lower Court to consider whether or not the plaintiffs were persons who were entitled to the legal character or right alleged by them under s. 42, Specific Relief Act. GULAB SINGH v. KHUSHAL KAUR, **A.W.N. 1886, 307.**

(317)—*S.* 42—*Cause of action for declaratory suit by reversioner—Execution of will by widow.*—The execution of a will by a limited owner such as a Hindu widow does not, as a general rule, afford a sufficient reason for granting a declaratory decree to the effect that the will was invalid for the purpose of transferring the estate. JAIPAL KUNWAR v. INDAR BHAHADUR SINGH, **26 A. 238, P.C.=31 I.A. 67=8 C.W.N. 465=6 Bom. L.R. 495=14 M.L.J. 149=8 Sar. 625.** [*R.*, 8 O.C. 81, 28 M. 560=15 M.L.J. 469, 3 C.L.J. 224.]

(318)—*S.* 42—*Right of presumptive heir to sue for declaration of reversionary right.*—The expression "legal character" means a positive recognized by law. A person who stands in the position as presumptive heir upon the death of a Hindu widow is entitled to maintain a suit for a declaration of his reversionary right. RAO HIRALAL v. THAKUR GULAB SINGH, **10 C.P.L.R. 1.** (4 A. 16, 22 C. 354, *F.*; 10 M. 90, 6 C. 528, *R.*)

(319)—*S.* 42—*Suit to set aside a mortgage by Hindu widow—Reversionary heirs—Discretion of Court—Proper case—Declaration in dismissed suit—Legality.*—Where a Hindu widow mortgaged a portion of her husband's estate for a small sum of money which might be paid off by the widow in her lifetime, a suit by the reversionary heirs, specially when there is a dispute as to who the nearer reversionary heir or heirs are, is premature and not maintainable. A Civil Court has ample discretion under s. 42 of the Specific Relief Act to exercise the jurisdiction vested in it and to decline to set aside, during her lifetime, an alienation made by a Hindu widow when no proper case has been made out by the party seeking to have such alienation set aside. (9 C. 817, 10 C. 324, *D.*) A declaration affecting the plaintiff in a suit which is dismissed is not legal. CHHOTU MAHTON v. MUSSTT. SHEOBARTI KOER, **3 C.W.N. 445.**

(320)—*S.* 42—*Rights of a Hindu daughter, a next reversioner, to sue for construction of will of father and for declarations incidental thereto.*—A Hindu daughter is entitled, during the lifetime of her mother, to maintain a suit for the construction of a will of her deceased father and declaration incidental thereto, especially where the mother has allowed her rights, if any, to be barred by limitation and where the immediate conduct of the executors will be determined by the construction. A suit for the construction of a will is maintainable only when some immediate necessity for the construction is established: "perpetuation of testimony" is not the only ground on which declaratory suits of this description are allowed. SRINIBASH DAS v. MONMOHINI DASI, **3 C.L.J. 224.** (2 I.A. 169, 15 B.L.R. 83, *D.*; 29 C. 260, 32 C. 62, 3 B.L.R. 362, 21 W.R. 86, note, *F.*)

(321)—*S.* 42—*Suit by reversioner to declare his interest.*—A suit by a reversioner to declare that he is entitled to the property after the widow's death is not maintainable when there is no allegation of wrongful act on the part of the widow or denial of his title on her part. MUHAMMADI v. MUSSAMMAT JIWANI, **42 P.R. 1898.**

(322)—*S.* 42—*Cause of action—Hindu Law—Widow—Suit against reversioners for declaration that widow was competent to transfer property for necessity.*—The plaintiff, a Hindu widow of Arora caste, residing in the town of Kohat, sued her husband's reversioners for a declaration that she was entitled to alienate family property in her charge in order to discharge certain *bona fide* expenditure partly incurred and partly to be incurred. The plaintiff had served a notice on the defendants giving them intimation of her intention to alienate but they paid no attention to it. The defendants denied the plaintiff's title to the property and pleaded that the suit did not lie. *Held* that, in the absence of allegation by the plaintiff that the defendants had overtly disputed her rights to alienate, the suit was premature. MANNA SINGH v. MUSSAMMAT BAI JAN, **76 P.L.R. 1904.**

(323)—*S.* 42, *Act* I *of* 1877 (*Specific Relief*)—*Conversion of life-estate into absolute estate.*—Where a Hindu widow relinquishes her life-interest in a portion of property inherited from her husband in favour of a reversioner, and the latter, in consideration thereof, gives an absolute interest to the widow in another portion of the estate, the next reversioner may maintain a suit for a declaration during the lifetime of the widow, that the deed under which the above alienations were made are invalid. HEM CHUNDER SANYAL v. SARNAMOYI DEBI, **22 C. 884.** (10 C. 324, P.C., *R.*; 23 W.R. 314, P.C., 8 C. 761, 17 C. 933, P.C., *D.*) [*F.*, 7 Bom. L.R. 622, 8 M.L.T. 355=18 M.L.J. 309, 35 C. 939 =12 C.W.N. 837=8 C.L.J. 280; *R.*, 29 C. 260, 3 C L J. 224, 10 C.P.L.R. 1, 16 P.L.R. 1902=17 P.R. 1902; *D.*, 2 C.W.N. 132, 31 M. 446; *Cons.*, 25 B. 129.]

(324)—*S.* 42—*Adoption, suit to set aside—Suit by distant reversioner—Pleadings.*—The mere

Specific Relief Act (I of 1877)—*continued.*

possibility of succeeding to the estate held by the widow for life does not confer on the person who has it the right to sue to contest an adoption. Such a suit must be brought either by the presumptive reversioner, or, in the case of his refusal to sue or precluding himself by act or word from suing, or of his concurrence in the alleged wrongful act or collusion, by the next reversioner. In such a case, the plaint must state why the presumptive heir does not sue, and the Court will, in the exercise of its discretion, decide whether the plaintiff is competent to sue, and whether it is necessary that any other party should be joined. GYANENDRO NATH ROY v. LOBONGOMUNJORI DABI, **11 C.L.R. 198.** (6 C. 764, P.C., *F.*)

(325)—*S.* 42—*Reversioner's right of suit—When widow's act prejudicial.*—A reversioner's right to bring a declaratory suit under s. 42 of the Specific Relief Act exists not only when the alenation in dispute is by the widow herself, but it applies also to a case where she may alienate in her capacity as guardian. The right to declaratory relief exists where an act prejudicial to the estate is done by the widow. SUNKARA RAMIAH v. SUNKARA SUBBAMMAH, **M.W.N. 1912, 70=13 Ind. Cas. 489.** (33 A. 430, 26 A. 606, *R.*)

(326)—*S.* 42—*Declaratory decree—Discretion of the Court—Will—Hindu widow—Privy Council—Practice.*—Under s. 42 of the Specific Relief Act, a claim to a declaratory decree is not a matter of right, but it rests with the judicial discretion of the Courts. The execution of a will by a limited owner, such as a Hindu widow, does not as a general rule, afford a sufficient reason for granting a declaratory decree. Their Lordships of the Privy Council are always slow to reverse the decision of the Courts below made in the deliberate exercise of a discretion entrusted to them by law. THAKURAIN JAIPAL KUNWAR v. BHANJA INDAR, **6 Bom. L.R. 495, P.C.=26 A. 238=8 C.W.N. 465=14 M.L.J. 149=31 I A. 67=8 Sar. 625.** [*R.*, 8 O.C. 81, 28 M. 560=15 M. L.J. 469, 3 C.L.J. 224.]

(327)—*S.* 42—*Suit for declaration in anticipation of future litigation—Maintainability.*—Under s. 42 a suit for a declaration in anticipation of possible future litigation cannot be maintained. RAJASING ZAMINDAR v. JHINGRAO TELI, **6 C.P.L.R. 51.**

(328)—*S.* 42—*Declaration where plaintiff's property not transferred—Cause of action—Discretion—Hindu law — Mitakshara — Joint family—Power of undivided co-parcener to alienate property—Consent of co-parceners—Benefit of family.*—The mere apprehension that complication may arise in future is not a proper ground for the granting of a declaratory decree. Where therefore a sale-deed impeached by the plaintiff is found not to include his share, he is not entitled to a decree either for possession or for a declaration of title. *Per Karamat Hussain, J.*—In a Hindu family governed by the Mitakshara in these provinces, one sharer has no authority without the consent of his co-sharers to dispose of his undivided share of the joint family property even for the benefit of the joint family. JAMNA PRASAD v. JAGDEO, **6 A.L.J. 11=A.W.N. 1908, 163=5 M.L.T. 56=1 Ind Cas. 83.** (16 A. 369, *Not F.*)

(329)—*S.* 42—*Suit for declaration—Bom. Act V of* 1879, *s.* 37—*Crim. Pro. Code (Act X of* 1882), *s.* 133.—In a suit for a declaration that certain land on which the plaintiff had erected an *otta* was his property and not that of Government, where it appeared that the Magistrate had made an order, under s. 133 of the Crim. Pro. Code, for the removal of the *otta* as an obstruction to the public way, *held* that the public roads were vested by s. 37 of Bom. Act V of 1879 in the Government of Bombay who were thus "interested to deny" the plaintiff's title to the land, and that, therefore, under s. 42 of the Specific Relief Act, the plaintiff (subject to the discretion of the Court) was entitled to a declaration as against the Government of his right to the land, and that he was not called upon to wait until the Government had taken possession of the land. The Magistrate's order under s. 133, Crim. Pro. Code, is not a conclusive determination of the question of title. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. JETHABHI KALIDAS, **17 B 293.** (15 C. 460, *R.*) [*R.*, 22 B. 330, 76 P.L R. 1904.]

(330)—*S.* 42—*Suit for declaration of non-proprietor's right to hold their houses free of charge—Maintainability.*—The right to hold a house free of charge is a continuously existing and very real though incorporeal 'property' and so a suit can be brought for a declaration that certain non-proprietary residents of a village are entitled to hold their houses in the village *abadi* free of any demands on the part of the proprietors for fees and dues. RALA MAL v. BIR SINGH, **48 P.R. 1887.**

(331)—*S.* 42—*Decree for arrears of rent against a judgment-debtor since deceased—Order for sale of joint ancestral proprety in execution of the said decree—Suit by some of the descendants for declaration of the invalidity of the order for sale—Non-joinder of parties, dismissal of suit for—Discretion of Court.*—In execution of two decrees for arrears of rent obtained by the present defendant against a certain person, since deceased the defendant made an application to the Collector under the Rent Act for attachment and sale of the judgment-debtor's ancestral property, which was ordered accordingly. The sons of the judgment-debtor objected to the sale but their objection was disallowed. Instead of filing their objections in the Collector's Court, the grandsons and great-grandsons of the judgment-debtor instituted the present suit for a declaration that the entire share in the property was not liable to be sold. They did not limit their claim to a declaration that their own interest was not liable to be sold. Though the sons of the judgment-debtor were alive, they were not made parties to the suit. The

Specific Relief Act (I of 1877)—*continued.*

Court of first instance dismissed the suit on the ground of non-joinder of the sons of the judgment-debtor as parties to the suit. *Held*, that the Court of first instance had exercised a wise discretion in refusing to grant the relief under s. 42 of the Specific Relief Act. It is obviously inconvenient that the Court should intervene in a matter which is pending in the Collector's Court, particularly as the Legislature has provided a definite course, for persons in the position of plaintiffs to take in a case where property, in which they claim to have an interest, is being attached and sold. MAHARAJA OF BENARES v. RAMJI KHAN, **27 A. 138 = A.W.N. 1904, 190 = 1 A.L.J. 512.**

(332)—*S. 42—Suit for declaration of right to recover rent—Maintainability—Act* XII *of* 1881 *(N.W.P. Rent Act), s.* 148, *proviso.*—A suit by a person for a declaration of his right to recover his proportion of rent in consequence of a decree passed adversely to him by a Revenue Court in a previous suit instituted under Act XII of 1881, to which previous suit the present defendants were parties, is one which could be maintained under s. 42 of the Specific Relief Act I of 1877 and his power to sue is specially provided for by the proviso to s. 148 of the Rent Act XII of 1881. SABT ALI v. BASHIER DAULAT, **A.W.N. 1885, 194.**

(333)—*S. 42—N.W.P. Rent Act* (XII *of* 1881), *s.* 95—*Civil and Revenue Courts—Jurisdiction.*—Where the tenants of certain lands sued their zemindar, alleging that they had been erroneously entered in the settlement papers by the Settlement Officer as occupancy-tenants whereas they were really tenants at fixed rates, and seeking for a declaration that the said entry made by the Settlement Officer was wrong and should stand as an entry exhibiting them as tenants at fixed rates, *held* that the suit was not cognizable by the Civil Courts. It is true that the Civil Courts alone have jurisdiction to grant declaratory decrees under s. 42. Specific Relief Act, but it is equally true that it is not every action for a declaration of right, title, or interest, that can be taken cognizance of by the Civil Courts. By the special rule contained in s. 95, N.W.P. Rent Act, it is provided that the Civil Courts shall not take cognizance of any dispute or matter on which any application of the nature mentioned in that section might be made. The plaintiffs might have applied to have the nature of their tenure determined as provided and therefore the cognizance of the Civil Courts is barred. SADIK ALI v. LIAKAT ALI, **A.W.N. 1887, 214.**

(334)—*S. 42—Possession—Suit for declaration of title-Application for partition in Revenue Court—Objection—Land Revenue Act* (*Act* III *of* 1901), *ss.* 111, 233 (*k*).—The plaintiffs, who were lambardars, objected, under s. 111 of the Land Revenue Act, to an application for partition made by the defendant, alleging that the latter had no share in the Zemindari, and they were required to institute a suit in the Civil Court. Accordingly the present suit for declaration was brought. *Held*, that the

Specific Relief Act (I of 1877)—*continued.*

plaintiffs, being admittedly in possession as lambardars, all that was needed was a declaration to the effect that the defendant had no title, and such a declaration having been made by the Civil Court, it would not be necessary for the plaintiffs to seek any further relief. The suit, therefore, was not barred under the provisions of s. 42, Specific Relief Act. *Held* also, that s. 233 (*k*), Land Revenue Act, did not apply to the case, as it was provided for by s. 111 of that Act, and the decision of the Civil Court referred to in the latter section meant the "final decision" of that Court. RAM CHARAN v. RAM PARTAB, **5 A.L.J. 614 = A.W.N. 1908, 249.**

(335)—*S. 42—Suit to stay partition by Collector—Act* VIII *of* 1876 (*B.C.*).—Where a person, under s. 42, Specific Relief Act, sues for the purpose of staying a partition which was ordered by the Collector under the Act of 1876, on the ground of a private partition having been already made, he must prove that there has been such a private partition and that under it he is entitled to and was separately in possession of some specific portion of the property again sought to be partitioned by the Collector; and he can have no declaration affecting the rights of other shares in the parent estate. KALUP NATH SINGH v. LALA RAMDEIN LALL, **16 C. 117.** (3 C.L.R. 453, *D.*)

(336)—*S. 42—Mortgage by qualified owner—Suit by reversioner for declaration of his right to redeem—Discretion of Court.*—Where a woman, having only a life interest, mortgaged a portion of the property, and the reversioners sue for a declaration of their right to redeem the mortgage in the event of her death, the Court should not in the exercise of the discretion conferred by s. 42, make the declaration. Because, the woman's right to redeem might possibly become time-barred before her death, and the mortgagees are entitled to the benefit of this contingency. Further, it may be that, when the right now vested in her passes to the reversioners they may be unwilling or unable to exercise it. MUTHUKARUPPAN v. KASINATHAN PILLAY, **2 M.L.T. 67.**

(337)—*S. 42—Mortgage by Karnavan of a Malabar Tarwad to a stranger—Re-demise by mortgagee to the Karnavan who is in possession—Suit by other members for a mere declaration that mortgage is not binding.*—The first and second defendants, the Karnavan and senior Anandravan of a Malabar Tarwad, mortgaged Tarwad properties to the third defendant, a stranger, who leased the same to the first and second defendants. The first defendant never parted with possession of the property. Plaintiffs, the other members of the Tarwad, sued for a declaration that the mortgage was not binding on the Tarwad. *Held*, that the plaintiffs need not have claimed possession, and that a declaration was the only relief open to them. URUMI KORAN v. AHMAD, **6 M.L.T. 157 = 3 Ind. Cas. 41.** (17 M. 232, *Appl.*)

(338)—*S. 42—Declaratory decree—Mortgage—Redemption of mortgage.*—The plaintiffs in

Specific Relief Act (I of 1877)—*continued.*

this suit, alleging that they had mortgaged certain land to the defendants and put them in possession thereof, and that the defendants had fraudulently obtained in the settlement department an order to record their names as proprietors of the mortgaged property, sought, under s. 42 of the Specific Relief Act, to obtain a declaration of their proprietary right to the land and cancellation of the order made in the settlement department. The Court of first instance gave the plaintiffs a decree as sought. The defendants appealed to the District Judge, who reversed the decree of the Court below on the ground that the plaintiffs might have sued to redeem the land, and therefore, under the proviso to s. 42 of the Specific Relief Act, could not lawfully be granted a declaratory decree. The plaintiffs appealed to the High Court. *Held* that the appeal must prevail and that the Judge had misapplied the proviso to s. 42 of the Specific Relief Act. It was not incumbent on the plaintiffs to sue for redemption of mortgage as well as for a declaration of their title as mortgagors. RAM CHARAN v. DURGA PRASAD **A.W.N. 1884, 78.**

(339)—*S.* 42—*Purchaser of mortgaged property, suit by, for declaration that sale-deed set up by mortgagee is invalid as against him--Maintainability—Redemption whether to be sought.*—The purchaser of mortgaged property may institute a suit for mere declaration that a sale-deed set up by the mortgagee is fraudulent and invalid as against him and in such a suit, the plaintiff is not bound to sue for redemption. SUBRAHMANYA MUDALY v. CHITHRAPUTRA MUDALY, **9 M. L. J. 165.**

(340)—*S.* 42—*Declaratory decree— Burden of proof—Suit by usufructuary mortgagee in possession that property is not saleable in execution of decree on a prior mortgage.*—When a plaintiff seeks from the Court a declaratory decree, it lies upon him to make out his title affirmatively. Although in the case of a party in possession defending his title it may be different, still, where the party in possession sets the Court in motion, and seeks a declaration establishing his title against a third party, the plaintiff is in the same position as any other plaintiff and must make out his case. The Court will not in such a case exercise the discretionary power conferred upon it by s. 42 of the Specific Relief Act in favour of the plaintiff. A usufructuary mortgagee in possession sued for a declaration that the mortgaged property was uot saleable in execution of a decree for sale obtained by another mortgagee on a mortgage prior to his own, on the ground that the prior motgagee did not make him a party to his suit. *Held*, that in such a case the plaintiff had to prove not only that he had obtained possession as a usufructuary mortgagee and was still in possession, but that his mortgage still subsisted and had not been discharged. CHITTA SINGH v. DEBI DIN, **24 A. 170.**

(341)—*S.* 42—*Suit to declare mortgage invalid—Some items under mortgage not in plaintiff's possession—Rest in his possession—Entire*

Specific Relief Act (I of 1877)—*continued.*

suit not to be dismissed—Suit maintainable as regards latter.—A suit to declare that a mortgage of several items of property was not binding on the plaintiff is not liable to be wholly dismissed, under s. 42, Specific Relief Act, merely because no prayer was asked for recovery of possession of some items which were not in plaintiff's possession (15 M. 225, *Not F.*) The declaration prayed for by the plaintiff may be given in respect of the items in his possession. CHOMU HENGSU v. SANRARA BELCHAMPADA. **8 M.L.T. 358=7 Ind Cas. 867.**

(342)—*S.* 42—*Mortgagee's possession is that of mortgagor—Mortgagor can maintain a suit for declaration.*—The possession of a usufructuary mortgagee is the possession of his mortgagor. If any third person effects a transfer of the property to the detriment of the interest of the mortgagor, he can sue for a declaration of his title, notwithstanding the fact that the mortgagee is in possession. Section 42 of the Specific Relief Act does not bar such a suit. MUSSAMMAT AKASI v. JUTAGIR *alias* PARSRAMGIR, **6 Ind. Cas. 166.**

(343)—*S.* 42—*Successive mortgages— Suit for declaration that prior mortgage not redeemable without paying amount of second mortgage--Further relief—Payment of mortgage amount by mortgagors—Right to have appeal heard not barred.*—In July 1877, defendants mortgaged to plaintiff certain immoveable propertywith possession. In September 1879, defendants by a second mortgage, further charged the same land to the extent of another amount which it was agreed should be repaid on the day when the first mortgage fell due. The balance of Rs. 400 due on the second mortgage not having been paid, plaintiff prayed for a declaration that defendants could not redeem the mortgage of 1879, without paying the said sum of Rs. 400. Defendants objected that the suit was not maintainable for the reason that consequential relief was available. This objection was held to be not maintainable. There was no further relief arising out of the cause of action sued upon, *viz.*, the refusal to recognize the mortgage of 1879 to which plaintiff could be said to be necessarily entitled in the present case. It was open to the plaintiff to elect that, so far as he was concerned, the mortgage should subsist,and to maintain the present suit merely to clear away the doubts which had been thrown upon the validity of the mortgage by the defendant. At the bearing of this appeal it was contended by way of preliminary objection that, after the institution of the suit, the defendants had sued for and obtained redemption of both the mortgages actually paying up the amount of the mortgages and recovering possession of the mortgaged property, and that therefore there was really nothing left for the defendants (appellants) to gain by prosecuting their appeal further and the appeal should not be allowed to proceed. *Held* that the defendants were clearly entitled to have their appeal heard and determined

Specific Relief Act (I of 1877)—*continued.*

except when they themselves might have elected to abandon it. JODHA v. BUDH RAM, **35 P. R. 1890.**

(344)—*S.* 42—*Mortgage-decree—Purchase by mortgagee in execution—Suit maintainable for declaration of judgment-debtor's exclusive right to property sold.*—When plaintiff, the mortgagee in execution of a decree obtained by him, sought to sell the property mortgaged, defendants, brothers of the mortgagor judgment-debtor, set up claims to it which struck at the root of the mortgage, and, if sustained, would have rendered it practically useless. In this suit, instituted by the plaintiff, praying for a declaration that the property belonged to the mortgagor exclusively and not jointly with his brothers as claimed by them, the Court of first instance, which found that the mortgagor was the sole owner and that the claim of the defendants was untenable, was held to have rightly exercised its discretion in having given the plaintiff the declaratory decree sought by him under s. 42 of the Specific Relief Act. WAMANRAO v. RUSTOMJI, **21 B. 701.** [*R.*, 6 C.L.J. 74=11 C.W.N. 732, 36 C. 726=10 C.L.J. 189=1 Ind. Cas. 549.]

(345)—*S.* 42—*Adverse possession—Mortgage.*—In a suit for declaration of title, the defendants raised two pleas, (1) adverse possession, and (2) bar under s. 42 Specific Relief Act. It appeared that more than 12 years prior to the suit, one J executed a sale-deed by which he sold the equity of redemption to the plaintiff, and that the property so was and continued to be in the possession of the of the mortgagees. The defendants were the representatives of J. *Held* that, as the defendants admittedly had not been in possession and had admitted that the mortgagees had been in possession from a period prior to the date of sale, no question of adverse possession arose as between the plaintiffs and the defendants; *held* also that the suit was not barred by s. 42 of the Specific Relief Act, as the plaintiff could not have asked for any further relief, as an action for possession could not be maintained against the defendants, because they were never in possession, and as an action for redemption could not be maintained against the defendants as they were not the mortgagees. BIRANGI v. RAM SARAN, **A.W.N. 1887, 103.**

(346)—*S.* 42—*Declaratory suit without consequential relief.*—A suit to have the true construction of a statute declared and to have an act done in contravention of the statute rightly understood pronounced void and of no effect, is not the sort of the declaratory suit prohibited by s. 42 of the Specific Relief Act. There may be cases where no further relief could be asked. And the decree in such a suit cannot be said to be inexecutable, for the declaration of the void and illegal character of the act done against the statute, would mean the restoration or maintenance of the act or order which was cancelled by the illegal act. FISHER v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **3 C.W.N. 161=26 I. A. 16=22 M. 270=7 Sar. 459.** [*Expl.*, 17 M. L. J. 423; *R.*, 23 M. 385.]

Specific Relief Act (I of 1877)—*continued.*

(347)—*S.* 42, *proviso—Declaratory suit—Further relief.*—The further relief which the plaintiff is bound to claim under the proviso to s. 42 of the Specific Relief Act, is such relief as he would be in a position to claim from the defendant in an ordinary suit, by virtue of the title which he seeks to establish or of which he prays for a declaration (14 C. 586, 15 M. 15, *R.*) The plaintiff's ability to seek further relief than a mere declaration of title depends upon the circumstances of a particular case. A Court will not throw out a suit on the ground that it is barred by the proviso to s. 42 of the Specific Relief Act, unless it is satisfied beyond all doubt that the plaintiff ought to seek further relief and yet has claimed nothing beyond a declaration of title. AISA SIDDIKA v. BIDHU SEKHAR, **17 C. L. J. 30=18 Ind. Cas. 633.**

(348)—*S.* 42—*Declaratory decree, when should be made and when refused—Consequential relief, injunction if.*—S. 42 of the Act does not sanction every form of declaration, but only a declaration that the plaintiff is entitled to any legal character or to any right as to any property. Courts in this country should see that plaints, which pray for declaratory decrees only conform to the terms of s. 42, Specific Relief Act. An injunction is a consequential relief. The limit imposed by s. 42 of the Act is on decrees which are merely declaratory and does not expressly extend to decrees in which relief is administered and declarations are embodied as introductory to that relief. For such declarations legislative sanction is not required as they rest on long established practice. But for all that the Court should be circumspect and even chary as to the declarations it makes; it is ordinarily enough that relief should be granted without the declaration. MUSTT. DEOKALI KOER v. BABU KEDAR NATH, **16 C.W.N. 838=39 C. 704=15 Ind. Cas. 427.**

(349)—*S.* 42—*Suit for mere declaration—Omission to ask for consequential relief—Effect of.*—S. 42, Specific Relief Act, does not empower a Court to dismiss a suit, merely because the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. It merely says that, in such a case, no Court shall make a declaration. If there is some relief which the plaintiff was able to seek but has not done so, an opportunity should certainly be given to the plaintiff to include that relief, conditionally (if necessary) upon her paying the additional Court-fees. SHWARNAMOYI DEBYA v. NAVADURGA DEBYA CHOWDHURANI, **3 Ind. Cas. 161.** (28 B. 567, 28 B. 332, 29 B. 19, *F.*)

(350)—*Civ. Pro. Code*, 1882, *s.* 539—*Consequential relief.*—Where in a suit under s. 539, Civ. Pro. Code, the plaintiffs ask for the relief specified in cl. (*a*) thereof, s. 42 of the Specific Relief Act is no bar to the maintainability of the suit, on the ground that there is no prayer for consequential relief. NETI RAMA JOGIAH v. VENKATACHARLU, **26 M. 450.**

(351)—*S.* 42—*Declaratory suit—Prayer for further relief.*—Where the plaintiff, alleging

Specific Relief Act (I of 1877)—*continued.*

that he was in possession of certain lands, sought to have his right to such possession declared, and the alienations inconsistent therewith, and to which he had not assented, set aside, *held* that the lower appellate Court was not competent to dismiss the suit on the ground that he might have prayed for maintenance of possession but had omitted to do so. BHOLAI PANDEY v. RAGHUBANS PANDEY, **A.W.N. 1881, 60.**

(352)—*S.* 42—*Declaratory suit—Consequential relief.*—A suit for a bare declaration that the plaintiffs are members of the defendants' tarwad and have community of property with them, where the plaintiffs do not pray for consequential relief of any kind and in the plaint they expressly reserve their contentions with the defendants as to the latter's right of management of their property excluding the plaintiffs', is barred by the proviso to s. 42 of the Specific Relief Act. RAMAN ADIODI v. UNNI ADIODI, **11 M L.J. 338.**

(353)—*S.* 42 — *Consequential relief.*—The proviso to s. 42 of the Specific Relief Act is not applicable to a suit for a mere declaration of right to property without any prayer for possession, where it appears that possession of the property was, at the time of the suit, neither with the defendant nor with the plaintiff, the property having been in *custodia legis* and in the hands of an officer of Court, though, owing to a mere accident, the officer is the plaintiff himself; for, in such a case, as the defendant has not been in possession of the property, the plaintiff cannot, as against him, have claimed as consequential relief an order for delivery. VEDANAYAGA MUDALIAR v. VEDAMMAL, **27 M. 591** [*R.*, 32 B. 275=10 Bom. L.R. 149.]

(354)—*S.* 42—*Declaratory suit—Declaration—Suit—Dismissal—Injunction— Consequential relief.*—S. 42 of the Specific Relief Act does not empower a Court to dismiss a suit where the plaintiff being able to seek further relief omits to do so. All that is enacted by the section is that in such a case no Court shall make a declaration. An injunction is a "further relief" within the meaning of s. 42 of the Specific Relief Act. KUNJ BIHARI v. KESHAVLAL, **6 Bom. L. R. 475=28 B. 567.**

(355)—*S.*42—*Declaration—Injunction—Consequential relief.*—In a suit for a declaration that the plaintiffs are entitled to enjoy certain lands without paying the summary settlement, the local fund cess or any kind of assessment to Government, the plaintiff should also ask for the consequential relief by way of injunction. KALABHAI v. SECRETARY OF STATE, **6 Bom. L.R. 648=29 B. 19.**

(356)—*S.* 42—*Suit for injunction—Right to use articles for worship—Maintainability of suit.*—Plaintiff sued the defendants for an injunction restraining them from causing obstruction to the performance of pujah by the plaintiff in the temple, and prayed for a decree directing the defendants to open the doors of the temple

Specific Relief Act (I of 1877)—*continued.*

locked by them. *Held* that the plaintiff need not sue for possession under the circumstances of the case, because the plaintiff has only a right of access to the temple and to the use of articles kept therein for the purpose of performing worship. The suit for permanent injunction, therefore, would not be barred by his failure to claim possession. VENGAN POOSARI v. PATCHAMUTHU, **14 M. L. J. 290.** [*R.*, 33 M. 452=20 M.L.J. 301=7 M.L.T. 311=5 Ind. Cas. 630.]

(357)—*S.* 42—*Declaratory suit—Consequential relief—Injunction not to execute decree in foreign territory.*—A suit for a mere declaration that a certain decree has been collusively obtained is not barred by the provisions of s. 42, Specific Relief Act, when it is not necessary for the plaintiff, who is not bound by that decree, to seek to set it aside. No consequential relief can be asked for in the form of an order addressed to a foreign Court, or of an injunction to a person not to execute a decree in a foreign territory. NARAYANA AIYAR v. ASTANASI. **4 M.L.J. 254.**

(358)—*S.* 42—*Suit for declaration and injunction—Further relief, omission to ask for.*—In a suit for a declaration that the plaintiffs and not the defendants were the trustees and managers of a pagoda, and for a perpetual injunction restraining the defendants from interfering with the plaintiffs in the management thereof, where it was found that the defendants were in possession of the temple jewels and other temple property, *held* that the plaintiffs were entitled to a further relief than a mere declaration of title, and that, having regard to s. 42 of the Specific Relief Act, the suit for a declaration could not lie. *Held*, further, that the plaint could not be sustained even in so far as it asked for an injunction, as injunction was not the appropriate remedy, and to grant to plaintiffs relief such as was asked for in the suit would be to allow them to obtain by a side wind the declaration which according to the law they were not entitled to have. RAMASAWMI AIYAR v. ANNASAWMI AIYAR, **8 M.L.J. 124.**

(359)—*S.* 42—*Declaratory decree—Consequential relief—Injunction—Constructive possession.*—Where defendants are in constructive possession through tenants, and plaintiff desires to have constructive possession only, the utmost that the plaintiff can ask for, or obtain, against the defendants is a declaration of rights, binding the defendants, coupled with an injunction preventing them from interfering with such rights. *Held*, also, that the plaintiff is not bound to ask for actual physical possession from the tenants, and that there is no rule of law to compel a man to seek for all the relief that he is entitled to or might obtain if he desired it. An injunction is a "consequential relief" as contemplated by s. 42 of the Specific Relief Act. PARASRAM v. BHIMBHAI, **5 Bom. L.R. 195.**

(360)—*S.* 42—*Suit for a declaration and injunction—Maintainability of—Plaintiff out of*

Specific Relief Act (I of 1877)—*continued.*

possession at the date of suit.—Where the plaintiff himself admits that, at the date of the suit, he was out of possession, his suit for a mere declaration and injunction is barred by s. 42 of the Specific Relief Act. DEIVASIKAMANI BHATTAR v. SUBBIAH BHATTAR, **5 M. L.T. 224.**

(361)—*S.* 42—*Declaration of right—Consequential relief—Injunction not asked for.*—Where the defendant interferes with the plaintiff's right in building upon a piece of land on the ground that he (defendant) is a joint owner, the plaintiff is entitled to bring a suit for a declaration that he is the exclusive owner and need not ask for an injunction to restrain the defendant from interfering with his right. SUNDAR LAL v. RAM GHULAM, **3 A.L.J. 316=A.W.N. 1906, 149.** (15 M. 15, *R.*)

(362)—*S.* 42, *proviso—Suit for declaration and confirmation of possession—Plaintiff not in possession at date of suit—Possession not claimed as consequential relief—Whether suit liable to dismissal—Crim. Pro. Code, s.* 145—*Order—Dispossession.*—A prayer for confirmation of possession is a prayer for consequential relief. (15 W. R. 95, 16 W. R. 213, 19 W. R. 18, 22 W. R. 438, 15 B. L. R. 172, *F.*) A suit for declaration of title and for confirmation of possession is not barred by the proviso to s. 42 of the Specific Relief Act, simply because the plaintiff was not in possession at the date of the suit, and instead of seeking recovery of possession, he claimed confirmation of possession as a consequential relief. If it transpires that the plaintiff, as a matter of fact or of law, was not in possession at the date of the suit, the only objection which can possibly be taken is that consequential relief, which the plaintiff may be really entitled to obtain, namely, recovery of possession, is different from the consequential relief which he has actually sought, namely confirmation of possession. But it would be a meaningless technicality in this class of cases to dismiss the suit on the ground that the relief which the plaintiff is entitled to obtain is different from the relief he has actually sought. (16 W. R. 27, 24 W. R. 301, 25 W. R. 168, 11 C. L. R. 443 and 451, *Rel. on.*) The proposition cannot be comprehensively laid down that, in every case where an order under s. 145 of the Crim. Pro. Code has been made, the necessary consequence is the actual dispossession of the unsuccessful party. JHUMANKARTI v. DEBU LAL SINGH, **16 Ind. Cas. 898.**

(363)—*S.* 42—*Suit for declaratory decree—Consequential relief—Cancellation of document.*—The owner of property coming into Court for a declaration of his title thereto on the ground of the defendant's having obtained a decree for sale on a mortgage of the same property from a stranger and causing a proclamation of sale thereof, is not bound to ask for cancellation of the mortgage or the decree thereon as a consequential relief. GANGA GHULAM v. TAPESHRI PRASAD, **26 A. 606 =A. W. N. 1904, 128.**

Specific Relief Act (I of 1877)—*continued.*

(364)—*S.* 42—*Suit to establish the right to attach certain property—Civ. Pro. Code, s.* 283—*Consequential relief.*—S. 283 of the Civ. Pro. Code says nothing about consequential relief. So, a suit brought under that section is not affected by the proviso to s. 42 of the Specific Relief Act. KYA GET v. BU NWE, **4 B.L.R. 88.**

(365)—*S.* 42—*Declaratory decree—Further relief.*—The effect of the proviso to s. 42 of the Specific Relief Act is that the Court shall not make a declaration in the events specified in the proviso, and not that the Court shall not grant the relief that is prayed. SAKHARAM v. COLLECTOR OF RATNAGIRI, **6 Bom. L.R. 124 =28 B. 332.**

(366)—*S.* 42—*Suit for declaration and injunction—Declaration that a certain person is not plaintiff's son—Civ. Pro. Code (Act V of* 1908), *s.* 9—*Suit of a civil nature—Suit for declaration—Minors, suits against—Stay of suit—Practice and procedure.*—The plaintiff sued for a declaration that the defendant No. 2 was not his son, and that he was not born to defendant No. 1 (wife of plaintiff), and for an injunction restraining defendant No. 1 from proclaiming to the world that defendant No. 2 was plaintiff's son, and from claiming maintenance for him as such son. It was contended that the suit as framed would not lie: *Held*, that, having regard to the really serious nature of the question with which the plaintiff was faced as soon as the assertion was made that a son not admitted by him had been born to his wife, his contention as to his right under s. 42 of the Specific Relief Act was perfectly reasonable, and the suit was, therefore, one which fell within the purview of s. 42. *Held*, further, that the Court of first instance in entertaining the suit had exercised a proper discretion in the matter; for the plaintiff's own hand had been forced by the open assertion of a definite claim on behalf of the minor defendant, a claim which the plaintiff was entitled to repel at a time when the material evidence was obtainable. The general power vested in the Courts in India under the Civ. Pro. Code to entertain all suits of civil nature, excepting suits of which cognizance is barred by any enactment for the time being in force, does not carry with it the general power of making declarations except in so far as such power is expressly conferred by statute. It is not the practice to stay suits against infants until they have attained full age, as it is generally considered that an infant's case can be sufficiently placed before the Court by a duly constituted guardian. BAI SHRI VAKTUBA v. AGARSINJI, **12 Bom.L.R. 697=34 B 676=7 Ind. Cas. 945.**

(367)—*S.* 42—*Declaratory suit—Omission to seek further relief, when such relief is possible—Duty of Court—Amendment of plaint.*—Plaintiff sued to have cut certain trees on his land, which had been sold to defendant. The suit was couched in the form of a declaratory suit to the effect that the defendant was not entitled to keep the trees standing on the plain-

Specific Relief Act (I of 1877)—*continued.*

tiff's land. The original Court gave the plaintiff a declaratory decree to the above effect, with a direction that the defendant should cut the trees. The lower appellate Court dismissed the suit on the ground that the plaintiff, being able to seek further relief, had omitted to claim it. *Held*, by the Chief Court, that the lower appellate Court should have directed the plaintiff to amend the plaint by asking for the further relief, *viz*., a permanent injunction to restrain the defendant to allow the trees to stand on his land and to cut them. HAZARA SINGH v. BISHEN SINGH, **128 P.R. 1907**.

(368)—*S.* 42—*Suit to set aside auction sale—Subsequent dispossession of plaintiff—Amendment of plaint, if necessary.*—Where, after the plaintiff had instituted a suit to set aside an auction sale in respect of property of which he was then in possession, the plaintiff was dispossessed by the auction-purchaser, *held* that the plaint need not necessarily be amended into a suit for possession, and that the suit should not be dismissed for failing to make such amendment. RAM ADHAR v. RAM SHANKAR, **26 A. 215 = A.W.N. 1903, 236.** (A.W.N. 1900, 172, *F.*)

(369)—*S.* 42—*Plaintiff losing possession two days after institution of his suit for a declaration—Amendment of plaint—Grounds of appeal—Suit decided on a preliminary point.*—Where a plaintiff has instituted a suit for a declaration and two days afterwards the defendants are put into possession under the decree to protect his rights against which the plaintiff has sued for a declaration: *Held*, that the plaintiff cannot be compelled to amend his plaint so as to include in it a prayer for possession. It is clear that when a suit has been decided on a preliminary point, an appellant cannot be taken to have waived objections urged by him in the lower Court as to other points merely because he has not included those other points in his grounds of appeal. SURJAN SINGH v. BALDEO PRASAD, **A. W. N. 1900, 172.** [*F.*, 26 A. 215.]

(370)—*S.* 42—*Suit for declaration of title to hold lands free from payment of Government-revenue—Amendment of plaint by a prayer for injunction—Discretion of Court.*—Plaintiffs sued for a declaration that they were entitled to hold certain lands free from the payment of Government-revenue and other cesses. The defendant, Secretary of State, contended that the suit was not sustainable, under s. 42 of the Specific Relief Act, no claim for any consequential relief having been put forward. At a very late stage of the suit, the plaintiff applied for amendment of the plaint by adding a prayer for injunction. This application was refused. *Held*, on appeal to the High Court, (1) that the suit, as brought, was unsustainable for want of a prayer for consequential relief and (2) that the prayer for amendment ought not to have been refused though it was late, seeing that the amendment asked for was a mere matter of form not affecting the merits of the claim or transforming the nature of the suit. The plaintiff should have been allowed the amendment subject to his paying the costs incurred by the other side up to date thereof. KALABHAI v. THE SECRETARY OF STATE FOR INDIA, **29 B. 19.**

(371)—*S.* 42—*Declaration, suit for, that a decree was fraudulent—Further relief—Court-fee how to be assessed — Plaint originally correctly framed—Subsequent amendment, defective—Restoration by appellate Court*—It is necessary for the plaintiff to ask not only for a declaration that a decree obtained against him was fraudulent, but also for a consequential relief, *viz.*, either to have the fraudulent decree set aside or to have a perpetual injunction granted to restrain the decree-holder from executing it. (25 C. 49, *F.*) A suit for a declaration that a decree obtained against the plaintiff was fraudulent, with a consequential relief, should ordinarily be valued at the amount for which the decree sought to be set aside was obtained. (11 C.W.N. 705, *F.*) Where the plaint was originally correctly framed, but by reason of an unfounded objection as to deficiency of Court-fees taken by the defendant, the plaintiff withdrew his prayer for consequential relief, which resulted in the dismissal of the suit on the ground of its not being maintainable, the High Court in second appeal allowed the plaint to be amended and restored to its original form. THAKUR PROSAD v. PUNKAL SINGH, **8 C.L.J. 485.**

(372)—*S.* 42—*Limitation—Applicable to.*—In the case of declaratory suits time does not commence to run until the right to sue accrues. DATTATRAYA v. RAMCHANDRA, **2 Bom. L.R. 354 = 24 B. 533.**

(373)—*S.* 42—*Cancellation of instrument—Limitation.*—Where a landlord sues a tenant for the cancellation of an instrument under which the latter purports to hold his tenement, and the recovery of the possession of the tenement is only put in as a consequential relief, the suit would come within s. 39 or 42 of the Specific Relief Act, and the relevant article of the Limitation Act would be either Art. 91 or 120. RAJA RAMPAL SINGH v. BALBHADDAR, **4 Bom. L.R. 832 = 25 A. 1 = 29 I.A. 203 = 6 C.W.N. 849 = 8 Sar. 340, P.C.**

(374)—*S.* 42—*Suit for a declaratory decree—Limitatien—Suit to set aside an order of an officer of Government—Unnecessary prayer—Act* XV *of* 1877 (*Limitation Act*), *sch.* II, *No.* 14.—On the 3rd June, 1884, a Collector, in partition proceedings under the N.W.P. Land Revenue Act (XIX of 1873) included a temple within the defendant's mahal, but ordered the plaintiff to contribute a certain sum yearly towards its expenses. On the 2nd June, 1887, the plaintiff instituted a suit for a declaration that the order was *ultra vires*, and passed without jurisdiction. *Held* that the suit must be dismissed, as the case was not within s. 42 of the Specific Relief Act (I of 1877) since the Collector's order did not impugn in any way the title of the plaintiff to any property. *Held*, that although the Collector's order was *ultra vires*, and the suit to have it so declared was wholly

Specific Relief Act (I of 1877)—*continued.*

unnecessary, still as the plaintiff had chosen to bring it, art. 14, sch. II of the Limitation Act (XV of 1877) must be applied to it, and the suit was barred by limitation. BIJAI MISR v. GOBIND GIR, **A.W.N. 1890, 195.**

(375)—*S.* 42—*Parties — Defendant's death before the suit was instituted— Representatives — Punjab Land Revenue Act*, 1887, *s.* 45 — *Declaratory suit—Limitation Act*, 1877, *second schedule, art.* 120.—When the representatives of a respondent who died before the suit was instituted against him were not made parties to the appeal the decision of the case would not bind them. Where the Revenue authorities included land in dispute in the estate of the defendants without the knowledge of the plaintiffs, *held*, that a suit to obtain declaration of plaintiff's title to the land, on the allegation that the defendants are now taking advantage of the entry to endeavour to oust plaintiffs from the land was maintainable under s. 42, Specific Relief Act, and s. 45, Punjab Land Revenue Act, 1887. *Held*, further that art. 120, sch. II, Limitation Act XV of 1877 was applicable to the case. NATHA SINGH v. SADIQ ALI, **25 P.L.R. 1900=20 P. R. 1900.**

(376)—*S.* 42—*Occupancy holding — Suit by presumptive heir during the lifetime of the tenant.*—V applied to the Revenue Court for mutation of names in favour of his daughter, S and his daughter's son K, along with his own in respect of his occupancy holding. M contested the application on the ground that K was not the daughter's son. A compromise was effected between V and M, wherein it was stated that M was joint in cultivation with V, and was entitled to succeed, and that K was not the heir. In a suit brought by K for a declaration that he was the heir of V, *held*, that K, as daughter's son or the nearest collateral male relative who was sharing in the cultivation of the occupancy holding with the recorded tenant V, was a person entitled to a legal character within the meaning of s. 42 of the Specific Relief Act, and that the dispute between K and M was a fit subject for a declaration under that section even during the lifetime of V. MOHENDRA MISRA v. KEDAR PANDE, **9 A.L.J. 788=14 Ind. Cas. 746.**

(377)—*S.* 42—*Claim of private right by plaintiff over land—Claim of public right by defendants — Cause of action — Crim. Pro. Code, s.* 133 — *Parties — Persons claiming public right are alone necessary parties—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 30 — *Irregularity in not recording formal order.*—Where the plaintiff claims a private right upon a certain land, over which a public right of way is claimed by the defendants, who initiated proceedings under s. 133, Crim. Pro. Code, and there has been an order by the Magistrate upon the plaintiff to remove certain structure which the Magistrate found to be an obstruction upon the alleged public right of way: *Held*, that, as a cloud had been thrown upon his title by the proceedings under s. 133, Crim. Pro. Code, the plaintiff had a cause of action to bring a suit for declaration of his title: *Held*, also, that the plaintiff had a right to bring the suit against the defendants alone, without impleading any other member of the public. Where notices under s. 30 of the Civ. Pro. Code, 1882, were issued one year before the trial, mentioning the defendants and other residents of the neighbouring villages, and the defendants put in written statement after the service of the notices, and adduced evidence in support of the public right of way, the notices must be considered to be definite enough, and the simple fact that particular person was not directed, by an express order of the Court before the trial, as authorized to defend the suit, did not affect the result of the case. SHEIK EKHAR ALI v. ANU MANJHI, **6 Ind. Cas. 46.** (21 C. 180, 29 C. 100, *F.*; 17 C. 906, *R.*)

(378)—*S.* 42—*Civ. Pro. Code*, 1882, *s.* 578.—Even if the plaintiff had no ground for coming into Court under s. 42 of the Specific Relief Act for a declaratory decree, yet, when such a suit had actually been entertained and disposed of on the merits and had resulted in a decree which is sound on the merits, the appellate Court ought not to interfere with such a decree, for, even if there had been an irregularity in the original Court entertaining the suit, such irregularity would be covered by s. 578 Civ. Pro. Code. POHKAR DAS v. RAM PRASAD, **A. W.N. 1887, 231.** (8 A. 365, *R.*)

(379)—*S.* 42.—Declaratory decree of title to ownership of land refused where there was break in possession for about twenty years before the annexation of Upper Burma. MAUNG CHA v. MAUNG PE GYI, **U.B.R. 1897—1901, Vol. II, 554.**

(380)—*S.* 42—*Voluntary conveyance by debtor —Suit to impeach conveyance as fraudulent and void—Mere creditor without decree not competent to sue--Declaratory decree.*--A mere creditor, who has not obtained a decree for his debt, cannot sue to impeach, as being fraudulent and void, a voluntary conveyance by his debtor, first because he is not competent to claim a declaration under s. 42 of the Specific Relief Act, until he has a decree for his debt, and secondly because before that decree is made, the only relief that could be sought by him is the relief afforded by a declaratory decree. NATHA SINGA v. GURBAKSH SINGH, **10 P R. 1882.** (86 P.R. 1879, *R.*)

(381)—*S.* 42 — *Declaration — Possession — —Order under s.*59, *Land Registration Act*, VII (*B.C.*) *of* 1876—*Effect.*—The effect of an order under s. 59 of the Land Registration Act is stated in s. 62 of that Act to be "that of settling the actual possession."—When the plaintiff who is admittedly out of possession in consequence of an order under the Land Registration Act, has not sued to recover possession, but has asked merely for a declaratory decree,

Specific Relief Act (I of 1877)—*continued.*

his suit is barred under s. 42 of the Specific Relief Act. The proviso to that section clearly states that no Court shall make any such declaration when the plaintiff, being able to seek other relief than a mere declaration of title, omits to do so. RAM MUNDUR v. JANKI PERSHAD, **12 C L.R. 139.** [*F.*, 26 C. 845=4 C.W.N. 162.]

(382)—*S.* 42—*Government order cancelling separate registration--Suit for declaring illegality —Suit for cancellation of a Government order—Parties—Grantee of portion of estate—Subsequent separate registration—Amount of peishcush payable*—A plaint praying for a declaratory decree that an order of Government cancelling the separate registration of portion of an estate, but without seeking consequential relief, is not bad under s. 42 of the Specific Relief Act. It is a suit asking that an act done in contravention of a statute is void, and the Specific Relief Act does not apply to it. Even supposing that the Act applied, no further relief need be asked since it would be the duty of the Collector, when the decree is passed declaring the Government order illegal, to make such alterations in the registers as are consequent on the decree. [*R.*, 23 M. 385, 17 M.L.J. 423.] In a suit framed as above, the zamindar of the estate, of a portion of which separate registration is sought, or his lessees are not necessary parties. Where the grant of a village forming part of a zamindari was made on the condition that the grantee was to pay every year to the Circar as peishcush Rs. 3,500, and the village was subsequently separately registered, *held* that Rs. 3,500 was fixed provisionally to cover the portion of Government revenue attributable to that village and that, after separation, the grantee should pay direct to the Collector only the burdens fixed as properly incident to that village. ROBERT FISCHER v. SECRETARY OF STATE FOR INDIA IN COUNCIL, **22 M. 270, P.C.=26 I A. 16=3 C.W.N. 161=7 Sar. 459.**

(383)—*S.* 42 — *Declaratory relief sought against tenant—Possession, prayer for—Under-proprietary rights, acquisition by prescription of--Second appeal, new pleas first taken in.*—The plaintiffs' suit against J for arrears of rent having failed, they sued him in the Civil Court for a declaration that he had no proprietary or under-proprietary right in the land in dispute. J alleged that he was not in possession of the land and that it was in the possession of H and C, who were made defendants. They pleaded that the land had been in their possession as zamindars from the time of native rule. The Court of first instance decreed the suit and granted the declaration prayed for, and the Court of first appeal dismissed the defendant's appeal. In second appeal it was contended by the defendant that the proviso to s. 42, Specific Relief Act, barred the declaration given by the Court of first instance inasmuch as the plaintiffs could have sued for possession of the land and not merely for declaratory relief. This plea was not taken in the memorandum of appeal. *Held*, that as the suit was originally brought, the plaintiffs inasmuch as they alleged that J was a tenant, could not have claimed possession. When H and C were joined as defendants they did not plead in the lower Courts that the plaintiffs should sue for possession of the land, and it was too late to take such a plea in second appeal. *Held* further, that, if the defendants, as they contended, had been in possession of the land for 12 years, claiming to be the underproprietors of the same, and adversely to the plaintiffs, the plaintiffs would not be entitled to the declaration granted inasmuch as the defendants would have acquired under-proprietary rights by prescription. HARNANDAN v. RAHA BHUP INDAR BIKHRAM SINGH, **4 O C. 207.**

(384)—*S.* 42—*Suit to declare that plaintiffs are not bound to make certain payments*—A suit will lie to declare that the plaintiffs are not liable to pay *mahsal or batai* which the defendant alleged he had a right to levy and enforce his claim. S. BAHADUR KHAN v. JIWAN, **27 P.R. 1899.**

(385)—*S.* 42—*Defendant entitled to possession but not in actual possession—Suit for declaration--Maintainability--Operation of s.* 42 *as bar to suit--Requisites.*—Where, though the defendant was entitled to obtain possession of certain Chatram properties under a decree of the High Court, he was not at the date of the suit in actual possession of the same. *Held* that it cannot be contended that a suit by the plaintiff for a mere declaration of his right will not lie. In order that a suit can be held to be unmaintainable by the application of s. 42 of the Specific Relief Act, it must be shown that the defendant was in possession and as against him the plaintiff could have obtained an order for delivery of possession. MALAIYA PILLAI v. TIRUMALAPERUMAL PILLAI, **10 M.L.T. 277.** (28 C. 845, 28 M. 338, *R.*)

(386)—*S.* 42—*Suit for mere declaration—Scramble for possession and no effective ouster of plaintiff—Subsistence Inam granted by zemindar jointly to plaintiff's and defendant's ancestors—Such Inam not limited to lineal male descendants—B.S O.* 57, *whether applicable--Effect of that order.*—Plaintiff sued for a declaration of his title to a half share in the *Mokhasa* village of B, which had been jointly granted by the zemindar of Nuzid as a subsistence grant to the ancestors of the plaintiff's and defendant's families. The District Judge decreed his claim. The defendants appealed. They contended: (1) that the village being an unenfranchised subsistence Inam, it could only pass to the direct lineal male heirs of the last holder; and the plaintiff being an adopted son, cannot inherit it; and that it passed by survivorship to the defendants, the representatives of the other grantee. And reliance was placed on Board's Standing Order No. 57; (2) that most of the tenants having attorned to the defendants and executed *muchilikas* to them, they should be taken to be in exclusive possession of the village and the plaintiff's suit for mere declaration is not maintainable.

Specific Relief Act (I of 1877)—*continued.*

Held:—(1) in the absence of the original Inam grant, it cannot be assumed that it ceased to have operation so far as the plaintiff's family was concerned, on the death of his adoptive father; (2) that B.S.O. 57 does not apply to this case, as the reversionary right belonged to the zemindar and not the Government; (3) that, even if it does apply, it only gives the Government the right to resume it and does not treat the grant as lapsing, though the Government does not choose to exercise its right: (4) as it is not proved that the defendants had collected more than their share of the rents of the village, there was no effective ouster of the plaintiff, but only a scramble for possession; and therefore the plaintiff's suit for mere declaration is maintainable. BOYANAPALLI VENUGOPALA ROW GARU v. POTHAPALLI VENKATA NARASIMHA ROW GARU, 2 **M.W.N. 1911, 384.** (15 M. 307, *R.*)

(387)—S. 42—*See* ACT XXIII OF 1871, ss. 4 to 6, 2 O.C. 57.

(388)—S. 42—*See* U.P. ACT XII OF 1881, s. 7, A.W.N. 1893, 177.

(389)—S. 42—*See* U.P. ACT XXII OF 1886, ss. 5, 108, cl. (4), 5 O.C. 118.

(390)—S. 42—Maintainability of suit in Civil Court for declaration that plaintiff is entitled to get from his co-sharer the amount due from him, on account of the arrears of revenue—*See* U.P. ACT XXII OF 1886, s. 108, 9 O.C. 232.

(391)—S. 42—*See* BENAMI TRANSACTION—GENERAL, 21 M. 231.

(392)—S. 42—*See* CAUSE OF ACTION, 20 P. R. 1900.

(393)—S. 42—*See* CIV. PRO. CODE, 1908, s. 11, O. II, r. 2, 4 A. 261, F.B.

(394)—S. 42—Suit for declaration of right to office of *Dharmakarta*—No prayer for possession of temple lands—Tenants willing to pay rent—No bar to suit—*See* CIV. PRO. CODE, 1908, s. 92, 10 M.L.T. 356=21 M.L.J. 952.

(395)—S. 42—*See* CIV. PRO. CODE, 1908, O. I, r. 8 (1), 3 O.C. 351.

(396)—S. 42—No denial of legal character—No consequential relief—Maintainability of suit—Whether s. 42 controls s. 539, Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, O. I, r. 8 (1), ss. 92, 93, 7 M.L.T. 45=5 Ind. Cas. 515.

(397)—S. 42—Suit for specific performance of contract of sale, based upon award of arbitrators—Subsequent suit for possession, maintainability of—*See* CIV. PRO. CODE, 1908, O. II, r. 2, sch. II, r. 20, 4 N.L.R. 14.

(398)—S. 42—Difference between s. 283, Civ. Pro. Code (1882) and—Grant of declaratory decree—Interference with discretion of Court—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 16, 52, 58, 60, 63, 8 Ind. Cas. 608.

(399)—S. 42—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 60, 61, 63, 24 M. 20.

Specific Relief Act (I of 1877)—*continued.*

(400)—S. 42—Suit under s. 283, Civ. Pro. Code, maintainability of, when no further relief is asked for—*See* CIV. PRO. CODE, 1908, O. XXI, r. 63, 29 M. 151.

(401)—S. 42—*See* CIV. PRO. CODE, 1908, O XXI, r. 63, 111 P.R. 1900, L.B.R. 1893—1900, 481.

(402)—S. 42—*See* COURT FEES ACT, 1870, s. 7, cls. (vi) (c) and (viii), s. 12 (ii); art. 17, cl. (1) of sch. II, U.B.R. 1897—1901, Vol. II, 355.

(403)—S. 42—Suit for declaration that plaintiffs are the real decree-holders of the decree obtained by defendent and that the decree should be transferred to them—Consequential relief—Court fee—Amendment of plaint—*See* COURT FEES ACT, 1870, sch. I, art. 17, 47 P.L.R. 1911=1 P.R. 1911=22 P.W.R. 1911=9 Ind. Cas. 673.

(404)—S. 42—Suit by reversioners for possession—Uncertainty of widow's death—Competency of Court to pass declaratory decree—*See* CUSTOMS—PUNJAB—ALIENATION, 1 P.W.R. 1910=5 Ind. Cas. 587.

(405)—S. 42—Suit for declaration of title—Property in possession of tenants—Receipt of rent not proved—Maintainability of suit—*See* CUSTOMS—PUNJAB—INHERITANCE, 5 P.R. 1908=29 P.W.R. 1908=99 P.L.R. 1908.

(406)—S. 42—*See* CUSTOMS—PUNJAB—INHERITANCE, 14 P.L.R. 1900, 72 P.R. 1906=108 P.L.R. 1907.

(407)—S. 42—Suit by daughter's son for a declaration that a gift by a Hindu widow to her daughters, and sale by one daughter to another, are void beyond widow's lifetime—*See* HINDU LAW—ALIENATION, 4 A.L.J. 677=A.W.N. 1907, 269.

(408)—S. 42—*See* HINDU LAW—JOINT FAMILY, 11 Bom. L.R. 606=3 Ind. Cas. 257.

(409)—S. 42—Discretion of Courts—*See* HINDU LAW—PARTITION, 3 Ind. Cas. 234.

(410)—S. 42—Defendant not in possession—Plaintiff cannot claim possession as "further relief"—*See* HINDU LAW—PARTITION, 5 Ind. Cas. 343=7 M.L.T. 253=20 M.L.J. 709.

(411)—S. 42—*See* HINDU LAW—REVERSIONERS, 8 O.C. 21.

(412)—S. 42—Suit by more remote reversioner when nearer reversioner alive—*See* HINDU LAW—REVERSIONERS, 32 C. 62=9 C.W.N. 25.

(413)—S. 42—Suit by presumptive reversioner against widow for injunction against waste and alienation—*See* HINDU LAW—REVERSIONERS, 2 A.L.J. 84=A.W.N. 1905, 6=27 A. 406.

(414)—S. 42—*See* HINDU LAW—WILL, 25 M. 504, 28 M. 363=15 M.L.J. 299, 8 Ind. Cas. 517.

Specific Relief Act (I of 1877)—*continued.*

(415)—S. 42—*See* INJUNCTION—GENERAL, 5 Bom. L.R. 195.

(416)—S. 42—Declaratory decree—Negative declaration—Declaration of contingent right—*See* JURISDICTION—GENERAL, 12 C. W. N. 777=8 C.L.J. 1 =4 M.L.T. 27=35 C. 777.

(417)—S. 42—*See* JURISDICTION OF CIVIL COURTS, 3 M.L.T. 309, P.L.R. 1900, p. 541.

(418)—S. 42—*See* LEASE—GENERAL, 6 A. L.J. 177=31 A. 271=2 Ind. Cas. 209.

(419)—S. 42—*See* LIMITATION ACT, 1908, s. 14, 1 O.C. 272.

(420)—S. 42—*See* LIMITATION ACT, 1908, arts. 118, 119 and 144, 26 M. 291=13 M.L.J. 27.

(421)—S. 42—Suit for declaration of title to immoveable property—Applicability of Limitation Act to such a suit—*See* LIMITATION ACT, 1908, arts. 120, 144, 1 C.L.J. 73.

(422)—S. 42—*See* MORTGAGE—GENERAL, A.W.N. 1894, 205.

(423)—S. 42—Suit by sub-mortgagee for a declaration that a declaration held by the mortgagee had been satisfied—*See* MORTGAGE—MISCELLANEOUS, 2 A.L.J. 609.

(424)—S. 42—Altering prayer of plaint—Suit for declaratory decree—*See* MUTATION OF NAMES IN REVENUE REGISTER OF HOLDINGS, 2 L.B.R. 243.

(425)—S. 42—Declaratory suit—Civ. Pro. Code, 1882, s. 54, amendment of plaint by adding prayer for consequential relief—*See* PLAINT—AMENDMENT OF PLAINT, 9 B. 355.

(426)—S. 42—Suit for decree declaratory of title without prayer for consequential relief—Relief by way of injunction not sought—Effect—Civ. Pro. Code, 1882, s. 424, notice under—See PUBLIC OFFICER, 14 B. 395.

(427)—S. 42—Suit for declaration as to membership of tarwad—Suit instituted in subordinate Court — Prior suit in Munsif's Court—Valuation of suit to avoid jurisdiction—Maintainability of suit—*See* RES JUDICATA—COMPETENCY OF COURT, 24 M. 275.

(428)—S. 42—Declaration of reversionary interest—Protection of present interest of plaintiff—Maintainability of suit—*See* RES JUDICATA — MISCELLANEOUS, 11 C.L.J. 623=6 Ind. Cas. 301.

(429)—S. 42—*See* RIGHT OF SUIT—SALE IN EXECUTION OF DECREE, 7 A. 533=A.W. N. 1885, 124.

(430)—S. 42—Suit to eject trustee—Possession — Valuation for jurisdiction — Specific Relief Act, s. 42—*See* VALUATION OF SUITS, 8 M. 516.

(431)—S. 42—*See* WILL—MISCELLANEOUS, 15 B. 697.

(432)—*S.* 42, *proviso—Not applicable to suits under s:* 283, *Civ. Pro. Code*, 1882.—The proviso to s. 42, Specific Relief Act, has no application to suits instituted under s. 283,

Specific Relief Act (I of 1877)—*continued.*

Civ. Pro. Code, 1882. SAHIB DIAL v. LAJPAT RAI, **10 P.R. 1912.** (29 M. 151, 14 M. 23, 51 P.R. 1897, F.B., *F.*; 16 M. 140, *N.F.*)

(433)—*S.* 42, *proviso—Civ. Pro. Code, s.* 278—*Suit for declaration of title to attached property—No application for removal of attachment under s.* 278, *Civ. Pro. Code—Suit not barred*—The object of the proviso to s. 42 of the Act is to prevent a plaintiff from getting a declaration in one suit, and consequential relief afterwards in another. In a suit which was merely for a declaration that certain land attached and sold in execution of a decree at the instance of the defendant was the property of the plaintiff and not liable to attachment, it was found that no application for removal of attachment had been made under s. 278, Civ. Pro. Code. *Held*, the proviso to s. 42 of the Act did not apply to the suit. P. L. A. N. ALLAGAPPA CHETTY v. NAZAMATALI CAOWDHRY, **4 L.B.R. 263.** (1 L.B.R. 1, 4 L.B.R. 88, 4 L.B.R. 75, *R.*)

(434)—*S* 42, *proviso—'Able to seek further relief'—Land in possession of defendant's tenant.—Plaintiff suing for mere declaration—Maintainability.*—The fact that the land in dispute is in possession of the tenants, who apparently hold under the defendant, in no way entitles the plaintiff, who is out of possession, to bring a declaratory suit. He certainly is able to seek further relief than a mere declaration of title within the purview of s. 42, Act I of 1877. ABDUL GHAFUR v. MUSSAMMAT MEHARUN-NISSA, **101 P.R. 1909=4 Ind. Cas. 856.** (25 M. 504, *F.*; 15 M. 307, *D.*)

(435)—*S.* 42, *proviso—One plaintiff out of possession — Other plaintiff in possession in defendant's right—Declaratory suit—Second suit for possession.*—Where, out of two plaintiffs to a suit for declaration of title, it appeared that one was not in possession of the property claimed, and the other was in possession but in the right of the defendant who had previously been in possession, *held*, that the suit was barred by the express provision of s. 42, Specific Relief Act, and ought to be dismissed. But the dismissal of this suit would not affect the right of these plaintiffs, if they were entitled to possession, from instituting and maintaining a suit for possession. AKBAR KHAN v. TURABAN, **5 A.L.J. 640.**

(436)—*S.* 42, *proviso—Suit for declaratory decree.*—The proviso to s. 42 of the Specific Relief Act forbids the giving of a mere declaratory decree where the plaintiff being able to seek further relief omits to do so. Where a plaintiff being able to sue for an injunction, omits to do so, the Court cannot grant a mere declaration of title. As the suit was framed in this case, it was a land suit within the definition of the term "land suit" in s. 2 of the Lower Burma Courts Act, because a suit in which a right to and interest in the standing crops on the land was claimed, is a "land suit" for the purposes of s. 2, Lower Burma Courts Act. MA DUN v. MA PAU, **2 L.B.R. 124.** [*D.*, L.B.R. 1907—1908, 88; *R.*, L.B.R. 1905—1906, 90.]

Specific Relief Act (I of 1877)—*continued.*

(437)—*S.* 42, *Ill.* (*e*)—*Suit for possession under will— Will found invalid—Suit for declaration of reversionary heirship* —Where the plaintiff seeks for possession and establishment of his title from a Hindu widow on the ground of being the heir of the deceased under his will, and the will is held to be not genuine, he cannot obtain in that suit a declaration under the terms of ill. (*e*) to s. 42, Specific Relief Act, 1877 ; as such relief is not asked for in the plaint. BALBHADDAR v. SURTI, **A W.N. 1881. 93.**

(438)—S. 42, ill. (*e*)—Existence of presumptive reversioners—Right of contingent and more remote reversioners to sue—*See* HINDU LAW—REVERSIONERS, 28 M 57=14 M.L.J. 209.

(439)—*S.* 42, *ills.* (*e*) *and* (*f*), *Scope of—Presumptive reversionary heir entitled after widow's death—Suit to set aside the will of last male owner.*—A presumptive reversionary heir, entitled to inherit after the death of the widow of the last male owner, is entitled to sue for declaration that an alleged will, under which other persons claimed the property as devisees, was made under undue influence and coercion, and is, therefore, invalid as against his reversionary right. The right of the presumptive reversioner to sue for declaration under s. 42 of the Act, is not confined to the case of transactions by the widow herself, as are referred to in ills. (*e*) and (*f*) to the section ; nor is such a reversioner bound to show collusion, acquiescence or laches on the part of the widow, before he is allowed to institute the suit. PUTTANNA *alias*, KESHAVA BHATTA v. RAMAKRISHNA SASTRI. **30 M. 195 =17 M.L.J. 374.** (6 C. 764, P.C., *D.*) [*R.*, 3 Ind. Cas. 178=10 C.L.J. 263.]

(440)—S. 42—*See* Nos. 109, 110, 253 to 257, *supra.*

(441)—*Ss.* 42, 39—*Suit for declaration of invalidity of alienation of* waqf *property—No relief to set aside deed or the decree for possession in favour of alienees—No bar under proviso to s.* 42—*Nature of relief under s.* 39—*Mahant of religious endowment—Nature of his power.*—A, claiming to be in possession, brought a suit for a declaration that a sale by defendant No. I in favour of defendants Nos. 2 and 3, of certain *waqf* property, was illegal, and that the decree for possession of the said property passed in favour of defendants Nos 2 and 3 on the strength of the said sale should have no effect on the property sold. *Held*, that, even if the plaintiff could have brought a suit under s. 39 of the Specific Relief Act for cancellation of the deed of sale, he was not bound to do so, and that the present suit for a mere declaration without any consequential relief lay. (13 M. 324, *F.*) The proviso to s. 42, Specific Relief Act, was only applicable for such relief as was appropriate and consequent on the right asserted. The relief under s. 39 would be a species of auxiliary relief, and not such further relief as is contemplated by the proviso to s. 42 aforesaid. *Held* also, that, as regards the setting aside of the decree for possession in favour of defendants Nos. 2 and 3, the plaintiff who was no party to it can regard it as a nullity, and that there was no necessity for him to get it set aside specifically when he was no party to it. The powers of a Mahant of a religious institution in matters of alienation of the endowment property are analogous to those of a Hindu widow. AMIN CHAND v. SANT MURLI DHAR. **18 P.R. 1913 =19 Ind. Cas. 211=211 P.L.R. 1913=151 P. W R. 1913.** (3 P.R. 1902, *F.*)

(442)—*Ss.* 42, 45—*Municipality—Election—Omission of a candidate's name from the candidates' list prepared by the Receiving Officer—Suit for declaration and injunction.*—A Receiving Officer, appointed by the Collector under the Election Rules, refused to accept the nomination paper of the plaintiff, a candidate at a by-election for a councillorship of the Surat City Municipality : and the list of candidates that was published omitted plaintiff's name from it. The plaintiff thereupon sued the Municipality for a declaration that he was entitled to come forward as a candidate and for an injunction to prevent the Municipality from carrying on the by-election without accepting plaintiff as a candidate : *Held*, (1) that the suit for declaration failed since the Municipality neither denied nor was interested to deny the character or right which the plaintiff sought to establish. It was the Receiving Officer that was concerned with the question and over him the Municipality had no control ; (2) that the claim for injunction too could not be sustained, since the Municipality had done no wrong and was threatening to do no wrong ; it only proposed to proceed in accordance with the Act and the Rules so far as they related to it. SURAT MUNICIPALITY v. CHUNILAL, **8 Bom. L.R. 209=30 B. 409.**

(443)—Ss. 42, 54—Declaration—Meaning of "property"—Right to Birt—*Spes successionis* —Injunction when can be claimed—*See* CIV. PRO. CODE, 1908, ss. 2 (2), 115, 216 P. L. R. 1911.

(444)—Ss. 42, 54—*See* INJUNCTION—SPECIAL CASES, 22 M. 189.

(445)—*S.* 45—*Scope of section.*—The conditions set forth in s. 45 of the Specific Relief Act, 1877, are cumulative. RUSTOM v. KENNEDY, **4 Bom. L.R. C.A. 1=26 B. 396.**

(446)—*S.* 45—*Scope of Section—Procedure—Companies Act* VI *of* 1882, *s.* 58.—When there was a remedy both specific, adequate and appropriate under s. 58 of the Companies' Act, the plaintiff cannot invoke the provisions of Ch. VIII of the Specific Relief Act for the enforcement of public duties. *Ex parte* R. GILBERT ; *In the matter of the* BOMBAY FIRE INSURANCE CO., LTD., **16 B. 398.**

(447)—*S.* 45.—*Enforcement of public duties —Public servant—High Court.*—The Commissioner of Police at Bombay, acting under s. 28 of the Bombay City Police Act, 1902, issued a notice upon the applicants requiring them to

Specific Relief Act (I of 1877)—*continued.*

vacate the premises occupied by them, and intimating that "failure to comply with this notice will render you liable to punishment under s. 129" of the Act. The applicants applied to the High Court, under s. 45 of the Specific Relief Act, 1877, for a rule against the Commissioner of Police to show cause why the notice should not be cancelled and why he should not be restrained from carrying the same into effect: *Held*, that the cancellation of the notice or the non-enforcing of it is an act clearly incumbent by law upon the Commissioner of Police, so as to bring it within s. 45 (*b*) of the Specific Relief Act, 1877. *In re* TARABAI, **7 Bom. L.R. 161.**

(448)—*S.* 45—*Enforcement of public duties—Public servants—High Court—"Personal right"—Interpretation—Act* XLVIII *of* 1860, *ss.* 11, 12—*Commissioner of Police—Licenses—Discretion in granting licenses—Eating house.*—A person purchased the business and stock in trade of an eating house which was carried on under a license granted by the Commissioner of Police, Bombay, under Act XLVIII of 1880. Subsequent to his purchase, he applied to the Commissioner of Police for a transfer of the license to his name. This leave was refused. He, thereupon, applied to the High Court, under s. 45 of the Specific Relief Act, for an order directing the Commissioner to grant a license to him: *Held*, that no order could be made under s. 45 of the Specific Relief Act, as the Commissioner of Police, had, under ss. 11 and 12 of Act XLVIII of 1860, a discretion in the matter of granting licenses. The five conditions mentioned in s. 45, Specific Relief Act, are not disjunctive, the effect of which is that if any one of them is not complied with the section cannot be put into operation. The words "personal right" in s. 45 (*a*) of the Specific Relief Act, are intended to cover rights *in rem* such as every human being in a civilized society possesses independently of any act of his own. *In re* RUSTOM, **3 Bom. L.R. 653.**

(449)—*S.* 45—*Calcutta Municipal Act* (III *of* 1899, *B.C.*), *ss.* 88, 556 *-Agreement for lease—Contract—Calling of tenders when obligatory—Covenant in lease relating to the tenement—Mandamus — Matters of discretion.* — Under s. 556 of the Calcutta Municipal Act, 1899, the Corporation of Calcutta has the power to lease any property vested in them on any terms they think fit, without calling for any tenders in that behalf. Although a covenant in or in respect of a lease is a contract, yet, if the same relate to the demised premises and be not independent of them, then, in that case, the contract in the covenant does not come within the meaning of s. 88 of the Calcutta Municipal Act so as to make it obligatory upon the Corporation to call for tenders. *In the matter of* JOGENDRA NATH MUKHUTI, **13 C.W.N. 129=36 C. 274=1 Ind. Cas. 968.** [*R.*, 13 C.W.N. 740.]

(450)—S. 45—*See* BEN. ACT II OF 1888, ss. 8, 19, 21 to 23, 31, 23 C. 717.

Specific Relief Act (I of 1877)—*continued.*

(451)—S. 45—*See* BEN. ACT II OF 1888, ss. 14, 24, 31, 19 C. 192.

(452)—S. 45—Application to High Court to require a public officer to do a specific act—*See* BOM. ACT III OF 1888, ss. 33, 34, 12 Bom. L. R. 737=34 B. 659.

(453) — S. 45—Mandamus, issue of—*See* MAD. ACT I OF 1902, ss. 3, 23, 48, 7 M.L.T. 73=5 Ind. Cas. 740.

(454)—*S.* 45 *and proviso* (*c*)—Mandamus, *issue of, by High Court against public officer for non-performance of statutory duty—Election roll, preparation of—Calcutta Municipal Act* (*B.C.* III *of* 1899), *sch.* IV, *r.* 8—*Time, place and officer for lodging notice of claim or objection to voter's list as provided by the Act, if may be varied.*—Where the Calcutta Municipal Act, sch IV, r. 8, provides that the notice of any claims or objections to the voter's list should be lodged with the Chairman on or before the 1st of January, and some persons, instead of filing such notice of claims before the duly authorized Deputy Chairman, who kept the Election Department open on that day, left the notice of claims on the 1st of January with the Secretary to the Corporation in his private residence, and then, on the 2nd of January, they took the papers from the Secretary and filed them with the Deputy Chairman: *Held*, that the requirement under the Act had not been satisfied and the Deputy Chairman had no authority to extend the time to the 2nd of January and allow the claim. The omission of a statutory officer to perform the public duties as to the settlement of election roll in the manner provided by the Act amounts to doing or forbearing to do something not consonant to right and justice, and it is within the jurisdiction of the High Court to issue an order in the form of a *mandamus* on the officer under s. 45 of the Specific Relief Act. *In re* MR. ROMESH CHANDRA SEN, **16 C.W.N. 472=15 C.L.J. 494=39 C. 598=14 Ind. Cas. 682.**

(455)—S. 45—*See* No. 442, *supra.*

(456)—*Ss.* 45, 46—Mandamus *on Board of Revenue to release estate in charge of Court of Wards--Necessary parties to application—Other legal remedy available—Question of title if will be gone into.*—The petitioner having obtained a decree in the Court of the Subordinate Judge of Shahbad for recovery of possession, against an infant, of an estate of which the Court of Wards had taken possession on behalf of the infant, applied, pending defendant's appeal to the High Court, for an order under s. 45, Specific Relief Act, calling upon the Members of the Board of Revenue forming the Court of Wards to release the estate from its charge: *Held* that the failure to implead the infant, whose interest would be affected if the application succeeded, was fatal to the application. That the exercise by the High Court of its extraordinary powers under s. 45 of the Specific Relief Act was not called for, as an adequate legal remedy

Specific Relief Act (I of 1877)—*continued.*

viz., by way of execution of his decree, was open to the petitioner. That the Court will not make an order under the section, unless it is satisfied that it is clearly incumbent on the opposite party to do the act, and pending the appeal to the High Court it could not be said that it was clearly incumbent on the opposite party to release the estate. That the Court will not in such a proceeding try a question of title. *In the matter of* KESHO PRASAD SINGH, **15 C.W.N. 503=13 C.L.J. 390.**

(457)—*Ss.* 45, 46—*Public duties, enforcement of—Applicant guilty of grave misconduct—Application to be admitted to examination—Applicant debarred from appearing—Notification in Calcutta Gazette.* In dealing with an application under Chap. VIII of the Specific Relief Act, the principles applicable to a writ of *mandamus* should be generally followed (35 I. A. 130=8 C.L.J. 103=32 B. 466, *R.*). S. 45 of the Specific Relief Act enables the Court to make an order requiring any specific act to be done or forborne and nothing else: s. 46 provides that an application must be founded on an affidavit of the person injured stating his right, his demand of justice and denial thereof. Where, by a petition, the applicant prayed, *first*, for an order that the Board of Examiners acted illegally in not publishing the petitioner's name in the list of successful candidates; *secondly*, that it might be declared that the petitioner had passed the Pleadership Examination, that his name should be gazetted as a successful candidate, or, it might be declared that the order appearing in the *Calcutta Gazette* which was passed by the Board or Examiners of the Pleadership and Muktearship Examinations or by the Local Government was illegal and *ultra vires*, and, *thirdly*, that it might be declared that the Board of Examiners had acted illegally in not entertaining the petitioner's application and his certificate of character and not allowing him to appear at the ensuing examination, *Held*, that, as the application completely disregarded in substance the provisions of ss.45 and 46 of the Specific Relief Act, it was not maintainable. That the jurisdiction conferred on the High Court by chapter VIII of the Specific Relief Act should not be strained in favour of the applicant, as he had not come with clean hands. BOARD OF EXAMINERS v. PROVAS CHUNDER ROY, **17 C.L.J. 354=40 C. 588=18 Ind. Cas. 527=17 C.W.N. 1225.**

(458)—S. 46—*See* Nos. 456, 457, *supra.*

(459)—*S.* 47—*Act* XIV *of* 1859, *s.* 15—*Suit for possession—Growing crops.*—Where a person recovered possession of certain land in virtue of a decree under s. 15 of Act XIV of 1859, *held*, that he recovered the land with the crops growing upon it and that he was entitled to cut the same. SHIRAJEE PRAMANICK v. EMAM BUKSH BISWAS, **13 W.R. 104.**

(460)—S. 52—*See* CIV. PRO. CODE, 1908, ss. 141, 151, O XXXIX, r. 1, 8 S.L.R. 128=4 Ind. Cas. 609.

Specific Relief Act (I of 1877)—*continued.*

(460-*a*)—*S.* 53—*See* INJUNCTION—SPECIAL CASES.

(460-*b*)—*S.* 54—*See* INJUNCTION—SPECIAL CASES.

(461)—*S.* 54—*Mandatory injunction—Actual damage, whether necessary.*—The plaintiff sued for an injunction restraining the defendant from using certain newly erected brick-kilns in the vicinity of the plaintiff's fruit garden. The brick-kiln had never been used, but there was evidence that similar brick-kiln in the neighbourhood had produced serious damage to similar fruit gardens. *Held* that the plaintiff had a good case for the granting of an injunction, and that it was not necessary to show that actual damage had been caused in the particular instance, before a mandatory injunction could issue. HARGU LAL v. DWARKA PRASAD, **1 A.L.J. 239=A.W.N. 1904, 101.**

(462)—*S.* 54—*Perpetual injunction when granted under.*—Where the defendants threaten to invade the enjoyment of property by the plaintiffs, and the invasion is such that pecuniary compensation would not afford adequate relief, the plaintiffs have a right to obtain a perpetual injunction under s. 54 of the Specific Relief Act (I of 1877). KALIDAS JIVRAM v. GOR PARJARAM HIRJI, **15 B. 309.**

(463)—*S.* 54—*Easement—Enjoyment of light and air through windows—Obstruction—Remedy—Injunction or damages—Power of Court to grant injunction.*—The power of the Courts in India to grant a perpetual injunction is determined by the Specific Relief Act (I of 1877), s. 54. Where there is a material injury to that which is a clear legal right, and it appears that damages, from the nature of the case, would not be a complete compensation, the Court will interfere by injunction. The plaintiff sued for an injunction restraining the defendant from erecting a building which would interfere with the access of light and air (which he had been enjoying for 24 years) through 4 windows in the southern wall of the plaintiff's house. The northern wall of the defendant's building was 6 feet distant from the southern wall of the plaintiff's house (in which the windows were put up) and was intended to be raised to a height of 64 feet, with the result that light and air passing through the windows would be obstructed. *Held* that, as the comfort of the plaintiff in the use of the house was not materially diminished by the decrease in the amount of light and air which had been passing through the windows, the plaintiff was entitled only to damages, but not to an injunction. DHUNJIBHOY COWASJI UMRIGAR v. LISBOA, **13 B. 252.** [*F.*, 20 B. 704; *Cons.*, 18 B. 474; *R.*, 19 A. 259, 22 M. 251, 7 Bom. L.R. 352, 7 Bom. L.R. 73, 3 N.L.R. 114, 3 S.L.R. 30=1 Ind. Cas. 958].

(464)—S. 54—*See* LIMITATION ACT, 1908, art. 120, 13 M. 445.

(465)—S. 54—*See* MARRIAGE, U.B.R. 1897-1901, Vol. II, 488.

Specific Relief Act (I of 1877)—*continued.*

(466)—S. 54—*See* PRESCRIPTION—EASEMENT—LIGHT AND AIR, 18 B. 474.

(467)—S. 54, ill. (*k*)—*See* BEN. ACT VIII OF 1885, s. 23, 31 C. 174=9 C.W.N. 87.

(468)—S. 54—*See* Nos. 119, 443, 444, *supra*.

(469)—Ss. 54 and 55—Prohibitory and mandatory injunctions—Obstruction to light and air—Discretion of Court to grant injunction or damages—*See* EASEMENTS ACT, 1882, ss. 7, 15, 16, 33, 35, 3 N.L.R. 114.

(470)—*Ss.* 54, 56—*Partition proceedings in Revenue Court—Suit for temporary injunction to restrain.*—The same principles which govern the granting of perpetual injunction are applicable to the case of temporary injunctions. According to s. 56 (*b*) the Chief Court has no power to restrain partition proceedings in a Revenue Court which is in no way subordinate to the Chief Court. MALIK SOHARA KHAN v. AHMAD KHAN, **57 P.R. 1899=17 P.L.R. 1900.**

(471)—*Ss.* 54, 56—*Easement—Light and air—Obstruction to—Substantial deprivation—Damages not adequate relief—Injunction ordinarily granted.*—Where a wall constructed by the defendant was admittedly built flush with the plaintiff's house, the effect of which was, so far as the means for access of light and air were concerned, to prevent them entirely. *Held*, that the plaintiff had a right of action. To constitute an actionable obstruction of ancient lights, it is not enough that the light is less than before. There must be a substantial deprivation of light enough to render the occupation of a house uncomfortable according to the ordinary notions of mankind. *Held*, also, that this was not a case in which adequate compensation can be given by way of damages, or a case in which an equally efficacious remedy can certainly be obtained by some other novel mode of proceeding (22 M. 251, *R.*; 22 M. 251, *not assented to*). Injunction is the rule and damages the exception. RAMANJULU NAIDU v. APPARANJI AMMAL, **9 M.L.T. 383.** (13 B. 252, 18 B. 474, *R.*)

(472)—*Ss.* 54, 56—*Injunction—Restraining defendant from executing decree—Multiplicity of suit.*—The defendant obtained a decree for recovery of possession of certain land from which, he said, he had been wrongfully ousted. But before he had taken any steps to execute his decree or had threatened to execute it, the plaintiff brought a suit for perpetual injunction to restrain the defendant from taking possession of the lands decreed to him, by executing the decree:—*Held*, that the case did not fall under s. 54 of the Specific Relief Act, and that the plaintiff was not entitled to an injunction. KARNODHAR HALDAR v. HARI PROSAD RAI CHOWDHURY, **6 Ind. Cas. 444=14 C.W.N. 878=12 C.L.J. 86=37 C. 731.**

(473)—*Ss.* 54, 56 (*b*)—*Application to stay partition proceedings pending in Revenue Court*

Specific Relief Act (I of 1877)—*continued.*

—*Temporary injunction.*—The petitioners' suit for a declaration of their title as proprietors of certain land which had been recorded in the Revenue papers as *Shamilat deh* was dismissed. Their appeal in the Chief Court was admitted. They applied for an order staying partition proceedings pending in the Revenue Court till the decision of the appeal. *Held*, that s. 56 (*b*) of the Specific Relief Act, 1877, was a bar to the application, as the Court in which proceedings were pending was not subordinate to the Chief Court. *Held*, further, that the same general principles must equally apply to the granting of a temporary injunction as to a perpetual injunction. MALIK SHARA KHAN v. AHMAD KHAN. **17 P.L.R 1900=57 P.R. 1899.** (6 B. 266, *F.*)

(474)—*Ss.* 54, *cls.* (*d*) *and* (*e*), 56 (*c*)—*Transfer of a non-transferable holding, enforced recognition of—Injunction—Irreparable loss*—Marfatdar, *receipt of rent from, if amounts to a recognition of his right to a tenancy.*—The defendant obtained a decree against a third person in a suit to which the plaintiffs (respondents) were not parties. The plaintiffs were landlords of the land covered by the decree. The land was a non-transferable holding, and they brought a suit to prevent the defendant from taking possession of the holding, covered by the defendant's decree. The plaintiffs never recognised the defendant as a tenent. *Held*, that the enforced recognition of the transferability of a holding is an 'irreparable injury' and an injunction can be granted. *Held*, also, that, if the injunction was not granted, the plaintiffs will be compelled to bring a suit to eject the defendant, and that will result in a multiplicity of proceedings. The foundation of the Court's jurisdiction to grant an injunction rests on the probability of irreparable injury, the inadequacy of pecuniary compensation and the prevention of a multiplicity of suits. The Courts may grant an injunction in all cases of trespass according to their discretion, such discretion being exercised according to the principles of the Specific Relief Act and the circumstances of the particular case. Under s. 56 (*b*) an injunction cannot be granted by a Court to stay proceedings in a Court not subordinate to the Court granting the injunction. But when no proceedings are pending, an injunction can be granted. (14 M. 425, *R.*) The mere receipt of rent from a *marfatdar* does not involve any recognition of the *marfatdar's* personal right to a tenancy on transfer from an old tenant. KARNADHAR HALDHAR v. HARI PRASAD, **6 M.L.T. 247=3 Ind. Cas. 338.** (11 C.W.N. 865, *R.*)

(474 *a*)—S. 55—*See* INJUNCTION.

(475)—*S.* 55—*Mandatory injunction—Suit for demolition of buildings-Delay in suing—Damage.*—The plaintiff sued (*inter alia*) for the demolition of a building erected on property which has been found to belong jointly to the parties. The suit was instituted about a year and a half

Specific Relief Act (I of 1877)—*continued.*

after the completion of the building, but the lower appellate Court had found that the plaintiff, though he lodged no complaint, had, from the first, protested against the erection and that the building blocked one of the lower doors of the plaintiff's house: *Held*, that the circumstances of the case did not warrant interference with the mandatory injunction granted by the lower appellate Court in the plaintiff's favour. RAJA RAM v. MOTI RAM, **A.W.N. 1906, 221.** (A.W.N. 1901, 53, 30 C. 901, *D.*)

(476)—*S.* 55—*Penetration of trees on neighbour's wall—Continuing actionable nuisance—Threatened injury — Injunction.*—Injunction may be granted, not merely when an injury had actually taken place, but also when it has been threatened. A mandatory injunction is ordinarily the proper remedy in cases of continuing actionable nuisance, such as branches overhanging, and roots penetrating into, adjoining land (*Lemmon* v. *Webb*, (1895) A. C. 1; *Norris* v. *Baker*, 1 Roll. Rep 393: Baten's case, 9 Rep. 53; *Shelfer* v. *City of London Electric Lighting Co.*, 1 Ch. 287, 19 B 420, *R.*) A perpetual injunction restraining the defendants from planting trees, that are likely to penetrate into the foundation of plaintiff's building and wall, will be unworkable. LAKSHMI NARAIN BANERJEE v. TARA PROSONNA BANERJEE, **31 C. 944=8 C.W.N. 710.** (24 C. 260, *R.*) [*R.*, 3 N.L.R. 114].

(477)—*S.* 55—*Mandatory injunction—Discretion of Court.*—No general rule can be laid down as to the cases in which a mandatory injunction should be given to a co-sharer who brings a suit for such injunction, and who does not sue until some time after the completion of the building complained of. KAUSHAL SINGH v. GANESH SINGH, **A.W.N. 1901, 53.**

(478)—*S.* 55—*Mandatory injunction—Suit for demolition of buildings—Delay in suing.*—Certain co-sharers sued for demolition of some tiled buildings erected by other co-sharers without the consent of the plaintiffs on common land. The suit was brought some months after the completion of the buildings, the construction of which the plaintiffs were held to be cognizant of. It was not shown that the plaintiffs suffered any special damage from the building, or that the encroachment was such that they could not be compensated for it. *Held* that this was not a case in which a mandatory injunction should be granted. GANESH SINGH v. KAUSHAL SINGH, **A.W.N. 1900, 55.** (A.W.N. 1885, 277, 8 C. 708, 16 C. 252, 12 A. 486, 18 A. 115, *R.*)

(479)—*S.* 55, *ch.* X—*Trespass—Wall built on footings of neighbour's wall—Building completed promptly—Mandatory injunction—Proper remedy—Footings—Existence for long time—Presumption.*—Where the footings of a wall have been in existence for a great length of time, it is fair to presume that they were not placed there wrongfully and that they were placed within the limits of the land belonging to the owner of the wall. Where a trespass by way of building a wall on the footings of plaintiff's wall has been carried out, not as the result of long and continuous work, but of work completed quietly and promptly, and where the trespass is one which still continues and will continue so long as the wall is permitted to remain in its present site, and where there has been no delay or acquiescence on the part of the plaintiff who instituted the suit after the completion of the wall. *Held*, that the proper remedy is by way of mandatory injunction, and that, in accordance with what is provided in s. 55, Specific Relief Act, it will be right to compel the defendant to pull so much of the wall as is an encroachment on the plaintiff's land. The case comes clearly within the law laid down in ch. X of the Specific Relief Act. ABDUL HOOSSAIN v. RAM CHARAN LAW, **38 C. 687.**

(480)—S. 55—*See* No. 469, *supra.*

(480-*a*)—S. 56—*See* INJUNCTION—SPECIAL CASES.

(481)—*S.* 56—*Grant of injunction, when proper—Discretion of Court—Award of damages—Practice.*—Where the actual invasion of a right and other circumstances of the case show that the invasion is likely to continue, the proper remedy in such a case is injunction, under s. 56 of the Specific Relief Act, 1877. To say that the plaintiff ought to sue for damages every time that the right is invaded is to drive him to a multiplicity of suits. It is not necessary that any positive evidence should be let in by the plaintiff for the purpose of showing that the defendant intended evading the rights in the future also. That is a question which can be determined on the probabilities of the case, the surrounding circumstances, and by the light of the conduct of the defendant in the actual obstruction which he has caused in one year and with reference to the attitude which he adopts. In a suit for injunction the Court can grant relief by way of damages. BAL SAMRAT v. SARDARSANG HAMABHAI, **13 Bom. L.R. 905.**

(482)—*S.* 56—*Mandatory injunction against tenant.*—Where an agricultural tenant changed the character of the land by planting mangoes, to the landlord's knowledge, though without his consent, *held*, the landlord was not entitled to a mandatory injunction, after having stood by quietly for over three years. MOYNA MISSER v. RUPIKUN, **9 C. 609=12 C.L.R. 300.**

(483)—*S.* 56—*Door opened on one's land—Egress and ingress—Flow of water—Dispossession disentitling one to an injunction, what constitutes.*—The defendant placed a *chhappar* on the wall of his house and made a door opening on to the plaintiff's land, which was also used by the defendant for egress and ingress. The plaintiff sued for an injunction to close the door and to remove the thatch and to prevent the flowing of water from the defendant's roo

Specific Relief Act (I of 1877)—*continued.*

on to his land. *Held*, that the facts did not constitute such a dispossession as to bar the suit under s. 56 of the Specific Relief Act and to necessitate a resort to an action for ejectment. GAURI SHANKER v. LALA RAM, **12 O.C. 33=1 Ind. Cas. 689.**

(484)—*S.* 56—*Magistrate's order—Bengal Municipal Act (III of* 1884. *B.C*), *s.* 44—*Chairman's power to lease or sell—Estoppel.*—A suit, for a declaration that the land on which the plaintiff's house was built belonged to him and was not a public road and for the withdrawal of an order issued by the Magistrate, directing him to demolish it, is not barred by s. 56 of the Specific Relief Act. The Chairman of a Municipality has no power, under s. 44 of the Bengal Municipal Act, to sell or lease a land belonging to the Municipality. Only the Commissioners at a meeting can do so. Where the plaintiff was allowed two years and four months, after taking lease, to construct a drain round the house; *held*, that the Municipality was not estopped from questioning the lease. JAGANNATH SAHA v. THE CHAIRMAN ON BEHALF OF THE COMMISSIONERS OF BERHAMPUR MUNICIPALITY, **9 C.L.J. 286=4 Ind. Cas. 55.**

(485)—S. 56—*See* PUN. ACT XX OF 1891, ss. 92, 95, P.L.R. 1900, p. 385.

(486)—S. 56—*See* CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 2, 31 C. 480=8 C.W.N. 395.

(487)—S. 56 (*b*)—*See* CIV. PRO. CODE, 1908, O. XXXIX. r. 1, A.W.N. 1884, 352.

(488)—S. 56 (*b*) and (*f*)—*See* JURISDICTION OF CIVIL COURTS, 5 A. 429=A.W.N. 1883, 67.

(489)—S. 56 (*g*)—*See* NUISANCE, 78 P.R. 1901.

(490)—*S.* 56 (*i*)—*Injunction — No other equally efficacious relief existing.*—S. 56 (*i*) of the Specific Relief Act prohibits an injunction being granted where there is any other remedy which would give equally efficacious relief. BAPU v. GUNAJEE, **1 Bom. L.R. 210.**

(491)—*S.* 56, *cl.* (*k*)—*Municipal funds, expenditure of, for unauthorized purposes—Rate-payer entitled to injunction against Municipality.*—This suit was brought by some of the rate-payers of a Municipality for an injunction to restrain the Municipality from expending money in the purchase of a band of music. Plaintiffs alleged that the use of the Municipal funds for such a purpose was *ultra vires* and therefore illegal. Without deciding the legality of the matter, the District Judge dismissed the suit on the ground that the plaintiffs were not entitled to sue as individuals without proof of special damage. The High Court was of opinion that his decision could not be supported. As a general rule, Courts of Justice will not permit individuals interested in any fund or estate to institute or maintain a suit without bringing before the Court all persons interested in the matter. This general rule has its exceptions and it is settled law that any individual member of a corporation may file a suit for the

Specific Relief Act (I of 1877)—*continued.*

purpose of restraining the corporation from doing any act which may be illegal. There is not much of distinction between a shareholder suing a Company and an individual rate-payer suing a Municipal Corporation, to the funds of which he contributes, and in the proper application of which funds he is necessarily interested. Each individual who contributes and is liable to contribute to the fund must be held to be personally interested in the due application of that fund and does not therefore fall within the prohibition of cl. (*k*) of s. 56 of the Specific Relief Act, 1877. The plaintiffs in the present case, as rate-payers, were not mere stangers, but were directly interested in the application of the municipal funds which interest, however small, would suffice to entitle them to sue in their individual capacity. VAMAN v. MUNICIPALITY OF SHOLAPUR, **22 B. 646.**

(492)—S. 56—*See* Nos. 180, 471, 472, 473, 474, *supra.*

(493)—*S.* 57—*Breach of contract—Injunction—Damages—Proper remedy.*—Suit for specific performance of an agreement entered into with defendants and for injunction restraining defendants, from committing a breach of the agreement and for damages. The defendants were the owners of mica mines and the agreement for financing them was that the plaintiffs were to give them a standing advance of Rs. 55,000, for a period of five years, that the plaintiffs were to appoint a manager to assist the defendants in the management of their business, and also to assist them with their advice that the sales were to be made jointly by the plaintiffs and the defendants, and thatthe plaintiffs should be entitled for their advice and services to a commission of 5 per cent. The defendants broke the agreement by parting with their mica to third parties without the intervention of the plaintiffs. *Held*, that, though the contract could not in all details be specifically performed, the plaintiffs were entitled to an injunction under s. 57, Specific Relief Act, to enforce the negative covenant that the defendants would not part with their mica without the plaintiff's consent. (26 M.168, *R.*) *Held* also that damages could not be awarded in this suit for the present breach, as damages would not prevent the defendants from committing fresh breacnes and driving the plaintiffs to fresh suits in future. SOUTH INDIAN EXPORT CO. v. A. SUBBA NAIDU, **8 M.L.T. 149=7 Ind. Cas. 243.**

(494)—S. 57—*Contract of service—Negative agreement—Injunction—Contract Act* (IX *of* 1872), *s.* 27—*Contract—Restraint of trade.*—S. 57 of the Specific Relief Act, 1877, deals only with such objection to the enforcement of a negative agreement as might arise from the inability of the Court to compel specific performance of affirmative agreement coupled therewith, and leave unaffected objections that might arise on other grounds such as the invalidity of a negative agreement, so far as it would operate to restrain any one from

Specific Relief Act (I of 1877)—*concluded.*

exercising a lawful trade or business. The section extends to agreements of a negative character such as are necessarily implied from contracts for whole time service, even if not expressed therein and the operation of such contracts as contracts for service, appears in such cases to prevent the application of s. 27 of the Contract Act, 1872, to such negative agreements so far as they purport to impose restrictions only during the period of affirmative agreement for service after the expiry of that period, such negative agreement could form no part of a contract to exercise the business or trade, and would then be void as agreements purporting to do nothing else than restrain. PRAGJI v. PRANJIWAN, **5 Bom. L.R. 878.**

(495)—*S. 57—Injunction—Implied negative covenant—Codified law.*—Where the law has been codified, it is of little avail to enquire what is the law apart from such codification, and the Courts must look to the Code itself as their guide in the matter. Under s. 57 of the Specific Relief Act, the Courts in India are empowered to grant an injunction to perform a negative agreement, express or implied, when it is not possible to compel specifically the performance of the affirmative agreement. (23 B. 103, *F*) The defendant covenanted under an agreement "diligently and to the best of of his ability to devote himself to the duties as a draftsman and general assistant" to the plaintiff company for five years. *Held*, that the agreement implied that he would not give his services during that period to any other person, and in such a case, an injunction is not only the most effective but the only remedy according to the principles of equity, justice and good conscience. BURN & CO., LTD. v. COLIN MAC DONALD, **13 C.W.N. 253=9 C.L.J. 190=36 C. 354=1 Ind. Cas. 829.**

(496) —S. 57—*See* NOS. 137, 171, 180, *supra.*

Speculative Sale.

Contract Act, s. 23—Champerty.—A speculative sale is not bad on the ground of being against public policy. **RAMANUJA AYYANGAR v. NARAYANA AYYANGAR, 18 M. 374.** [*R*, 2 N.L.R. 17.]

Speculative Suit.

See CHAMPERTY.

Speculative Theory.

Questions relating to testamentary capacity—Speculative theory derived from medical books and judicial dicta, not a safe basis—*See* WILL—EXECUTION, 22 C. 1 P.C. =22 I.A. 171.

Spes Successionis.

(1)—*Chance of succession of heir-apparent—Not transferable—Mahomedan Law.*—The chance of an heir-apparent succeeding to an estate is neither transferable nor releasable according to Mahomedan law. It is only by an application of the principle that equity considers that done which ought to be done, that such a chance

Spes Successionis—*concluded.*

can, if at all, be bound. SUMSUDDIN v. ABDUL, **8 Bom. L.R. 781=31 B. 165,** (*On appeal from* 8 Bom. L.R. 252, O.C.J.)

(2)—*Transfer of—Muhammadan Law*—Under the Mahomedan law a mere *spes successionis* cannot be the subject of a valid transfer. But this principle does not affect a transaction, in the nature of a family arrangement, by which the father makes immediate provision for his daughter, to take effect both in his life-time and after his death in consideration of the daughter agreeing not to claim her legal share as heir on his death. Whether such a transaction should be set aside as inequitable depends upon circumstances at the time it was made, not upon subsequent events. SHAMSUDIN v. ABDUL HOOSEIN, **8 Bom. L.R. 252.** [*See on appeal*, 8 Bom. L. R. 781=31 B. 165.]

(3)—*Mahomeden Law.*—A mere *spes successionis* is unknown to and not recognised by the Mahomedan law. ABDOOL v. GOOLAM, **7 Bom. L. R. 742=30 B. 304.**

Agreement by expectant heir to give property which he hopes to get after his adoption—Effect—*See* HINDU LAW—ADOPTION, 12 Bom. L. R. 910=8 Ind. Cas. 625.

See HINDU LAW—WIDOW, 6 C.W.N. 169=20 I. A. 1=24 A. 94, P. C.=4 Bom. L. R. 233.

Nature of Reversioner's interest—Whether a —*See* REVERSIONER, 214 P.L R. 1911.

Spiritual Adviser.

Suit for cancellation of instrument—Gift to spiritual adviser—Fiduciary relationship—Undue influence—*See* BURDEN OF PROOF—DECREES AND DEEDS, SUITS RELATING TO, 12 A. 523=A.W.N. 1890, 56.

Spiritual Benefit.

Whether the only principle of inheritance under the Dayabhaga School.—*See* HINDU LAW—INHERITANCE, 12 C.W. N. 511=35 C. 721.

Spiritual Brother.

Certificate to collect debts of personal estate of deceased Mohunt—Spiritual son and—of a Mohunt—*See* CERTIFICATE TO COLLECT DEBTS, 4 C. 954=4 C.L.R. 49.

Spiritual Necessities.

See HINDU LAW—ALIENATION, 8 M. 552.

Spiritual Son.

Certificate to collect debts of personal estate of deceased Mohunt—and Spiritual brother of a Mohunt—*See* CERTIFICATE TO COLLECT DEBTS, 4 C. 954=4 C.L R. 49.

Splitting up of Cause of Action.

See CIV. PRO. CODE, 1908, s. 11.

Splitting up of Cause of Action—*continued.*

See CIV. PRO. CODE, 1908, O. II, r. 2.

See RES JUDICATA.

s (1)—*Several plots of land under one patta—Separate suit not maintainable for rent of each plot—Splitting up of cause of action.*—In this series of suits for rent brought by the plaintiff with regard to several parcels of land, the defendant pleaded that all the parcels were held by him under one pottah by which he was bound to pay one lump sum as rent for all the parcels, and contended that consequently only one suit would lie for all the rent claimed under the pottah, and the plaintiff could not split up and sue separately for each parcel. The lower appellate Court, while holding that the pottah, was of the above description, considered that the contract contained in it had been departed from and waived by the parties, and therefore that the suits might be treated as distinct suits brought for the rent of each parcel. The High Court *held* that the acts of the parties amounted to no such departure from, or waiver of the original pottah as could sustain the present suit. RAJAH OJOODHEARAM KHAN v. NILKUNT MYTEE, **2 W.R. Act X, Rul. 36.**

(2)—*Dispossession of rights in three villages—Suit to recover one of the villages—Subsequent suit for other two not maintainable—Splitting of cause of action—Civ. Pro. Code, s.* 43.—The acts of the defendant by which the plaintiffs had been dispossessed of three villages were done with the same object, namely, in pursuance of a claim of ownership antagonistic to the plaintiffs. Plaintiffs were therefore bound to sue once for all for recovery of possession of the whole estate. But they brought a suit in respect to one of the villages only omitting to sue for the lands comprised in the other two villages. *Held* that they could not subsequently maintain a suit relating to those villages by reason of s. 43 of Act X of 1877. MADDA SINGH v. BUKAN SINGH, **9 P.R. 1881.** [*R.*, 110 P.R. 1883 ; *D.*, 162 P.R. 1884.]

(3)—*House let for season vacated before term—Suit against lessee for rent accrued due—Suit whether maintainable as for damages in respect of remaining term—Civ. Pro. Code, s.* 43—Defendant took the plaintiff's premises on lease for the season of 1881, at a monthly rent payable on the 21st of each month. He entered on occupation on the 21st of April and paid up the rent due on 21st May and 21st July. On 16th July, the plaintiff was informed that the defendant intended to give up the tenancy of the house on August 22nd, but as a matter of fact the house was vacated on the 22nd July. Plaintiff, in a previous suit, having obtained a decree against the defendant for rent due up to the 21st of August, instituted the present suit for damages for wrongful refusal to pay plaintiff rent for the remainder of the term from the 21st August 1881. The question was whether the plaintiff, having already sued for and recovered rent up to 21st of August, was debarred under the provisions of s. 43 of Act X of 1877 from recovering damages from the same defendant on account of breach of contract to pay rent: *Held* that the plaintiff had not split his claim. On the announcement by the defendant to the plaintiff before the term for payment came, that he intended not to pay his rent, it was open to the plaintiff, as the promisee, to treat such notice as a present breach of contract, and he might, had he chosen to do so, have sued at once for damages for non-performance. It was however open to the promisee to disregard the notice and insist upon performance according to the contract. This the plaintiff elected to do. On September 2nd, the date of the suit in which the cause of action was one month's rent, no rent for any period subsequent to August 21st had accrued due. The provisions of s. 43 of the Civ. Pro. Code, did not therefore apply to the case. R.D. GOODALL v. J.W. ALEXANDER **70 P.R. 1882.**

(4)—*Civ. Pro. Code*, 1882, *s.* 43—*Suit for possession of land—Subsequent suit for mesne profits, bar of—Omission to urge plea in lower Courts—Effect.*—S. 43 of the Civ. Pro. Code, 1882, being a provision introduced for the benefit of a defendant to prevent him from being harassed by numerous suits, it should be expressly pleaded by him before judgment if he wishes to take advantage of it, and consequently no Court is bound to take up *proprio motu* the question involved in that section unless the defendant urges it, as such question is not one of jurisdiction. Where a plaintiff who had obtained a decree for possession of land in a previous suit, sued for mesne profits accruing on the land before the decree for possession was passed, and the lower Courts decreed his claim, the Chief Court refused to consider the objection urged for the first time before it, that the plaintiff's claim was barred by s. 43 of the Civ. Pro. Code. MUHAMMAD NUR v. MUSSAMUT MAHROIA, **37 P.R. 1883.** (138 P.R. 1882, *R.*)

(5)—*Cause of action for possession as well as mesne profits—Previous suit for profits only—Subsequent suit for possession barred by* s. 43, *Civ. Pro. Code.*—With reference to para 3 of s. 43 of the Civ. Pro. Code (Act X of 1877), it was held that it was not open to the plaintiffs to bring the present suit for the possession of the land. When the plaintiffs instituted their former suit for a share of the produce of a certain harvest, they had a cause of action which entitled them to sue for possession as well as for mesne profits. In that case, notwithstanding that the defendants challenged the plaintiffs to sue for all their remedies at once, the agent of the plaintiffs distinctly declined to sue for possession at that time, nor did he obtain permission from the Court to bring a subsequent suit for possession. Under the words of the said para, the present action was therefore held to be barred. PHALLA v. KESAR SINGH, **138 P.R. 1882.** [*Diss.*, 129 P.R. 1889 ; *Appr.*, 47 P.R. 1886 ; *R.*, 37 P.R. 1885 ; *D.*, 79 P.R. 1886.]

Splitting up of Cause of Action—*continued.*

(6)—*Suit for profits of land—Subsequent suit for possession of land—Act X of 1877, s. 43.*—There is no reason why a person should not be allowed first to bring a suit for profits of land which defendant, his agent, had misappropriated, and afterwards to bring a suit for possession of that land which the agent refused to give up. The subsequent suit could not be barred by s. 43 of the Civ. Pro. Code, the cause of action being the defendant's refusal to deliver possession, as the claim for possession could not be said to have arisen out of the cause of action on which he first sued when there was no allegation in the plaint that the defendant had refused plaintiff possession or was holding in adverse possession. MALIK FATTEH MUHAMMAD v. THE ADMINISTRATOR GENERAL OF BENGAL, **59 P.R. 1883.** (24 P.R. 1882, *R.*) [*D.*, 47 P.R. 1886.]

(7)—*Proprietary right—Suit to establish—Suit for occupancy right.*—A plaintiff against whom a notice of ejectment was issued by the defendant who was the recorded proprietor first brought a suit to establish his proprietary right, which was rejected. A second suit by him to establish his right of occupancy in the same land was barred. JIWAN v. PIR BAKHSH, **9 P.R. 1884, Rev.**

(8)—*Civ. Pro. Code, (Act XIV of 1882), s. 43—Second suit on same cause of action, bar of.*—L, H, and S were three brothers of whom the plaintiffs represented L and the defendant H's son. S having died, the defendant was in possession of the whole estate as the plaintiffs had been absentees then. The plaintiffs, after first obtaining a decree for their one-third share of the estate, sued subsequently to recover a half of S's third; and the question was whether the former suit did not bar the subsequent suit under s. 43 of the Civ. Pro. Code (Act XIV of 1882). The lower Courts decided that it did not, holding that there were two separate causes of action. *Held*, that the causes of action were not the absenteeism and the inheritance right, but the defendant's refusal to acknowledge the plaintiff's right of entry; that the right to entry at the date of the first suit was not a right to enter on a third, but on a half of the estate; and that as in their former suit they claimed only a third, the residue of their then outstanding claim was barred by s. 43 of the Civ. Pro. Code (Act XIV of 1882). MAHI v. USMAN, **15 P. R. 1885.**

(9)—*Joint property situate in several districts—Separate partition suits in several districts—Splitting of claim—Act XIV of 1882, s. 43.*—A and B were joint owners in joint possession for immoveable property (houses) in two districts F and G. A sued in district F for partition of all the houses in that district and got a decree for one-half. A, having subsequently continued in joint possession with B of the property, there demanded partition from B of such property, and on B's refusal sued for it in that district. *Held*, that there was nothing in the above circumstances to bind a Court trying the case to hold that there was such a splitting of claim by A in the first suit that it was not competent for him to maintain the second. BHAI NIHAL SINGH v SOWAYA SINGH, **162 P. R. 1884.** (9 P.R. 1881, *D.*) [*R.*, 43 P.R. 1906=122 P.L.R. 1906.]

Splitting up of Cause of Action—*continued.*

(10)—*Res judicata—Civ. Pro. Code, (Act X of 1877), s. 43—Suits for different properties purchased under different deeds—Cause of action.*—The plaintiff to whom a certain amount was due by the defendant on a mortgage, purchased from him for a portion of this amount a certain share in a village, and for the remaining portion, a share in another village. The sale deeds were executed on the same date and registered. The defendant having refused to deliver possession, the plaintiff first brought a suit in respect of one village alone, and having obtained a decree, he then brought a second suit in respect of the other village. The defendant contended that the second suit was barred by s. 43, Civ. Pro. Code.—*Held*, that the transactions which took place between the parties did not form only one transaction but resulted in two separate sales of distinct properties; and the causes of action in the two suits, being thus different, that the second suit was not barred by s. 43, Civ. Pro. Code. MASSA SINGH v. KHAN SINGH, **110 P. R. 1883.** (9 P. R. 1881, *D.*)

(11)—*Suit for mistaken remedy, dismissal of, for defect in frame of suit—Second suit on same cause of action for proper remedy—Civ. Pro. Code Act X of 1877, s. 43.*—The dismissal of a suit for declaration of title, when consequential relief might have been prayed for, on the ground of the ommission to seek for such relief, is only a case of a dismissal of the suit for defect in the frame of the suit in contravention of s. 42 of the Specific Relief Act And, when such a dismissal is accompanied by a distinct refusal to adjudicate upon the subject-matter submitted for decision, s. 43 of the Civ. Pro. Code cannot preclude the plaintiff whose suit has been dismissed from bringing a second suit founded upon the same cause of action. The object of the clauses enacted in s. 43 of the Civ. Pro. Code (Act X of 1877) is to prevent further litigation concerning the subject-matter of dispute and there cannot be said to have been previous litigation regarding the same subject-matter when the Court has refused to exercise its function to give a decision between the litigants. The plaintiff is then at liberty, under s. 43 of the Civ. Pro. Code, notwithstanding, to commence proceedings *de novo*, and that without any express permission. There is nothing in s. 43 of the Civ. Pro. Code, which prevents a man who has mistaken his remedy and sued for what he is not entitled to, from subsequently bringing a suit for a remedy to which he has a right. The said s. 43 is directed against the splitting of claims, and it does not operate to prevent a man, who has lost a suit merely because it was brought in a wrong form, from repairing his error and suing for the proper remedy. BHOLA SINGH v. GURDIT SINGH, **66 P. R. 1884.** [*R.*, 35 P.R. 1885, 32 P.R. 1910=57 P.L.R. 1910=6 Ind. Cas. 655, 245 P.W.R. 1912=251 P.L.R. 1912.]

Splitting up of Cause of Action—*continued.*

(12)—*Civ. Pro. Code., s. 43—First suit for cancelling invalid mortgage—Second suit for possession— Bar of suit.*—An occupancy tenant under the plaintiffs had executed a mortgage of certain properties in favour of C who had been ever since enjoying the same uninterruptedly. The plaintiffs, proprietors, first brought a suit for the cancellation of the mortgage document and had it cancelled. *Held* that a subsequent suit by them for possession of the properties was barred under s. 43, Civ. Pro. Code as such possession could and should have been asked for in the previous suit alone. BAWA SANT RAM v. CHANDA SINGH, **47 P.R. 1886.** (24 P.R. 1882, 138 P. R. 1882, 59 P.R. 1883, *R.*)

(13)—*Minor's property, mortgage of, by mother—Suit against mother only—Subsequent suit against mother and son to enforce mortgage lien, if maintainable—Civ. Pro. Code, ss* 13, 43.—A mother and a son cannot be regarded as the same party where the question is whether the son is bound by his mother's act during his infancy. A Mahomedan widow mortgaged her minor son's property in 1868 professing to act as his guardian, without mentioning his title in the mortgage deed. Six years after, the mortgagees sued the mother alone without making the son a party, and obtained a money decree against her for the debt due under the deed. In 1880 the mortgagees sued to enforce their lien against the property, impleading both the mother and the son (who had become a major by that time). The son pleaded that the second suit was barred under ss. 13 and 43 of the Civ. Pro. Code. The first Court passed a money decree against both the defendants, while the lower appellate Court dismissed the suit as being barred by the last clause of s. 43 of the Civ. Pro. Code. *Held*, on appeal to the Chief Court that so far as the plaintiff's claim against the son was concerned it could not be said that they had split their cause of action by suing for separate remedies, as there was no suit against him before; that the second suit being against a different party for a different remedy from that previously obtained, there was no question of *res judicata*; and that the cause of action against the mother was exhausted. MT. BHAGWANDEVI v. MEHR BAKSH, **41 P.R. 1883.**

(14)—*Civ. Pro. Code, s. 43—Mortgage-deed providing for possession in default of payment of interest—First suit for interest—Second suit on subsequent default for possession, if maintainable.*—The terms of a mortgage-deed were, that the mortgagor was to remain in possession of the mortgaged property paying an annual sum for interest; on default of which the mortgagee was to get possession of the lands and take the profits therefrom in lieu of interest. On the mortgagor making default, the mortgagee sued him and obtained a decree for interest. On a subsequent default being made, the mortgagee sued for possession of the property; *held* that the causes of action in the two suits were distinct and separate and therefore, s. 43 of the Civ. Pro. Code, was no bar to the second

Splitting up of Cause of Action—*concluded.*

suit. RAMAN v. WAZIRA, **79 P.R. 1886.** (138 P.R. 1882, *D.*) [*D.*, 31 P.L.R. 1910=8 Ind. Cas. 224, 268 P.W.R. 1912.]

(15)—*Civ Pro. Code.* 1877, *s.* 43—*Bond—Splitting cause of action—Agreement to pay interest month by month—Term for payment of principal—Stipulation permitting suit for entire amount on default of payment of interest—Suit for interest—Second suit for principal with interest.*—This suit brought for recovering principal and balance of interest due on a mortgage-bond was dismissed by the Courts below as barred under s. 43 of Act X of 1877, on the ground that the plaintiff, having, in a former suit, simply claimed and recovered a decree for the interest due on the same bond up to the date of that suit, whereas he might have then claimed, under the stipulations of the bond, the entire debt with interest, was now debarred from bringing a fresh suit because of his having split his cause of action. *Held*, that, to constitute a bar under s. 43 of Act X of 1877, what is claimed in the subsequent suit must be something that can be deemed to have formed a constituent part of the former claim which the plaintiff was entitled to make in respect of the cause of action then sued upon, but which, in point of fact, he had omitted to sue for. The distinct agreement in this case, stipulating to pay the interest "month by month" constituted, when there was default of such payment, the basis of a distinct cause of action, and the creditor was entitled to demand and to enforce his demand for the payment of interest as stipulated, without being compelled to proceed to the further step of demanding the whole of the debt and enforcing his demand by the sale of the mortgaged property. RAM BHAJ v. DEVIA, **123 P R. 1881.** [*R.*, 10 P.R. 1883, 188 P.R. 1883, 70 P.R. 1889, 28 P.R. 1907.]

(16)—*Splitting of claim—Inheritance—Circular* 95 *of* 1858.—Plaintiff was not in a position to prove his claim to a house when he brought his suit to recover certain land as a part of the inheritance. *Held* that that fact of itself did not prevent him from bringing a suit for the house also when evidence to prove his claim in regard to it became available to him. If a plaintiff finds himself unable at a particular juncture to prove his demand as to the whole of a certain inheritance, there is no law to prevent his suing for what he can obtain, and afterwards if possessed of better evidence, suing for another portion of the property, provided that the portions constitute distinct properties. FUTTA v. SUMMA, **57 P. R. 1866.**

See CUSTOMS—PUNJAB—ADOPTION, 35 P. R. 1885.

Splitting up of Claim.

See CIV. PRO CODE, 1908, s. 11.

See CIV. PRO. CODE, 1908, O. II, r. 2.

See RES JUDICATA.

See SPLITTING UP OF CAUSE OF ACTION.

Sradh.

Alienation by widow—Necessity—at Gya—*See* HINDU LAW—ALIENATION, 11 B. L. R. 118=19 W. R. 426.

Srotriyam.

Alienation of, by holder—Validity.—A Srotriyam conferred for lives is inalienable by the holder for the time being except as to his own life interest. SUNDARAMURTI MUDALI v. VALLINAYAKI AMMAL, **1 M. H. C. 465.** [*D.*, 2 M. H. C. 341.]

Stables.

For milch-cows, license for, by the Municipal Commissioner, Bombay— *See* Bom. ACT III OF 1888, s. 394, 5 Bom. L.R. 1001=28 B. 253.

Staff Corps.

Attachment of moiety of pay of officer of the Indian Staff Corps—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 25 M. 402.

Stakeholders.

Agreement to pay to two stakeholders—Death of one—Failure to pay to the other—Whether breach of contract—*See* CONTRACT, —GENERAL, 9 M. L. T. 454.

Suit for winnings on a wager—*See* CONTRACT ACT, 1872, s. 30, 2 L.B.R. 271.

Money deposited with Barrister—Suit for recovery of—*See* LEGAL PRACTITIONERS—ADVOCATE, 194 P.R. 1883.

A person, even though he be an advocate with whom fee-money is deposited on certain conditions is a stake-holder — *See* LEGAL PRACTITIONERS—ADVOCATE, 52 P.R. 1894.

Stamp.

See COURT FEES ACT, 1870.

See STAMP ACTS.

See VALUATION OF APPEALS.

See VALUATION OF SUITS.

(1)—*Bond—Stamp—Evasion of stamp and registration rules.*—Three bonds for Rs. 49 each were given by A to B on the same date, and they bore a stamp of four annas each. In a suit on these bonds, the question was raised whether they were admissible in evidence, seeing that there was an apparent evasion of the stamp and registration rules. *Held* that the plaintiff was within the law and the bonds were admissible in evidence. So long as the letter of the law is adhered to, the Court cannot object to any apparent evasion of the stamp and registration rules. *In re a* REFERENCE BY JUDGE, SMALL CAUSE COURT, AMRITSAR, **5 P.R. 1866, Civ. Ref.**

(2)—*Act* VIII *of* 1859, *s.* 31—*Dismissal of suit—Under-valuation found after—Order levying deficient stamp duty illegal.*—It is not open to the Court to levy from a plaintiff additional stamp duty after the dismissal of the suit, on the ground that the suit was at first undervalued. The only penalty for under-valuation is the rejection of the plaint, under s. 31, Act VIII of 1859, before the trial of the suit. CHOOHUR KHAN v. MUMOO KHAN, **15 P.R. 1868.**

Stamp—*continued.*

(3)—*Suit on bond—Sufficiency of stamp—Rise in value of property.*—Where a bond stipulating for the delivery, on a future day, by the debtor, of a certain quantity of grain, was stamped on a calculation of the then value of the grain, a subsequent rise in the value of the grain, at the institution of a suit to recover the grain or the price of it, would not make the instrument one not sufficiently stamped under the Act. BHAIRAB CHUNDRA CHOWDRI v. ALEK JAN, **13 C. 268.**

(4)—*Certificate of sale—Sale subject to mortgage lien—Property sold in different lots to different persons—Stamp duty payable by each purchaser, amount of.*—Where immoveable properties, subject to an individual mortgage lien, have been attached and sold in several lots to several different persons, in computing the stamp duty payable by the purchaser of any one lot, the whole amount of the principal mortgage-debt, and not merely a proportionate amount of it, is to be added to the price, and the total amount forms the consideration upon which the *ad valorem* stamp duty is to be calculated, as each purchaser is to obtain a separate certificate. *In re* VISHNU KESHAV SATHE, **10 B. 58.** (Bombay P.J. for 1884, p. 98, *R.*)

(5)—*Act* XVIII *of* 1869, *sch.* II, *art.* 5—*Unstamped acknowledgment—Objection as to admissibility of.*—The words "note or memorandum whereby a debt is acknowledged to be due" in art. 5, sch. II, Act XVIII of 1869, taken in their most natural sense, mean a document made for the purpose of recording and affording evidence of an acknowledgment of a debt, and do not include every letter or other writing which, though written without any idea whatever of securing evidence of an acknowledgment, happens incidentally to contain an acknowledgment express or implied. An objection that certain letters were inadmissible inasmuch as each of them was not stamped under art. 5 of sch. II to Act XVIII of 1869, cannot be taken for the first time in appeal. DR. J.C. MORICE v. THE SIMLA BANK CORPORATION LIMITED, SIMLA, **2 P.R. 1878.** (3 B.L.R.A.C. 126, 235, 5 B.L.R. App. 10, 21 P.R. 1866, 79 P.R. 1870, *F.*) [*R.*, 2 P.R. 1884.]

(6)—*Act* X *of* 1862, *sch*, II, *art.* 11, *Note* 1—*Stamp duty—Refund—Remand.*—When a suit is remanded in part, the appellant is entitled to only a proportionate refund of stamp-duty. (By the majority of the Full Bench, Campbell and Loch, JJ., *contra.*) *In the matter of the petition of* DOORGA DASS DUTT, **B.L.R. Sup. Vol. 511=6 W.R. Mis. 65.** [*F.*, 18 W.R. 434; *D.*, 20 W.R. 106.]

(7)—*S.* 34, *Court Fees Act*, 1870—*Transfer of Stamps.*—Transfer of a Court-fee stamp on promise of a stamp of equal value being returned is no "sale" under s. 34, Act VII of 1870, and no conviction can be sustained for such transfer. KEDAR NATH SHAHA v. EMPEROR, **30 C. 921=7 C.W.N. 704.**

Stamp —*continued.*

(8)—*Stamp duty—Decision on objections.*—Stamp objections are the care of the Court and when they are raised it is for the Court to decide whether they ought to be sustained, without any regard to the ground, as being the sole and only possible ground upon which the objection may have been taken. R.D. SELTMA v. MIRZA MAHOMED SHIRAZI, **9 Bom. L.R 1034.**

(9)—*Sufficiency of stamp—Document—Construction—Practice.*—In determining the question whether a document bears a sufficient stamp, the document must be looked at as it stands. A defect, if any, in the Stamp Act cannot be cured by construing a document to be other than what it is or purports to be. SAKHARAM v. RAMCHANDRA, **5 Bom. L.R. 28 =27 B. 279.**

(10)—*Stamp—Construction of document—Act X of 1862, sch. A, arts. 25 and 35.*—One of the defendants in answer to a suit for the recovery of possession of certain land produced a document of which the following is a translation:—"We Hanuman Singh and Kalka Singh do hereby grant to Nandan Ram Misir asshankalap the plot called Rae Chanda consisting of one bigha land and two Mahwa trees in grove called Satti. We shall take no rent thereof; while the grantee is to avail it for (his) whole life. Any one of our family will have no right to interfere afterwards. Given this Asarh Badi 2nd, 1274 Fasli, Sambat 1924. (Corresponding to the 19th June, 1867)." The document when produced bore a stamp of 2 annas only. On objection being taken by the plaintiff that this document was insufficiently stamped a reference was made through the District Judge to the High Court. *Held* that the document must be construed as a conveyance on the face of which no value appears, and as such, should have been stamped with a stamp of the value of Rs. 50. LACHMAN SINGH v. ISHRI SINGH, **A.W.N. 1891, 65.**

(11)—*Unstamped document, admissibility in evidence of, for collateral purposes.*—Documents happening to be unstamped can be admitted, when tendered in evidence, not for the purpose of giving effect to the documents themselves directly, but for some other collateral purpose. RUSTOMJI EDULJI CROOS v. CURSETJI SORABJI CROOS, **4 B. 349.**

(12)—*Stamp—Promissory note payable on demand—Collateral agreement.*—In applying the Stamp law, the stamp duty must be paid upon what is stated in the instrument, and cannot depend on collateral evidence. Where a promissory note is payable on demand, it ought to be stamped as a note payable on demand, although there may be a collateral agreement between the parties that the holder will not present it for a given time, or that, if paid on demand, the maker of the note shall be entitled to a certain amount of discount to be deducted. CHANDRAKANT MOOKERJEE v. KARTIK CHARAN CHAILE, **5 B.L.R. 103=14 W.R.O.C. 38.** [*F.*, 3 C. 220, 16 C. 432; *R.*, 6 Bom. L.R. 679.]

Stamp —*continued.*

(13)—*Unstamped document—Evidence.*—The want of stamp in a document admitted as evidence, where the error of receiving it unstamped did not affect the merits of the case, is not a ground for reversing a decision. MARK RIDDED CURRIE v. S. V. MUTU RAMAN CHETTY, **3 B.L.R.A.C., 126=11 W.R. 520.** [*F.*, 5 B.L.R. App. 10, 16 W.R. 6, 25 W.R. 376; *R.*, 13 B. 449, F.B.; *Disc.*, 2 A. 554; *D.*, 11 B.H.C. 125.]

(14)—*Suit on unstamped Hundi—Hundi not admissible in evidence—Plaintiff whether entitled to recover on original consideration.*—The Stamp Law and the Law of Evidence in England are the same as those of India, in regard to the admissibility of an unstamped document in evidence, and the exclusion of oral by documentary evidence, and, it has been ruled in England that, when a plaintiff cannot recover on a count on a note for want of a stamp, he may recover on account for money lent by proving an acknowledgment on a demand made. In the present case, it was found that plaintiff paid defendant Rs. 300; that the latter on demand repaid Rs. 68-11-0 on account. There was, therefore, evidence on which plaintiff might recover the balance of the monies originally lent although he could not put the hundi in evidence. MANI RAM v. KALA MAL, **4 P.R. 1881.** [*F.*, 82 P.R. 1891; *Appr.*, 73 P.R. 1886; *D.*, 42 P.R. 1895.]

(15)—*Insufficiently stamped hatchitta—Admission—Cause of action*—. Where, in the case of an insufficiently stamped *hatchitta* amounting to a promissory note, the defendant admitted the loan but pleaded payment, *held*, the plaintiff had a cause of action, whereupon he might maintain a suit independently of the note. PRAMATHA NATH SANDAL v. DWARKA NATH DEY, **23 C. 851.** (7 C. 256, *Expl.*; 3 C. 314, *F.*) [*Rel. on*, 6 O.C. 16; *R.*, 28 B. 360=2 Bom. L.R. 25, 9 O.C. 314].

(16)—*Unstamped account—Evidence.*—An account of advances made to, and part-payments made by the defendant, in his handwriting and signed by him, need not be stamped, in order to be admissible in evidence. BROJO GOBIND SHAHA v. GOLUCK CHUNDER SHAHA, **9 C. 127.** (4 C. 885, *F.*) [*F.*, 15 C. 162.]

(17)—*Reception in evidence of unstamped and unregistered document—Objection in first appeal—Civ. Pro. Code*, 1959, *s.* 350—*Civ. Pro. Code*, 1877, *s.* 578.—An appellate Court may admit and consider an objection to the reception, in evidence, of an unstamped and unregistered document. SAFDER ALI KHAN v. LACHMAN DAS, **2 A. 554.** (3 B.L.R. 126, *Disc.*) [*R.*, 2 N.L.R. 121.]

(18)—*Deficiency of—Document admitted in evidence—Objection taken on appeal.*—The holder of a bill or note, which is defective and inadmissible in evidence for want of a stamp, may still sue on the consideration the person to whom he gave it, though he cannot use the bill in support of his suit. When a document has been admitted in evidence, no objection on the score of absence or deficiency in stamping can be taken on appeal. KRISHNNAJI v. RAJMAL, **2 Bom. L.R, 25=24 B. 360.**

Stamp—*continued.*

(19)—*Stamp—Objection to stamp based on rules of Revenue Department.*—The objection that a security bond is engrossed on an eight anna stamp threaded to other stamps aggregating to the full value, contrary to the rules of the Revenue Department is merely a technical objection and does not affect the merits of the case. MR. A. D. DUNNE v. AMEEROONISSA KHATOON, **13 W.R. 41.**

(20)—*Evidence—Time of stamping—Duty of Court.*—Where a document, which under the stamp laws requires to be stamped, is tendered in evidence, all that the Civil Court has to see is that it bears a proper stamp at the time when it is offered in evidence. The Civil Court is not bound, nor is it at liberty, to allow the parties to go into evidence to show at what time the instrument was stamped. KALI CHURN DAS v. NOBO KRISTO PAL, **9 C.L R. 272.** (24 W.R. 198, *F.*) [*R.*, 6 Bom. L.R. 699.]

(21) — *Penalty — Secondary evidence of a document.*—Secondary evidence of the contents of a document, which was liable to stamp-duty but was unstamped, cannot be admitted on payment of a penalty. KOPASAN v. SHAMU, **7 M. 440.** [*F.*, U.B.R. (1892—1896), Vol. II, 632, 17 M. 473; *R.*, 23 M. 49, 4 M.L.J. 192.]

(22)—*Stamp—Document tendered in evidence not duly stamped—Failure to pay stamp duty and penalty in lower Court—Offer to pay same in second appeal, not allowed.*—An instrument which is not duly stamped will not be admitted in evidence, on second appeal, on payment of the stamp and penalty, when there is no evidence that the stamp and penalty were tendered to and refused by the District Court. LAKSHMAN DAS v. RAMBHAU, **20 B. 791.**

(23)—*Permission to pay stamp duty of lost instrument— Quære.*—Whether permission to pay the stamp duty and penalty can be given in the case of a lost instrument? ARUNACHELLAM CHETTY v. OLAGAPPA CHETTY, **4 M.H.C. 312.** [*R.*, U.B.R. (1892-1896), Vol. II, 631, 23 M. 49, P.C.]

(24)—*Execution of agreement in Calcutta — Pleading in the mofussil—Stamp duty.*—Where parties residing and carrying on business in Calcutta execute agreements without intending to plead the same in mofussil, *held*, under the old Stamp Law, that such documents were good and binding though not on stamped papers. GOURY CHURN MOOKERJEE v. JOGENDRA NATH MOOKERJEE, **W. R. 1864, 289.** [*R.*, 4 M.L.J. 192.]

(25)—*Valuation of appeal to Privy Council —Bengal Stamp Reg. X of* 1829, *necessity of compliance with the terms of —Fresh evidence on question of value, if admissible.*—In this case, the leave to appeal originally granted provided that such leave should be null and of no effect unless satisfactory evidence should be supplied by the appellants to the Registrar of the Sudder Court, that the real or market value of the land in dispute exceeded

Stamp—*continued.*

the sum of Rs. 10,000. This order having been obtained *ex parte* and appearing to have been obtained upon an inaccurate statement of the facts, was discharged. The present application was put in to discharge the said order of discharge and to restore the appeal. *Held*, there was no fraud practised upon the Court in obtaining the order granting leave to appeal and the condition on which that order was granted had been fulfilled. There was, therefore, *prima facie* no ground for refusing to restore the appeal. It was contended for the respondents that the value of the land in dispute was untruly stated in the plaint in fraud of the Revenue Laws of India, and that leave to appeal ought not therefore to be granted. But it was *held* that it was a mistake on the part of the Court, no less than that of the appellants, to have allowed the cause to proceed upon such a representation of the value as was continued in the supplementary plaint, and their Lordships suggested that Bengal Reg. X of 1829 upon the subject of value should be carefully attended to. Permission was asked by the respondent to go into evidence on the question of value, but their Lordships were not disposed to deviate in this respect from their original order, which was carefully and designedly confined to evidence to be adduced by the appellants, with a view to prevent the introduction, for the purpose of a merely fiscal Regulation, of a contested issue on the question of value, a result, which in their Lordships' judgment ought, in all cases, as far as justice will permit, to be avoided. MOHUN LAL SOOKUL v. DEBEE DOSS DUTT, **2 W. R. P. C., 9=8 M.I.A. 492=1 Suther. 458=1 Sar. 811.**

(26)—*Lease for term of 3 years with covenant for renewal of lease after expiry of term—Stamp duty payable.*—An instrument of lease for a term of 3 years at a monthly rent of Rs. 190, with a covenant on the part of the lessor to renew the lease, at the option of the lessee, for a further term of one or two years from the expiration of the said term of 3 years, is liable to be stamped only with the duty payable on a lease for a term of 3 years, as the instrument contains only one contract, a demise, the option of renewal of the lease being ancillary to it and forming part of the consideration for entering into the lease. THE SECRETARY TO THE COMMISSIONER OF SALT v. SUTHERLAND ORR, **11 M.L.J. 350, F.B.**

(27)—*Correspondence containing agreement to lease—Stamping.*—Where a correspondence contained a complete agreement to lease in the absence of anything to connect the subsequent draft and engrossed lease properly stamped with it, the latter could not be treated a part of the correspondence. Such being the case, the correspondence must be stamped and the penalty paid before it could be admitted in evidence. A. C. BOYD v. A. KREIG, **17 C. 548.**

(28)—*Sunnud authorising gomastah to collect and sue for rents—Stamp duty—Act X of* 1862,

Stamp—*continued.*

sch. A, art, 143.—A *sunnud* which authorises a *gomastah* to collect rents and to sue for them must be stamped. If it is a general power of attorney which authorises the *gomastah* to collect rents generally and to sue for them, it necessary, it requires a four rupees stamp under art. 143, sch. A of Act X of 1862. RUGHOO NUNDUN THAKOOR v. RAM CHANDER KUPALI, **10 W.R.F.B. 39.**

(29)—*Agreement with covenant sounding in damages is not a bond--Stamp duty.*--An instrument with a covenant to do a particular act, the breach whereof is to be compensated in damages, is not a bond; it requires only an eight anna stamp. GISBORNE AND CO. v. SUBAL BOWRI, **8 C. 284=10 C.L.R. 219.** [*R.*, **9** A. 585, F.B.]

(30)—*Stamp—Promissory note.*—A promissory note is sufficiently stamped if the stamp is sufficient to cover the principal sum secured by the note. GOMEZ v. YOUNG, **2 B.L.R.O. C. 165=12 W.R O.C. 1.**

(31)—*Pro note bearing a stamp not cancelled, admitted by first Court—Appellate Court whether can question admissibility.*—Though a promissory note bearing a stamp not properly cancelled is inadmissible in evidence, yet, when the Court of first instance has admitted it, the appellate Court cannot question its admissibility in appeal. MI KE v. NGA KAN GYI AND NGA PO SIN, **U.B.R. 4th Qr. Stamp, 3.** (U.B.R. 1897—01, 11, 556, 559. *F.*; 2 L.B.R. 103, *Diss.*; 14 B. 152, 18 B. 369, *R. and Com.*)

(32)—*Conflict of laws—Promissory note executed at Rampur in favour of the Nawab without stamp—Stamp affixed when suit filed in British India*—Lex loci contractus—*Rampur Stamp Law, s. 52. proviso (c)—Admissibility in evidence.*—A promissory note was executed in favour of "the Nawab of Rampur" at Rampur. It was not stamped. According to s. 52 of the Rampur Stamp Law, no document which required a stamp, but was not stamped, could be admitted in evidence for any purpose or be acted upon, unless it was executed in favour of the state (proviso c.). The suit was brought in British India, the plaintiff's pleader affixing an one anna stamp on the document when he filed it. The Subordinate Judge *held* that it was immaterial to find what the law at Rampur was and decreed the suit. *Held* that it was material to find what the law in force at Rampur was about the validity of unstamped documents. *Held* further that the note having been executed in favour of the "Nawab of Rampur" and not "Sir Mohammad Hamid Ali Khan Bahadur, &c.," was one executed in favour of the State within the meaning of the aforesaid proviso, although the money was not advanced to the defendant from the State Treasury. It was, therefore, though unstamped, a note in accordance with the law in existence at the place of contract, and could be admitted in evidence against the defendant in British India. AMNA BEGUM v. NAWAB OF RAMPUR, **8 A.L.J. 566.**

Stamp—*continued.*

(33)—*Unstamped memorandum of account.*—In case of an unstamped memorandum of account signed by defendant, if the account is inadmissible in evidence on the ground of want of stamp, the suit will have to be dismissed, no other evidence being admissible. DINGAR MAL v. GOPAL, **A.W.N. 1881, 108.**

(34) *Memorandum of appeal insufficiently stamped—Stamp not supplied within time fixed—Dismissal of appeal—Appeal—Revision.*—Where an appeal is struck off the file, owing to the failure of the appellant to make up the deficiency in Court fees on the memorandum of appeal, within the time allowed, the appellant can prefer an appeal from that order as from a decree and should not apply for revision under s. 622, Act X of 1877. *In re* PETITION OF MACHAL SAHU, **A.W.N. 1881, 51.**

(35)—*Stamp on plaint.*—The amount of the stamp upon the plaint is not conclusive of the value of the subject matter of the suit. MOHUN LALL SOOKUL v. BEBEE DOSS, **7 M.I.A. 428=1 Suther. 458=1 Sar. 739.**

(36)—*Stamp on plaint—Quaere.*—Whether the stamp upon the plaint required by Ben. Reg. X of 1829, s. 17, being for fiscal purposes only, is conclusive of the value of the property sued for? MUSSUMAT AMEENA KHATOOR v. RADHABENOD MISSER, **7 M.I.A. 261=12 Moo. P.C. 470=1 Sar. 644.**

(37)—*Appeal—Return of plaint by appellate Court.*—Where an order has directed a plaint to be returned for presentation to the proper Court, an appeal from such an order is an appeal from an order and should be stamped with Rs. 2. It not being an appeal from a decree, full stamp-duty need not be paid. FAZLUR RAHIM v. ABU AHMED, **30 C. 453=7 C.W.N. 402.** (26 C. 275, *F.*)

(38)—*Plaint not stamped—Credit asked for excess paid elsewhere.*—Where the plaint is not stamped but the plaintiff claims that the necessary stamp for the same relief has been furnished in excess in another suit, the credit claimed cannot be allowed. ASSAN v. PATHUMMA, **22 M. 494.**

(39)—*'Dowl Fehrist' Stamp.*—A 'dowl fehrist' is no more a contract than are chittas, measurement papers or 'sumthalic' papers, and does not require to be stamped or registered. GUNGAPERSHAD v. GOGUN SING, **3 C. 322.** [*F.*, 5 C. 864=6 C.L.R. 286; *D.*, 10 C.L.R. 121.]

(40)—*Act X of 1862, arts. 7, 12—Document regarding remuneration to pleader—Agreement for service within art. 7, and not bond under art. 12.*—An agreement by a client retaining a pleader for procuring a certificate under Act XXVII of 1860, and reciting that, in consideration of his trouble, he was to receive a certain fixed sum of money in any event, is an agreement for service within the meaning of art. 7 of Act X of 1862, and not a bond or other

Stamp—*continued.*

obligation for the payment of money under art. 12; and the question depends on the nature of the document and not on the amount secured thereby. DULPUT RAI v. RUHEEM BUKSH, **86 P.R. 1869.** [*D.*, 82 P.R. 1870.]

(41)—*Bond—Pleader's fees—Act* XVIII *of* 1869.—An instrument by which a party appoints a vakil and agrees to pay a certain sum on the accused in the case being acquitted and to pay nothing if they are convicted, comes under the definition of a bond given in Act XVIII of 1869, s. 3, para. 5, and must be stamped accordingly. SPENCER v. EMAMOODDEEN, **82 P.R. 1870.**

(42)—*Bombay Regulation* XVIII *of* 1827, *s.* 12, *cl.* (2)—*Sale-deed under—Suit to recover possession—Practice.*—In the case of a sale-deed executed on an one-anna stamp when Regulation XVIII of 1827 (Bombay) was in force, *held* that the deed was sufficiently stamped under cl. (2) of s. 2 of the Regulation, but that the plaintiff suing thereon cannot obtain a judgment for a sum or value beyond what is covered by the stamp, unless he paid an additional stamp-duty and penalty, which the Court might allow him to do. MULJI BECHAR v. JETHA JESHANKAR, **10 B. 239.**

(43) —*Contract—Suit for recovering costs of preparing deeds of indenture and debenture—Stamp duty—Place of origin of cause of action—Jurisdiction—Counter claim against plaintiff not allowed—Civ. Pro. Code*, 1882, *s.* 111.—By an agreement of December 1892, plaintiffs, contractors, entered into a contract with the defendant Company for the supply of machinery to be delivered and paid for in the manner agreed on. On difficulties arising as to payment, a supplementary agreement was entered into between the parties in August 1894 by which it was arranged that the plaintiffs should accept shares in the Company and debentures charged on its property in satisfaction of their claim. By the fifth clause of the agreement, it was provided as follows:—"The Company shall forthwith execute an indenture of trust in favour of the trustees to be named by the contractors for the purpose of securing the debentures, such indenture and debentures to be prepared by the solicitors of the contractors at the expense of the Company and to be approved of by the company's solicitors. It was to recover the costs of the preparation of the above said indenture and debentures from the defendant Company that the plaintiffs brought this suit. On the materal issue as to jurisdiction, the Court was held to have jurisdiction, leave having been given under cl. 52 of the Letters Patent. Where one of the parties assents to a contract in Bombay, part of the cause of action must surely be taken to have arisen at Bombay; for, if the assent of such party to the contract be disproved, the whole contract would fall to the ground and with it the right of suit. Also, under the circumstances of this case, the preparation of the documents in Bombay and their approval by the defendants, Bombay solicitors having deen accepted, it must be held to have been intended that they should be prepared in Bombay and paid for there. The issue whether, under the above agreement, the defendants were liable to pay the stamp-duty for the deeds was decided in the affirmative. Under the agreement the defendant Company were liable to pay all the costs incidental to the execution of the deeds and the term 'prepared' must have been intended to include the stamping of the document but for which it could not be executed. On another issue raised as to whether the defendants were not entitled to set off their counter-claim for damages against the plaintiffs for their failure to carry out the earlier agreement of 1892, it was *held* that such counter-claim or set-off should not be permitted, for, the claim was not one for an ascertained sum of money legally recoverable from the plaintiffs, as provided for in s. 111 of the Civ. Pro. Code. DOBSON AND BARLOW v. THE BENGAL SPINNING AND WEAVING COMPANY, **21 B. 126.** [*R.*, 20 M. 336 = 16 M. L.J. 395 = 1 M.L.T. 153.]

Stamp—*continued.*

This circular calls for annual statements regarding stamp fees, and the expense to Government for each description of Court. **Cir. No. 2, dated the 13th February 1865, 2 W.R. Civ. Cir. Order, p. 1.**

This circular deals with stamp on receipts from suitors for money repaid to them from sums in deposit. **Cir. No 22. dated the 13th September 1865, 4 W.R. Civ. Cir. Orders, p. 1.**

This circular draws attention to circular No. 2 of 1865, calling for annual statements regarding stamp fees and the expense to Government for each description of Court. **Cir. No. 4, dated the 20th February 1866, 5 W.R. Civ. Cir. Orders, p. 2.**

This circular substitutes new rule regarding stamp paper on which applications for new trials under s. 21, Act XI, 1865, &c., are to be engrossed. **Cir. Order No 35, dated 14th December 1867, 9 W.R. Civ. Cir., p. 1.**

This circular requests Courts to satisfy themselves as to the cancellation of adhesive stamps filed between 1st April last and the receipt of Circular, dated 17th January 1871. **Civ. Cir. No. 10, dated 13th April 1871, 15 W.R. Civ. Cir., p. 19.**

This circular calls attention to Rules relative to the use of Bicolor and Adhesive Stamps as denoting fees chargeable under the Court Fees Act. **Civ. Cir. Memo. No. 1, dated 10th January 1872, 17 W.R. Rules and Orders of the High Court, p. 1.**

This circular directs that Collectors, &c., are to be careful that Stamps commonly used are always available at Sub-divisions. **Rev. Cir. No. 4, 20 W.R. Rev. Cir., p. 3.**

This circular directs that occasional inspection is to be made by heads of offices to ensure the effectual punching and defacement of stamps. **Rev. Cir. No. 3, 20 W.R. Rev. Cir. p. 7.**

Stamp—*continued.*

This circular makes an alteration in cl. 4, s. 6, Ch. XIII of Board Rules, regarding Stamps. **Rev. Cir. No. 1, 20 W.R. Rev. Cir., p. 9**

This letter circulates Financial Department Order drawing attention to an instance of fraud in a District Stamp Office, and directing precautions to be taken when Collector grants refund or renewal of stamps. **Rev. Cir. No. 10, 20 W.R. Rev. Cir., p. 14.**

This circular directs that Court-fee Stamps for processes should be put in with application and fixed on process at once, and that postage labels should not be received until party desires process should be actually transmitted. **Civ. Cir. No. 17, 20 W.R. Rules and Orders of the High Court, p. 8.**

This circular calls for report regarding number of stamps required to be repunched monthly in the Courts at head-quarters and subdivisions, and asks whether any inconvenience is felt in carrying out orders on the point. **Rev. Cir. No. 5, 21 W.R. Rev. Cir., p. 4.**

This letter circulates Financial Department Orders of 31st January 1874, regarding cancellation and punching of stamps. **Rev. Cir. No. 4, 21 W.R. Rev. Cir., p. 6.**

This circular draws attention to previous circular regarding the punching of stamps affixed to documents. **Civ. Cir. Memo. No. 4 of 14th February 1874, 21 W.R. H C. Rules and Orders, p. 9.**

This circular in supersession of previous circulars, promulgates new rules regarding payment of discount on stamps. **Rev. Cir. No. 2, 22 W.R. Rev. Cir., p. 3.**

This circular lays down orders regarding the refund of judicial stamps when the applications for refund are unsupported by certificates. **Rev. Cir. No. 5, 22 W.R. Rev. Cir., p. 5.**

This circular communicates orders of Government in a case of embezzlement of stamps at a sub-divisional treasury. **Rev. Cir. No. 6, 22 W.R. Rev. Cir., p. 5.**

This circulates Financial Department Resolution regarding the refund or renewal of a Stamped Paper. **Rev. Cir. No. 6, 23 W.R. Rev. Cir., p. 17.**

This circular promulgates rules for guidance of proceedings held by District Officers for realization of Stamp Fees in Pauper Suits. **Rev. Cir. No. 1, 23 W.R. Rev. Cir., p. 29.**

With reference to Government Order regarding ss. 49 and 50 of the General Stamp Act, this circular intimates that documents not correctly prepared are to be considered as insufficiently stamped, and treated accordingly. **Rev. Cir. No. 2, 23 W.R. Rev. Cir., p. 31.**

This letter circulates Financial Resolution relating to the cancellation of stamp labels on certain documents before issue. **Civ. Cir. Order No. 13, 23 W.R. Rules and Orders of High Court, p. 13.**

Stamp—*continued.*

This circular deals with quarterly stamp statements and their comparison with previous year's quarters. **Rev. Cir. No. 4, 24 W.R. Rev. Cir., p. 5.**

This circular deals with the indents for stamps. **Rev. Cir. No. 7, 24 W.R. Rev. Cir., p. 7.**

This circular cancels C. O. No. 10 of March 1875 as to Store Book of stamps. **Rev. Cir. No. 3, 24 W.R. Rev Cir., p. 18.**

This circular deals with the exchange of adhesive stamp for stamped papers. **Rev. Cir. No. 1, 24 W.R. Rev. Cir., p. 25.**

This circular directs that frauds in connection with stamps are to be reported immediately. **Rev. Cir. No. 2, 24 W.R. Rev. Cir., p. 25.**

This circular lays down certain additional precaution in the custody of stamp-labels. **Rev. Cir. No. 6, 24 W.R. Rev. Cir., p. 27.**

This circular lays down that the periodical inspection of documents bearing adhesive labels is to apply to all papers which require such labels. **Rev. Cir. No. 7, 24 W.R. Rev. Cir., p. 27.**

This circular deals with the duties of Collectors when unstamped or insufficiently stamped documents are produced before them. **Rev. Cir. No. 6, 25 W.R. Rev. Cir., p. 4.**

This circular deals with the Board's Rule 8, s. I, about issue of stamps after 27th of the month. **Rev. Cir. No. 3, 25 W.R. Rev. Cir., p. 6.**

This circular deals with non-judicial stamps. **Rev. Cir. No. 5, 25 W.R. Rev. Cir., p. 7.**

This circular lays down a new table of rates of discount on sale of stamps. **Rev. Cir. No. 1, 25 W.R. Rev. Cir. p. 10.**

This circular states that certificates of purchase-money are not conveyances, and should not be stamped —C.O. No. 4 of January, 1876, cancelled. **Rev. Cir. No. 2, 25 W.R. Rev. Cir., p. 12.**

This circular deals with the corrections in form of license for vend of stamps. **Rev. Cir. No. 5, 25 W.R. Rev. Cir., p. 12.**

This circular deals with the value of stamps stored in sub-divisions. **Rev. Cir. No. 5, 25 W.R. Rev. Cir., p. 22.**

This circular deals with the details of land-revenue — Excise and stamp return. **Rev. Cir. No. 7, 25 W.R. Rev. Cir., p. 22.**

This circular deals with stamp return No. XXXV. **Rev. Cir. No. 8, 25 W.R. Rev. Cir., p. 23.**

This circular deals with the evasion of stamp-law in loans. **Rev. Cir. No. 3, 25 W.R. Rev. Cir., p. 25.**

This circular deals with the evasion of stamp duty in blank transfer deeds. **Rev. Cir. No. 4, 25 W.R. Rev. Cir., p. 27.**

Stamp—*continued.*

All receipts for sums of over Rs. 20, except those granted to cultivators for rent, must have a one-anna stamp. The postage stamp on a receipt sent by post is not enough. Rev. Cir. No. 4, 25 W.R. Rev. Cir., p. 29.

This circular deals with the stamping of documents after execution—Prosecution. 25 W.R.H.C. Rules Cir. No. 5, dated 25th March 1876, p. 4.

See ACT VI OF 1882, ss. 76, 79, A.W.N. 1900, 15.

See APPEAL — ARBITRATION, 3 B.L.R. App. 104=12 W.R. 50.

Appeal—Rejection for insufficient — Appeal from order—*See* APPEAL—ORDERS, A.W.N. 1883, 255.

Evidence—Objection as to stamp in special appeal—*See* APPELLATE COURT — OBJECTIONS FIRST TAKEN IN APPEAL, 4 B.L.R. A.C. 27 Note=12 W.R. 362.

Suit-bond unstamped - Appeal—*See* APPELLATE COURT—REJECTION OR ADMISSION OF EVIDENCE, 5 B.L.R. App. 10.

Letters submitting to arbitration — Not required—Verbal agreement, evidence of—*See* ARBITRATION—REFERENCE TO ARBITRATION, 19 B. 32.

Objection as to want of, cannot be taken for the first time in second appeal—*See* AWARD, 10 C.L.J. 41=2 Ind. Cas. 414=37 C. 63=14 C.W.N. 75.

Issue of certificate of sale—Insufficiency of stamp—Court not bound to grant fresh certificate—*See* CERTIFICATE OF SALE, 9 B. 526.

Order rejecting memorandum of appeal—Duty—*See* CIV. PRO. CODE, 1908, s. 2, O. VI, r. 17, O. VII, r. 11, O VI, r. 18, O. XLI, r. 3, s. 107 (2), O. XXII, r. 11, A.W.N. 1885, 323.

Sum recoverable by Government as stamp-fees, first charge on proceeds of sale—*See* CIV. PRO. CODE, 1908, O. XXXIII, r. 10, 25 M. 733 =12 M.L.J. 405.

Memorandum of objection insufficiently stamped—Defect not made good—Dismissal for default—Appeal memo. also insufficiently stamped—Appeal—*See* CIV. PRO. CODE, 1908, O. XLI, r. 22, s. 146, 4 N.L.R. 168.

Application to wind up partnership—Nature of suit—*See* CONTRACT ACT, 1872, s. 265, 13 C. L.R. 160.

Declaratory suits—Stamp duty—Act VII of 1870, s. 12—*See* DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLES, 1 M. 40.

Unstamped document—Secondary evidence of its contents—Admissibility—*See* EVIDENCE —GENERAL, 2 M.W.N. 1911, 166.

Entry in book recording extent of holding and rate of rent—Admissibility in evidence—

Stamp—*continued.*

Unstamped and unregistered document—*See* EVIDENCE—MISCELLANEOUS DOCUMENTS, 5 C. 864=6 C.L.R. 286.

Secondary evidence—Unstamped instrument —Notice to produce—*See* EVIDENCE—SECONDARY EVIDENCE, 2 M. 208.

See EVIDENCE—SECONDARY EVIDENCE, 21 B. 201, F.B.

Document inadmissible for want of—Suit thereon—Suit on original cause of action—Maintainability—*See* EVIDENCE — MISCELLANEOUS, 21 M.L.J. 462.

Insufficient stamp—Document admitted by the defendant—Dismissal of suit—Legality—*See* EVIDENCE ACT, 1872, s. 58, 11 Ind. Cas. 810.

Unstamped entry in account book—Admission in evidence—*See* IRREGULARITIES, A. W.N. 1882, 115.

See LANDLORD AND TENANT—RELATIONSHIP OF LANDLORD AND TENANT, 4 M.H.C. 153.

Plaint sent to Court unstamped—Requisite Court fee paid after expiry of the period of Limitation—Plague restrictions—*See* LIMITATION—GENERAL, P.L.R. 1900, p. 191.

Limitation—Plaint sent to Court by post unstamped—Plaintiff restrained from going to Court owing to plague under executive orders —Court-fees Act, 1870, s. 28—*See* LIMITATION —GENERAL, P.L.R. 1900, p. 189.

Plaint insufficiently stamped — Deficiency made up within time allowed—Suit not barred —*See* LIMITATION—GENERAL, 3 Ind. Cas. 557.

See LIMITATION ACT, 1908, s. 3, 3 P.R. 1893.

See LIMITATION ACT, 1908, s. 3, art. 23, 20 C. 41.

See MORTGAGE —ACCOUNTS BETWEEN MORTGAGOR AND MORTGAGEE, 9 B. 435.

See NEGOTIABLE INSTRUMENTS—BILL OF EXCHANGE, 16 C. 432.

Partition suit—Title of plaintiff to share in many of the properties included in plaint denied—Court-fee payable—*See* PARTITION—MISCELLANEOUS, 20 C. 762.

Plaint, insufficiently stamped— Deficiency not made good within time allowed by Court—Plaint admitted subject to defendant's objections— Subsequent rejection of plaint— *See* PLAINT—REJECTION OF PLAINT, A.W.N. 1891, 166.

Finality of decision of first Court as to undervaluation of plaint—Plaint not to be rejected without opportunity to plaintiff to affix proper stamp—*See* PLAINT—REJECTION OF PLAINT, 9 B. 355.

Plaint or appeal if returnable for presentation in proper Court, after admission, in wrong Court and cancellation of Court-fees — *See* PLAINT—RETURN OF PLAINT, 7 B. 487.

Stamp—*concluded.*

Petition of compromise containing recital of a previous oral agreement for lease, whether requires stamp — *See* REGISTRATION ACT, 1908, s. 17, 12 C.W.N. 59.

Release—*See* REGISTRATION ACT, 1908, s. 17, cl. (3), 2 A. 554.

See BOM. REG. XXVIII OF 1827, s. 14, cl. 1, 5 B. 127.

See RESISTANCE TO EXECUTION OF DECREE, 4 B.L.R. F.B. 94=12 W.R. F.B. 25.

See SECURITY FOR COSTS, 21 B. 576.

Second appeal—Plea that appeal in lower Court was barred by limitation—Plea cannot be raised at the hearing when not taken in memo. of appeal—*See* SPECIAL OR SECOND APPEAL—PRACTICE AND PROCEDURE IN SPECIAL APPEAL, 13 A. 580=11 A.W.N. 166.

See SPECIAL OR SECOND APPEAL—MISCELLANEOUS, A.W.N. 1883, 165.

On certificate—*See* SUCCESSION CERTIFICATES ACT, 1889, ss. 17, 20, 19 B. 145.

Stamp Act (XXXVI of 1860).

[REP. ACT X OF 1862].

See STAMP.

See STAMP DUTY.

(1)—*Stamp Law (Act* XXXVI *of* 1860), *s.* 14—*Optional stamp—Bond—Rights of obligee.*—Where a person knowingly and without mistake, ignorance or inadvertence, executes a document on an optional stamp, the obligee can recover such a sum only as that optional stamp covers; no larger sum than that can be recovered in any Court of Justice under the provisions of s. 14, Act XXXVI of 1860, and no amount of penalty can make up the deficiency in the stamp. SYUD KERAMUT ALI v. MOONSHEE ABDOOL WAHAB, **17 W.R. 131.**

(2)—*Sch. A, cl.* 4—*Instrument in the nature of promissory note—Amount of stamp duty payable.*—An instrument contained the following: "We bind ourselves to pay with interest to.....the sum of rupees.....being the balance of dealings held with your firm and the amount received this day from you in cash on account of stamp." *Held* that the instrument, though not a bond or hundi, was in the nature of a promissory note and came within the description in cl. 4, sch. A of Act XXXVI of 1860. HUTUMAN SAHIB v. HUSAIN SAHIB, **1 M.H.C. 152.**

(3)—*Sch. A, cl.* 20—*Agreement to share in profits and loss in consideration of amount advanced—Partnership agreement—Amount of stamp duty.*—The defendant had obtained from Government the Abkari farm of a taluk. In consideration of a certain amount advanced, by the plaintiff for payment of the deposit, an agreement was entered into between the parties, whereby the whole management of the business was to reside in the plaintiff, and both the

Stamp Act (XXXVI of 1860)—*concluded.*

parties were to share in the profits and loss and render accounts to each other. The document did not purport to transfer to the plaintiff a separate and distinct property in either the shops or the trees of the farm. *Held* that the agreement provided for a partnership between the parties in respect of the subject matter of the whole undivided contract, each sharing the profit or loss in equal proportions. The document was, therefore, a deed of partnership and had to be stamped under cl. 20, sch. A of Act XXXVI of 1860. CHINNAIYA NATTAN v. MUTHUSWAMI PILLAI, **1 M.H.C. 226.**

(4)—*Stamp—Bombay Regulations — Sch. A and s.* 14—*Promissory note containing agreement to waive jurisdiction.*—A promissory note containing an agreement by the maker that, in case of any dispute or difference arising concerning the payment of the note or the subject-matter thereof, the same shall and may be sued in the Supreme Court, and "to the jurisdiction of which I hereby waive and agree to waive all pleas," properly stamped as a promissory note, did not require an additional stamp as an agreement under Act XXXVI of 1860, sch. A and s. 14. RAKHALDASS SINGHEE v. ROY CHUNDER DUTT, **1 Ind. Jur. O. S. 124.**

Stamp Act (X of 1862).

[REP. ACT VII OF 1870.]

(1) — Mourosee-ryotee *pottahs, stamp duty not chargeable for.*—In this suit for enhanced rent, plaintiff admitted the tenure of the defendant, who however, pleaded a *mourosee-ryotee* pottah. The lower Courts refused to admit the pottah because it was not stampted and the lower appellate Court refused even to allow the defendant to pay the prescribed price and obtain a stamp on the document on the ground that the defendant had wilfully evaded the law. The High Court *held* that the Judge was wrong. The pottah purported to be a *mourosee* pottah, which, if genuine, would protect the tenure from enhancement, and such a pottah, neither under the old Stamp Law (Reg. X of 1829) governing this case, nor under the new law (Act X of 1862) required to be written on stamped paper. MOHEEOODEEN AHMED v. PRANNATH ROY CHOWDHRY. **3 W.R. Act X, Rul. 142.**

(2)—*Stamp Act—Transfer of under-tenure endorsed on pottah—Admissibility in evidence.*—Where the transfer of an under-tenure is effected by an endorsement on the back of the tenant's pottah, the endorsement is not admissible in evidence, unless it be stamped as though it were a separate deed. TETAI ABOM v. GAGAI GURA CHAWA, **3 B.L.R. App. 30**; PITAYE AHUNG v. GIRGHEE KOER AJOOAH, **11 W.R. 363.** [*R.*, 12 W.R. 203.]

(3)—*Petition for lease, if registrable—Registration Act* (XX *of* 1865), *s.* 17—*Stamp duty and penalty — Evidence—Suit in ejectment, Act* X *of* 1859, *s.* 78.—S. 17, XX of 1866, does not provide for the registration of a petition

Stamp Act (X of 1862)—*continued.*

asking for a lease. Stamp duty and penalty are not leviable on such petition, when it is used as evidence of a contract to be entered into between parties. [*F.*, 17 W.R. 509 ; *Appl.*, 7 C. 703, F.B. = 10 C.L R. 121.] Where, in a suit in ejectment instituted under Act X of 1859, the judgment-debtor fails to invoke the protection of s. 78 of the Act, against the decree-holder, he cannot, in special appeal, claim the 15 days' time under the section within which to pay the money. CHOONEE MUNDAR v. CHUNDEE LALL DASS, **14 W.R. 178.**

(4)—*Stamp Act* (X *of* 1862)—*Promissory note—Ambiguity.*—Where the wording of a promissory note bearing a one anna stamp appears to be ambiguous as to whether it is payable on demand the Court will take the evidence of the parties as to the intention, and will then decide whether it is properly stamped. Under such circumstances, the Court will take evidence of usage. BANK OF HINDUSTAN, CHINA AND JAPAN v. SEDGWICK, **1 Ind. Jur. N.S. 107.**

(5)—*Decision as to stamp duty—Power of Court of appeal.*—An appellate Court has got power to re-open in appeal the question whether a document, which the Court of first instance has declared to be liable to stamp under Act X of 1862, is so liable. SUBRAYA PILLAI v. SRINIVASA PILLAI, **3 M.H.C. 71.**

(6)—*Unstamped bond—Intention to evade stamp laws—Evidence—Construction.*—Where a bond contained a stipulation to the effect that, as the obligors were urgently in want of money and unable to procure a stamp, they executed the bond on plain paper, agreeing to make good any penalty the obligees might have to pay in suing them to enforce the obligation, *held* that this was not in point of law an agreement to evade the stamp laws, though, as a matter of fact, an intention to evade the stamp laws might have been inferred. SASHI BHUSAN BANERJEE v. TARACHAND KAR, **3 B.L.R.A. C. 329 = 11 W.R. 553.**

(7)—*Stamp—Release on insufficient stamp—Such deed confined only to so much property as would be covered by the stamp.*—A deed was written on unstamped paper, but it was stipulated in the deed that A should get it stamped, which was done, but, instead of an *ad valorem* stamp, a stamp of 2 annas only was impressed. A, after having been in possession of his allotment for ten years, brought a suit against his elder brother, claiming a share in the family estate, accordingly to the ordinary Hindu Law, and impeaching the deed of release as forgery. The Sudder Ameen upheld the deed. On appeal to the Civil Court of Dharwar, A for the first time objected to the reception of the deed as evidence, as not being impressed with a stamp sufficient to cover the value of the property released. That Court admitted the deed as evidence of the release. On appeal, the High Court also upheld the deed, but, under Bom. Reg. XVIII of 1827, s. 10, cl. 1, and s. 12, cl. 2, reduced its effect and operation by making it a deed of release for so much only of the property

comprised in it as would be covered by the 2 annas stamp impressed. The Judicial Committee reversing such decree, held that the course adopted by the High Court in respect to the insufficiency of the stamp was erroneous, as it was the duty of that Court (1) either to have refused to admit the deed as evidence for want of a proper stamp, or (2) in the alternative, to have required to deed to be properly stamped before admitting it as evidence. MANTAPPA NADGOWDA v. BASWANTRAO NADGOWDA, **15 W.R.P.C. 32 = 14 M I.A. 24 = 2 Suther 407 = 2 Sar. 648.**

(8)—*Insufficient stamp duty — Contract.*—Where two distinct contracts are written on one paper affixed with the stamp duty payable on only one of the two contracts, the Court may take into aocount the stamp already on the instrument in making up the aggregate of the stamp required BALAJI MAHADEV v. KRISHNAJI CHIMNAJI, **6 B H C.A.C. 95.**

(9)—*Mortgage—Execution and delivery to mortgagor of supplementary deed reserving equity of redemption—Subsequent possession of deed by mortgagee—Presumption—Stamp.*—Certain lands were mortgaged by A to B by a deed which on the face of it appeared to be a deed of absolute sale ; at the same time, an *ekrar* which reserved the equity of redemption to A was executed and made over to him. In a suit subsequently brought by B, for confirmation of possession and registration of title, on the allegation that A had returned the *ekrar* to him, thereby surrendering the equity of redemption, A's plea was that the *ekrar* was lost and had somehow found its way to the plaintiff. *Held* that, as it was admitted that the *ekrar* was in plaintiff's possession, he was entitled to the benefit of the presumption of law which was in his favour, and the *onus* lay on the defendant to prove by legal evidence the loss of the *ekrar*. *Held* also that, as the deed was on the face of it an absolute sale, and as the effect of the deed was merely controlled by the *ekrar*, the effect of the return of the *ekrar* to the mortgagee was that the equity of redemption which, under the *ekrar*, was vested in the mortgagor, became extinguished, so that it was unnecessary to execute any separate document requiring a separate stamp. RAJ COOMAR SINGH v. RAM SUHAYE ROY, **11 W.R. 151.**

(10)—*See* APPELLATE COURT—REJECTION OR ADMISSION OF EVIDENCE, 3 B.L.R. A C. 126 = 11 W.R. 520.

(11)—*See* CONSIDERATION, 7 B.H.C. A.C. 10.

(12)—*See* COPY OF DECREE OR JUDGMENTS, 1 W.R. Mis. 21.

(13)—*See* DAMAGES—MEASURE AND ASSESSMENT, 5 W.R. S.C.C. Ref. 10.

(14)—Promissory note not duly stamped—Stamp penalty not receivable—Suit on note—*See* NEGOTIABLE INSTRUMENTS—PROMISSORY NOTES—GENERAL, 7 M.A.C. 361.

Stamp Act (X of 1862)—*continued.*

(15)—*Ss.* 3 *and* 54—*Engrossing document on unstamped paper.*—Persons who bave merely engrossed documents liable to stamp duty on unstamped papers are not liable to be fined under s. 54. Act X of 1862. REG. v. JOTI *bin* SATU, **1 B.H.C 37.**

(16)—*S.* 14—*Act* X *of* 1862—*Documents without proper stamp—Admissibility as against person producing same.*—Documents not bearing proper stamp under Act X of 1862 are not admissible in evidence to show the terms of the deed as against the party producing the same. THAKOOR OOMRAO SINGH v. THAKOORANEE MEHTAB KOONWUR, **3 Agra 103.**

(17)—*S.* 14—*Stamp Act—Transfer of under-tenure endorsed on potta—Admissibility in evidence.*—Where the transfer of an under-tenure is effected by an endorsement on the back of the tenant's potta, the endorsement is not admissible in evidence, unless it be stamped as though it were a separate deed. TETAI ABOM v. GAGAI GURA CHAWA, **3 B.L.R. App. 30.**

(18)—*S.* 14—*Validity of Bonds subsequently stamped—Act* VIII *of* 1859—*Act* XXXVI *of* 1860—*Act* X *of* 1862.—A bond properly stamped when produced at the first hearing of a suit, and when the Court is asked to receive it in evidence, is valid under Acts VIII of 1859, XXXVI of 1860 and X of 1862, even though it may not be stamped at the time of the institution of the suit. ATMARAM v. AMIRCHAND, **3 B.H.C.A.C. 92.**

(19)—*S.* 14—*Stamp, determination as to payment of—Real nature of instrument—Discretion—Appeal.*—In determining what provision of the Stamp laws is applicable to a particular instrument, regard must be had to the real nature of the instrument, and not to the title which may have been given to it by the parties, if the contents of the title show that the title was a misnomer. When the Legislature has not made any particular rule of conduct imperative, but leaves the procedure to be followed under particular circumstances within the discretion of the Court of Judge, it is intended that a sound and reasonable discretion should be exercised, and not that the matter should depend on the caprice or fancy of the Court or individuals in whom the discretion may be vested. When the Court of original jurisdiction exercises the jurisdiction vested in it in an irregular and unreasonable manner, it is the duty of an appellate Court to rectify its erroneous procedure. A Civil Court is bound to allow the defects in an insufficiently stamped deed to be made good in the manner which the law has provided, when there is no reason to suspect any design on the part of the holder to defraud the revenue; and if it arbitrarily and without assigning any reason refuses the relief which it has power to grant, it is the duty of the Court, to which an appeal lies from its decision, to correct the error which has been committed. M. G. PENDS v. R S. MALSE, **3 B H.C.A.C. 94.** [*R.*, 6 B. 304; *D.*, 10 B.H.C. 406.]

Stamp Act (X of 1862)—*continued.*

(20)—S. 14—*See* APPELLATE COURT—REJECTION OR ADMISSION OF EVIDENCE, 5 B. L.R. App. 10.

(21)—S. 15—*See* BOM. REG. XVIII OF 1827, s. 13, 5 B. 621.

(22)—Cl. 6, s. 15—*See* PAUPER SUIT, 10 W. R. 357.

(23)—*Ss.* 15, 17—*Question of stamp-duty—Jursdiction of Small Cause Court.*—The plaintiff sued to recover a sum of money, being a debt secured by a *hissab* entered in a leaf of plaintiff's *khatta*-book, and the defendant denied the claim and objected to the admission of the leaf as it did not bear the proper stamp, *held* that the Judge of the Small Cause Court was competent to find on the facts before him whether the omission or neglect to execute the instrument on paper bearing the proper stamp did or did not arise from any intention to evade the stamp duty. RAJ CHUNDER SHAHA v. GOBIND CHUNDER KOOLAL, **18 W. R. 102.**

(24)—*S.* 17—*Unstamped documents — Evidence—Act* VIII *of* 1859, *ss.* 130, 350.—Where documents have been insufficiently stamped, payment may be made into Court of the proper stamp-duty; but documents not stamped at all ought not to be received as evidence. Where unstamped receipts, which might have been properly rejected by the first Court, have been filed there and accepted as evidence, an appellate Court is bound to consider them as evidence in the case, and the decree of the Court of first instance cannot be reversed or modified for that reason. LALJI SINGH v. SYAD AKRAM SER, **3 B.L.R.A.C. 235=12 W.R. 47.** [*F.*, 5 B.L.R. App. 10; *D.*, 11 B.H. C. 129.]

(25)—*S.* 17—*Unstamped deed—Payment of penalty—Reg.* X *of* 1829, *s.* 14, *cl.* 5.—The sale deed in this case executed in 1939 had to be stamped under Reg. X of 1829 which was then in force; and the suit was brought when Act X of 1862 was in operation. The document was therefore inadmissible. But the Court viewed the case as subject alike to cl. 5, s. 14 of Reg. X of 1829 and to s. 17 of Act X of 1862, and held that the Court of first instance might have admitted the document (on the ground that the plaintiff would have been subjected to unmerited hardship or injustice), upon payment of a discretional fine. The case was accordingly remanded for this purpose. TURTEE v. MUKH RAM, **59 P. R. 1867.** [*R.*, 28 P. R. 1878.]

(26)—*S.* 17—*See* APPEAL—CASES WHERE APPEAL LIES OR NOT, 3 W.R. Act X, Rul. 158.

(27)—*S.* 17, *Cl.* (1)—*Stamp—Rejection of document—Appeal.*—In a suit on a joint and several promissory note, the first defendant admitted his liability, but on the note being tendered in evidence, it was objected to on behalf of the second defendant, as it bore only an adhesive stamp which it was contended was, moreover, of inadequate value, the note though

Stamp Act (X of 1862)—*continued.*

purporting to be payable on demand, being really intended by the parties to it to be payable three months after date. The Division Judge of the High Court, after inquiry refused to allow the document to be received in evidence upon payment of the penalty; and the case having been gone into as for money lent, judgment was given for the plaintiff as against the first defendant, but in favour of the second defendant with costs. On appeal by the plaintiff, it was *held*, (i) that an appeal lay to the High Court from the decision of a Judge in a Division Court rejecting a document, tendered in evidence under s. 17, cl. 1 of the Stamp Act, 1862, on the ground that there had been an intention to evade the payment of stamp duty; (ii) that the point upon which the decision of the Court is to be final, under s. 17 of the Act, is as to what is the proper amount of stamp duty which the document ought to bear, and not as to whether the Court ought, or ought not, to receive the document in evidence; (iii) that a Court to which a document is tendered in evidence under s. 17 of the Act, ought not to reject it, unless it clearly appears that there was an intention to evade the payment of stamp duty; and (iv) that the circumstances of the present case did not disclose any intention to evade the payment of the duty, and that, therefore, the Judge was not justified in refusing to receive payment of the penalty and to allow the note to be given in evidence. ROYAL BANK OF INDIA v. HORMASJI KHARSEDJI, **3 B.H.C.O.C. 153.**

(28)—*S.* 17, *cl.* 1—*Document liable to stamp duty, unstamped—Objection for first time taken in appeal, maintainability of.*—The Stamp Act (X of 1862), prohibits an unstamped document from being received in evidence or acted upon in any civil proceeding in a Court of Justice, except on payment of the proper amount of stamp duty and penalty which every Civil Court is by s. 17, cl. 1, empowered to ascertain and receive. It is imperative on the High Court hearing the suit on appeal to give effect to this provision, though the objection be pointed out for the first time on the hearing of the appeal. A. ADINARAYANA SETTI v. F J.V. MINCHIN, **3 M H C. 297.** [*R.*, 5 M.H.C. 391.]

(29)—*S.* 17—*See* No. 23, *supra.*

(30)—*S.* 26—*Refund of stamp duty—Hearing of suit.*—For the purposes of refusing or granting a certificate for the refund of stamp duty under s. 26, Act X of 1862, the hearing of a suit must be considered to commence when proof of the service of the summons is taken on the day appointed for the hearing; and where proof of service of the summons has been previously taken, it must be considered as if it had not been taken until the commencement of proceedings in the case on the day appointed for hearing. AMIRCHAND JAMNADAS v. MAGGAN AMTHU. **4 B.H.C.A.C. 176.**

(31)—*S.* 30—*Stamp Act* (XVIII *of* 1869), *s.* 28—*Promissory note unstamped—Admission in evidence on payment of penalty.*—In a suit on

Stamp Act (X of 1862)—*continued.*

the following unstamped document, dated 25th October, 1869:—"Whereas I (defendant) have borrowed Rs. 1,500 of the Company's coin from you without interest, without a bond, hence I declare that I shall repay on or before the 15th *Falgun Suddi* the whole amount in question in one lump and take back this *chitta*; should I fail to repay the amount in question on the above date, I will pay interest ....." the defendant pleaded that under s. 30 of Act X of 1862, the Stamp Act in force at the time of its execution, it was inadmissible in evidence. *Held* that the *chitta* was in substance a promissory note within the words of s. 28, Act XVIII of 1869, and could not be admitted in evidence on payment of penalty. *Held* also that though the document itself was executed before the date when Act XVIII of 1869 came into operation, s. 28 of the Act did apply. NANDAN MISSER v. CHATTERBATI, **13 B.L.R. App. 33, 21 W.R. 446.** [*F.*, 16 M. 283; *Rel. cn.*, 4 Bom. L.R. 912; *Appl.*, 7 C. 256; *R.*, 2 B. 19, 1 A. 725.]

(32)—*S.* 32—*Valuation of claim—Appeal to High Court.*—Under s. 32 of Act X of 1862, the High Court can entertain an appeal relating to the valuation of a claim. BASOO MAD FUROSH v. HUREE PANDEY, **11 W. R. 479.**

(33)—*S.* 54—*See* No. 15, *supra.*

(34)—*Act X of* 1862, *sch. A, as amended by Act* XXVI *of* 1867—*Written order by master on servant's petition to pay money—Stamp duty.*—A written direction by master to a servant for the payment of money belonging to the former in the hands of the latter is not an order for the payment of money within the scope and intention of the terms used in sch. A, Act X of 1862, as amended by Act XXVI of 1867. SREE PUTBALWANT RAO v. FUTTEH-OO-DEEN, **1 N.W.P. 143.**

(35)—*Stamp Act, X of* 1862, *sch. A, art.* 1—*Pro note for re-payment of grain—Stamp duty.*—A document in the form of a pronote, for the repayment of a certain quantity of grain, requires a stamp of one rupee under art. 1, sch. A of the Stamp Act, X of 1862. LACHIRAM JAYASANGI v. RAJI *bin* SHIVAJI, **6 B.H.C.A. C. 107.**

(36)—*Sch. A, art.* 3—*Suit for rent—Kabuliat—Stamp duty.*—In a suit for payment of rent for use and occupation of land, where the basis of the plaintiff's rent claim is for a kabuliat without which the tenant cannot lawfully hold the land, the agreement produced for evidencing the contract, if not the deed of contract itself, is not liable to be stamped under art. 3, sch. A of Act X of 1862. CHOONEE MUNDUL v. CHUNDI LALL DASS, **14 W R. 334.**

(37)—*Sch. A, arts.* 4, 15—*Agreement to supply cotton.*—An agreement to supply cotton in consideration of a sum of money received requires Stamp of the value specified in art. 4, sch. A, Stamp Act X of 1862. SAMSUDDIN SULTAN v. RAMJI BHIKA, **5 B.H.C.A.C. 151.**

Stamp Act (X of 1862)—*continued.*

(38)—*Sch. A, art.* 10—*Promissory note—Bond.*—A promissory note, attested by a witness, does not require to be stamped as a bond under Act X of 1862, sch. A, art 10. The words in that clause "not being a bond, instrument, or writing bearing the attestation of one or more witnesses," referred only to the preceding words, "other order or obligation for the payment of money." Also the words "bearing the attestation of one or more witnesses apply only to the words "instrument or writing," and not to the word "bond." GLADSTONE v. SADOO CHURN DUTT, **2 Ind. Jur. N.S. 203.**

(39)—Sch A., cl. 10—*See* SHARES, B.H.C. O.C. 9.

(40)—*Sch. A, art.* 12—*Appeal to Privy Council—Security bond for costs—Stamp duty*—Art. 12, sch. A of the Stamp Act X of 1862, is applicable to a security bond tendered in appeal to the Privy Council by way of security for costs; and according to it, the bond ought to be engrossed on a stamp of the value of Rs. 25 SOONJAHAREE KOONWUR v. RAMESSUR PANDEY, **5 W.R. Mis. 47.**

(41)—*Sch. A, art.* 12—*Suit on instalment bond solehnamah filed by defendant in, not petition under art.* 10, *Act* XXVI *of* 1869—*Stamp duty Agreement—Act* X *of* 1862, *sch. A.*—The first of the two cases referred for the opinion of the High Court by the Judge of the Small Cause Court was a suit on a bond for Rs. 40 with interest. A solehnamah was filed by the defendant by which he admitted that Rs. 25 was due, and agreed to pay the same by instalments. The High Court agreeing with the Small Cause Judge held that the solehnamah was not a petition but an agreement, so that the proper stamp duty was not one anna but two annas as for an instalment bond. The Second case was also a suit on a bond after filing which plaintiff put in a razeenamah stating that the defendant had satisfied his claim and so he withdrew the suit. This razeenamah was rather of the nature of a petition than of an agreement. Plaintiff had already paid a stamp duty on the bond, and the razeenamah was simply in the nature of an application stating that the money due on that bond had been satisfied. MANICK CHUNDER ROY v. LALMON SHEIKH, **8 W.R. 214.**

(42)—*Sch. A, art.* 12—*Bond—Agreement.*—An instrument reciting that A has sold certain premises to B for Rs. 620 and has received Rs. 25 for earnest money, and that he will execute a sale deed on receipt of the balance of the purchase-money and will not retract, is a conditional bond falling under art. 12, sch. A, Act X of 1862, on which the stamp duty payable is four annas. P.R. 1866, S.C.C. Rul. No. 4.

(43)—*Sch. A, arts.* 12, 23, 35 *and* 46—*Notification No.* 835, *dated the* 19*th February*, 1886—*Deed of dower containing also a hypothecation of immoveable property.*—Where a deed of dower executed in 1862, besides containing provision for the dower of a Muhammadan wife, also contained a hypothecation of shares in certain villages as security for the payment of such dower, it was *held* that the deed, though exempted from stamp duty as a deed of dower by virtue of a Notification of the Government of India was still liable to duty as a mortgage-deed under the provisions of Act X of 1862. ABBASI BEGAM v. TUFAIE ALI KHAN, **A.W.N. 1900, 23.**

(43-*a*)—Sch. A, art. 15—*See* No. 37, *supra.*

(44)—*Art.* 18, *sch. A—Optional stamp—Provision for penalty.*—If the parties to an agreement add to the stipulation which it contains a provision whereby a sum of money is made payable by way of fine or penalty in the event of the non-performance at the appointed time of the work contracted to be done,-such a provision is an obligation for the payment of money and for the due execution of work within the meaning of the law and therefore requires an optional stamp. Where the Court expressly found that the omission to provide a proper stamp was neither intentional nor for the purpose of evading the stamp law, the Court should have received the document in evidence on payment into Court of the amount of stamp duty payable. COLLINS v. DEWAN SINGH, **2 N.W.P. 465.**

(45)—Sch. A, art. 23—*See* No. 43, *supra.*

(46)—Sch. A, art. 35—*See* No. 43, *supra.*

(47)—Sch. A, art. 42—*See* LANDLORD AND TENANT — RELATIONSHIP OF LANDLORD AND TENANT, 4 M.H.C. 153.

(48)—*Sch. A, art.* 43—*Gomasta's sunnad—Stamp.*—A sunnad which authorises a gomasta to attach rents and to sue for them, requires to be stamped. If it is a general power-of-attorney authorising him to collect and sue for rents, it must bear a four rupee stamp under Act X of 1862, sch. A, art. 43. RAGHUNANDAN THAKUR v. RAM CHARAN KAPALI, **1 B.L.R.F.B. 55=10 W.R. F.B. 39.**

(49)—Sch. A, art. 46—*See* No. 43, *supra.*

(50)—*Sch. A, art.* 54—*Instrument of partition—Each sharer's copy, meaning of.*—In the case of a document purporting to be a partition-deed between brothers, it was held that since each sharer's copy of an instrument under Act X of 1862 must be taken to mean each sharer's part as exemplification of an instrument executed in duplicate, triplicate, etc., the document in question should be stamped as if it were such a copy under Act X of 1862, sch. A, art. 54. NARAYAN RAGHUNATH POTNIS v. KASHINATH VIDYADHAR, **8 B. 299.**

(51)—*Sch. B.—Practice—Time allowed for obtaining copy—Appeal—Stamp paper—Plain paper.*—The principle laid down by the rule of Circular Order No. 31 of the 3rd October 1864 which provides that "the time allowed for obtaining a copy shall not begin to count till the whole of the requisite pieces of *stamp* paper of the copy are put in," applies to *plain* paper

Stamp Act (X of 1862)—*concluded.*

filed under the "general rule" at the end of sch. B, Act X of 1862, when the copy cannot be conveniently comprised within the stamp paper put in. CHUMUN CHOWDHRY v. SHAIKH ALI AZIM, **9 W.R. 138.**

(52)—Sch. B—*See* SPECIAL OR SECOND APPEAL—ERRORS OF LAW OR PROCEDURE, 5 B.H.C. 153.

(53)—*Sch. B, cl.* 11—*Suit for title to fractional share in Zemindari—Interest in land.*—A suit for a declaration of the plaintiff's title to a fractional share in a Zemindari paying revenue to Government cannot be deemed to be a suit, "for lands forming one entire mehal or a *specific* portion thereof, with a *defined* jumma;" the share in question in this case was held to be an "interest in land" falling within the purview of Act X of 1862, sch. B, cl. 11, note (*e*) and the mode of valuation to be adopted was that laid down in that note. RAJ CHUNDER ROY v. CHUNDEE CHURN NAIK, **8 W. R. 437.**

Stamp Act (XVIII of 1869).

[REP., ACT I OF 1879.]

(1)—*Insufficiency of stamps—Civil Courts.*—Act XVIII of 1869 allows the Civil Court to receive the proper amount of stamp, not only in cases of insufficiency of stamp, but also where documents have not been stamped at all. MAHOMED RIJAH v. THE COLLECTOR OF CHITTAGONG, **6 B.L.R. App. 117=15 W.R. 116.**

(2)—*Orders on tenants—Unstamped documents—Admissibility.*—Documents which appear to be orders upon the tenants to hold themselves responsible for a particular person to whom a release had been executed by their landlord are admissible in evidence without being stamped, as they do not come under the description of any of the documents which the law requires to be stamped. BUKSHEE KUNNEE LALL v. MAHARANEE THAKOORNATH SAI, **25 W.R. 80.** [*F.*, 25 W.R. 376.]

(3)—*Unregistered kubooliat—Evidence—Admissibility.*—A kubooliat executed at a time when the law did not require registration, is admissible in evidence though unregistered. SHEO RAM SINGH v. SEWAK RAM, **20 W.R. 83.**

(4)—*Prior and subsequent assignment of debt—Decree-holder—Respective rights—Assignment of chose in action—Stamp Act—Doubtful cases—Benefit of doubt.*—The prior assignee in equity of a *chose* in action (debt), not having given notice to the debtor from whom the debt is due cannot claim against a subsequent assignee for valuable consideration who did give such notice. When it is said that an assignee has not done everything to perfect the assignment until he has given notice to the debtor, that means to perfect it for certain purposes, for it is plainly complete as between the assignor and assignee, if no third person claiming under the assignor intervened. This reason does not apply to the judgment-creditors, who

Stamp Act (XVIII of 1869)—*continued.*

obtain their decrees quite irrespectively of the property, the subject of assignment. A judgment-creditor may under his judgment take in execution all that belongs to the debtor and nothing more. He stands in the place of his debtor. He only takes the property of his debtor subject to every liability under which the debtor himself held it. And he cannot claim the rights similar to those of a prior assignee. [*R.*, 6 B. 193, 21 B. 205, 21 B. 287, 16 B. 91.] A letter by which a *chose* in action is equitably assigned does not require a stamp where it is not in British India at the time of assessment. [*R.*, 2 C. 58, 23 C. 187.] Whenever it is in doubt whether the Legislature intended to impose a charge upon the subject in favour of the Crown, the benefit of the doubt must, as established by a legion of authorities, be given to the subject. MEGJI HANSRAJ v. RAMJI JOITA, **8 B.H.C O.C. 169.**

(5)—*Decree for amount covered by stamp—Effect.*—A plea raised by defendant to the effect that, as plaintiff sued on a plaint with a stamp of only Rs. 25-he could not get more than an amount for which a stamp of that value would be sufficient was not decided on its merits, because it was ruled that plaintiff could not get more than he claimed and that amount was covered by the stamp. BUDDUN SAHU v. RAMPERTAB SAHU, **25 W.R. 511.**

(6)—*Partition deed — Registration— Agreement of partition—Stamp.*—A deed of partition does not require registration, nor is it required to be stamped. An agreement of partition is admissible in evidence without being stamped, to show the intention of the parties. NEM ROY v. LALMUN ROY, **25 W.R. 376.**

(7)—*Letter containing admission—Admissibility in evidence—Stamp.*—A letter containing an admission is admissible in evidence without stamp. SITUL PERSHAD v. MONOHUR DOSS, **23 W.R. 325.**

(8)— *Lease — Documents substituting new terms—Stamp.*—Where, after a first complete lease deed has itself been executed, stamped, and registered, another document is prepared and executed with a view to alter that first complete document and to substitute, so far as the rent is concerned, certain new terms for the old terms, the latter document requires under the Stamp Act to be itself stamped with a stamp which is rendered necessary for a lease. It is not merely a paper which is to be taken in connection with another paper that has already been stamped, in order to supply what is deficient in that paper, *i.e.*, such that the two must be taken together in order to arrive at the agreement of lease which was originally come to. BYJNATH DUTT JHA v. MUSSAMUT PUTSOHEE DOBAIN, **20 W.R. 36.** [*R.*, 14 C.L.J. 411].

(9)—*Ijara Muchalka—Lease under General Stamp Act of* 1869—*Stamp duty.*—An 'Ijara Muchalka' is a lease or farm of land revenue, which a superior is entitled to receive from a subordinate proprietor, and falls within the

Stamp Act (XVIII of 1869)—*continued.*

definition of a lease contained in the General Stamp Act of 1869. [*R.*, 4 M.L.J. 201.] The stamp duty payable on it is the duty with which a bond for the total amount payable under such lease during the first year of the term is chargeable. This being so, the penalty for an insufficient estimate should attach only to the obligation of that year. In such a case, sufficient effect would be given to s. 26 of Act I of 1879, if, in the first year of the term, no more than the amount covered by the stamp is allowed to be recovered, though in subsequent years effect may be given to the terms of the instrument. THE COLLECTOR OF TANJORE v. RAMASAMIER, **3 M. 342, F.B.** [*R.*, 4 M.L.J. 201.]

(10)—*Deed of sale—Schedule—Stamp.*—A schedule appended to a deed of sale does not require to be stamped under the provisions of Act XVIII of 1869. PROCEEDINGS, 3RD NOVEMBER 1871, **6 M.H.C. App. 36.**

(11)—*Conveyance—Covenant for title—Additional duty.*—A conveyance, with the usual covenant for title, cannot be construed as constituting an indemnity bond, so as to render the document liable to stamp duty as an indemnity bond, in addition to the stamp duty to which it is liable as a conveyance. ON REFERENCE BY THE BOARD OF REVENUE, **1 M. 133.** [*R.*, 25 M. 3.]

(12)—Appeal against "order as to fine" under Civ. Pro. Code—Inapplicable to penalties under —*See* APPEAL—ORDERS, 5 C. 311.

(13)—*See* APPELLATE COURT—POWERS OF APPELLATE COURT, 28 P.R. 1878.

(14)—*S.* 2, *cl.* 5—*Bond—Definition of.*—The definition of "bond" in the Stamp Act is not exhaustive; the word "includes" in cl. 5 of s. 2 has an extending force, and does not limit the meaning of the term to the substance of the definition. NASIBUN v. PREOSUNKER GHOSE, **8 C. 534.**

(15)—*S.* 3—*Conveyance—Sale of two or more items—Stamp-duty.*—Where two or more items of property are sold for a certain sum of money and the value of each item is also mentioned in the instrument, the document is simply a deed of sale coming solely under the definition of "conveyance" in Act XVIII of 1869, s. 3. The stamp-duty leviable upon such instrument should be calculated upon the aggregate sum specified therein and not upon the various items for which each property had been passed. *In re* TUKARAM HARI ATRE, **10 B.H.C. 354.**

(16)—*S.* 3—*Entries of loans in account books.*—Entries of loans in account books cannot be treated as bonds within the meaning of cl. 5, s. 3 of Act XVIII of 1869. THE QUEEN v. BULDEO, **2 N.W.P. 453.**

(17)—*S.* 3, *art.* 13—*Stamp—Letters of assignment of crop.*—Letters of assignment in respect of a season's crop *held* not to be mortgage-deeds but agreements requiring a stamp of 8 annas. MORAN v. MITTU BIBEE, **2 C. 58.**

Stamp Act (XVIII of 1869)—*continued.*

(18)—*Ss.* 3, 18—*Suit on promissory note not stamped—Evidence.*—An unstamped promissory note payable on demand is inadmissible as evidence under cl. 25, s. 3, Act XVIII of 1869. Plaintiff recovering on an unstamped promissory note must recover on the contract actually made, and not on any implied contract. *Quære*: Does not s. 18, Act XVIII of 1869 prevent the contention that a defendant's written statement and deposition may contain such an admission as renders it unnecessary for the plaintiff to put the written contract in evidence? ANKUR CHUNDER ROY CHOWDHRY v. MADHUB CHUNDER GHOSE, **21 W. R. 1.** [*F.*, 12 B. 443; *R.*, 7 C. 256, 18 B. 369, U.B.R. 1907, 3rd Qr., Evidence, 5; *D.*, 3 C. 314=2 C.L.R. 412 (N), 21 B. 360.]

(19)—S. 3 (5), (25), sch. II, art. 11—*See* INTEREST—STIPULATION IN THE NATURE OF PENALTY, 3 A. 260, F. B.

(20)—S. 3 (25), sch. II, art. 5—*See* EVIDENCE—SECONDARY EVIDENCE, 3 A. 581, F.B.

(21)—*S.* 4—*Instrument executed in foreign country—Admissibility in British India without British stamp.*—An instrument executed in a foreign country, which is valid by the law of that country and does not affect any property within British India, can be admitted in evidence in British India without a British stamp. NARAYAN SADASHIV v. BAPUJI BALAL, **7 B. H C.A.C. 140.**

(22)—Ss. 5, 8, 19, 20, 26, 28—*See* EVIDENCE—SECONDARY EVIDENCE, 4 C. 259=2 C.L.R. 409.

(23)—*Ss.* 5, 18, 28—*Stamp—Document stamped after execution but before tender—Evidence.*—A document, to which a one anna adhesive stamp ought to be affixed, is admissible in evidence, if, when tendered, it bears the requisite stamp, even though such stamp had been affixed after the execution of the document. BHAURAM MADAN GOPAL v. RAMNARAYAN GOPAL, **12 B.H.C. 208.**

(24)—S. 8—*See* No. 22, *supra.*

(25)—*S.* 9—*Account stated and signed by defendant agreeing to pay interest—Stamp duty.*—An account stated and signed by the defendant in the plaintiff's account book and containing a stipulation for payment of interest, was held to fall within the terms of s. 9 of Act XVIII of 1869, and to have been sufficiently stamped with one-anna stamp. GIRDHAR NARAN v. UMER AJU, **4 B. 326.**

(26)—*S.* 14, *sch.* II, *art.* 11—*Debt bond containing distinct agreement, stamp duty chargeable on.*—Where in a simple money bond executed for a loan of Rs. 12-8-0, there was contained a promise made by the obligor to give a certain quantity of grain to the obligee besides repaying the principal with interest, the proper stamp duty payable on the instrument was held to be eight annas, that being the stamp duty required for an agreement liable to the higher rate of duty of the two parts of the

Stamp Act (XVIII of 1869)—*continued.*

instrument in question. It was however competent to the obligee to abandon the agreement for the payment of *nagli* and sue to recover the principal Rs. 12-8 0. with interest, a stamp of two annas being sufficient to cover the loan bond for the amount. CHIMNAJI v. RANU, **4 B. 19.**

(27)—*S.* 15, *sch.* II, *art.* 7—*Receipt or discharge.*—A memorandum purporting that a sum of money has been received by a Bank from a person, other than a constituent of such Bank, to be credited to a constituent's account, and furnished by the Bank for transmission to such constituent, is not a receipt or discharge given for or upon payment of money in satisfaction of a debt, within the meaning of art. 7 of Act XVIII of 1869, sch. II, and is not chargeable with stamp duty. *In re* THE UNCOVENANTED SERVICE BANK, LTD., **3 C.L R. 597.**

(27-*a*)—S. 18—*See* Nos. 18, 23, *supra.*

(28)—*Ss.* 18, 28—*Document stamped after execution—Admissibility—Suit based on unstamped document—Evidence.*—A document is receivable in evidence on being duly stamped and as bearing the stamp required by the law for the purpose of the trial in which the document is tendered in evidence, and it is no business of the Court to inquire at what time the stamp was affixed or whether the provision of the Stamp Law was duly observed. That is a matter which is connected with the law as to penalties. [*Appl.*, 9 C.L.R. 272.] If a document is not receivable in evidence as not being duly stamped, the plaintiff might recover on such part of the case as he could make out by other evidence. SREEMUTTY NOOR BIBEE v. SHAIKH RUMZAN, **24 W.R. 198.**

(29)--S. 19—*See* No. 22, *supra.*

(30)—S. 20—*See* No. 22, *supra.*

(31)—*Ss.* 20 *and* 22—*Unstamped document—Penalty—Evasion of stamp duty—Unstamped pro-note—Parol evidence—Terms of contract.*—Under s. 20 of Act XVIII of 1869, a Court ought not to admit a document in evidence on payment of stamp duty and penalty if it finds that the document was unstamped or insufficiently stamped with the intention of evading stamp duty. If the Court inadvertently received stamp duty and penalty and made an endorsement on an unstamped document and admitted it in evidence but afterwards found that the original omission was owing to an intention to evade payment of stamp duty, it ought to cancel the endorsement and impound the deed and send it to the Collector. Where a contract is reduced to writing and the only cause of action which the plaintiff has against the defendant arises out of the contract embodied in an unstamped promissory note, no oral evidence is admissible to prove the terms of the contract. PROSUNNO NATH LAHIREE v. TRIPOORA SOONDUREE DABEE, **24 W.R. 88.** [*R.*, 17 C. L.J. 399, 16 Ind. Cas. 33.]

(32)—*Stamp Act*, XVIII *of* 1869, ss. 20, 28—*Promissory note—Unstamped—Admissibility on payment of stamp-duty and penalty.*—Under s.28, Act XVIII of 1869, an unstamped pro-note could not be admitted in evidence though stamp-duty and penalty were paid. DOSABHAI KAVASJI v. KHERBADJI HORMASJI, **7 B H.C. O.C. 180.**

(33)—*Ss.* 20, 49—*Bond executed on two stamp papers, when admissible—Stamp vendor's certificate.*—A bond which, instead of being executed on a single impressed stamp is written on two stamp papers (making up the aggregate value required), cannot be said to be properly stamped according to the Stamp Act, in the absence of the stamp vendor's certificate as required by the proviso to s. 49 of the Act, and a penalty is consequently leviable under s. 20, before it can be admitted in evidence. CHEYN SUKH DASS v. MUSA, **26 P.R. 1876, F.B.** (64 P.R. 1874, *overruled*; 7 M.H.C. 36, *F.*)

(34)—S. 22—*See* No. 31, *supra.*

(35)—S. 26—*See* No. 22, *supra.*

(36)—*S.* 28—*Promissory note insufficiently stamped—Erroneous procedure in lower Court.*—The plea of the defendant in this suit that the document sued on by the plaintiff was insufficiently stamped, was overruled by both the lower Courts which decreed the plaintiff's claim. On special appeal by the defendant, the High Court was of opinion that the document was a promissory note and should bear a stamp of 12 annas and that the deficiency in stamps could not be supplied when the document was admitted in evidence. The appeal was, however, *held* to fail because the document had been admitted by the first Court and accepted by the lower Court as bearing a sufficient stamp, and the insufficiency of the stamp was the only ground charged in special appeal; and further, the error in the admission of the document did not in any way affect the decision on the merits. MAKBUL AHMED v. MUSSAMUT IFTIKHAR-UN-NISSA BEGUM, **7 N.W.P. 124.** [*R.*, 3 A. 581, F.B.]

(37)—*S.* 28—*Pro-note--What.*—A document containing a promise to pay money and paddy is not a promissory note for the purpose of the General Stamp Act, 1869, s. 28. MUTHU v. MUTHAN, **4 M. 296, F.B.**

(38)—*S.* 28—*Stamp Act X of* 1862, *s.* 30—*Promissory note unstamped—Admission in evidence on payment of penalty.*—In a suit on the following unstamped document, dated 25th October, 1869:—"Whereas I (defendant) have borrowed Rs. 1,500 of the Company's coin from you without interest, without a bond, hence I declare that I shall repay on or before the 15th *Falgun Suddi* the whole amount in question in one lump and take back this *chitta;* should I fail to repay the amount in question on the above date I will pay interest.....", the defendant pleaded that under s. 30 of Act X of 1862, the Stamp Act in force at the time of its execution, it was inadmissible in evidence. *Held* that the *chitta* was in substance, a promissory note within the words of s. 28, Act

Stamp Act (XVIII of 1869)—*continued.*

XVIII of 1869, and could not be admitted in evidence on payment of penalty. *Held* also that though the document itself was executed before the date when Act XVIII of 1869 came into operation, s. 28 of the Act did apply. NANDAN MISSER v. CHATTERBATI, **13 B.L.R. App. 33 =21 W.R. 446.** [*F.*, 16 M. 283; *Rel. on.*, 4 Bom. L.R. 912; *Appl.*, 7 C. 256; *R.*, 2 B. 19 1 A. 725.]

(39)—S. 28—*See* Nos. 22, 24, 28, 23, *supra.*

(40)—*Ss.* 39, 40—*Promissory note—Evidence.*—S. 39 of the Stamp Act provides that when an unstamped or insufficiently stamped document is endorsed by the Collector to the effect that the full stamp duty with which it is chargeable has been paid, it shall be deemed to be duly stamped, and shall be receivable in evidence or otherwise in all Courts and public offices, as if originally executed on paper bearing the proper stamp. And although the Collector is not authorized to make any such endorsement on a promissory note, yet a promissory note so endorsed by him may nevertheless be received in evidence notwithstanding such irregularity. GIRDHARI DAS v. JAGAN NATH, **3 A. 115.** [*F.*, 13 B. 449, F.B.]

(41)—S. 40—*See* No. 40, *supra.*

(42)—*S.* 49—*Deed written on two stamp papers admissibility of.*—A deed of sale requiring a stamp of Rs. 20 but written on two Ten Rupee stamped papers, held admissible in evidence without payment of a penalty. GANGA RAM v. MOLAK RAM, **64 P.R. 1874.** [*Overruled*, 26 P.R. 1876.]

(43)—*S.* 49—*Bond written partly on one and partly on another stamp paper—Admissibility in evidence—Stamp duty and penalty.*—A bond written partly on one and partly on another stamp paper, the two aggregating the proper stamp leviable—was tendered in evidence without the certificate required by s. 49 of the General Stamp Act. *Held* that there was a deficiency of stamp on the bond and therefore a liability to the penalty, and that the deficieney must be held to be equivalent to the difference between the value of the stamp on one of the papers and the whole value chargeable. PROCEEDINGS, 6TH NOVEMBER, 1874, **7 M.H.C. App. 36.**

(44)—S. 49—*See* No. 33, *supra.*

(45)— *Art.* 15 — *Conveyances—Ad valorem duty.*—Act XVIII of 1869 has not made any provision for an *ad valorem* stamp-duty where the consideration of a conveyance consists of shares in a public company made over to the vendor. The word "amount" in cl. 15, sch.I of that Act clearly means amount of money, and does not include or denote such a consideration as that expressed in the agreement entered into between the parties in the case, namely, the *par* value of the shares of a Company. The words "or secured" in s. 15, manifestly apply only to cases of mortgages and the like, and do not apply to a conveyance out and out, whatever the consideration for such conveyance may be. THE PORTING CANNING LAND COMPANY, *Petitioners*, **16 W.R. 208.**

Stamp Act (XVIII of 1869)—*continued.*

(46)—*Sch.* I *and sch.* II, *cl.* 11—*Bond and agreement.*—Where an instrument which set forth a contract for the sale and delivery of 500 to 700 cases of hog's lard on certain terms, contained an undertaking on the part of the seller not to sell any hog's lard to any other party, or to make any shipments during the term of the contract without the consent of the purchaser, under a penalty of Rs. 5,000 by way of liquidated damages in the event of his failure to take delivery under the contract, *held* that the document was an agreement and not a bond. ROBERT AND CHARRIOL v. SHIRCORE, **7 B.L.R. 510.** [*Appr.*, 8 C. 284].

(47)—*Sch.* II, *cl.* 5—*Adjustment of accounts—Necessity for stamp — Admissibility in evidence.*—An adjustment of account is not admissible in evidence, unless stamped with an one-anna stamp. TARINEY CHURN NUNDY v. SHEIKH ABDUR ROHOMAN, **2 C.L.R. 346.**

(48)—*Sch II, art.* 5—*Document liable to stamp duty under the Stamp Act, how determined—Entry in an account attested by borrower—Stamp duty.*—In determining whether a document falls within the description of documents liable to stamp duty under the Stamp Act, the entire document must be looked at. [*F.*, 9 C. 127.] An entry in an account, with two sides to it—*viz.*, 'amount advanced' and amount received,'--the amount due on which varies from time to time, and depends upon the relation of the two sides is not, because of the borrower affixing his seal or signature to each entry of advance, a note or memorandum whereby any debt is acknowledged to be due, and is not chargeable with stamp duty. BROJENDER COOMAR v. BROMOYEE CHOWDHRANI, **4 C. 885 =3 C.L.R. 520.** [*R.*, 31 C. 1043=9 C.W.N. 83; *D.*, 11 C. W.N. 1122.]

(49)—*Sch II, art.* 5—*Entry of balance due not signed by debtor.*—An entry of the balance struck in the creditor's account, which is not signed by the debtor. is not a note or memorandum of the kind mentioned in Art. 5, sch. II of the Stamp Act, 1869. NAND RAM v. RAM PRASAD, **2 A. 641.**

(50)—*Sch II, art.* 5 — *Running account — Balance brought forward—Stamp.*—The provisions contained in art. 5, sch. II, Act XVIII of 1869, mean that only once the stamp is to be affixed in a running account, the balance brought forward from the close of a previous year not being a new balance requiring fresh stamp. INDRA CHAND ASWAL v. KALEE DOSS MITTER, **24 W.R. 439.**

(51)—*Sch.* II, *art.* 5—*Balance of accouut—Stamp duty.*—Art. 5 of sch. II of the General Stamp Act applies to cases where any account, debt, or demand, or any part thereof amounting to Rs. 20 or upwards, is expressed to have been balanced and assented to by both the parties. An entry in a hat-chitta representing a balance of account arrived at by one only of the parties, does not require to be stamped. KOONJO MOHUN DOSS v. KRISHNA CHUNDER SHAHA, **25 W.R. 361.** [*D.*, 11 C.W.N. 1122].

Advocate High Court Jammu & Kashmir Srinagar

Stamp Act (XVIII of 1869)—*continued.*

(52)—Sch. II, art. 5—*See* No. 20, *supra.*

(53)—*Sch* II, *arts* 5, 11—*Rejection of document—Tender of stamp duty and penalty before appellate Court.*—Where the amount of stamp duty and the penalty on a document were not tendered, when it was first offered in evidence and rejected, an appellate Court has no authority to direct the reception of the instrument on a subsequent tender of the amount. CHAMPABATY v BIBI JIBAN. **4 C. 213** (1 B.L.R. 58 F.B. = 10 W.R. 51, 7 W.R. 439, *F.*) [*F.*, 3 A.W.N. 93; *R.*, 1900 P.L.R. 303.]

(53-a)—Sch. II, art. 7—*See* No. 27, *supra.*

(54)—*Sch.* II, *art.* 11—*Instrument—Construction of—Stamp duty.*—An instrument under which a person acknowledges having received a sum of money and undertakes to pay interest at a specified rate *per mensem* must be construed as an agreement falling within art. 11 of Act XVIII of 1869. MRS. A. FERRIER v. RAM KALPA GHOSE, **23 W.R. 403.** [*F.*, 15 C. 150.]

(55)—*Sch.* II, *art.* 11—*Contract for execution of work — Stamp-duty—Bond by surety —Stamp.*—A contract with the Public Works Department for the execution of works falls within art. 11, sch. II of Act XVIII of 1869, and must be stamped with a stamp of eight annas. Where a contractor enters into a simple agreement and his sureties give bonds for the performance of that agreement by him, the bonds are chargeable with duty under art. 5, sch. I, and not art. 20, sch. II. ANONYMOUS—REFERENCE TO HIGH COURT BY FINANCIAL COMMISSIONER OF OUDH, **13 W.R. 353.**

(56)—*Sch. II, art.* 11—*Agreement—Stamp.*—The document produced by the defendant in this case, the stipulation in the concluding part of which he sought to make use of for the purpose of proving that he was not bound to restore to the plaintiffs the promissory notes sued for by them, unless and until a house belonging to him was given back to him in good order, was held to constitute an agreement requiring a stamp of eight annas under art. 11 of sch. II of Act XVIII of 1869. MOTILAL AND BHOGILAL v. MUNSHOOK KURAMCHAND, **4 B. 328.**

(57)—*Sch. II, art.* 11—*Legal Practitioner—Agreement to reward pleader by share of amount realized in suit—Legality—Necessity of stamp.*—The Court should not enforce an agreement to reward a pleader for his professional services by a share of the amount received in suit in which he is retained. Where a pleader is to receive a remuneration under a special agreement contained in his *vakalatnamah* or in a separate document, the document containing the agreement must bear a stamp of adequate value. NUTHOO LALL v. BUDREE PERSHAD, **3 Agra 286.**

(57-a)—Sch. II, art. 11—*See* Nos. 19, 26, 46, 53, *supra.*

(58)—*Sch. II, art.* 13—*Power of attorney for registration of document—Stamp—Act* VIII *of* 1871, *s.* 33 (*a*).—For a power of attorney for registration of a document in a Registration Office, a stamp of eight annas is sufficient under art. 13, sch. II of the General Stamp Act XVIII of 1869. *In re* KESHAV KASI NATH, **9 B.H.C. 43.**

Stamp Act (XVIII of 1869)—*concluded.*

(59)—*Sch.* II, *cl.* 20—*Policy of assurance, transfer of—Stamp duty.*—An assignment of a policy of insurance by endorsement is liable, as a collateral instrument, to a stamp duty of one rupee under sch. II, cl. 20 of the General Stamp Act, 1869; but not a re-transfer of the same back to the assured, all claims having been satisfied—*Per Markby & Ainslie, JJ.* Neither of the endorsements is chargeable with any duty—*Per Garth, C.J. In the matter of* THOMPSON'S POLICY, **3 C. 347.**

Stamp Act (I of 1879).

[REP., ACT II OF 1899.]

(1)—*Stamp Act—Construction.*—The Stamp Act of (1879) in India ought to be construed according to the same principles of construction as the Stamp Act in England and the earlier Stamp Acts in this country. RAMEN CHETTY v. MAHOMED GHOUSE, **16 C. 432.**

(2)—*Rules of Governor-General, 3rd March,* 1882, 5 (*e*)—*Construction—Stamped paper—Writing on reverse.*—The rule is an enabling rule, authorising parties to use plain papers in addition to a stamp paper, where the whole of an instrument cannot be written on the side of the stamp paper which bears the stamp. The rule, while favouring the writing of an instrument only on that side, does not prohibit the writing on the reverse side. REFERENCE UNDER STAMP ACT, S. 46, **7 M. 176, F B.**

(3)—*Sufficiency of stamp—By what law governed.*—Under the provisions of the Indian Stamp Act, 1879, the duty chargeable on unstamped or insufficiently stamped documents should be calculated with reference to the law in force at the time of the execution, but the penalty leviable is in all cases determined by the Act of 1879. REFERENCE UNDER STAMP ACT, S. 46, **5 M. 394, F.B.**

(4)—*General Stamp Act,* 1869—*Indian Stamp Act of* 1879—'*Chargeable*'.—The date of *execution* of a document is that which is regarded in the use of the word 'chargeable' in the Acts of 1869 and 1879.—A document, executed when the Act of 1869 was in force, and coming under the definition of promissory note, if it is not duly stamped, cannot be admitted in evidence on the ground, that it is a bond within the meaning of the Act of 1879, by the payment of penalty. The levy of a penalty, on the admission of an insufficiently stamped document, implies a punishment for neglect in failing to affix the proper stamp at the time of execution. NARAYANAN CHETTI v. KARUPATHAN, **3 M. 251.** [*R.*, 5 M. 394, L.B.R. 1893—1900, 485.]

(5)—*Unstamped document executed in Australia in* 1862—*Penalty.*—An assignment of an interest in a will was executed by an unstamped instrument on the 25th May, 1862. It was

Stamp Act (I of 1879)—*continued.*

not chargeable with stamp duty either under the Stamp Act XXXVI of 1860 or under X of 1862. Consequently, no penalty could be levied under Act I of 1879. REFERENCE UNDER STAMP ACT, S. 46, **14 M. 255, F.B.**

(6)—*Stamp Act—Power of attorney.*—A document executed by a number of mirasidars of a village, authorising the person in whose favour it is executed to recover for them *Swatantrams* and other continual income appertaining to their rights, is a power-of-attorney and must be stamped with a five-rupeee stamp. REFERENCE UNDER STAMP ACT, S. 46, **15 M. 386, F.B.**

(7)—*Release executed by two brothers—Provisions for payment of annuity, deed not chargeable with stamp in respect of.*—A document executed by two brothers purported to relinquish their right to certain property in favour of another brother of theirs, and provided that the latter was to discharge certain debts and pay an annuity to both the executants. The document was held liable to be stamped as a release only because the provisions in favour of the executants were a mere recital of the consideration for the release and oreated no interest in their favour so as to necessitate additional stamp duty as regards such provisions. EKNATH S. GOWNDE v. JAGANATH S. GOWNDE, **9 B. 417.** [*Appr.*, 18 M. 233, F.B.]

(8)—*Attested instrument promising to pay balance due on previous bond—Bond—Stamp.*—On settlement of accounts under a former bond executed by the defendant he executed a document by which he undertook to pay on demand the amount found due with interest, and the document was attested. *Held* that the document was not promissory note but a bond within the definition in Stamp Act I of of 1879 and chargeable accordingly. BALAKRISHNA TRIMBAK v. GOVIND PAND NAIK, **8 B. 297, F.B.**

(9)—*Presentation of insufficiently stamped document for registration—Effect.*—There is no provision in the Registration Act or in the Stamp Act, which lays down that, where a document is presented for registration insufficiently stamped, the presentation shall be no presentation. It is a good presentation, though the actual registration is delayed SHAMA CHARAN DAS v. JOYENOOLAH, **11 C. 750.**

(10)—*Construction of instrument—Trust deed—Settlement--Testamentary document Stamp.*—The party executing the instrument in question called it a trust deed. It was clearly intended to have immediate operation, the most important test in distinguishing a settlement from a will. It vested the properties at once in trustees, and the provisions as to the management and the ultimate beneficial interest in the properties show that it was contemplated that its operation might extend beyond the lifetime of the owner. The question was whether such an instrument was a testamentary document or a settlement. *Held* that it was a settlement

Stamp Act (I of 1879)—*continued.*

within the definition of the term in the Stamp Act (I of 1879), in spite of the fact that the management by the owner during his lifetime had been reserved; and that it should be stamped accordingly. (*Crossman* v. *The Queen*, 18 Q.B D. 256; *Attorney-General* v. *Heywood*, 19 Q.B D. 326, *R.*) REFERENCE BY THE COLLECTOR AND SUPERINTENDENT OF STAMPS, BOMBAY, **20 B. 210, F.B.** [*F.*, 20 M.L.J. 519=8 M.L.T. 139=7 Ind. Cas. 357=33 M. 304.]

(11)—*Stamp Act — Document insufficiently stamped—Copy not admissible in evidence.*—Where it appears that a document which is not produced was insufficiently stamped, a copy of the document cannot be admitted in evidence on payment of penalty. RAJAH OF BOBBILI v. BHANAYAMMI, **4 M.L.J. 192.**

(12)—*Signing, whether necessary for execution—Unstamped document alleged to be in the possession of defendant—Admissibility of secondary evidence.*—There is nothing to show that, in the Stamp Act of 1879, it was intended to exempt from stamp duty instruments executed otherwise than by signing. The plaintiff sued for redemption of a mortgage, alleging that the mortgage was recorded on a *purabaik* in the possession of the defendant. The defendant denied having any such document. *Held* (1) that the *parabaik* document, though not signed, was *executed* within the meaning of the Stamp Act (I of 1879) then in force, and therefore was not exempt from stamp duty; (2) and that secondary evidence of the contents of the unstamped document was not admissible, though the defendant was alleged to be withholding it MI TA v. NGA SEIN, **U.B.R. 1907: 4th Qr., Execution — Signing, 5.** (U B.R. 1892—1896. Vol I, 303 U.B R 1897—1901, II, 365, 421 U.B.R. 1907. Ex. Signing p. 1, 26 I.A. 262, 19 B. 635, *R.*)

(13)—*See* CAUSE OF ACTION, L.B R. 1893—1900, 122.

(14)—*S.* 1—*Stamp Act, construction of.*—Acts of the nature of the Stamp Act should, when there is a doubt as to what construction should be placed upon their terms, be construed in favour of the subject. BISHAMBARNATH v. NAND KISHORE, **15 A. 56=A.W.N 1892, 234.**

(15)—*S* 2, *cl.* 13—*Agreement—Declaration of trust.*—An agreement among certain persons to make over certain surplus receipts from their respective trades to a trustee, to be held by him on certain trusts mentioned in the agreement, is a declaration of trust and an agreement not otherwise provided for, and the intended fund, indicated as security, is not specified property within the meaning of s. 2 cl 13 REFERENCE UNDER STAMP ACT, S. 46, **11 M 216. F.B.**

(16)—*S.* 3—*Bond.*—A document which contains a promise to pay, on demand, a certain sum with interest and which bears the signature of the writer and some others as witnesses, is a bond, and liable to stamp duty as such. REFERENCE UNDER STAMP ACT, S. 49, **13 M. 147, F.B.**

Stamp Act (I of 1879)—*continued.*

(17)—*S.* 3—*Deed of family arrangement.*—A deed of family arrangement, by which one conveyed a pargana and a sum of money to his brother, in consideration of the latter releasing certain family property on which he had claims is neither a conveyance nor a settlement, nor an instrument of partition within the meaning of Act I of 1879. *In the matter of the* MAHARAJAH OF DURBUNGAH, **7 C. 21.**

(18)—*S.* 3—*Omission of stamp vendor to make necessary endorsements on stamp paper—Effect of.*—The omission of a stamp vendor to endorse on a stamped paper the particulars required of him does not make the document not duly stamped within s. 3 (10) of Stamp Act, 1879. REFERENCE UNDER THE STAMP ACT, S. 46, **11 M. 377, F.B.**

(19)—*S.* 3, *cl.* 4—*Agreement for service with provision for penalty in money, not chargeable with duty for bond.*—An agreement in writing was entered into between the plaintiffs and defendant, the latter undertaking to serve the company of the former at Madras for a certain number of years. The document contained a clause whereby the defendant bound himself to the plaintiffs, under a penalty in money, to faithfully perform the matters under the agreement. It was merely an agreement for the purposes of the Stamp Act, and the addition of the penalty could not make any difference so as to require it to be stamped as a bond. MADRAS RAILWAY CO. v. RUST, **14 M. 18.**

(20)—*S.* 3 (4), *cl.* (*b*)—*Attestation—Writer's statement in document as written by him, whether sufficient attestation.*—A document under which the promisor undertakes to pay on a certain date with the accrued interest, to the person to whom it is executed, the sum of money borrowed from him, requires to be stamped as a bond only when attested by witnesses. A mere statement made in writing, in the document, by the scribe thereof to the effect that it has been written by his pen and is correct, cannot amount to an 'attestation' by a witness necessary in the case of a bond under cl. (*b*) of sub-s. (4) of s. 3 of the Indian Stamp Act (I of 1879). REFERENCE UNDER ACT I OF 1879, S. 49, **17 A 211, F.B. = A.W.N. 1895, 61.** [*F.*, 3 P.L.R. 1902; *R.*, 4 Bom. L.R. 912.]

(21)—*S.* 3, *cl.* 4 (*b*)—*Bond.*—A document is a bond, which contains a promise to pay a certain sum on demand, not made payable to bearer or order, and in which the signature of the obligor is attested by a witness. REFERENCE UNDER STAMP ACT, S. 49, **10 M. 158, F.B.** [*F.*, 13 M. 147; *R.*, 3 P.L.R. 1902.]

(22)—*S.* 3 (4) (*b*)—*Instrument evidencing a loan of grain—Bond.*—The defendants in this case executed the instrument that they were sued on, stating that they borrowed a certain quantity of grain from the plaintiff and undertaking to repay the same in larger measure. Overruling the contention that the instrument was an agreement and should have borne a stamp of eight annas, it was *held* to be a bond

Stamp Act (I of 1879)—*continued.*

within the meaning of s. 3 (4) (*b*) of the Stamp Act, I of 1879, and to have been properly stamped with a stamp of annas two, as the market value of the grain was clearly less than Rs. 10. MAGANDAS KHEMCHAND v. RAMCHANDRA HIRAJI, **7 B. 137.**

(23)—*S.* 3, *cl.* 4 (*b*)—Khata *in debtor's name containing his acknowledgment of receipt of loan amount—Affixture of signature of writer as such*—Khata *an acknowledgment only and not a bond.*—Reference was made to the High Court of the question whether the *khata* book in the debtor's name, in which he had entered an acknowledgment of his having received the loan amount, and to which the writer of the *khata* attached his signature as such, constituted a bond within the meaning of cl. 4 (*b*) of s. 3 of the Stamp Act, I of 1879, and the Court *held* that the document amounted to a mere acknowledgment of a debt and was not a bond within its definition in the Stamp Act. There was nothing to lead to the supposition that the writer signed it as an *attesting* witness. DULABH VANMALI v. REHMAN JAMAL, **14 B. 511.**

(24)—*S.* 3 (9)—*Transfer by trustees to* cestui que trust—*Conveyance.*—A transfer, by trustees of trust property to a *cestui que trust* in pursuance of the trust, need not be made for a pecuniary consideration, but if the parties think fit to frame the instrument as a sale-deed and to express that it is made in part for a money consideration, it is liable as a conveyance to duty calculated on such consideration. REFERENCE UNDER STAMP ACT, S. 46, **7 M. 350, F B.**

(25)—*S.* 3 (10)—"*Unduly stamped*"—*Rule 5 (e) of the Government of India, dated 3rd March* 1882.—Rule 5 (*e*) of the rules issued by the Governor-General in Council under ss. 9, 15, 17, 32, 51 and 56 of the Stamp Act, 1879, requires that the part of an instrument which is written on plain sheets of paper attached to the stamped paper, must be attested by the parties executing it and by the witnesses thereto. The effect of this is to declare, that an instrument written contrary to the rule is not duly stamped within the meaning of s. 3 (10) of the Stamp Act. *Held, by Kernan, Muttusami Iyer and Brandt, JJ.*, that the rule is *ultra vires* and inoperative for the purpose intended. (*Per Turner, C.J., contra*). REFERENCE UNDER STAMP ACT, S. 46, **8 M. 532, F.B.**

(26)—*S.* 3 (11)—*Document purporting to divide property—Instrument of partition.*—Where the parties to a document, purporting to be co-owners of certain properties, agreed, in that capacity, to divide the property in severalty, the document, though styled a release-deed, was held to fall within the definition of "instrument of partition" in cl. 11, s. 3 of the Act. REFERENCE UNDER STAMP ACT, S. 46, **12 M. 198, F.B.**

(27)—*S.* 3 (11)—*Partition deed—List of divided property—Agreement to divide outstandings.*—A document, which contains a note that certain property has been allotted for the maintenance of

Stamp Act (I of 1879)—*continued.*

parents, and a memorandum of the particulars of the property which has fallen to the share of one of the brothers, and also an agreement for the future division of outstandings, need not be stamped as a partition deed. It does not, of itself, operate to release the joint interests of the other parties to the partition and create a sole interest in the person whose share it records. The document should, in respect of the agreement for future division, bear an agreement stamp. REFERENCE UNDER STAMP ACT, S. 49, **7 M. 385, F.B.**

(28)—*S.* 3, *cl.* 11—*Instrument of partition—Stamp-duty—Value of property partitioned, computed for purposes of Stamp Act.*—The words, "the final order," in s. 3, cl. 11 of the Stamp Act, mean not the order passed by a Revenue Court authorizing a partition to proceed, but the order passed after the partition has been made declaring the various allotments of land. The Stamp duty leviable on an instrument of partition should be calculated upon the value of the entire property sought to be divided, and not merely on the value of the portion assigned to the applicant for partition. The value of the property partitioned must be computed, for the purpose of the Stamp Act, with reference to its market value, and not according to the rules laid down in the Court Fees Act for determining the fee payable on plaints and appeals. REFERENCE BY BOARD OF REVENUE, N.W.P. UNDER ACT I OF 1879, **2 A. 64, F.B.**

(29)—*S.* 3, *cl.* 11—*Written agreement between co-sharers to divide property according to award of arbitrators—Partition deed.*—Where the members of an undivided Hindu family executed a document, whereby they agreed to be bound by the award of certain arbitrators for partition, *held* that the instrument was an agreement to divide property in severalty and was, therefore a partition deed which required to be stamped, as such under cl. 11 of s. 3 of the Stamp Act, 1879. *In re* VASANJI HARI BHAI, **15 B. 617.**

(30)—*S.* 3, *cl.* 13—*Mortgage—Indemnity—Stamp duty.*—An agreement between the Secretary of State and a salt contractor stated that the contractor had lodged in the treasury Government promissory notes as security for the due and faithful performance by the contractor of his contract and that, on the completion of the contract to the satisfaction of the Deputy Commissioner, the promissory notes should be returned and delivered up to the contractor. The above agreement was a mortgage, and the indemnity clause being incidental to all mortgage deeds, was not liable to a separate duty. REFERENCE UNDER STAMP ACT, S. 46, **11 M. 39, F.B.**

(31)—*S.* 3, *cl.* 13—*Lease-deed reciting hypothecation by lessees to secure payment of rent, whether chargeable as lease or as mortgage under s.* 3, *cl.* 13 *of Stamp Act—Applicability of s.* 7—Where by a deed under which certain lands had been leased to the lessees, the latter had hypothecated certain property of their own for the purpose of securing the payment of the

Stamp Act (I of 1879)—*continued.*

agreed rent in cash and the performance of the undertaking under the lease to deliver certain cart-loads of straw and grass, the document was held to constitute a mortgage deed as defined in cl. 13 of s. 3 of the Indian Stamp Act and to be chargeable with stamp duty as such. The mortgage was not a distinct matter from the lease, and the instrument was not therefore one comprising or relating to several distinct matters. It therefore fell within para. 2 of s. 7 of the Act, and was consequently chargeable with duty only as a mortgage-deed, that being the higher duty. REFERENCE UNDER ACT I OF 1879 (INDIAN STAMP ACT), S. 49, **17 A. 55, F.B.** = **A.W.N. 1894, 204.** (8 C. 254, *R.*)

(32)—*S.* 3, *cl.* 15—*Memorandum of proposed insurance—Policy of insurance—Document not contemplating any other formal document.*—A document which is not a mere slip or memorandum of a proposed insurance, which mentions the sum for which the assurer declares the name of the ship, the voyage and premium, which provides for losses being paid on its production in conformity with certain conditions in the possession of the assurers, which expressly guaranteed the payment of losses and claims settled under it, and which, on the face of it, does not contemplate the necessity of any other document of a more formal character being passed to the assured, is an instrument which requires to be stamped as a policy under cl. 15, s. 3 of the Stamp Act (I of 1879). *In re* MARINE INSURANCE CERTIFICATE, **19 B. 130, F. B.**

(33)—*S.* 3 (17)—*Receipt.*—To constitute a "receipt" within the meaning of s. 3 (17) of the Stamp Act (I of 1879), there must be an acknowledgment, either express or signified or imported, of the receipt and not a mere statement that money was received. *In re* JAMNADAS HARINARAN, **23 B. 54.**

(34)—*S.* 3 (19)(*b*)—*Settlement -Gift.*—The definition of the term "settlement" in the Stamp Act suggests the creation of separate interests in favour of several persons who may have a legal or moral claim on the settlor, or for whom he may desire to make a provision. Where, therefore, a person bestows on his sister and her son certain land, because of natural affection, the document is liable to stamp duty as a gift and not as a settlement. REFERENCE UNDER STAMP ACT, S. 46, **7 M. 349, F.B.** [*D.*, 21 M. 422.]

(35)—*Ss.* 3, 9, 33, 34, 57—*Pro-note payable otherwise than on demand—Pro-note written on impressed sheet of proper value bearing word 'hund,' if duly stamped - Construction of Stamp Laws—Government Notification No.* 2955, *dated* 1-12-1882, *effect of.*—A promissory note for less than Rs. 200, payable otherwise than on demand, but not more than one year after date, and requiring a stamp of two annas, was *held* to be duly stamped, when it was written on an impressed sheet of the value of two annas, notwithstanding that it bore the word '*hundi*,' [*F.*, 21 P.R.

Stamp Act (I of 1879)—*continued.*

1891.] Provisions of laws relating to stamps and cognate matters are to be construed strictly, and, whenever there is any ambiguity or doubt, in favour of the subject. The effect of Government Notification No. 2955, dated 1 12-1882. is not to prohibit pro-notes, other than those chargeable with a duty of 6. 10 or 12 annas, being written on impressed sheets bearing the word '*hundi*' thereon. RADHA BAI v. NATHU RAM, **13 A. 66 = A.W.N. 1890, 238.**

(36)—*Ss.* 3 (15), 25 (*c*)—*Uncovenanted Civil Service Family Pension Fund—Entrance certificate*—An entrance certificate granted under the rules of the Uncovenanted Civil Service Family Pension Fund is a life policy and is within s. 3, sub. s. 15 of the Stamp Act. If it is for an amount within Rs. 1,000, it is chargeable with a stamp duty of 6 as. Such an instrument is not within the scope of s. 25 (*c*) of the Act. REFERENCE UNDER STAMP ACT, 1879, S. 46, **19 C 499.**

(37)—*S.* 3, *cl.* 11, s. 29 (*c*)—*Partition deed.*—Where documents evidence that three out of seven brothers have received Rs. 200 each in pursuance of partition of family property and that they remain liable, each for one-seventh of the family debts. in one case the executant also adding that his claims have been fully satisfied, the documents are partition-deeds. and must be stamped accordingly, having regard to the provisions of s 23 (*e*) of Act I of 1899. Each member must pay according to the share which he has taken under the partition. REFERENCE UNDER STAMP ACT, S. 46, **15 M. 164, F B.**

(38)—*Ss.* 3, 31, 51.—*Allowance for spoiled stamps.*—Allowance for spoiled stamps may be made under s. 51 of the Stamp Act when a stamped instrument has been endorsed by the Collector under s. 31 of the Act. REFERENCE UNDER STAMP ACT, S. 46, **11 M. 37, F.B.**

(39)—*Ss.* 3, (6) 34—*Order for payment addressed to person not a banker—Stamp duty.*—Where a certain "chits" for specified sums of money were addressed by A to B who had previously agreed to lend him money and who was requested to pay the amounts mentioned in the "chits" to A's creditors, *held* that the chits in question did not require a stamp as the agreement did not constitute B A's banker, within the meaning of cl. 6 (3) of the Stamp Act (I of 1879). RATULAL RANGILDAS v. VRIZ BHUKKAN, PARABURAM, **17 B. 684, F.B.**

(40)—*Ss.* 3, 50—*Admission of unstamped document by first Court on payment of duty and penalty—Power of appellate Court to review.*—Where an unstamped document has been received in evidence by the first Court, under s. 3 of the Stamp Act, upon payment of the prescribed duty and penalty, an appellate Court cannot review the proceedings of the lower Court in regard to such reception in evidence, except in the case provided for by s. 50 of the Act. PUNCHANUND DASS CHOWDHRY v. TARAMONI CHOWDHRAIN, **12 C. 64.** [*F.*, L.B. R. 1893-1900, 485; *R.*, 17 B. 235.]

Stamp Act (I of 1879)—*continued.*

(41)—*Ss.* 3 (10), 61—*Absence of certificate as required by rule* 5 (*b*) *of the Rules made by the Governor-General in Council—"Duly stamped" instrument.*—The absence of the certificate, required by Rule 5 (*b*) of the Rules, dated 3rd March, 1882, issued by the Governor-General in Council, under the Stamp Act, does not make a document "not duly stamped" within the intention of the Act, and the person executing the document has not committed any offence punishable under s. 61 of the Act. The non-compliance by the treasury officer or the stamp vendor with the direction to give such a certificate is not an act for which the person purchasing the stamp from him can be punished by the invalidation of the stamps innocently brought by him. QUEEN EMPRESS v. TRAILAKYA NATH BARAL, **18 C. 39.**

(42)—*S.* 3, *art.* 9—*Provision for life of donee, a settlement and not a gift—Gift for consideration, a conveyance.*—A document containing no absolute and unqualified disposition of property, but only a provision for the life of the donee. with reversion to the settlor or his heirs, is not a gift, but only a "settlement" within them eaning of the Stamp Act A document by which the executant, in pursuance of a razinamah filed in a suit for maintenance brought against him by a widow, transferred certain land to her with power to alienate, and subject only to the condition that no further claim for maintenance was to be put forward by her, would constitute neither a settlement nor a gift but must be treated as a conveyance and stamped accordingly. REFERENCE UNDER STAMP ACT, s, 46, **21 M. 422.**

(43)—*S.* 3, *sch.* I *Art.* 11—"*Duly stamped*"—*Bill of exchange payable otherwise than on demand*—The words "duev stamped" in s. 3 of the Stamp Act signify "stamped or written upon paper bearing an impressed stamp." A bill of exchange for Rs. 500, payable otherwise than on demand, must be stamped with an impressed stamp of the value of six annas. RADHAKANT SHAHA v. ABHOY CHURN MITTER, **8 C. 721 = 11 C.L.R. 310.**

(44)—*S.* 3, *sch.* I *art.* 13—*Bond.*—A document by which a Debenture Company agrees to pay £220,000 for the cost of the construction of a certain railway on certain terms, and which contains a provision that the Company should be at liberty to retain £40,000 as compensation for risks, expenses etc., must be stamped as a bond for the payment of £220.000, REFERENCE UNDER STAMP ACT, S. 46, **15 M. 193, F.B.** [*R.*, 11 Bom. L.R. 386]

(45)—*S.* 3, *cl.* 9, *sch.* I. *art.* 21—*Contract for sale of standing trees, chargeable as an agreement and not a conveyance.*—The document in this case, in respect of the stamp duty on which reference was made to the High Court under s. 48 of the Stamp Act bore a stamp of one rupee. The so-called purchaser of the trees under the document was allowed by it to cut and remove the trees within the specified villages within two years, and there was also the provision that such trees as he had

Stamp Act (I of 1879)—*continued.*

not cut off within the two years should remain the property of the vendor. The High Court decided that the document did not require to be stamped as a conveyance under s. 3, cl. 9, and art. 21 of sch. I of the Stamp Act. Whether the instrument be regarded as a sale of the trees when cut by the purchaser, in which case it would be a memorandum relating to the sale of "goods and merchandise" or as an agreement to allow the contractor to cut and remove the trees on certain conditions, it was sufficiently stamped either under art. 2 of sch. II or under art. 5 of sch. I of the same Act. VOHRA MAHOMADALI v. RAMACHANDRA, **22 B. 785.**

(46)—*S.* 3 (13), *sch.* I, *and arts.* 290 44—*Mortgage—Definition for purposes of stamp duty*—*s.* 54, *T. P. Act*, 1882.—For the purpose of ascertaining what stamp duty is payable on an instrument, alleged to be a mortgage, the definition of mortgage, as given in the Stamp Act, and not that in the T.P. Act, is to be referred to. [*R.*, 4 L.B.R. 2.] Art. 29 applies to an instrument evidencing an agreement to secure the re-payment of a loan which means an instrument executed at the time the loan is made, and not to the case of an assignment by way of mortgage of a valuable security to secure a pre-existing debt. This article contemplates an instrument contemporaneous with the advance and with the deposit. An instrument evidencing an agreement to secure the re-payement of a loan of a certain sum of money with interest, for which a certain promissory note payable on demand was given as collateral security, is a mortgage-deed as defined by s. 3, sub-s. 13, Stamp Act, and the stamp duty on it is payable under art. 44 of the Act, and not under art. 29. QUEEN-EMPRESS v. DEBENDRA KRISHNA MITTER, **27 C. 587 = 4 C.W.N. 524.**

(47)—*S.* 3 (17), *sch.* I, *No.* 52—"Sarkhat"—*Receipt.*—A "*Sarkhat*" or document signed by a creditor, acknowledging the receipt of sugar-cane juice, the price of which exceeded Rs. 20, but without anything to show that the sugar-cane juice had been received in part satisfaction of a bond, is not a "receipt," within the meaning of the Indian Stamp Act, but only a memorandum of sugar-cane juice supplied, and does not require to be stamped. DEBI PRASAD v. RUPU, **6 A. 253 = A.W.N. 1884, 72.**

(48)—*S.* 3, *cl.* (11), *sch.* I, *art.* 54—*Document securing life-interest to executant with reversion to his sons—Release deed.*—A document securing to the executant the enjoyment for life of a portion of the joint family property with a reversion to his sons at any subsequent division of the property, though not merely renouncing the executant's claim against any or all of the property, should be stamped as a release deed and not as a partition deed. REFERENCE UNDER STAMP ACT, s. 46, **18 M. 233, F.B.**

(49)—*S.* 3 (17), *sch.* II, *art* 15 (*b*)—*Barrister's fees—Stamp duty on receipt.*—A Barrister's fees for services in litigation being a gratuity or

Stamp Act (I of 1879)—*continued.*

honorarium, the payment of such fees must be held to be without consideration, so that a receipt given by him for his fees is exempted from stamp duty by art. 15 (*b*) of sch. II of the Stamp Act. REFERENCE UNDER STAMP ACT, s. 46, **9 M. 140, F.B.** [*R.*, 25 A. 509 = 23 A.W.N. 104; *D.*, 10 C.P.L.R. 11, Crim.]

(50)—*S.* 4 (*c*)—*Document insufficiently stamped admitted in evidence by lower Court—Power of appellate Court to exclude it.*—An appellate Court is not competent to question the admissibility of a document (though insufficiently stamped) which has been admitted in evidence by a lower Court. SHIDAPA v. IRAVA, **18 B 737.** [*F.*, 8 M.L.J. 66; *R.*, U B.R. 1897-1901, Vol. II, 559.]

(51)—S. 4 (*c*), sch. I, art. 5—*See* COURT FEES ACT, 1870, sch. II, art. I (*b*), 8 M. 15, F.B.

(52)—S. 5—*See* POWER OF ATTORNEY, 23 C. 187.

(53)—*Ss.* 5, 11, 18, 34—*Promissory note executed out of British India not properly stamped—Suit thereon in British India—Maintainability.*—Suit on a promissory note executed out of British India and not properly stamped. The question was as to the admissibility of the promissory note in British India. *Held* that s. 34 of the Stamp Act did not render it inadmissible in evidence. That section only applied to an instrument which was "chargeable with duty," but there was no provision of law which required a promissory note executed out of British India to be stamped before it was sued on or used in Court. The holder of the note not having done any of the acts referred to in ss. 5 and 18 of the Act, the obligation to stamp it does not arise. MAHOMED ROWTHAN v. MAHOMED HUSIN ROWTHAN, **22 M. 337 = 9 M.L.J. 135.**

(54)—*Ss.* 5, 14, 35, 37, 39—*Conveyance and release—Stamp.*—Where a conveyance for Rs. 100 was written on the face of a one rupee stamped paper and a release on the back of the paper, the first instrument should be considered to have been written, executed, and stamped, according to law. The second instrument can be validated on payment of the deficient stamp duty and the penalty under s. 39 of the Stamp Act. REFERENCE UNDER STAMP ACT, s. 46, **11 M. 40, F.B.**

(55)—*S.* 6, *sch.* I, *art.* 38—*Deed conveying immoveable property—Consent of undivided nephew of executant—Deed of adoption—Endorsement of—Consent by natural mother and father of adopted boy.*—A executed a sale-deed to B. on a 3 Rs. stamp paper conveying thereunder certain immoveable property for Rs. 275. The deed contained an endorsement by the undivided nephew of the executant, giving his consent to the sale. *Held*, that the conveyance and the endorsement of consent were "several instruments" to complete the transaction as contemplated by s. 6 of the Stamp Act (I of 1879) and that the consent should be written

Stamp Act (I of 1879)—*continued.*

on a separate stamp-paper of the value of one rupee. X acknowledged the fact of the due adoption of B on a ten-rupee stamp paper, which recited that B was constituted X's heir to his interest in the family property and contained also an endorsement by the natural mother and father of the adopted boy giving their consent to the adoption. *Held* that the document not conferring an authority to adopt, was not chargeable under art. 38 of sch. I of the Stamp Act (I of 1879), and that therefore the endorsements below it were not chargeable with any stamp duty. *In the matter of* HANMAPPA, **13 B. 281.** [*Doubted*, 17 B. 687.]

(56)—*S. 7—Contracts for several loans—Construction.*—Where sixteen different persons borrowed a quantity of rice from a certain person and passed a single bond to the creditor showing how much was borrowed by each, and the bond did not contain a joint engagement to pay the entire debt, *held* that the instrument ought to be regarded as containing sixteen distinct contracts liable to stamp duty as such under s. 7 of the Stamp Act. SHABUDIN MAHOMED v. HIRNAK RAJANAK, **10 B. 47.** [*D.*, 16 P. W. R. 1910=15 P. R 1910.]

(57)—*S. 7—Stamp duty payable on lease deed—Payment of rent monthly—Repayment of rent received in advance—Instrument not relating to "several distinct matters."*—Where the consideration for a lease consisted partly of rent to be paid each month and partly of a sum equal to a month's rent paid in advance and to be repaid at the end of the lease, the instrument was not to be regarded as dealing with the two distinct matters under s. 7 of Act I of 1879, but as relating only to one matter. REFERENCE UNDER STAMP ACT, s. 61 (1), **26 M. 473.**

(58)—*S. 7—Execution of single power of attorney by several persons—No common interest—Validity.*—It is not competent for several persons who are unconnected and have no common interest in a property to execute a single power of attorney in respect thereof. Separate documents should be executed by each of the individuals. REERENCE UNDER STAMP ACT, **s. 46. 2 M. L. J. 118, F. B.**

(59)—*S 7—Instruments embodying two contracts though of same matter—Promissory note containing two undertakings by two provisions.*—The test under s. 7 is whether an instrument relates to several distinct matters. If it does, it must be charged with the aggregate duty payable in respect of all such matters though they may be grouped together and the instrument is signed at one and the same place by all the executants. But if the matter is single the duty need not be increased though the several executants had signed separately and within separate endorsements reciting their liability. It is immaterial that the deed comprises distinct contracts if only such contracts relate to the same matter. MUSA v. KAHAN, **102 P. R. 1893.** [*R.*, 15 P. R. 1910, F. B.]

(60)—*S. 7, paras 1 and 2—Lease and usufructuary mortgage—Stamp duty.*—Where certain properties were leased for a certain term, under an instrument which provided that the yearly rental was to go towards payment of interest and liquidation by the end of the term, of a debt due by the lessor *held* that though the arrangement effected was partly a lease and partly an usufructuary mortgage the instrument should be stamped as a mortgage only under para. 2 of s. 7 of the Stamp Act. S. 7, para (1) of the Stamp Act relates only to transactions so distinct in their nature as to be capable of being carried out by two or more instruments instead of one. *Ex parte* HILL, **8 C. 254=10 C.L.R. 33.** [*F.*, 17 A. 55, F.B.]

(61)—*Ss. 7, 34—Instrument executed by two persons jointly—Stamp duty—Document once admitted cannot be rejected on ground of insufficiency of stamps.*—An instrument otherwise properly stamped does not become two instruments for purposes of stamp for the simple reason that it is executed by two persons. If the two persons have executed it jointly and the matter of the bond has been dealt with as a single one the whole instrument will be treated as a single instrument for purposes of stamp duty. Where an insufficiently stamped instrument has been admitted in evidence in the lower Court such admission cannot be called in question by the appellate Court. WILAITI v. PIR BAKSH, **A.W.N. 1884, 318.**

(62)—*S. 7, sch I, No. 5 (c)—Agreement with a penal clause - Bond for amount of penalty.*—*Held* by the Full Bench, Stuart, C. J., *dissenting*:—An agreement with a penal clause, by which the obligor undertakes, in the event of his failing to fulfil the conditions of the agreement, to pay certain amount as penalty to the obligee, is chargeable, under s. 7 of the Stamp Act, with the stamp duty leviable on a bond for the amount of such penalty. *Per* Stuart, C.J.—For the purposes of the Stamp Act, the penal clause in the agreement cannot be considered separately, as constituting a bond, but simply as one of the several subsidiary clauses making up the whole agreement, and the document is only chargeable as an agreement. (Sch. I, No. 5 (c)). REFERENCE BY BOARD OF REVENUE N.W.P UNDER ACT I OF 1879, **2 A. 654. F.B.** [*Diss.*, 8 C. 284; *Doubted*, 9 A. 585, F.B.]

(63)—S. 9—*See* No. 35, *supra* and No. 113, *infra*.

(64)—*S. 9, r 6.—Promissory note on impressed hundi paper.*—A promissory note for Rs. 4,300, written on an impressed hundi paper for Rs. 3, was correctly stamped and did not contravene rules framed under the Stamp Act. The rules under s. 9 of the Stamp Act (I of 1879), require that a document, such as the above, must be written on an impressed sheet. They render it compulsory that promissory notes chargeable with a duty of 6, 10 or 12 annas must be written on a hundi paper; but that does not imply any prohibition against other promissory notes also being so written, as the hundi papers are also impressed sheets. BANK OF MADRAS v. SUBBARAYALU, **14 M. 32.** [*F.*, 21 P.R. 1891.]

Stamp Act (I of 1879)—*continued.*

(65)—*S.* 10—*Hundi—Stamp*——A hundi, for a sum of Rs. 380, payable otherwise than on demand, cannot be stamped with an adhesive stamp. The words "drawn or made out of British India" in cl. (*b*) of s. 10 of the Stamp Act of 1879, apply to the entire clause. DEVAJI v. RAMAKRISHNAIAH, **2 M. 173.**

(66)—*Ss.* 10, 11—*Promissory note stamped as hundi—No adhesive stamp—Admissibility in evidence.*—A promissory note payable on demand, which must, under s. 11 of sch. I of Act I of 1879, be stamped with an adhesive stamp for one anna, but which is written on an impressed stamp as a *hundi*, is nevertheless admissible in evidence. SADIK ALI v. RANI KANNO DAI, **A.W.N. 1885. 317.**

(67)—*S.* 11.—*Rule as to cancellation of adhesive stamp, cases to which applicable.*—The receipt to a salary bill of a Government official, which requires to be stamped before or at the time of its execution is not an instrument contemplated by the first paragraph of s. 11 of the Stamp Act, 1879. That paragraph applies to cases in which the instrument chargeable with duty may be stamped after execution. QUEEN-EMPRESS v. RAHAT ALI KHAN, **9 A. 210 = A.W.N. 1887, 5.**

(68)—S. 11—See Nos. 53, 66, *supra* and No. 190, *infra*.

(69)—*Ss.* 11, 16—*Stamp*—Hundi—*Execution, meaning of—Time of execution—Stamp affixed and subsequently cancelled*—Where a *hundi* was written by the defendant and stamped by him with a one-anna stamp which was left uncancelled and the *hundi* was subsequently taken by him to the plaintiff's son who received it from him and at the time of receiving it cancelled the stamp by writing the date across it: *Held*, that the *hundi* was duly stamped under ss. 10 and 16 of the Stamp Act (I of 1879) and was admissible in evidence. If, at the time of delivery, which completed its legal character, the *hundi* was stamped, and if the cancellation took place at that time as part of the same transaction, it was sufficient. A deed is duly stamped if the stamp is affixed and cancelled at the time of execution or if, having been at any time previously affixed, it is cancelled at the time of execution. "Execution" when applied to a document, is the last act or series of acts which completes it. It might be defined as formal completion. The contract on a negotiable instrument is until delivery incomplete and revocable. Until delivery, a *hundi* is not clothed with the essential characteristics of a negotiable instrument. BHAWANJI HARBHUM v. DEVJI PUNJA, **19 B. 635.** [*R.*, 3 O.C. 195. U.B.R. 1907, 4th Qr., Execution, Signing, 5.]

(70)—*Ss.* 13, 14, 34—*Simple money-bond on impressed stamped paper—Transfer by endorsement—Stamp duty.*—Where a simple money-bond executed on an impressed stamp paper was transferred by endorsement on the back thereof, *held* that the endorsement required a stamp and could be stamped under s. 34 of Act (I of 1879). PRAHLAD LAKSHMAN RAV NIKANE v. VITHU, **17 B. 687, F.B.**

(71)—S. 14—*See* Nos. 54, 70, *supra*.

(72)—*S.* 16—*Pro-note—Stamp affixed and cancelled soon after signature—Admissibility.*—A pro-note was first signed by the executant and the stamp was affixed and cancelled immediately after *Held* that as the signing and stamping were continuous acts in the same transaction the pro-note was stamped at the time of the execution within the meaning of s. 16, and was admissible in evidence. SURIJ MULL v. HUDSON, **24 M 259.** [*R.*, 6 Bom. L.R. 699.]

(73)—S. 16—*See* No. 69, *supra*.

(74)—*Ss.* 16, 34—*Document stamped after execution—Admissibility of.*—A document which is stamped subsequently to execution, but before it is produced in Court, cannot be admitted in evidence. Under s. 34 of the Stamp Act (I of 1879), all instruments chargeable with duty should be duly stamped and under s. 16 they must be stamped before or at the time of execution. JETHIBAI v. RAMCHANDRA NAROTTAM, **13 B. 484.**

(75)—*S.* 16, *sch.* I, *art.* 1—*Acknowledgment of debt—Execution of* Rukka—*Contract of pay, Novation of—Cause of action.*—The defendant executed two *rukkas* for certain sums of money borrowed from the plaintiff on the 30th June and the 12th July 1893. On the 22nd November 1895 an account was made of the money due to the plaintiff from the defendant in respect of the two *rukkas* and for the sum found due up to the said date; the defendant executed a *rukka* in which the debts due on the first two *rukkas* were mentioned and acknowledged in the following terms: "*Mabligh* 12, 937-14-0.....*Tarikh* 22nd November 1895, *aj tak baki nikle wuh wajib-ul ada hai.*" This *rukka* bore a one-anna adhesive stamp, *Held*, that the acknowledgment of the balance found due in the *rukka* was an acknowledgment within the meaning of art. 1, sch. I, Act I of 1879, and was stamped at the time of execution, within the meaning of s. 16 of that Act. The mere acknowledgment of a debt, signed by the debtor, although it may amount to the so called 'account stated,' does not evidence a new contract to pay the debt admitted to be due *Held* therefore that the acknowledgment contained in the *rukka*, dated the 22nd November 1895, was not in itself evidence of a new contract to pay that debt, and did not give the plaintiff a fresh and independent cause of action against the defendant. JAWAHIR SINGH v LACHMAN DAS, **3 O.C 195.** [*Rel. on.*, 6 O C. 16; *Expressed.*, 7 O C. 166; *D.*, 11 O.C. 152.]

(76)—*S.* 18—*Pro-note made out of British India.*—A pro-note made out of British India comes within the provisions of s. 18 of the Stamp Act (I of 1879). When the first holder sues upon the pro-note within British India, it is enough that he is ready to affix the proper

Stamp Act (I of 1879)—*continued.*

stamp before the decree is passed. The pro-note need not be stamped before being received in evidence in the suit. The obligation to affix a stamp arises only when the first holder presents it for acceptance or payment, endorses, transfers, or otherwise negotiates the note. (*Griffin* v. *Weatherby*, L R. 3 Q.B. 753, *R.*) SIMULU EBRAHIM ROWTHAN v. ABDUL RAHIMAN MAHOMED, **8 M. L.J. 182.**

(77)—S. 18—*See* No. 53, *supra.*

(78)—*S.* 23—*Bond for re-payment of double the amount borrowed.*—A bond (securing a loan), which recites that double the amount must be repaid for principal and interest in certain instalments, or earlier in case of default in the punctual payment of interest, is one chargeable with a stamp duty chargeable on double the amount lent S. 23, Stamp Act, has no application to such a bond. SAMBHU CHANDRA BEPARI v. KRISHNA CHARAN BEPARI, **26 C. 179.** [*R*., 11 C.W.N. 1122, 4 N.L.R. 90; *Not F.*, 3 Bom. L.R. 133.]

(79)—*S.* 24—*Property sold subject to mortgage—Payment of mortgage, no part of consideration—Document conveying such property—Stamp duty.*—Where property is sold subject to a mortgage or other charge, the payment of such mortgage or charge forms, under ordinary circumstances, no part of the consideration for the purchase. The stamp duty payable on a document conveying such a property is an *ad valorem* duty on the consideration for the sale. REFERENCE FROM THE BOARD OF REVENUE, **10 C 92=13 C L.R. 164.**

(80)—*S.* 24, *cl.* (3)—*Admission of document in evidence as being duly stamped—Competency of appellate Court to question admissibility—Bombay Reg.* XVIII *of* 1827, *s.* 10.—S. 34 of the Stamp Act (I of 1879), applies to all instruments whenever executed and it must be held to override the special provisions of s. 10 of Bombay Reg. XVIII of 1827 which provides that any instrument which requires a stamp is not valid unless duly stamped. After the admission by a Court of first instance of a document in evidence as having been duly stamped, it is not competent to the appellate Court, under s. 34, cl. 3 of Stamp Act, to question its admissibility. If the appellate Court considers the document to be insufficiently stamped, it can only proceed under s. 50 of the Stamp Act. GURPADAPA BIN IRAPA v. NARO VITHAL KULKARNI, **13 B. 493.** [*F.*, 18 B. 737; *R.*, 17 B. 235.]

(81)—*S.* 24 *and sch.* I, *art.* 5—*Deed containing agreement and relinquishment of title—Stamp duty.*—Where, under the same instrument, a mortgagor relinquishes his title to the mortgaged property in favour of the mortgagee, and also agress to pay the Government assessment on the land until the transfer of the land to the name of the mortgagee in the Collector's books the instrument would be liable to two stamp duties, one as a conveyance under s. 24

Stamp Act (I of 1879)—*continued.*

of the Stamp Act, 1879, calculated on the original mortgage amount plus the amount mentioned in the deed, and the other as an agreement not otherwise provided for under art. 5 of sch. I of the Act. SINAPAYA v. SHIVAPA, **15 B. 675.**

(81-*a*)—S. 25—*See* No. 36, *supra.*

(82)—*S.* 25 (*e*), *sch.* I, *art.* 10—*Annuity—Award securing an annuity.*—By an award a sum of Rs. 5 per mensem was made payable to a certain person, but without any mention whether the sum was secured or intended to be secured to the heirs or representatives of the person to whom it was payable. *Held* that the award ought to be stamped as a document securing an annuity under s. 25. cl (*c*) of Act I of 1879. REFERENCE UNDER ACT I OF 1879, s. 49, **A.W.N. 1896. 197.**

(83)—*S* 26—"*Claimable,*" *meaning of—Bond to secure future advances.*—The word "claimable," in s. 26, Act I of 1879, means "claimable in a Court of Justice." A plaintiff obligee is entitled to bring a suit on a mortgage-deed executed to secure future advances, even when more than the sum secured by the deed has been realised by him privately. HARENDRA LAL ROY CHOWDHRY v. TARINI CHARAN CHAKRAVARTI, **31 C. 807=8 C.W.N. 667.**

(84)—S. 26—*See* CONTRACT ACT, 1872, ss. 73, 74, 4 M.L.J. 201.

(85)—S. 29—*See* No. 37, *supra.*

(86)—S. 31—*See* No. 38, *supra.*

(86-*a*)—S. 33—*See* No. 35, *supra.*

(87)—*Ss.* 33, 61, 34, 49, 50—*Admission of promissory note improperly stamped—Reference.*—A promissory note payable not on demand but within a year after date, is liable to be stamped with a two anna stamp under cl. (*b*), art. 11, sch. I, Act I of 1879. Where an instrument has been treated as a promissory note, the reference cannot have been made under s. 49. S. 50 does not apply to the case of an instrument of any of the classes excepted in the first proviso to s. 34 of the Stamp Act, which has been erroneously admitted in evidence by a lower Court, and in such a case the Court can proceed under s. 33 of the Act. BAIJU v. JOWAHIR, **193 P R. 1883, F.B.** [*Cons.*, 2 P.R. 1891, F.B.].

(88)—*S.* 34—*Admission of deed in evidence—Objection in appeal—Proviso* 3, *scope of.*—The order of admission of a document in evidence cannot be called in question in the appellate Court. Proviso 3 to s. 34 relates to all instruments chargeable with duty including those exempted under proviso I. MANGAL SAIN v. GOBIND DAS, **139 P.R. 1890.** [*F.*, 2 P.R. 1891; *R.*, 103 P.R. 1908.]

(89)—*S.* 34—*Impressed sheets bearing the word "hundi."*—Promissory notes for sums not exceeding Rs. 5,000 made in British India and payable otherwise than on demand but not more than one year after date or sight will be

Stamp Act (I of 1879)—*continued.*

held to be properly stamped though written on impressed sheets of proper value, bearing the word "hundi." HILL v. NIHAL CHAND, **21 P.R. 1891.** (13 A. 66, 14 M. 32, *F.*)

(90)—*S.* 34—*Promissory note — Admission in evidence of, already admitted* —Admission of a promissory note admitted in evidence under proviso I of s. 34, Stamp Act, cannot be questioned at any stage of the same suit on the ground that the instrument has not been duly stamped. MA HNIN LE v. MAUNG E, **L.B.R. 1893–1900, 485.** (12 C. 64, *F.*)

(91)—*S.* 34—*Admission of document not properly stamped—Questioning in appeal.*—When a document has once been admitted in evidence, its admission cannot be objected to in an appellate Court on the ground that it is not properly stamped. DIWAN LACHMAN DAS v. DHOLAN DAS, **2 P.R. 1891.** (139 P.R. 1890, *F.*) [*R.*, 108 P.R. 1908.]

(92)—*S.* 34—*Stamp not duly cancelled—Admission and subsequent rejection of—Gambling—Money borrowed for—Private and public gambling distinguished.*—Courts of first instance should carefully examine documents chargeable with duty to see that they are duly stamped before admitting them in evidence. When, however, a document not duly stamped has been admitted in evidence it cannot subsequently in the same suit be rejected because it was not duly stamped. Where money is borrowed to be used in gambling, the question whether the object of the loan was unlawful depends upon whether the gambling was of a kind forbidden by law. MA PYU v MAUNG HEIN, **L.B.R. 1893—1900, 60** (7 M. 301, *R.*)

(93)—*S.* 34 — *Promissory note, nature of.*—A letter was in the following terms:—"In addition to Rs. 115 already received, Rs 385 is also required. Please send it by the bearer Streenivasan. The amount will be returned with interest at 12 per cent. without delay." *Held* that it was not a promissory-note within the meaning of that term as used in s. 34, Act I of 1879, as there was no unconditional undertaking on the face of the document to pay the money, and as it was clear on the face of the document that the undertaking was conditional on the amount being remitted as requested. BHARATA PISHARODI v. VASUDEVAN NAMBUDRI, **27 M. 1, F B.** (16 M. 233, *Diss.*; 23 M. 156, foot-note, *Appr.*).

(94)—*S.* 34—*Suit upon Hundis—Hundis not properly stamped—Admissibility in evidence—Admission by defendant—Effect—Decree—Validity.*—A suit was brought upon two hundis which were inadmissible in evidence for want of impressed stamps. The lower appellate Court awarded the plaintiff's claim on the ground that the admissions by the defendant in his written statement rendered it unnecessary to put the hundis in evidence. *Held* that, under s. 34 of the Stamp Act (I of 1879), the hundis in question (not being properly stamped) should not only not be received in evidence but they should not also be "acted upon," in any

Stamp Act (I of 1879) *continued*

manner. In this case, the hundi is "acted upon," where a decree is passed on it, whether proved or admitted, and, owing to the language of the Stamp Act, s. 34, effect cannot be given to it in either case: CHENBASAPA v LAKSHMAN RAMACHANDRA, **18 B. 369.** [*F.*, 17 M.L.J. 308=30 M. 386, 7 Ind. Cas. 320=8 M.L.T. 251; *R.*, 18 B. 745, 24 B. 360, U.B.R. 1897-1901, 556, 25 A. 509=23 A.W.N. 104, 73 P.L.R. 1907=66 P.R. 1906, 11 C.L.J. 426=14 C.W.N. 703; *Cons.*, 2 L.B.R. 333, U.B.R. 1909, 4th Qr., Stamp, 36, 12 Bom. L.R. 466; *D.*, 18 B. 614.]

(95)—*S.* 34—*Original instrument chargeable with penalty—Documents constituting secondary evidence not governed by the section.*—The provisions that have been enacted in the Indian Stamp Act (I of 1879), for the case of deeds either unstamped, or insufficiently stamped, have no application when the original deed, which ought to have been stamped or was insufficiently stamped, has not been produced. The above provisions deal with, and exclusively refer to, the admission as evidence of original documents which, at the time of their execution, were not stamped at all, or were insufficiently stamped. So, a party ought not to be permitted to prove a *copy* of a deed tendered by him and to use it as secondary evidence either on due payment of a penalty into Court, or upon its endorsement by the Collector. RAJA OF BOBBILI v. INUGANTI CHINA SITARAMASAMI GARU, **23 M. 49=26 I A. 262=4 C.W.N 117, P.C.=7 Sar. 597.** [*R.*, U.B.R. 1897-1901, 365, U.B.R. 1907, 4th Qr., Execution-Signing, 5.]

(96)—S. 34—*See* ACKNOWLEDGMENT, 18 B. 614.

(97)—S. 34—*See* CIV. PRO. CODE, 1882, s. 257-*a* A.W.N. 1883, 93, F.B.

(98)—S. 34—*See* EVIDENCE—SECONDARY EVIDENCE, A.W.N. 1899, 210.

(99)—*See* EVIDENCE ACT, 1872, ss. 91, 102, 114, U.B.R. 1897-1901, Vol. II, 396.

(100)—S. 34—Acknowledgment— Admissibility in evidence—*See* NEGOTIABLE INSTRUMENTS—PROMISSORY NOTES—FORM OF, 8 C. 645.

(101)—*S.* 34, *cl.* 3—*Civ. Pro. Code, s.* 578—*Unstamped hundi, admission on appeal—Objection in second appeal disallowed.*—An unstamped hundi which is admitted in evidence upon an erroneous construction of the law, cannot under cl. 3, s. 34 of the Stamp Act be allowed to be called in question in second appeal. Nor can the Court entertain the objection, as it is not one affecting the merits of the decision. RAMASAMI v. RAMASAMI, **5 M. 220.** [*F.*, 8 M.L.J. 66; *Appr.*, 13 B. 449, F.B., 17 B. 235.]

(102)—*S.* 34, *sub s.* 3—*Notice of allotment, unstamped—Admissibility in evidence.*—It is clear from sub-s. 3 of s. 34 of the Stamp Act (I of 1879) that a notice of allotment which is not duly stamped is admissible in evidence. MOHUN LALL v. SRI GUNGAJI COTTON MILLS COMPANY, **4 C.W.N. 369.** (26 C. 955, *F.*).

Stamp Act (I of 1879) —*continued.*

(103)—*S.* 34, *sub-s.* 3—*Agreement admitted in evidence in lower Court.*—Where an agreement is admitted in evidence rightly or wrongly by the original Court, any objection as to its admissibility in evidence on the ground that it was not properly stamped cannot be entertained in appeal, having regard to s. 34, sub-s. 3 of the Stamp Act (I of 1879). HARDEO DAS v. PARBATI, **A W N. 1887, 94.**

(104)—*S.* 34, *proviso* (3)—*Admission of document—Insufficiency of stamp.*—Attention called to this provision of law which is—"When an instrument has been admitted in evidence, such admission shall not, except as provided in s. 50, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped." NGA PYAN NA v. MAUNG THA ZAN, **U.B.R. 1892-1896, Vol. II, 633.** [*R.*, U.B.R. 1897-1901, Vol. II, 559.]

(105)—S. 34—*See* Nos. 35, 39, 53, 61, 70, 74, 87, *supra*, and Nos. 142-*a*, 143, 190, *infra.*

(106)—*Ss.* 34, 35, 39—*Unstamped document, admission of, on levy of duty and penalty—Production of original instrument necessary.*—The requirement in s. 35 of the Indian Stamp Act (I of 1879) that the officer admitting an instrument in evidence under s. 34 shall send to the Collector an authenticated copy of the instrument, and the provision in s. 39 that such officer shall certify by endorsement on the document that the proper duty and penalty have been levied, clearly show that a Court cannot admit, in evidence, an unstamped document, under s 34, unless the original instrument is actually produced before it. In such a case, secondary evidence cannot be admitted by the Court to prove the contents of the documents, the original instrument having been inadmissible, as not duly stamped. KALLU v. HALKI, **18 A. 295 = A.W.N. 1896, 68**

(107)—*Ss.* 34, 41—*Act* XVIII *of* 1869—*Suit to recover penalty paid on unstamped document—If applicable in case of documents executed when prior stamp laws were in force—Mufassil Small Cause Courts Act* XI *of* 1865, *s.* 6—*Suit not of the nature of Small Causes—Second appeal.*—In a suit on an unstamped bond, the plaintiff had to pay stamp duty and penalty under s. 34 of Act I of 1879, and the present suit was brought under s 41 of the Act for the recovery from the defendant of the amount of such stamp duty and penalty. It was contended on behalf of the defendant that when the bond was executed, Act XVIII of 1869 was the Stamp Law, that that Act did not contain any provisions in it similar to s. 41 of Act I of 1879, and that the present Act was inapplicable to the case of the present bond. *Held* that this contention, being based upon an erroneous presumption that the penalty on the bond was wrongly imposed under s. 34 of the Stamp Act, I of 1879, was untenable, and that the defendant was bound, under s. 41 of the Act, to pay to the plaintiff the amount claimed by him.

Stamp Act (I of 1879)—*continued.*

The rule contained in the body of s. 34 of the Stamp Act I of 1879, renders unstamped documents inadmissible in evidence, and the first *proviso* prescribes a procedure by which they may, in certain cases, be admitted on payment of duty and penalty. The rules belong to the province of procedure, *ad litis ordinationem*, and must regulate the manner in which unstamped documents are to be dealt with in suits instituted after the passing of Act 1 of 1879, *whether such documents* were executed before or after the time when the Act came into force. This view does not proceed upon giving any retrospective effect to the enactment, but, on the contrary, is consistent with the rule that penalties cannot be imposed under a repealed Act. And the interpretation is borne out by the language of the Act itself, for the important expressions '*chargeable*' and "duly stamped" as they occur in s. 34, must be interpreted in the sense in which they are defined in cls. (5) and (10) of s. 3, and they show that s. 34 contemplates that its provisions are to govern the imposition of penalty on unstamped documents, even though executed before Act I of 1879 came into force. The penalty on the bond in the present case being therefore rightly imposed under s. 34 of the Act, it follows that the provisions of s. 41 are applicable to the case, and available to the plaintiff. The claim in the present suit having arisen out of a rule of law as contained in s. 41 of the Stamp Act, cannot fall under the category of "debt, damage or demand" as used in s. 6 of the Mufassil Small Cause Courts Act, XI of 1865. Therefore, it was *held* that there could be no objection to a second appeal therein. ATMA RAM v. SARDAR KUAR, **A.W.N. 1884, 328.**

(108)—*Ss.* 34, 50—*Insufficiently stamped document admitted in evidence—Effect*—When an instrument has been admitted in evidence, and judgment delivered, its admission can be questioned only by the appellate Court in a proceeding under s. 50 of the Stamp Act. REFERENCE UNDER STAMP ACT, S. 46, **8 M. 564, F B.**

(109)—*S.* 34, *proviso* 3, *s.* 50, *proviso* 2—*Entry of transfer of land in Thugyi's Register No.* IX—*Exclusion by appellate Court of unstamped document already admitted by Court of first instance—Ejectment suit—Burden of proof.*—A report entered in the Thugyi's Register No. IX of the transfer of land by sale, signed by the transferrer, does not require to be stamped. A Court of Appeal has no power to exclude from evidence an unstamped document already admitted by the Court of first instance before whom no question had been raised about its exemption or otherwise from stamp duty. MAUNG SHWE LON v. MAUNG SHWE AN, **L.B.R. 1893-1900, 68.**

(110)—*S.* 35—*Unstamped document—Decree—Practice.*—Decree cannot be given on unstamped document not produced, even though its production in evidence is not necessary. MA EIN MIN v. MAUNG TUN THA, **U.B.R. (1897-**

Stamp Act (I of 1879)—*continued.*

1901, Vol. II, 556. (U.B.R. 1897-1901, Vol. II, 365, 379, 391, *R.*; 21 W.R. 1, 18 B. 369, *F.*) [*R.*, U. B. R. 1907, 4th Qr. Evidence, 13, U.B R 1909, Stamp, 3.]

(111)--*S.*35--*Determination of stamp--Penalty.*—The duty chargeable on an insufficiently stamped document must be decided with reference to the Act in force at the date of execution of the document and the penalty leviable is to be determined always in accordance with the provisions of the Act in force at the time of so determining. *In re* DEVI DITTA MAL, **7 P.R. 1885, Rev.**

(112)—*S.* 35—*Lost document insufficiently stamped—Secondary evidence.*—The Stamp Act provides for the admission of an instrument in evidence upon payment of duty and penalty, but makes no provision for the admission of secondary evidence of its contents upon such payment. Apart from revenue considerations, the use of stamped paper is of assistance in securing the genuineness of documents, and considerable room would be given for fraud if omission to comply with the Stamp law were condoned without insisting on the production of the documents in respect of which they take place. Secondary evidence of a lost document not stamped in accordance with law is inadmissible. MAUNG SO v. MAUNG PYI, **U B.R. (1892-1896), Vol II, 631.** (8 C L.R. 533, *F.*; 7 M.440, 2 M.208, 4 M.H.C. 312, 20 W.R. 63, *R.*) [*R.*, 2 U.B.R. 1892—1896, 371.]

(112-*a*)—**S.** 35—*See* Nos. 54, 106, *supra.*

(113)—*Stamp Act, ss.* 35,9 —*Hundi written on two stamps—Evidentiary value — Hundi inadmissible—Suit on original cause of action.*—A hundi written on two impressed stamps sewn together contrary to one of the rules made by the Governor-General in Council requiring such hundis to be drawn up on a single stamp, is not duly stamped, and is therefore not admissible in evidence under s. 34 of the Stamp Act. Notwithstanding the inadmissibility of the Hundi, a plaintiff can still obtain a decree if he can show an original cause of action complete in itself and independent of the hundi and for which the hundi was only a collateral security. SAMAD MIR v. BRIJ LAL, **73 P R. 1886.** [*R.*, 82 P.R 1891, 42 P.R. 1895.]

(114)—*S.* 36—*Rule of interpretation — Insufficiently stamped document admitted in evidence—Effect.*—The ordinary rule of interpretation is that an enactment is to be construed according to its plain meaning where there is no ambiguity and no sufficient reason for supposing any other meaning to have been intended by the Legislature. When a Court of First Insance bas admitted in evidence a document not stamped, the appellate Court cannot question its admissibility on the ground that it is not stamped. MI PO v. MA THE ON, **U.B.R. (1897-1901), Vol. II, 539.** (U.B.R. 1892-1896, Vcl. II, 633, 13 B. 449, 18 B. 737, 3 C 787, 8 M. 564, 11 W.R. 521, 16 W.R. 6, *R.*) [*Affirmed*, U.B.R. 1909, Stamp, 3.]

Stamp Act (I of 1879)—*continued.*

(115)—*S.* 37—*Certificate of Collector that document is duly stamped—Production of certificate after dismissal of suit and when appeal is pending—Order of remand.*—In a suit by certain bankers to recover the principal and interest, on the basis of an instrument described as a sarkhat executed in their favour by the defendants, the original Court found that the document was understamped and invalid, and therefore inadmissible in Court. The appellate Court dismissed the appeal solely on the ground that the document was improperly stamped. Subsequent to the order of dismissal, a certificate was given by the Collector, under s. 37 of the Stamp Act, that the document upon which the suit was brought was duly stamped. The plaintiffs preferred a second appeal to the High Court. *Held*, that the lower appellate Court had come to no finding on the facts, that as the Collector had given the certificate since the dismissal of the appeal by the lower appellate Court, the certificate was binding upon the High Court, and that, consequently, the lower appellate Court must proceed to hear the appeal upon the merits, and to dispose of the issue in the light of all the legal evidence in the case, and that consequently the appeal should be allowed and the case remanded under s. 562, Civ. Pro, Code. AGAR CHAND v. BALAK RAI, **A W.N. 1887, 21.**

(116)—S. 37—*See* No. 54, *supra.*

(116-*a*)—*S.* 37 (*b*)—*Decision of Collector as to chargeability of instrument, not final—Duty of Civil Court under s.* 33.—While the Indian Stamp Act makes the certificate of the Collector given under cl. (*a*) of s. 37 conclusive evidence, there is nothing in it which provides that his decision under cl. (*b*) shall be final or conclusive. If his decision is complied with, and the duty and penalty paid, then under s. 39 the instrument will be admissible in evidence, but, where such decision has not been obeyed and the duty and penalty not paid, a Civil Court before whom the instrument may come has the duty cast upon it, under s.33, of examining the document and of determining for itself whether the instrument is duly stamped or not, and, if not, of taking the steps laid down in ss. 33 34, and 35, whatever decision it may come to being subject to revision under s. 50. HARIBAI v. KRISHNARAV, **22 B. 632.** [*R.*, 9 Bom. L. R. 119.]

(117)—*S.* 39—*Penalty—Lost document.*—A copy of a lost unstamped document cannot be admitted in evidence on payment of the penalty, for, s. 39 of the Stamp Act, prescribing such penalty, pre-supposes that the document is forthcoming. RANGA RAU v. BHAVAYAMMI, **17 M. 473=4 M L J. 192.** (7 M. 440, *F.*).

(118)—S. 39—*See* Nos. 54, 106, *supra.*

(119)—*S.* 39, *Pro.* 3—*Documents admitted in evidence on payment of stamp duty and penalty--Subsequent rejection--Validity—Remand—Civ. Pro. Code* (1882), *s.* 578—The plaintiff sued to recover a sum of Rs. 653-7-0 due on 3 *khatas*

Stamp Act (I of 1879)—*continued.*

signed by the defendant. On an objection having been taken by the defendant that the *khatas* sued on were not duly stamped, the Subordinate Judge admitted them in evidence on payment by the plaintiff of the proper stamp duty and penalty, as required by s. 34 of the Stamp Act (I of 1879), holding that the *khatas* were bonds within the meaning of s. 3 of the Act. His successor in office held that the *khatas* were promissory notes and could be stamped only on the date of their execution. Being of opinion that they had been illegally admitted in evidence on payment of stamp duty, he dismissed the suit. On appeal, the District Judge held that the Subordinate Judge, having once admitted the *khatas* in evidence on payment of the requisite stamp duty, was precluded from calling in question their admissibility by the terms of proviso 3 to s. 34 of the Stamp Act. The lower Court's decree was reversed and the case remanded for trial on the merits. On appeal to the High Court against the order of remand, *held*, (1) that the *khatas* sued on cannot be rejected, when once they had been admitted on payment of the requisite stamp duty and penalty, and (2) that the order of remand not being one which affected the merits of the case or the jurisdiction of the Court, it was not competent to the High Court to interfere with it under s. 578 of the Civ. Pro Code, 1882. DEVACHAND v. HIRACHAND KAMARAJ, **13 B. 449 F.B.** [*F.*, 18 B. 737, U.B.R. 1897—1901, 559, 8 M.L.J. 66.]

(120)—*S.* 41—*Suit for the amount of stamp duty and penalty — Costs — Civ. Pro. Code, s.* 13—A fresh suit is maintainable for the recovery of the amount of stamp duty and penalty paid by plaintiff in his suit against the defendant on an instrument not duly stamped, executed by the latter who was bound to bear the expense of providing the proper stamp. S. 41 of the Stamp Act does not prohibit such a suit, and ss. 13 and 43 of the Civ. Pro. Code, have obviously no application, nor can stamp duty and penalty be regarded as strictly within the designation of costs. ISHAR DAS v. MASUD KHAN, **6 A. 70=A.W.N. 1883, 211.**

(121)—S. 41—*See* No. 107 *supra.*

(122)—*S.* 44 (*b*)—*Instrument—Mortgage deed —Further advance—Stamp.*—When property is once mortgaged and a further advance is made on the security of the same property by a fresh mortgage deed which extends the period of redemption of the original mortgage, the new mortgage deed should be stamped only in respect of the amount of the new loan advanced. REFERENCE UNDER STAMP ACT, 1879, **1 Bom. L.R. 7.**

(123)—*S.* 46, *sch.* I, *arts.* 5 (*c*) 44—*Muchalika executed by Abkaree licensee.*—A *Muchalka* executed by an abkari licensee, which simply states that the executant agrees to all the terms and conditions mentioned in the license, one of them being that, as a security for the due performance of the conditions of the contract, the licensee shall deposit with the Collector a sum

Stamp Act (I of 1879)—*continued.*

equal to three months' rental ought to be stamped with an eight-anna stamp. REFERENCE UNDER STAMP ACT, S. 46, **15 M. 134, F.B.**

(124)—*S.* 46, *sch.* I, *art.* 16—*Execution sale of property subject to incumbrance—Stamps for sale certificate.*—Where, in execution of a decree, property is sold subject to an incumbrance the stamp on the sale certificate should be calculated on the amount of the purchase money and not on that amount *plus* the amount of the incumbrance. JWALA PRASAD v. RAM NARAIN, **15 A. 107=A.W.N. 1892, 243.**

(125)—S. 49—*See* DISTRICT JUDGE, JURISDICTION OF, 11 M. 38, F.B.

(125-*a*)—S. 49—*See* No. 87, *supra.*

(125-*b*)—S. 50—*See* Nos. 40, 87, 108, 109. *supra.*

(126)—*S.* 51—*Stamp paper for engrossing sale certificate accidentally spoiled in Court—Effect.*—Where a stamp paper for the engrossment of a sale certificate was inadvertently punched by an officer of the Court and an instrument was subsequently drawn up on it notwithstanding and delivered to the purchaser, the document could not be treated as unstamped. REFERENCE UNDER STAMP ACT, S. 46, **18 M. 235, F.B.**

(127)—*S.* 51 (*a*)—*Extent of its application.*—Cl. (*a*) of s. 51 of the Stamp Act applies only to cases of accidental spoiling of the paper of which the stamp is made, and does not cover cases in which a person has used the paper in the ordinary way, but has made a mistake in using it. NARASIMHA CHARYULU v. APPA RAU, **18 M. 122.**

(128)—*S.* 51 (*d*) (6)—*Deed of conditional sale —Refund of cancelled stamps used for mortgage-deed in favour of another.*—A person owning certain lands executed a duly stamped document purporting to mortgage them with possession. The transaction fell through before registration of the deed, and soon afterwards a deed of conditional sale of the same lands was executed by him on another stamp paper in favour of some other person. On an application by him for refund of the stamp used for the cancelled mortgage-deed, he was given the refund under s. 51 (*d*) 6 of the Stamp Act. The omission of the words 'between the same parties' which occur in cl. (7), from cl. (6), shows that the latter clause is sufficiently wide to admit of a case like the present in which, though one of the parties has been altered, and the new document is technically of a somewhat different nature, the transaction evidenced by both instruments is, in effect, practically the same. REFERENCE UNDER STAMP ACT, S. 46. **16 M. 459 F.B.=2 M.L.J. 181.**

(129)—S. 51—*See* No. 38, *supra.*

(130)—S. 57—*See* No. 35, *supra.*

(131)—*S.* 58—*Evidence of payment—Receipt.*—S. 58 of the Indian Stamp Act does not preclude other evidence than a receipt being

Stamp Act (I of 1879)—*continued.*

adduced to prove payment. It only provides that a party making a payment may demand a receipt. Even when a receipt is given and is not produced in evidence, evidence *aliunde* is admissible in proof of the payment. SESHAYYA v. SUBBAMMA, **8 M.L.J. 269.**

(132)—*Ss.* 58, 61, 64.—*Meaning of the expression, "signing otherwise than as witness"—Agent authorised to sign on behalf of the firm—Liability—Proof of demand of stamped receipt—Refusal to grant stamped receipt by a firm—Liability of the members of the firm—Meaning of the term "person".*—The words "signing otherwise than as witness," in s. 61 of the Act includes the writing of a person's name by himself, or by his authority, with the intention of authenticating a document as being that of the person whose name is so written. An ordinary agent authorised to sign on behalf of the principal comes within the purview of the section. Where a clerk signs a firm's name to certain letters under the authority of the firm, it makes little difference that he wrote the letters at the dictation of the Manager, and he may properly be convicted under s. 61 of the Act. To bring home a charge under s. 64, it must be shown that the person accused had been required under s. 58 to give a properly stamped receipt, and had refused to give it. The term "person" used in ss. 61 and 64 of the Stamp Act includes the members of a trading partnership. So, where a firm granted an unstamped receipt for money signed by their Agent, on their behalf, the members of the firm were held liable, under ss. 61 and 64, since they were, in contemplation of law, the persons who signed the unstamped receipt, refusing to give a duly stamped receipt, and it was not necessary that the members must have been present at the writing of the unstamped instruments or must have been aware of the writing of them. QUEEN-EMPRESS v. KHETTER MOHUN CHOWDHRY, **27 C. 324.**

(133)—S. 61—*See* Nos. 41, 87, 132, *supra.*

(134)—*Ss.* 61, 64—*Receipt—Acknowledgment by letter.*—Where the receipt of money exceeding Rs. 20 in satisfaction of a debt is acknowledged by its being mentioned in a letter, without a receipt stamp being affixed, the writer is liable to punishment under s. 61 of the Stamp Act, and not under s. 64. REFERENCE UNDER STAMP ACT, S. 46, **8 M. 11, F.B.**

(135)—S. 64—*See* Nos. 132, 134, *supra.*

(136)—*S.* 67—*Scope of.*—The second clause in s. 67 of the Indian Stamp Act, is not controlled by the first clause so as to restrict its application to negotiable instruments. The clause is of general application. REFERENCE UNDER THE STAMP ACT, S. 46, **9 M. 138 F.B.**

(137)—*Sch.* I, *No.* 1,—*Acknowledgment of debt—Proper stamp.*—A document contained an entry to the following effect and it bore a stamp of one anna:—"Out of Rs. 22-3-0 due to Shaik by my late elder brother Ahmed, I have

Stamp Act (I of 1879)—*continued.*

paid Re. 1; the balance will be paid by instalments." *Held*, that the instrument was nothing more than an acknowledgment of a debt and was sufficiently stamped. BANDA HUSAIN v. YAWAR HUSAIN, **A.W.N. 1883, 127.**

(138)—*Sch.* I, *art.* 1—*Limitation Act*, 1877, *s.* 19—*Letter acknowledging debt, can save limitation, although unstamped*—Where a letter, from a debtor to his creditor, written *anti litem motam* and before limitation in respect of the debt had expired, was tendered in evidence as an acknowledgment of the debt for the purpose of saving limitation, *held* that the same was admissible for the said purpose, though unstamped, because it was not written with the intention of supplying evidence of the debt, and there was in existence at the time other evidence of the same [*R.*, 19 A. 255, 21 B. 201, 30 C. 687.] whether a document, or the kind mentioned above, amounts to an acknowledgment within the terms of art. 1, sch. I of the Stamp Act, is a fact which depends in each case upon the intention of the writer, and such intention may be ascertained from the surrounding circumstances of the case and from what was taking place when the document was written. BISHAMBAR NATH v. NAND KISHORE, **15 A. 56 = A.W.N. 1892, 234.** [*R.*, 21 B. 201, 30 C. 687.]

(139)—*Sch* I. *art.* 1—*Nikash or balance sheet—Admissibility in evidence—A nikash* prepared and signed by a *gumasta* of a business, showing a balance due by him to the owner of the business is not an acknowledgment of a debt within the meaning of art. 1 of the Act and is admissible in evidence unstamped. NUND KUMAR SHAHA v. SHURNOMOYI, **15 C. 162.**

(140)—*Sch* I, *art.* 1—*Entry by debtor in books of creditor — Acknowledgment.*— Whether an account signed by the debtor in the creditor's books amounts to an acknowledgment under art. 1, sch. I of the Stamp Act, depends upon the form and intention of the entry. BINGA RAM v. RAJMOHUN ROY, **8 C. 282.** [*R.*, 21 B. 201, F.B., 30 C. 687.]

(141)—*Art.* 1—*Acknowledgment—Not a pro-note.*—An entry in an account book which purported to attest that the accounts of a certain person had been balanced by a third party who had declared that the result of the making up of the accounts was to show that a certain sum was due by a certain person who, in the presence of a witness signed an acknowledgment of the correctness of the accounts; *held* not to be a bond and therefore not liable to duty as such. CHAMBA RAM v. CROWN, **4 P.R. 1885, Rev.**

(142)—Sch. I, art. 1—*See* No. 75, *supra.*

(142-*a*)—Sch. I, art. 1 and s. 34—*See* EVIDENCE—SECONDARY EVIDENCE, 21 B. 201, F.B.

(143)—*Sch.* I, *art.* 1, *cl.* (5) (*c*), *s.* 34—*Lower Court wrongly admitting instrument without payment of stamp duty and penalty—Appellate*

Stamp Act (I of 1879)—*continued.*

Court cannot reject document as inadmissible.—A letter written to one partner after the dissolution of partnership by the other partners setting forth the terms of compromise arranged between the parties with regard to the dispute between them regarding that partner's share in the partnership business, though it may contain an approximate statement of the value of that share, is not an acknowledgment intended to be used as evidence of the debt so as to fall within art. 1, sch. I of the Stamp Act, but it must be treated as an agreement not otherwise provided for by the Stamp Act, and is therefore chargeable with a duty of eight annas under art. 1, cl. 5 (*c*) of sch. I. But when such a letter was admitted in evidence by the District Munsif without payment of stamp duty and penalty, the District Judge in appeal was precluded by s. 34 of the Stamp Act from rejecting it as inadmissible. LAKSHMINARAYANA v. RAMAJOGI GARU, **8 M L.J 66**. (5 M. 220, 3 C. 787, 13 B. 449, 18 B. 737, *F.*)

(144)—*Sch.* I, *art.* 2—*Court-Fees Act*, 1870, *sch.* II, *art.* 16—*Administration-bond, chargeable with duty under Stamp Act, art.* 2.—The usual bond executed on the grant of letters of administration will have to be stamped under art. 2, sch. I of the Indian Stamp Act 1879, which being the later Act and inconsistent with the provision in art. 16 of sch. II of the Court-Fees Act of 1870, repeals the said provisions of the Court-Fees Act by necessary implication. *In the goods of* F.M. TROWARD, **165 P.R. 1879.**

(145)—*Sch.* I, *art.* 4—*Agreement to lease.*—An agreement to lease must be stamped as such under art. 4, sch. I of the Stamp Act, notwithstanding that another instrument was intended to be executed. REFERENCE UNDER STAMP ACT, S. 46, **17 M. 280 (F.B.) = 4 M.L.J. 104.**

(146)—*Sch.* I, *art.* 5—*Receipt for money paid for agreed future sale of shares in Company—Undertaking to execute a formal document of Sale—Receipt liable to stamp duty.*—By the document in question the executants purported to sell their interest in certain receipts for a Company's shares purchased by them from the creditors of that company; they passed the document merely as a receipt acknowledging payment to them of some money by the intended vendees undertaking that, whenever the latter desired a formal document of sale, the same shall be executed. The property in the receipts, the subject of sale, not having been intended to pass to the executees of the document under consideration, it was merely an agreement liable to a duty of eight annas under Stamp Act, I of 1879. sch. I, art. 5. HEPTULA SHEKH ADAM AND COMPANY v. ESAF-ALI ABDUL ALI, **14 B. 316.**

(147)—*Sch.* I, *art.* 5, *s.* 26, *scope and applicability of.*—The language of cls. (3) and (4) of the Stamp Act seems clearly to imply that the document must provide for the payment of a fixed sum of money, whether ascertained at the time or not, by one person to another. *Held*—that, where parties were engaged in a business in which the plaintiff advances money to the defendant on promissory note and an instrument was drawn up between them in which, among other arrangements, it was provided that a certain rate of profit (or interest) should be paid on the loans, the document was not a bond but an agreement chargeable with fixed and not *ad valorem* duty, and that consequently s. 26 of the Stamp Act was not applicable. DAWOODJEE BAMJEE v. KAIROODEEN, **U.B.R. (1892-1896) Vol. II, 629.**

(148)—*Sch.* I, *cl.* 5—*Document—Agreement to pay—Stamp Act.*—A document ran as follows; —"This document, hand-note, is executed by me for the purpose of purchasing a *ghor*. I take from you Rs. 7. I will pay interest on the sum at half-anna per rupee per mensem. Having received Rs. 7 in cash, this hand-note is executed." *Held*, that the document was not a bond nor a pro-note, but an agreement to pay, chargeable with duty under cl. 5 of the schedule to the Stamp Act. MURARI MOHAN ROY v. KHETTUR NATH MULLIK, **15 C. 150**. [*R.*, 10 C.P.L.R. (Cr.) 1; *D.*, 4 Bom. L.R. 912.]

(149)—*Sch.* I, *art.* 5 (*a*)—*Liability to stamp duty of agreement by correspondence.*—*Fiscal enactment— Construction.*—Where an agreement for the sale of certain shares is contained in a number of letters which passed between the parties, none of them requires to be stamped under art. 5 (*a*). sch, I, of the Stamp Act, and they are not inadmissible in evidence for want of a stamp. [*R.*, 111 P.L.R. 1907=71 P.R. 1906.] The Stamp Act being a fiscal enactment, the intention to tax a particular instrument must appear in terms clear and positive, and in case of doubt, the construction must be in favour of the subject. RAMIER v. GOULD, **13 M. 255.**

(150)—*Sch.* I, *art.* 5 (*c*) *Pasture ground—Agreement to lease—General Clauses Act* (I *of* 1868), *s.* 2—*Growing grass, if immoveable property—Stamp duty.*—A rented his pasture ground to B. The rent-note recited that B was to graze 13 she-buffaloes at Rs. 1-10 per head on the ground for a fixed period for a consideration of Rs. 21-2-0 to be paid by him to A in two instalments, that the whole amount should become payable at once in default of payment of any instalment, and that interest should be paid at the rate of 2 per cent. per month, if the amount remained unpaid beyond the fixed period. *Held* (*Nanabhai Haridas, J. dissentiente*) that the instrument was an agreement and, as such, chargeable with a stamp duty of eight annas under cl. (*c*) of art. 5, sch. I of the Stamp Act (I of 1879). *Per Nanabhai Haridas, J.*—Growing grass is immoveable property within the definition of the expression in s. 2 of the General Clauses Act (I of 1868). So, the instrument was a lease chargeable with a stamp duty of four annas. If growing grass is not immoveable property the agreement is one for or relating to the sale of goods, the price

Stamp Act (I of 1879)—*continued.*

being fixed with reference to the quantity to be consumed by the cattle. So, the instrument is exempt from stamp duty under sch. II, art. 2 (*a*) of the Stamp Act (I of 1879). *In re* HORMASJI IRANI, **13 B. 87.**

(151)—Sch. I, art. 5—*See* Nos. 51, 62, 81, 123, *supra.*

(152)—*Sch.* I, *arts.* 5 (*c*), 44 (*a*)—*Agreement—Mortgage.*—A deed of contract for work, executed by a contractor contained the provision that the Executive Engineer, for the time being, may retain 10 per cent. on the value of the work done to cover compensation for default on the part of the contractor and as security for the proper performance of the contract. The proper construction of the provision is, that the contractor waives the prompt payment of a percentage of the sum to accrue due to him and agrees that the Government may set off against it, what sums it may be entitled to recover from him by reason of breach of contract. The contract is not a mortgage, but an agreement chargeable with stamp duty, under art. 5 (*c*) of sch I of the Stamp Act. REFERENCE UNDER STAMP ACT, S. 46. **7 M. 209. F. B.**

(153)—*Sch.* I, *art.* 8. (=*art.* 10 *of Act* II *of* 1899)—*Articles of association—Special resolution superseding articles of association—Indian Companies Act* (VI *of* 1882), s. 79—A document styled as "articles of association" was drawn up by a company limited by shares, on a special resolution in supersession of the 'articles' it already possessed. On its happening to be impounded as unstamped by the Registrar of Joint Stock Companies to whom a copy of the record of this special resolution was forwarded under the provisions of s. 79 of the Companies Act (1882), *held* that the Companies Act did not contemplate any such thing as new articles of association, and that the document in question was nothing more than a record of a special resolution, and, as such, did not require to be stamped under art. 8, sch. (I), Stamp Act, 1879. *In the matter of* THE NEW EGERTON WOOLLEN MILLS, **22 A. 131=A. W. N. 1900, 15.**

(154)—Sch. I, art. 9—*See* No. 42, *supra.*

(155)—Sch. I, art. 10—*See* No. 82, *supra.*

(156)—*Sch.* I, *art.* 11—*Bond — Impressed stamp—Attestation—Instrument stamped with adhesive stamp—Payable to person or order.*—An instrument attested by witnesses and not payable to bearer or order is a bond as defined in the Stamp Act, and if the stamp it bears is not a stamp which is proper for such an instrument, the instrument should be treated as unstamped. [*F*, 15 M. 259.] A document stamped with an adhesive stamp of one anna, purporting to be a promissory note attested by two witnesses and payable to person or order on demand, is not a bond but a promissory note. REFERENCE UNDER STAMP ACT, S. 46, **8 M. 87, F.B.**

Stamp Act (I of 1879)—*continued.*

(157)—Sch. I, art. 11—*See* **No. 43,** *supra.*

(158)—Sch. I, art. 13—*See* **No. 44,** *supra.*

(158-*a*)—*Sch.* I, *arts.* 13 *and* 44—*Bond for earnest money received—Hypothecation of produce as collateral security—Stamp-duty chargeable*—Where, under a document, the obligor borrowed money from the obligee which was to be treated as earnest money for an undertaking by the former to supply a certain quantity of sugar to the latter, and as collateral security the obligor hypothecated the produce in his field of sugarcane, without fixing any value therefor, the instrument was held to be a "bond" falling under No. 13 of sch. I of the Stamp Act I of 1879, and also to be a mortgage-deed under No. 44 (*b*) of the above schedule, and with reference to s. 7 of the Act, the stamp duty which was the same in either view of the instrument was the highest that could be charged in respect of it. *In the matter of* GAJRAJ SINGH, **9 A. 585=A.W.N. 1887, 190.**

(159)—*Sch.* I, *arts* 13, 44 (*a*)—*Document with clause agreeing to secure debts in debentures issued—Mortgage-deed.*—Under a clause in a document between an Electric Tramway Company and an Electric Construction Company, the fromer agreed that, on execution of the document, they would issue and hand over to the Construction Company, £8,000 part of the £25,000 second debentures, and that such second debentures, together with the £20,000, first debentures already issued to the Construction Company, and the remaining £5,000 first debentures, subject to the prior charges thereon, shall be held by them as security for the admitted debt of a large amount previously mentioned in the document as due to them by the Tramway Company. The provisions of the above clause in the operative part of the document was held to constitute it a mortgage deed under the Indian Stamp Act. It was not the case of a mere agreement to make a transfer, but an undertaking to deliver the debentures on the execution of the document, and, the debentures having to be handed over to the transferee Company, the mortgage deed was chargeable as one with possession under art. 44 (*a*), sch. I of the Stamp Act I of 1879. Also, in respect of another provision in the document undertaking to make further advances, it was held liable to further duty as an agreement "not otherwise provided for." REFERENCE UNDER STAMP ACT, 1879, S. 46, **23 M. 207.**

(160)—*Sch.* I, *art.* 16—*Certificate of sale—Purchase of equity of redemption—Duty.*—The stamp on a certificate of sale is regulated by the amount of the purchase money; it is to bear the same stamp as a conveyance for a consideration equal to the amount of the purchase money. It is one thing to make a sale subject to a condition to discharge a mortgage, and another to sell the property subject to a mortgage, that is, to sell the interest remaining in the mortgagor without imposing on the purchaser any obligation. REFERENCE UNDER STAMP ACT, S. 46, **7 M. 421, F.B.**

Stamp Act (I of 1879)—*continued.*

(161)—*Cl.* 16, *sch.* I—*Certificate of sale—Stamp duty—Property sold subject to mortgage.*—*Stamp.*—The stamp duty payable on a certificate of sale in governed by cl. 16, sch. I of the Stamp Act. Where property sold is under mortgage, the transfer is not necessarily subject to the charge, and where it is not, the mortgage debt cannot be regarded as forming any part of the consideration for the transfer. REFERENCE UNDER STAMP ACT, S. 49, **5 M. 18, F.B.** [*F.*, 10 C. 92.]

(162)—Sch. I, art. 16—*See* No. 124, *supra.*

(163)—*Sch.* I, *Arts.* 16, 21—*Sale in execution subject to mortgage—Valuation of property sold—Sale proclamation—Sale-certificate—Civ. Pro. Code*, 1882, *ss.* 282, 287—Mortgages, noted in the proclamation of sale as claims upon the property sold, should not necessarily be entered in the certificate of sale, or be computed as part of the purchase-money, unless they have been admitted by the parties, or established by decree, or unless they have been declared, under s. 282 of the Civ. Pro. Code, 1882, to be charges on the property, and the Court has seen fit to sell it subject to them, but they should be entered in the certificate and computed as part of the purchase-money if they have thus been admitted or established, or if they have been declared, under s. 282 of the Civ. Pro. Code, and the sale has been made subject to them. Claims admitted by parties or established by the decree of a Court should be entitled in the proclamation of sale as charges upon the property, though they have come to the knowledge of the Court in an enquiry under s. 287 only and have not been made the subject of an order under s. 287 of the Code. SHANTAPPA CHEDAMBARAYA v. SUBRAO RAMCHANDRA YELLAPUR, **18 B. 175, F.B.**

(164)—*Sch.* I, *art.* 21—*Conveyance—Consideration set forth less than instrinsic value.*—The proper Stamp duty payable on a conveyance is to be calculated on the consideration set forth in it, whatever may be the intrinsic value of the property conveyed. REFERENCE UNDER STAMP ACT, S. 46, **20 M. 27.**

(165)—*Sch.* I, *art.* 21—*Conveyance to vendors themselves under different denomination.*—A conveyance of property by certain persons, though only to themselves under another denomination, is, for purposes of stamp duty, leviable under art. 21 of the Stamp Act, as if it were to different persons. *In re* THE KONDOLI TEA CO., LTD., **13 C. 42.** [*D.*, 17 B. 235.]

(166)—*Sch.* I, *art.* 21—*Winding up of company—Transfer of Property of old to new company—Conveyance—Stamp.*—Where an old company on its being wound up conveyed to the new company some of its property by means of an instrument, which in terms was a conveyance of property at an agreed value, *held*, that the instrument was the sale of such property at that price, and was governed by art. 21 of the Stamp Act (I of 1879). And the fact that the transaction was a part of a larger transaction,

Stamp Act (I of 1879)—*continued.*

would not affect the character of the instrument. REFERENCE UNDER STAMP ACT, 1879, S. 46, **20 B. 432.**

(167)—*Sch.* I, *art.* 21—*Transfer of lease—Transfer of share of a partnership.*—Where a transaction is in substance a sale of a share in a partnership, and the transfer of a share in a lease only forms part of the subject-matter of the sale, as being a part of the partnership assets, the transaction should be regarded not as the transfer of a lease, but as the sale of a share in a partnership; so that the stamp duty thereon should be levied under art. 21 of the Stamp Act. (5 M. 15 *held* not applicable). *In re* THE MENGLAS TEA ESTATE, **12 C. 383.** [*D.*, 17 B. 235; *R.*, 23 C. 283, 3 C. L.J. 52.]

(168)—Sch. I, art. 21—*See* Nos. 45, 163, *supra.*

(169)—*Arts.* 21, 60 (*b*)—*Conveyance of lands and transfer of lease-hold interest.*—Where by one and the same deed a conveyance of free-hold lands and good-will and a transfer of interests secured by leases, when Act I of 1879 was in force, are effected, the deed should be stamped under art. 121 of that Act (art. 23 Act II of 1899) with an *ad valorem* duty on the conveyance of the free-hold property, good-will, etc., and under art. 60 of the above Act (art. 62 Act II of 1899) with a duty of Rs. 5 on the transfer of each of the interests secured by the leases. IN THE MATTER OF A REFERENCE UNDER THE STAMP ACT. **23 C. 283.** (12 C. 383, *R.*)

(170)—*Sch.* I, *art.* 22—*Civ. Pro. Code*, 1882, *s.* 62—*Copy of document filed with plaint—Attestation by Court or its officer—Stamp duty not leviable.*—Art. 22 of sch. I of the Stamp Act does not apply to copies or extracts of entries in account books and other similar books which a Civil Court has to attest under s. 62 of the Civ. Pro. Code, 1882, for the attestation in such a case by the Court or its officer is not made on the application of the owner of the copy, but solely in consequence of the express direction of the Code, with a view to its being filed for the purpose of identifying the book entry when produced at the hearing. KRISHNAJI SADASHIV RANADE v. DULABA, **15 B. 687.** [*R.*, 26 B. 522.]

(171)—*Sch.* I, *art.* 22—*Copy of order passed on application to Municipal Board—Certificate as true copy endorsed by Secretary.*—Records of the proceedings of a Municipal Board are public documents, and the officer who is authorised to deliver copies of public documents in the course of his official duties is for such purpose a public officer. The Secretary of a Municipality is an officer who in the ordinary course of his official duty, is authorised to deliver copies of the public documents of which he has the custody as Secretary. So, a copy granted, of an application presented to a Municipal Board, and of the order of the Board thereon, and certified as correct by the Secretary of the Board, would come within art. 22 of sch. I of the Indian Stamp

Stamp Act (I of 1879)—*continued.*

Act so as to require an eight annas stamp under the article. REFERENCE UNDER S. 46 OF ACT I OF 1879, **19 A. 293, F.B.=A.W.N. 1897, 61.**

(172)—*Act X of 1862, sch. A, arts. 23, 25—Conveyance—Stamp duty.*—The deed submitted in this case under s. 49 of Act I of 1879 was a transfer for the consideration therein expressed of the exclusive right to all the kankar under the land owned by the grantors. It was accordingly a conveyance within the meaning of art. 23 of sch. A of Act X of 1862, inasmuch as it transferred to a person for a consideration an exclusive right to property. As no value, however, appeared on the face of the conveyance, it was decided that it fell under the 2nd clause of art. 25 of the schedule and was chargeable with stamp duty thereunder. SCOTT v. BANNA, **44 P.R. 1881, F B.**

(173)—*Sch. I, art. 27—Sch. II, art. 11 (a)—Entry on roll of advocates—Exemption from duty.*—A person, already enrolled as a Vakil of the High Court, Madras applying to be entered on the roll of advocates, is exempted from the duty prescribed under art. 27, sch. I of the Indian Stamp Act, 1879, by virtue of art. 11 (*a*). sch. II. *In re* PARTHASARADI, **8 M. 14, F.B.** [*R.*, 36 C. 645=9 C.L.J. 621.]

(174)—*First schedule, art. 27 and sch. II, Exemption 11—Court of Judicial Commissioner of Burmah—Entry as advocate of High Court.*—The term "High Court" as used in exemption No. 11 in sch. II of the General Stamp Act, 1879, does not include the Court of the Judicial Commissioner of Burmah. *In re* GRANT, **14 P.R. 1888.**

(175)—Sch. I, art. 29—*See* No. 46, *supra.*

(176)—*Arts. 29, 44, Sch. I—Distinction between.*—Art. 44, sch. I, Act I of 1879, deals with cases in which the interest in, or right over property, is transferred, whether possession is given or not for the purposes of the mortgage. Art. 29 is limited to cases where moveable property only is given in pledge, coupled with an agreement securing the re-payment of a loan. *In the matter of* KO SHWAY AUNG v. STRANG STEEL AND CO, **21 C. 241.**

(177)—*Sch. I, arts. 35, 39, cls. (c), (d)—Lease of shares for consideration of premium and rent reserved—Stipulation by lessees to pay Government demand till expiry of lease—Payment of demand to be deemed as rent reserved—Stamp.*—Upon case stated by the Financial Commissioner, the question as to the stamp duty upon the instrument forming the subject of this reference was decided by the Chief Court to the effect that the instrument was a lease falling under the provisions of art. 39, cl. (*d*), sch. I, Act I of 1879. By the terms of the instrument under consideration, the owners executed a lease on their shares in certain villages, in consideration of a lump sum of money being paid in annual instalments throughout the period of the lease. Such lump sum was held to be of the nature of a fine or

Stamp Act (I of 1879)—*continued.*

premium, and it was not the less of that nature because the rate per annum at which it fell, when distributed over the entire term of the lease, happened to be stated in the instrument. With regard, however, to the provision in the instrument as to the payment of the Government demand, by the lessees, the Chief Court was of opinion that the sums so to be paid by the lessees periodically during the lease, being certain in amount, were of the nature of rent. And as the lease was one granted for a fine or premium in addition to rent reserved, *viz.*, the Government demand, it fell under art. 39, cl. (*d*), sch. I of Act I of 1879. *Per Plowden, J., dissenting:*—The sum payable under an engagement by the lessees to pay the taxes payable in respect of the property demised was not in the nature either of rent reserved or of a fine or premium, and the instrument referred therefore fell under cl. (*c*) and not under cl. (*d*) of art. 39 of Act I of 1879. *In re* A REFERENCE BY THE FINANCIAL COMMISSIONER OF THE PUNJAB, **102 P.R. 1882.**

(178)—*Sch. I, art. 36—Grant of annuity charged on revenues of village—Endorsement by grantor's adopted son—Stamp—Gift.*—A widow executed a settlement on plain paper granting thereby an annuity charged on the revenues of a village for religious purposes, and, on her adopting a son, he endorsed that paper by way of ratification of the gift; the instrument was *held* chargeable as a single instrument with the duty payable for a deed of gift under art. 36 of sch. I of the Stamp Act I of 1879. *In re* BHAVANIBAI, **7 B. 194.**

(179)—*Art. 38—Deed acknowledging former adoption—Construction—Stamp duty*—A Hindu widow executed a deed of adoption which recited as follows:—"I have no male or female issue. There being also no one in whose name the *patilki vatan* could be held hereafter, I spoke to your father of whom you are the youngest son, and he having consented, I placed you in my lap on 1st of August 1887 and adopted you as my son according to the customs and usages of Hindu religion. You have thus become my son from that date. Your name has been changed to Ravbhaji. You have got all the powers usually vested in a son." On a reference having been made to the High Court as to whether the deed must be treated as to deed of adoption, *held* that the document was distinct from an "adoption deed" or "authority to adopt" which is liable to stamp duty under art. 38 of sch. I of the Stamp Act (I of 1879), and that it was not liable to any stamp duty at all. *In the matter of* AMBAI, **13 B. 280.** [*F.*, 13 B. 281.]

(180)—Sch. I, art. 38—*See* No. 55, *supra.*

(181)—*Sch. I, Art. 39 (a), (c), (d)—Rent—Mortgage—Lease—Premium and fine.*—A document purporting to be a lease for four years fixed a certain annual rent, and out of the total rent a portion was payable in advance. This stipulation is only for a payment of rent in anticipation and not for the payment of a

Stamp Act (I of 1879)—*continued.*

premium or fine, within the meaning of art. 39 (c) of the Stamp Act, 1879. Where by a rent agreement for a certain term a certain rent is fixed, and the lessee is to deposit one year's rent to be credited to the rent of the last year of the term, the deposit is not a fine or premium, within the meaning of art. 39 (c) of the Stamp Act. When a debtor conveys to his creditor land, for a certain term of years in liquidation of the principal and interest, and the creditor is to enjoy the profits and suffer the loss, but has to pay to the debtor an annual rent, the document is a lease with a premium liable to duty under art. 39 (*d*), sch. I of the Stamp Act. REFERENCE UNDER STAMP ACT, S. 46, **7 M. 203, F.B.**

(182)—*Sch.* I, *art.* 39 (*b*)—*Lease—Rent—Duty.*—A perpetual lease, reserving a certain rent, the greater portion of which, representing the Government peshkash, the lessee is directed to pay to Government, and the balance to the lessor, is liable to stamp duty, on the whole amount reserved, and not merely on the balance to be paid to the lessor. REFERENCE UNDER STAMP ACT, S. 46, **7 M. 155, F.B.** [*R.*, 25 M. 752.]

(183)—Sch. I, art. 39—*See* No. 177, *supra.*

(184)—*Sch.* I, *art.* 39 *and sch.* II, *art.* 13, *cl.* (*b*)—*Lease for purpose other than of cultivation—Stamp duty.*—A *kabuliyat* or lease relaing to immoveable property let to a tenant for any purpose other than the cultivation of land, is not exempt from stamp duty under art. 13, cl. (*b*) of sch. II of the Stamp Act, 1879, and is chargeable with such duty under art. 39 of sch. I of the Act. NARAYAN RAMCHANDRA v. DHONDU RAGHU, **10 B. 173.** [*D.*, 15 B. 73.]

(185)—*Sch.* I, *art.* 44 (*a*)—*Kanom deed—Stamp duly payable as on mortgage—Calculation of consideration.*—A kanom deed of jenmam land, being a mortgage, must be stamped under art. 14 (*a*) of sch. I of the Stamp Act, and in calculating the consideration, the ascertained amount of compensation for improvements which is expressly named in the instrument and has been paid at the landlord's request by the incoming to the outgoing tenant, must be included. REFERENCE UNDER STAMP ACT, S. 46, **22 M. 164, F.B.**

(186)—*Sch.* I, *art.* 44, *cl.* (*a*)—*Rule of construction—Distinction between cls.* (*a*) *and* (*b*) *in art.* 44—"*Given,*" *construction of*—"*Agreed to be given,*" *construction of.*—Art. 44 cl. (*a*) applies only to those deeds, where immediate possession of the property is given, or agreed to be given, by the terms of the deed to the mortgagee. The Stamp Act is a Revenue Act, and the rule of construction of such Acts is, that, in case of the doubt, the construction most beneficial to the subject is to be adopted—*Per Garth, C.J., and Field, J.* [*R.*, U.B.R. 1903, Court Fees 1]. The principle of the distinction between the two classes of mortgages in art. 44 is that, where the title to the land and the possession or immediate right to possession both pass to the mortgagee, the same duty is charged as upon a conveyance by way of sale; but when the title only passes, and possession, or the right to possession, does not, the lower duty is chargeable. —*Per Garth, C.J.* The word "given" points out that only those transactions are intended to be covered where the transfer of possession takes place in consequence of the agreement on the part of the mortgagor to deliver over possession as part of the security for the mortgage money; but where the mortgagee becomes entitled to enter upon possession, irrespective of the consent of the mortgagor to make over possession, cl. (*a*) will not apply—*Per Mitter, J.* The words "agreed to be given" can only apply where there is an express or implied agreement to give possession; and not where there is no such agreement, express or implied, and the effect of the document is such that a mortgagee has merely a right enforceable in a Court of law to obtain possession.—*Per Field, J.* ANONYMOUS, **10 C. 274.**

(187)—*Sch.* I, *art.* 44 (*b*)—*Mortgage-deed with stipulation to give possession at future date—Applicability of cl.* (*b*) *of art.* 44, *sch.* I, *Stamp Act* I *of* 1879.—Where, by the terms of a mortgage-deed, possession was agreed to be given at a future date on default of repayment of the mortgage amount on that date; no possession having been given at the time of execution, cl. (*b*) of art. 44 of the Stamp Act of 1879 and not cl. (*a*) would apply to the case. Cl. (*a*) has been intended to cover only cases of mortgage with possession, and the words "agreed to be given" are to be read as if the words "at the time of execution" immediately followed and qualified the word "given." HINGANGHAT MILL COMPANY, LTD. v. REKCHAND BHIKAMCHAND, **8 B. 310, F.B.**

(188)—*Sch. I, art.* 44 (*b*)—*Mortgage—Assignment of growing crop.*—A document, evidencing an agreement by which a person, in consideration of a certain sum of money to be advanced to him by another, assigns to that other the whole crop of coffee then growing upon a certain estate, upon trust, *inter alia*, to secure the repayment of the sum advanced with a stipulation that he should cultivate the crop till maturity and deliver it to the other, is a mortgage liable to duty under art. 44 (*b*) of sch. I of the Indian Stamp Act, 1879. REFERENCE UNDER STAMP ACT, S. 46, **8 M. 104, F.B.**

(189)—Sch. I, art. 44—*See* Nos. 46, 123, 152, 159, 176, *supra.*

(190)—*Sch. I, art.* 46; *sch.* II, *cl.* 2, *and ss.* 11 *and* 34—*Broker's sold notes on agreement by sale—Cancellation of stamps.*—The one anna stamp on one of the sold notes which the broker had given to the plaintiffs in this case was cancelled "by a small portion of the first letter of the defendant's signature consisting of a slightly curved line" and the Court held that "whatever may have been intended by the small ink line upon the right side of the stamp it did not effect such a cancellation of the stamp as prescribed by s. 11 of the Stamp Act. The question also arose for decision whether by

Stamp Act (I of 1879)—*continued.*

cl. 2 of sch. II to the Stamp Act, I of 1879, the documents in this case were exempt from stamp duty. That clause, exempting an agreement or memorandum of agreement "for, or relating to, sale of goods or merchandise exclusively not being a note or memorandum chargeable under art. 46 of sch. I," had the effect of settling it that, where an agreement is contained in a document of the nature of a notice or memorandum chargeable under art. 46 of sch. I. It should be stamped and the rule equally applies whether such agreement is contained in one of such notes or more. S. A. RALLI v. CARAMALLI FAZAL, **14 B. 102.** [*Appr.*, 28 B. 432=6 Bom. L.R. 436; *R.*, 2 L.B.R. 103, U.B.R. 1909, Stamp 36].

(191)—*Sch.* I, *art.* 50, *cl.* (*b*)—*Gift-deed with direction to manitain donor.*—A document by means of which property was conferred on the donee with a direction to him to maintain the donor, was held to be not a trust-deed, but an instrument of gift coming under art. 36 of the Act. REFERENCE UNDER STAMP ACT, 1879, **12 M. 89.**

(192)—*Sch.* I, *art.* 50, *cl.* (*b*)—*Power of attorney.*—Where a number of rayats execute a joint document authorising a certain person to receive on their behalf money in which all of them are interested, and sign the refund bill, the document is not a vakalatnama, but a power of attorney and has to bear a one rupee stamp under. REFERENCE UNDER STAMP ACT, S. 46, **9 M. 358, F.B.**

(193)—Sch. I, art. 50 (*b*)—*See* COURT FEES ACT, 1870, Sch. II, art. 10 (*a*), 9 M. 146, F.B.

(194)—*Sch.* I, *art.* 52—*Receipt granted by Municipality for tax paid exceeding rupees twenty—Stamp duty.*—A receipt granted on behalf of a municipal body acknowledging receipt of monies paid in satisfaction of municipal taxes, the amount paid being over twenty rupees, requires a receipt stamp. Such a receipt is an instrument requiring a stamp under Act I of 1879, sch. I, art. 52, unless it comes under sch. II, art. 15 (*b*), which exempts from stamp duty a receipt for payment of money "without consideration." A receipt for payment of the rates due to a Municipality under the Act constituting it, is one passed on a payment in satisfaction or discharge of a legal obligation imposed by the Act, and not on a gratuitous payment or one "without consideration," within the meaning of sch. II, art. (*b*), of the Stamp Act I of 1879. *In re* KARACHI MUNICIPALITY, **12 B. 103.**

(195)—Sch. I, art. 52—*See* No. 47, *supra*, and No. 198, *infra*.

(196)—*Sch.* I, *art.* 54—*Release.*—In calculating the stamp due on a document, which is a release, an one anna adhesive stamp with which it is affixed ought to be taken into account. REFERENCE UNDER STAMP ACT, S. 50, **15 M. 299, F.B.**

(197)—Sch. I, art. 54—*See* No. 48, *supra*.

Stamp Act (I of 1879)—*continued.*

(198)—*Sch.* I, *arts.* 54, 52, *sch.* II, *art.* 15, *cl.* (*b*)—"*Receipt*" *in cl.* (17), *s.* 3—*Exemption from stamp-duty*—"*Consideration*" *as defined in Contract Act.*—To render a document liable to duty as a receipt, it must, upon its face, fall within the definition of "receipt" in cl. 17 of s. 3 of the Stamp Act and also within art. 52 of sch. I; and to exempt it, it must upon the face of it fall within cl. (*b*) of art. 15 of sch. II. In neither case can resort be had to extrinsic evidence to establish any fact or statement not contained in the document, that is not either expressly stated or to be gathered by necessary implication from its expressed contents. Every document must be judged on its actual contents as it is, and not on its contents as they might have been stated consistently with facts which are not disclosed although existent. The definition of "consideration" in the Contract Act is not necessarily a definition for all purposes, including that of the Stamp Act, though it may be a useful guide to ascertain its meaning for the purpose last mentioned; and whether a particular thing is a "consideration" for a payment within the meaning of the Stamp Act, must be determined with reference to the thing itself, rather than to the capacity of the parties to the payment to contract upon that basis, or the sufficiency of such thing to support a contract. Services rendered by a counsel to his client are a "consideration" although the counsel and client be incapable of entering into a valid contract, and a receipt given by the former to the latter requires a stamp as it is not exempt under s. 15 (*b*), sch. II, of the Stamp Act. REFERENCE UNDER S. 46 OF THE INDIAN STAMP ACT I OF 1879, **85 P.R. 1885, F.B.** (20 P.R. 1874, *Cited*) [*Diss.*, 15 P.R. 1897, F.B., Cr.]

(199)—*Sch.* I, *art.* 57—*Settlement—Stamp duty.*—The term, "as set forth in such settlement," in art. 57 of sch. I of the Stamp Act, do not refer to the property settled, but to the value of the property settled; and therefore the stamp duty payable on a settlement is, the value of the property settled, which should be set forth in the settlement. REFERENCE UNDER STAMP ACT, S. 46, **8 M. 453, F.B.**

(200)—*Cl.* 60, *sch.* I—*Application of*—*Assignment—Lease—Stamp.*—Where an assignment of rights created by certain leases is a conveyance and is also a transfer under cl. 60, the stamp duty leviable on it is regulated by the provisions of that clause. REFERENCE UNDER STAMP ACT, S. 46, **5 M. 15, F.B.**

(200-*a*)—Sch. I, art. 60—*See* No. 169, *supra*.

(201)—*Sch.* II, I (*b*)—*Affidavit for immediate purpose of being used or filed in Court, exempt from stamp duty.*—An affidavit in support of an application for copies, stating that they were needed for presentation in a certain suit against the applicant, is exempt from stamp duty. The question depends on the construction of the words of Act I of 1879, sch. II (*b*) "for the immediate purpose of being used or filed in any Court, or before the officer of any Court."

Stamp Act (I of 1879)—*continued.*

When a statute requires that something shall be done 'forthwith' or immediately, it should be regarded as allowing a reasonable time for doing it. The test in such cases, therefore, is whether, under the particular circumstances, there was any such unreasonable delay as would be consistent with what is meant by "immediate." From the examination of the dates in the present matter, the Court inferred that, at the time the affidavit was made, the purpose existed of filing it in a Court, and this purpose was carried out promptly. The affidavit was therefore liable to no stamp duty by reason of the said sch. II, I (*b*) of Act I of 1879. *In re* THE APPLICATION OF SESHAMMA, **12 B. 276**. [*F.*, 30 B. 275=7 Bom. L.R. 697.]

(202)—*Sch.* II, *art.* 2—*Exemption—Agreement for the sale of goods.*—The test, as to whether a document falls within the exemption or not, is to see whether the document evidences only a transaction of sale or a sale and some other independent transaction, and if the former, the number of subsidiary stipulations it may contain cannot alter the nature of the transaction. KYD v. MAHOMED, **15 M. 150**. [*R.*, 36 C. 736.]

(203)—*Sch.* II, *cl* 2 (*a*)—*Agreement relating to the sale of goods.*—The exemption in—covers the case of a document which purports to be an agreement to sell goods, the price to be paid one month after the execution of the agreement, and the goods to be at the risk of the purchaser on the execution of the agreement, and the goods to be at the risk of the purchaser on the execution of the document. If goods not removed as stipulated, it was agreed they should become the property of the seller. REFERENCE UNDER STAMP ACT, S. 46, **10 M. 27, F.B.**

(204)—Sch. II, art. 2 — *See* No. 190, *supra.*

(205)—*Sch.* II, *art.* 12 (*b*)—*Security-bond for due accounting for "property" received by virtue of office.*—Bond executed by the sureties of an officer of Government to secure the due execution of his office and the due accounting by such officer of "public monies, deposits, notes, stamp papers, postage labels, or *other property*" of Government committed to his charge. *Per Stuart, C.J.*—The words "*other property*" must be taken to mean property of the same kind as previously mentioned, and therefore, money or the like of money; the bond is therefore exempt from stamp duty under art. 12 (*b*) of sch. II of the Stamp Act. *Per Oldfield, J.*—The bond is exempt from stamp duty as the words, "the due accounting *for* money," "the due accounting for property," are mere surplusage, being the same thing as the due execution of his office. *Per Spankie, J. and Straight, J.*—The words in art. 12 (*b*) are not mere surplusage. The Legislature has drawn a distinction between the due execution of an office and the due accounting for money received by virtue thereof. The bond in question, being one for the due accounting for property, is not exempt from stamp duty. REFERENCE BY THE BOARD OF REVENUE, N.W.P., **3 A. 788, F.B.=A.W.N. 1881, 74.**

Stamp Act (I of 1879)—*continued.*

(206)—*Sch.* II, *art.* 13, *cl.* (*b*)—*Lease executed by cultivator, when exempt from stamp duty.*—The provisions in cl. (*b*) art. 13, sch. II of Act I of 1879, exempt all leases executed in the case of a cultivator without the payment or delivery of any fine or premium, whatever the reserved or annual rent may be, provided it be for a definite term not exceeding one year, and also whatever the term may be, provided the annual rent reserved does not exceed Rs. 100. *In re* BHAVAN BADHAR, **6 B. 691, F.B.**

(207)—*Sch.* II, *art.* 13 (*b*)—*Lease for planting cocoanut trees—If lessee a cultivator.*—A person who takes a lease of land for planting cocoanut trees is, in respect of that occupation, a "cultivator" within the meaning of art. 13 (*b*) of sch. II of the Stamp Act (I of 1879). A lease given by him is exempted from stamp duty if the annual rent reserved does not exceed Rs. 100. RAMACHANDRA VIASUDEVSHET v. BABAJI KUSAJI, **15 B. 73.**

(208)—*Sch.* II, *No.* 13 (*b*) & (*c*)—"*Cultivator*"—*Lease granted to a cultivator—Exemption from stamp-duty.*—The term "cultivator" in No. 13, Sch. II of the Stamp Act, connotes only those persons who actually cultivate the soil themselves, or who cultivate it by members of their household, or by their servants, or by hired labour, and with their own or hired stock, in other words, the class of husbandmen or actual agriculturists; but not farmers, middlemen or lessees, even though cultivation may be carried on to some extent by such persons in area covered by their lease. Therefore, where the land, the subject of a lease was for a large part not cultivable or susceptible of being treated as a cultivator's holding in any legitimate sense of the word, *held* that the lease was not exempt from stamp duty. STAMP REFERENCE, **5 A. 360=A.W.N. 1883, 113.** [*D.*, 15 B. 73.]

(209)—*Sch.* II, *art.* 13, *cl.* (*c*)—*Lease of salt-pans, counterpart of—Stamp duty.*—A counterpart of a lease of salt-pans not purporting to be the counterpart of a lease granted to a cultivator is not exempted from stamp duty by cl. (*c*) of art. 13 of sch. II of the Indian Stamp Act (1 of 1879). MANJUNATH MANGESHAYA BAINDUR v. MANGESH SHASHAGIRIAPA GOKARNKAR, **18 B. 546, F.B.**

(210) — Sch. II, art. 13 — *See* No. 184, *supra.*

(211)—*Sch.* II, *art.* 15.—*Receipt passed by connsel for fees, not chargeable with stamp duty.*—A barrister's fee for services in litigation being, in the eye of law, a gratuity or honorarium, a receipt executed by counsel in favour of his client who has paid him a fee for professional services (the amount exceeding Rs. 20), is not chargeable with duty under the

Stamp Act (I of 1879)—*concluded.*

Indian Stamp Act. STAMP REFERENCE FROM THE BOARD OF REVENUE N.W.P. AND O. **16 A. 132, F.B. = A.W N. 1894, 12.** [*R.*, 25 A. 509 = 23 A.W.N. 104.]

(212)—*Sch.* II, *art.* 15 (*a*)—*Receipt—Endorsement of payment on mortgage bond.*—An endorsement on a mortgage bond acknowledging the receipt of the sum secured by the instrument, is exempt from stamp duty under sch. II, art. 15 (*a*). REFERENCE UNDER STAMP ACT, s. 46, **10 M. 64, F.B.** [*R.*, Rat. Un. Cr. C. 732.]

(213)—*Sch.* II, *art.* 15 (*b*)—*Receipt given by Secretary of Club to member for club bill.*—A receipt in writing, given by the Secretary or other Manager of a club to a member, acknowledging a payment in amount above Rs. 20, is liable to a receipt stamp. REFERENCE UNDER STAMP ACT, s. 46, **10 M. 85, F.B.**

(214)—Sch. II, art. 15—*See* Nos. 49, 198, *supra.*

Stamp Act (II of 1899).

[AM. (IN LOWER BURMA)- ACT VI OF 1900, S. 47. Ss. 2, 26, 29 (*a*), 40 (*b*), 56 (1), SCH. I AM., S. 23 A, ADDED., ACT XV OF 1904. S. 2 (19) REP. IN PT., SS. 11, 29, 30, 32, 35, 40, 41, 51, 69, 74 AM., SCH. I, ARTS. 24, 41, 47, 53 AM., ACT V OF 1906. DECLARED IN FORCE IN THE SONTHAL PARGANAS, REG. III OF 1872, S. 3, AS AMENDED BY REG. III OF 1899, S. 3. DECLARED NOT TO EXTEND TO THE HILL DISTRICTS OF ARAKAN, REG. II OF 1901.]

(1)—*Award of lugyis—Instrument of partition — Unstamped document — Stamp duty and penalty not tendered in Original Court—Admission of document by appellate Court.*—Where the stamp duty and penalty on an award by lugyis, which fell under the description of "instrument of partition" as defined in the Indian Stamp Act, 1899—was not tendered in the Original Court, an appellate Court could not admit the document in evidence even if the stamp and penalty had been tendered. (4 C. 213, *F.*) Whether registration was requisite is open to doubt. MA SHWE KYAW v. MA BOK GALE, **1 L. B. R. 84.**

(2)—S. 2—*See* NEGOTIABLE INSTRUMENTS ACT, 1881, s. 4, 4 O.C. 318.

(3)—*S.* 2 (5)—*Bond — Promissory note — Stamp.*—An instrument evidencing an unconditional agreement to pay a certain sum of money only, the payment not being expressed to the bearer thereof and the name of the payee being not apparent on the face of it, must be treated as a bond and should be stamped as such. LALA v. BHAGA, **3 Bom. L.R. 699.**

(4)—*S.* 2 (5), (*b*)—*Bond—Promissory Note.*—The suit was based on a document executed by defendant to plaintiff bearing an one-anna stamp and attested by two witnesses. It was for money received and not payable to bearer or order. *Held*, the document was a bond and not a promissory note and it was liable to

Stamp Act (II of 1899)—*continued.*

stamp-duty as a bond. VENKU v. SITARAM, **29 B 82 = 6 Bom. L.R. 841.**

(5)—*S.* 2 (5) (*c*)—*Bond—Agreement of sale between two merchants—Attestation.*—An ordinary agreement for a sale of cotton between two merchants, when attested by a witness, becomes a bond within the meaning of the Indian Stamp Act, 1899. *In re* RALLI BROS., **8 Bom. L.R. 234.**

(6)—*S.* 2 (5) (*c*)—*Promissory note—Attestation.*—Under the Stamp Act, a promissory note unless it is payable to order or bearer, is to be deemed a bond if attested. R. D. SETHNA v. MIRZA MAHOMED SHIRAZI, **9 Bom. L.R. 1034.**

(7)—*S.* 2 (5) (*c*)—*Cheque—Post-dated.*—A post-dated banker's cheque is available in the hands of its holder and is admissible in evidence with only a one anna stamp. MOTILAL v. JAGMOHANDAS, **6 Bom. L.R. 699.**

(8)—*S.* 2 (7)—*Negotiable Instruments Act* (XXVI *of* 1881) *s.* 5—*Cheque—Receipt—Instrument purporting to receive money from bank and specifying name of messenger.*—An instrument which purports to receive a sum of money from the saving account of a depositor with a bank and specifies the name of the messenger who is to receive payment is only a receipt and is not liable to stamp duty as a cheque. *In re* STAMP ACT, **38 P.L.R. 1912 = 13 Ind. Cas. 330 = 184 P.W.R. 1912.** (17 B. 684, *D.*)

(9)—*S.* 2, *cl.* (10), *art.* 62, *cl.* (*b*)—*Contract, assignment of— Chose in action.*—A document, which assigned the benefit of a contract to the plaintiff, contained the words: "I have sold the whole of my right and interest in this contract and in the goods mentioned therein to the plaintiff:" *Held*, that the document was a chose in action and therefore came under s. 2, cl. (10) of the Stamp Act, and that an *ad valorem* stamp would be necessary: NATHU v. HANSRAJ, **9 Bom L.R. 119.**

(10)—*S.* 2 (15)—*Instrument of partition—Release— Stamp.*—In a joint Hindu family consisting of three brothers, one of them first agreed to take, in lieu of his share in the family property moveable and immoveable, a certain amount in cash and certain securities for money in the form of bonds securing debts due to the family; and executed a document in the form of a release in favour of the eldest brother. On the next day, the other brother passed to the same eldest brother a document in the form of a release, whereby he and the eldest brother divided the remaining family property by the latter handing over to him securities for money: *Held* that the first document was an instrument of partition, as defined by s. 2 (15), Stamp Act, 1899, for its effect was to divide the property of the three co-owning brothers between the executant on one side and the two brothers on the other. *Held* that the second document also amounted to an instrument of partition, as by the same the two remaining co-owners divided their property in severalty. *In re* GOVIND PANDURANG KAMAT, **12 Bom. L.R. 936 = 8 Ind. Cas. 632.**

Stamp Act (II of 1899)—*continued.*

(11)—*S.* 2 (15)—*Instrument of partition—Stamp.*—Lists of money bonds and lands prepared by members of a joint Hindu family indicating what portion has gone to the share of each at a private partition whereafter they begin to live separately, are to be deemed instruments of partition within the meaning of s. 2, cl. 15, of the Indian Stamp Act, 1899. GANPAT KRIPARAM v SUPDU KRIPARAM, **10 Bom. L.R. 778=32 B. 509.**

(12)—*S.* 2 (15)—*Instrument of partition—Award directing a partition—Stamp.*—An award whereby the arbitrators indicate the division of property among the rival litigants is an instrument of partition within the meaning of s. 2, cl. 15 of the Indian Stamp Act, 1899. KALIDAS v. TRIBHUWANDAS, **8 Bom. L.R. 869=31 B. 68.**

(13)—*S.* 2 (15)—*Instrument of partition—Decree made in accordance with a Commissioner's report—Civ. Pro. Code (Act XIV of 1882), s.* 396.—A decree passed, under s. 396 of the Civ. Pro. Code, in accordance with a Commissioner's report, is a final order for effecting a partition passed by a Civil Court, and must, therefore, be stamped as an instrument of partition. BALARAM v. RAMKRISHNA, **7 Bom. L.R. 308=29 B. 366.**

(14)—*S.* 2 (15)—*Partition deed—Deed for the dissolution of partnership—Stamp.*—Where the partners in a partnership business by a deed divide between themselves certain debts of the firm to be collected and appropriated, but remain joint regarding the other items of business, the deed must be construed as a partition deed and not as a deed for the dissolution of partnership, for the purposes of the Indian Stamp Act, 1899. CHOTURAM v. GANESH, **3 Bom.L.R. 132.**

(15)—*S.* (2), *cl.* 17—*Trust-deed for securing mortgage debentures—Stamp duty.*—A document was endorsed as a "trust-deed for securing mortgage debentures" and was executed for the purpose of securing money to be advanced by way of loan. It was argued, on behalf of the executants of the deed, that it cannot be regarded as a mortgage-deed, because it did not itself purport to transfer to, and vest in, the trustees any interest in the properties specified in the document. *Held* that, as the trustees were given the *right* to have the properties vested in them, to be held by them as trustees for the debenture-holders and as security for the amount to be advanced on the debentures, and as they were given the usual rights of entry, taking possession and management, which mortgagees and trustees for debenture-holders are usually given, the deed created rights over the properties in favour of the trustees, and was mortgage deed under the definition in s 2 (17), Stamp Act. STAMP ACT, *In re*, **4 L.B.R. 2, F.B.** (27 C. 587, *R.*)

(16)—*S.* 2 (21)—*Power of attorney.*—An instrument which authorizes a person to receive certain money and sign a receipt, but which does not empower him to do so in the name of the person executing the instrument, does not amount to a power of attorney. TRIBHOWAN v. PANDURANG, **3 Bom. L. R. 697.**

(17)—*S.* 2 (22)—*Promissory Note—Bond.*—*Held.* that a document in the following terms was a promissory note as defined in s. 2 (22) of the Stamp Act and not a bond. "Rs. 37 "which remain due to be paid, to be paid to "Gurditta According to this receipt, thirty "seven rupees. To be paid in two or three days. "To be paid by Dhanna Singh, *Bazaz*, 10th "*Poh Sambat* 1954—Written by Das Mal, "Wadhawa, at the dictation of Dhanna Singh, "Stamp affixed—Signed by Dhanna Singh with "his own pen." GURDITTA MAL v. DHANNA SINGH, **3 P.L.R. 1902=14 P.R. 1902, F. B.** [*R.*, 93 P.R. 1902, F.B.]

(18)—*S.* 2, (23)—*Meaning of term "receipt" in—Certificate to the effect that a premium on an insurance policy has been paid, issued for the purpose of supporting a claim to exemption from income-tax not a receipt.*—The meaning of the terms "acknowledged" and "acknowledgment" used in s 2, sub division 23, of the Stamp Act must be limited to documents given to or issued for the benefit of the debtor, acknowledging to him the payment of money etc., or delivery of goods, in discharge or satisfaction of his debt or the demand upon him. Obviously it could not have been intended that every acknowledgment of payment of a debt should be chargeable with stamp duty. For instance it is not to be supposed that the Legislature contemplated that a letter written by one friend to another stating that he had received payment of a debt from some third person must be stamped with an anna stamp. Accordingly a certificate to the effect that a premium on an insurance policy has been paid issued for the purpose of supporting a claim to exemption from income-tax on the amount paid and not primarily intended for use as evidence of payment between the policy-holder and the insurance company is not a receipt, and is therefore exempt from stamp duty. ANONYMOUS, **2 L.B.R. 30.** (*Rex v. James Harvey*, 1812, Russell and Ryan, 227; 4 C. 829. 11 C. 267, *R.*)

(19)—*Ss.* 2, 7, *sch.* I, *art.* 47-*A*—*Construction—Bills of lading by Inland River Steam Navigation Company—Case of company taking risk.*—An Act of this nature must be construed strictly. Bills of lading by Inland River Steam Navigation Company for goods consigned with them at one place for being delivered at another are bills of lading within the meaning of the Stamp Act (1899), and as such are liable to stamp duty under that Act (*Sewell* v. *Burdick* (1884), L.R. 10 App. Cas. 74, *R.*) The fact that they do not relate to the carriage of goods by a sea-going in vessel, but to Inland Navigation only, cannot alter the nature and character of the documents. Where, in consideration of an increased payment, a company takes all risk respect to the carriage of goods sent on a sea voyage, this fact does not render the deed

Stamp Act (II of 1899)—*continued.*

liable to stamp duty as a sea policy. REFERENCE UNDER THE STAMP ACT OF 1899, **30 C. 565.**

(20)—*Ss.* (2) *and* (22)—*Bond, Promissory note—Negotiable Instruments Act* (VI *of* 1881), *ss.* 4 *and* 5—*"Certain person," what it includes.*—A document was executed between a person called the "debtor" of the first part, the three persons called the "sureties" of the second part, and a Chetty firm of R.M.A. R.R.M., called the "creditor," which term was to include "the members for the time being of the firm of R. M.A.R.M., their representatives and assigns" of the third part. It recited that a sum of Rs. 36,000 was due irom the debtor to the creditor in respect of monies due on six pro-notes that the debtor had asked the creditor to accept a portion of the sum due, and as to the rest to give time and to receive it on certain dates mentioned in equal instalments, that, in consideration of so doing, the sureties had agreed to join with the debtor in making the payments to the creditor, and that the advance had been received by the creditor. Then there was a promise to pay the creditor the balance on the dates mentioned and to pay interest. The document was in form an agreement and was stamped as such. *Held*, that, for purposes of the Stamp Act, 1899, it was neither a bond nor a promissory note, and that it was duly stamped as an instrument. As there was absence of certainty with regard to the person or to whose order the money was payable, it is not a promissory note. Under s. 4 of the Negotiable Instruments Act, a "certain" person is one who is capable of being ascertained on the date on which the promissory note is made. So where the sum is made payable on a future date to "the members for the time being" of a specified firm, the instrument is not a promissory note as defined by the Neg. Instr. Act. *In re* YEO ENG PWA v. CHETTY FIRM OF R. M.A.R.R.M., **5 L.B.R. 102**, *F.B.*=**4 Ind. Cas. 293.** (8 C. 284, *R*).

(21)—Ss. 2 (21) 60, sch. I, art. 48 (*g*)—Document authorising holder to appear and do all acts necessary for execution of decree—Duty chargeable thereon. *See* POWER-OF-ATTORNEY, 8 A.L.J. 378, F.B.

(22)—*Ss.* 2 (2) *and* (3) 67, *sch.* I, *art.* 13—*Bill of exchange—First of exchange stamped with one anna—Whether stamp duty necessary on second of exchange.*—A second of exchange, payable on demand, does not require to be stamped with a stamp of one anna, when the first of exchange has been stamped with a stamp of one anna. *In re* THE NETHERLANDS TRADING SOCIETY, **4 L.B.R. 320, F.B.**

(23)—*S.* 2 (14) *and sch.* I, *art.* 5 (*b*)—*Letter containing statement of a credit entry in writer's accounts with rate of interest, and a promise to repay same with interest—Memorandum of agreement—Instrument—Liability to pay duty.*—*Held* (*Ormond, J., dissenting*) that a letter, acknowledging the receipt of a certain sum of money, as having been borrowed, two months

Stamp Act (II of 1899)—*continued.*

before, for particular period and at a particular rate of interest and stating that the loan had been duly entered in the writer's books and that it will be repaid with interest on the due date, was an "instrument," as defined in s. 2 (14) of the Stamp Act, 1899, and was chargeable as a memorandum of agreement, under art. 5 (*b*) of the first schedule to the Act, with a duty of 8 annas. *In re* V R S.A.R. RAMAN CHETTY, **4 L.B.R. 324=14 Bur. L.R. 292.** (13 M. 255, *R.*)

(24)—*S.* 2 (5) (*b*), *sch.* I, *arts.* 1 *and* 15—*Acknowledgment—Bond.—Held*, by the Full Bench, that the following entry in the books of account of the plaintiff being an acknowledgment of a debt signed by the debtor, and attested by witnesses, was chargeable with stamp duty as a bond and not as an acknowledgment: —*Lekha paya Ganda, beta Suiana da, Suhela beta Sujana da, Miti Jeth Sudi* 13, *Sal* 1957, *Ticket* 1 *anna. Rs.* 948 *baqui lene Ganda pason: Suhela pason, biaj saikra da Rs.* 1. *robkari Jhaba Singh. beta Bure da, robkari Mehtab Singh, beta Sarup Singh da. Nishani Ganda di nishani Suhela di.* (*Mohr*) *Roda, Lambardar. Zubani Suhela di, Ganda di zubani.* DAULA v. GANDA, **101 P.L.R. 1903, F.B.=35 P.R. 1903.** [*R.*, 102 P.R. 1905, 102 P.R. 1908, 119 P.R. 1908.]

(25)—*S.* 2 (5) (*b*) *arts.* 6, 15, 62—*Bond—Agreement to lend money—Transfer of mortgage.*—The transaction comprised in a document, consisted of a transfer of mortgage by one S to the A company, and an agreement *inter alia* that the company should lend money at the request of S, for making improvements, additions and repairs to the buildings and machinery of the H Mills up to an unascertained though ascertainable amount, and also such money as might be required for working the said Mills. On the question as to the amount of Stamp duty leviable on the document. *Held*, that the document was liable to duty as a transfer of mortgage and as an agreement. An agreement to lend money does not create an obligation to pay money within the meaning of s. 2 (5) (*b*) of the Indian Stamp Act, 1899, and is not chargeable as a bond. THE HITVARDHAK COTTON MILLS CO., LTD v. SORABJI DINSHAW KARAKA, **11 Bom. L.R. 386=33 B. 426=2 Ind. Cas. 432.**

(26)—S. 2 (15), sch. I, art. 45—Decree for partition—Stamp required under the General Stamp Act—*See* CIV. PRO. CODE, 1908, O. I, rr. 8 (2), 10 (2), (3), (5), 11, 32 C. 483.

(27)—*S.* 2 (21), *sch. I—art.* 48—*Power of attorney in favour of person not a certificated Mukhtar or Pleader—Court Fees Act* (VII *of* 1870), *sch.* II, *art.* 10—*Value of stamp.*—Where a power-of-attorney is executed in favour of a person, who is not a certificated Mukhtar or Pleader under the Legal Practitioners Act, the document should be stamped with the stamp provided for by art. 48 of the Stamp Act, and not with a Court-fee stamp as

Stamp Act (II of 1899)—*continued.*

provided for by art. 10 of sch. II of the Court Fees Act. PERMANAND v. SAT PERSHAD, **9 Ind. Cas. 617.**

(28)—*S.* 2 (23), *sch.* I, *art.* 53—*Receipt—Consideration — Contract —Payment by one officer of a firm to another for the purposes of the firm, if for consideration.*—Certain pay orders in respect of money to be paid to creditors of a firm had been made out by the Accounts Department of the firm, and were sent to the cashier who paid the amount to assistants for payment to the creditors, and the assistants signed their names on the back of the pay orders in acknowledgment of receipt. *Held*, that the acknowledgments were not liable to stamp duty as receipts for payment with consideration. There was in the circumstances no contract between the cashier and the assistants. *In the matter of* MESSRS BURN AND CO., **14 C. W.N. 833=6 Ind. Cas. 778=37 C. 634.**

(29)—*S.* 2, *cls.* (12), (23), *art.* 53, *sch.* I, *ss.* 17, 12, 63—*Receipted bill bearing uncancelled adhesive stamp—Stamp duty chargeable.*—A document which, on the face of it, purports to be a bill or account of monies due for goods supplied, and contains the words "received payment" and the signature of the persons to whom the money was due, is a document chargeable with stamp duty, the same being a receipt. *In the matter of a* REFERENCE FROM THE FINANCIAL COMMISSIONER, **1 L.B.R. 281.** (9 A. 210, *Millen* v. *Dent*, 1847, Q.B. 846, *F.*)

(30)—*S.* 2 (24), *art.* 58 *a*—*Settlement—Stamp—Power exercised under appointment by will—Executors devoting money to charity—Subscriptions gathered by an appeal to public—Declaration of trust as regards subscription.*—An instrument declaring trusts of certain funds placed in the hands of trustees for a charitable purpose was engrossed on a stamp paper of Rs. 15. The funds amounting in all to about three lakhs of rupees were derived from two sources. A lakh of rupees was the result of appeals for the charity, and was brought in various amounts by different contributors, who in some instances coupled the amounts with letters expressing their wishes with regard to the money. The remaining two lakhs were provided by the executors of one A H to whom the sum was bequeathed by A H for establishing such a charity as the executors thought fit. A question having arisen whether the stamp was properly valued: *Held*, (1) that, so far as the fund of one lakh was concerned, no previous disposition had been made in writing of any portion of it, and the instrument recorded by way of declaration of trust the terms of the disposition of the fund, and was, therefore, a settlement within the meaning of s. 2 (24) of the Stamp Act, 1899, and chargeable with duty at eight annas per cent. (2) That, so far as the two lakhs was concerned, the instrument was an appointment chargeable with a duty of Rs. 15 under art. 7, sch. I of the Stamp Act, 1899, inasmuch as the provisions of the will amounted to a disposition for a charitable purpose of the sum, and the executors in appropriating the money were exercising the power of appointment conferred upon them by the will. *In re* ABDULLA HAJI DAWOOD BOWLA ORPHANAGE, **13 Bom. L.R. 646.**

(31)—*S.* 4—*Sale of land — Mortgage of the land sold executed by the purchaser, duty chargeable on.*—In answer to a reference to the Full Bench under s. 57 (1) of the Act, it was *held*, that a document whereby a purchaser transferred to his vendor, by way of mortgage, an interest in the land sold, is not an, 'instrument employed for completing the sale of the property and the deed is, therefore, chargeable with the full amount of duty appropriate to the description of the mortgage under which it comes, specified in art. 40 of sch. I of the Act. REFERENCE UNDER STAMP ACT, 1899, No. 12 of 1905, **3 L.B.R. 205, F.B.**

(32)—*S.* 5—*Lease deed containing undertaking to renew for further term — Stamp duty—Document relating to distinct matters.*—An instrument of lease for a term of three years containing a covenant, on the part of the lessor, to renew the lease at the option of the lessee for a further term of one or two years is chargeable with stamp duty only as a lease for a term of three years. It need not be stamped with the aggregate of the duties payable on a lease for such a term and on an agreement to give a lease for a term of two years. The transaction or matter to which such an instrument relates is single and indivisible and it cannot be treated as relating to two distinct matters within the meaning of s. 5 of the Stamp Act. The instrument contains only one contract, a demise; the option of renewal of the lease is ancillary to it and forms part of the consideration for entering into the lease; and an instrument can be regarded as falling under two distinct categories, each requiring a separate stamp, only where there is what is called a "distinct consideration" for each, and not where there is a unity of consideration. REFERENCE UNDER STAMP ACT, s. 57, **25 M. 3.** [*F.*, 26 M. 473.]

(33)—*S.* 5—*Agreement for mining rights—Agreement with several landholders not having joint interest—Stamp duty payable.*—Several landholders not having joint interest in their lands entered into an agreement with a company, giving to the latter a license to prospect and work upon their lands for minerals and undertaking to sell or lease the mining rights in the lands if required by the company. They further undertook not to sell the mining rights to any other person for a number of years and indemnify the company from claims that might be made by any other persons. The question was as to the stamp duty payable on the instrument. *Held* that the instrument dealt with distinct matters, *i.e.*, with agreements with several persons with regard to their separate property. It did not contain distinct matters with any one landholder. The instrument was chargeable with the aggregate amount of the duties with which separate instruments relating to the same matters would be chargeable. The proper stamp to be affixed in such a case was

Stamp Act (II of 1899)—*continued.*

an eight-annas stamp or as many such stamps as there were separate landholders who were made parties to the agreement. REFERENCE UNDER STAMP ACT, s. 57, **24 M. 176, F.B.**

(33-*a*)—S. 5—*See* No. 115, *infra.*

(34)—*Ss.* 5, 6, 36, *sch.* I, *arts.* 5 *and* 43—*Bought and sold notes—Agreement to refer to arbitration—Stamp duty—Document not duly stamped—Admission by arbitrators—Effect—Arbitration by Bengal Chamber of Commerce—Arbitration Rules VI* (*g*) *and* (*o*), *X—Scope.*—The contract in this case was comprised in bought and sold notes, each signed by the brokers and stamped under art. 43 of the Stamp Act with a stamp of 2 annas. This contract contained a number of conditions one of which constituted the submission to arbitration. *Held* that the agreement to refer any dispute whatever arising out of the contract to arbitration is a part of the contract itself, and not a 'distinct matter' within the meaning of s. 5 of the Stamp Act, and that the documents together making the contract were not chargeable with duty otherwise than as broker's notes under art. 43 of that Act. (15 M. 150, *F.*; 13 C.W.N. 63, 13 C.W.N. 297=36 C. 388, *Diss.*; 19 B. 32, *R.*) If documents, which were not duly stamped, were admitted and acted upon by the arbitrators, s. 36 of the Stamp Act would prevent such admission from being called in question at any stage of the same proceeding, except under s. 61 of the Act, and an application to file the award of the arbitrators would be a part of the 'same proceeding.' Grammatically speaking, Rule VI of the arbitration rules of the Bengal Chamber of Commerce requires the Registrar, *upon the receipt of the application* of either party, to proceed to constitute a Court consisting of 2 or more arbitrators, and also, in the case of need, an umpire to adjudicate on the dispute. But, having regard to Rule VI (*m*) and VI (*o*), the omission to so nominate an umpire would not be a ground for setting aside or varying the award. The Court will be averse to setting aside or pronouncing as illegal the proceedings of a Tribunal selected by the parties themselves. It certainly should not do so on technical grounds. The fact that the names of the arbitrators were not disclosed to the parties is a state of things contemplated by Rule X of the arbitration rules and can be no objection to the award. Rule VI (*g*) does not provide that parties may, with the express permission of the arbitrators, appear before them; but the converse, namely, that, they, shall not, without the express permission of the arbitrators, be entitled to appear. The arbitrators may, if they please, invite or permit the parties to appear, but the invitation or permission must come from them; the parties are not entitled to appear or even to ask for such permission. THE BOMBAY COMPANY, LTD. v. THE NATIONAL JUTE MILLS CO., LTD., **39 C. 669=16 Ind. Cas. 153.**

(35)—*Ss.* 5, 12, 13, 14 (=*Stamp Act*, 1879, ss. 7, 13, 14, 15)-*Contract by principal and surety,*

Stamp Act (II of 1899)—*continued.*

whether single stamp paper sufficient—Document begun on reverse of impressed stamp—Validity.—A contract of the principal was written first and signed by him on a stamp paper; then commenced the contract of the surety on the same stamp paper and signed by him. *Held* that the two together constituted but one instrument and were liable to a single stamp duty notwithstanding the apparent separation of the clauses respectively relating to the principal's contract and that of the surety; the contract of the surety being incidental and accessory to that of the principal and in respect of one and the same sum or consideration—the leading object or character of the document being the securing of that sum [*R.*, 13 C.W.N. 815=1 Ind. Cas. 670, 15 P.R. 1910=16 P.W.R. 1910=4 P.L.R. 1910.] A document begun on the reverse of an impressed stamp does not fall within the prohibitory words of ss. 12, 13, 14 of the Act. It is not necessary that the document should commence on any particular side of a stamp paper, the only thing prohibited by the sections being the writing of the document in such a manner as to deface the stamp or to render a second use of the stamp possible. DOWLATRAM HARJI v. VITHO RADHOJI, **5 B. 188, F.B.** [*R.*, 13 A. 66.]

(36)—*Ss.* 5, 35, *and sch.* I, *art.* 5 (*a*)—*Agreement by villagers to supply fish in consideration of payment of advance—Whether one contract for sale of goods—Unity of consideration—Agreement relating to distinct matters—Admission of document—Penalty.*—Some villagers entered into an agreement to supply fish in consideration of an advance paid. The questions for determination were:—(1) whether the agreement was one relating to sale of goods exclusively; (2) whether there was unity of consideration; and (3) whether the document could be admitted in evidence. *Held*, (1) that the agreement was not one relating to the sale of goods exclusively, so as to bring it within sch. I, art. 5, Ex. (*a*) of Act II of 1899; nor (2) was it one comprising or relating to distinct matters within the meaning of s. 5 of Act II of 1899; and (3) that the Court has jurisdiction to admit the document on payment of duty and penalty as provided in s. 35 of Act II of 1899. MARIA JACOB RODRIGUES v. PETER FERNANDU, **5 M.L.T. 135, F.B.=19 M.L.J. 35=2 Ind. Cas. 481.**

(37)—*Ss.* 5, 57—*Mining lease—Agreement relating to several lands belonging to different owners—Document how chargeable.*—An agreement was entered into for the purpose of mining operations between a company and the owners of several pieces of land. A single agreement was drawn up and the intention was to have it executed by the several land owners, each severally interested in the piece of land mentioned against his name in the schedule annexed thereto. *Held* that the instrument was chargeable with the aggregate amount of the duties with which separate instruments relating to the same matters would be chargeable. For, agreements with two or more ryots

Stamp Act (II of 1899)—*continued.*

not jointly interested in the same land for the purchase or lease of their lands, were distinct agreements which might give rise to different rights of action by or against the several ryots. In the present instance, the instrument dealt with several distinct matters, *i e.*, with agreements with several persons with regard to their separate property. *In re* BODY NAIKAN AND BEST AND CO., **10 M.L.J. 378, F.B.**

(38)—*S. 5 and sch. I, art. 35—Lease concurred to by persons other than lessor, if multifarious document.*—B, to whom A had agreed for a certain price to transfer the mining rights in a certain property for a priod of 999 years, subject to the payment of certain rents and royalties, agreed to transfer those rights to C, subject to the same conditions as to rents and royalties, but for an increased price. To carry this last agreement into effect, a lease was executed, but concurrence of A amongst others was obtained to it: *Held*, that the instrument was a single lease and liable to stamp duty as such. It was not a multifarious document within the meaning of s. 5 of the Stamp Act embodying two leases. The concurrence, which it was thought proper to obtain of several persons other than the lessor, did not alter the character of the lease or the nature of the transaction. *In the matter of* PARASEA COLLIERIES, LD. **14 C.W.N. 861=6 Ind. Cas. 762=37 C. 628.**

(39)—*S. 5, arts. 40 (b), 57 (b)—Deed of mortgage executed by mortgagor, mortgagee and surety—Stamp duty payable—Test to ascertain proper duly.—Held*, that an instrument of mortgage securing the re-payment of a loan of Rs. 2,000, under which both the mortgagor and surety jointly and severally undertake liability in respect of the loan, and under which it would be competent to the creditor to claim the money from either the mortgagor or the surety, is correctly stamped, if it bears a ten-rupees stamp as a mortgage-deed, within the meaning of art. 40 (*b*) and s. 5 of the Act, and need not bear in addition a five-rupee stamp as also falling under art. 57 (*b*). (5 B. 188, F.B., *Rel.*; 10 B. 47, *D.*) The test under the Stamp Act is not whether the instrument embodies distinct contracts, but whether it comprises distinct matters. *In re* STAMP DUTY LIABLE ON A CERTAIN DEED EXECUTED BY M. GHULAM HAIDAR AND ABDUL LATIFF IN FAVOUR OF THE PUNJAB BANKING CO., LTD., PESHAWAR. **15 P.R. 1910, F.B.=16 P.W.R. 1910=4 P.L.R. 1910=5 Ind. Cas. 812.** (102 P.R. 1895, *F.*)

(40)—S. 6—*See* No. 34, *supra*, and No. 115, *infra.*

(41)—S. 7—*See* No. 19, *supra*,

(42)—*S. 9, cl. 15—Final order effecting partition—Chargeable with stamp duty—As in instrument of partition—Order—Chargeable—Only if final—Final order—To be passed—After share of each is ascertained—Final order—Analogy—Order under s. 265, Civ. Pro. Code.*—Where the decree effects an actual partition of the property among the parties and is therefore the final order in the suit effecting partition, it is chargeable with duty as an instrument of partition. To make an order chargeable under the section (Stamp Act, 1899, s. 9, cl. 15) it must effect an actual division. A final order allotting specified property to each co-sharer should be passed only after the Court has determined the share of each (32 C. 483, *F.*). Further proceedings on such a final order will merely lie for delivery of possession. Such a final order is analogous to the one passed by the Collector under s. 265 of the old Civ. Pro. Code. THIRUVENGADATHAN AIYA v. MANGAYYA, **2 M.W.N. 1911, 516.**

(43)—*S. 9, cl 15—Final order, meaning of—Final decree or order in execution.*—"Final order" in s. 9, cl. 15 of the Stamp Act, cannot be read to mean final decree. It applies to some order of the Civil Court passed in execution. SESHACHALAM PILLAI v. ALWAR CHETTY, **2 M.W.N. 1911, 515.**

(44)—*S. 12—Stamp—Promissory note—Stamp not cancelled—Evidence of consideration for debt* aliunde *admissible.*—Plaintiff sued for the recovery of a loan secured by a promissory note. When the promissory note was produced in Court, it was found that the stamp on it had not been cancelled, and it was therefore treated as an unstamped document and the Court refused to allow other evidence to be given of the debt. *Held*, that the evidence of the debt was admissible *aliunde*. When a cause of action for money is once complete in itself, whether for goods sold or money lent or for any other claim, and the debtor then gives a bill or note to the creditor for payment of the money at a future time, the creditor, if the bill or note is not paid at maturity, may, always as a rule, sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note under such circumstances as to make the debtor liable upon it to some third person. BANARSI PRASAD v. FAZAL AHMED, **A.W.N. (1906), 9=3 A.L.J. 25=28 A. 298.** (7 C. 256, *F.*).

(45)—*S. 12—Stamp—Mode of cancellation of adhesive stamp.*—A person who cancels an adhesive stamp affixed to a document does so sufficiently if he writes his name across it. It is not necessary that he should also date the stamp. KIRPA RAM v. BARU MAL, **A.W.N. 1906, 95=3 A.L.J. 326.**

(46)—*S. 12—Adhesive stamp, cancellation of—Adhesive stamp, lines drawn on, effect of—Burden of proof of consideration.*—Where the stamp on a pro-note or a receipt was cancelled by having lines drawn across it in different directions, each line extending more or less beyond the edges of the stamp on to the paper on which the document was written, *held*, that the adhesive stamps on the document in question had been cancelled in a sufficiently effectual manner. The question whether the requirements of law about the cancellation of stamp had or had not been sufficiently complied with was to be determined upon the examination of the document concerned in each

Stamp Act (II of 1899)—*continued.*

particular case. (108 P.R. 1908, *Appr.*) *Held* further, that, when a document is admitted in evidence, and its execution either admitted by the defendant or proved against him and the receipt of consideration acknowledged therein, the burden would lie upon the defendant to prove the want of consideration. MOHAMMAD AMIR MIRZA BEG v. BABU KEDAR NATH, **15 O.C. 58=15 Ind. Cas. 202.**

(47)—*S.* 12 (3)—*Act* I *of* 1879, *s.* 11—*Stamp—Cancellation — Receipt stamp.* — The mere drawing of two parallel lines over a receipt stamp, affixed to an instrument, does not amount to its cancellation either under s. 11 of the Stamp Act of 1879, or s. 12 (3) of the Stamp Act of 1899. VIRABHADRAPA v. BHIMAJI, **6 Bom.L.R. 436=28 B. 432.**

(48)—S. 12—*See* Nos. 29, 35, *supra.*

(49)—*Ss.* 12, 35—Hundi—*Stamps not properly cancelled—Inadmissibility in evidence—Proof of debt* aliunde.—Where the stamps on a *hundi* were not properly cancelled as required by s. 12 of the Stamp Act. *Held*, that the *hundi* is not admissible in evidence. (28 B. 432, *R.*) Where the plaint is drawn in sufficiently wide terms, and though it is possible that there may be some defence on the merits, the lower Court ought not to refuse to take evidence, apart from the *hundi*, as to the existence of the debt. PEOPLE'S BANK OF INDIA, LIMITED v. ABDUL KARIM, **18 P.R. 1912=65 P.W.R. 1912=15 P.L.R 1912=14 Ind. Cas. 512.** (28 B. 432, 66 P.R. 1906, 26 A. 178, 28 A. 298, *R.*)

(50)—*Ss.* 12, 35, 36—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s* 562—*Civ. Pro. Code* (*Act* V *of* 1908), *O.* XLI, *rule* 23—*Remand—Appeal against order of*—Hundi—*Stamp not cancelled—Document indexed but not admitted in evidence.*—Where, in a suit filed in August, 1908, a remand was made under s 562 of the old Civ. Pro. Code. *Held*, that the course of appeal was regulated by the old Code and not by the new Code. (12 P.R. 1900=P.L.R. 1900, 63, *F.*) Where a document has been marked as an exhibit without any note on it to the effect that it has been admitted in evidence, and there is nothing to show that its treatment as evidence in the case was otherwise than tentative. *Held*, that objection could be raised as to its admissibility at any later stage of the suit, on the ground that it was not properly stamped. (12 M.L.J. 351, *D.*) A hundi, the stamp on which was not cancelled at the time of its execution, is not admissible in evidence. SUNDAR DAS v. THE PEOPLES BANK OF INDIA, LTD., RAWALPINDI BRANCH, **169 P.L.R. 1912=272 P.W.R. 1912=16 Ind. Cas. 834.**

(51)—*Ss.* 12, 35, 36, 61—*Promissory note bearing uncancelled stamp.*—A promissory note bearing a stamp not cancelled as required by law is inadmissible in evidence under s. 35 of the Indian Stamp Act. A Court which gives a decree on such a document acts contrary to law. (14 B. 102, 18 B. 369, *F.*) Reading ss. 35, 36 and 61 together it appears that s. 36 applies to instruments which may be admitted in evidence under the provisos to s. 35, and to instruments which a Court holds to be not liable to duty, but the absolute provisions of the main part of s. 35 are not affected by s. 36, and if a Court admits and acts on an unstamped document which cannot under any circumstances be admitted and acted upon, s. 36 does not prevent a superior Court from dealing with the illegality. MAUNG BA KYWAN v. MA KYE KYEE, **2 L.B.R. 103.** [*Diss.*, U.B.R. 1909, Stamp, 3.]

(52)—*Ss.* 12 (3), 36, 61—*Drawing two lines across the face of an adhesive stamp—Effect—Appellate Court's power to question admissibility of document admitted by Court of first instance.*—It seems that the drawing of two lines across the face of an adhesive stamp on a document amounts to such cancellation as is required by s. 12 (3) of the Indian Stamp Act. (28 B. 432, 6 Bom.L.R. 436, *doubted*). Where a document, on which a suit is brought, is filed with the plaint, and is admitted in evidence in the first Court without demur or objection, *held*, that objection to its inadmissibility cannot, under the circumstances of the case, be raised in the appellate Court. (139 P. R. 1890, 2 P.R. 1891, 24 B. 360, *R.*) No order with regard to the stamp having been made in this case by the Court of first instance, s. 61 of the Act is inapplicable. PIRAN DITTA v. MANGAL SINGH, **108 P.R. 1908=207 P.W.R. 1908.**

(53)—S. 13—*See* No. 35, *supra.*

(54)—S. 14—*See* No. 35, *supra.*

(54)—*S.* 17—*Stamped—Duly stamped—Post-dated cheque.*—The term "stamped" in s. 17 of the Indian Stamp Act (II of 1899) means stamped not only with a stamp of the amount required by law but also in the manner prescribed by law. MOTILAL v. JAGMOHANDAS, **6 Bom. L.R. 699.**

(55)—*S.* 17—*Reg.* XVIII *of* 1827, *ss.* 13, 14—*Post stamped bond—Representatives of grantor of bond—Third parties—Practice—Mofussil Judge—Rulings of High Court.*—A bond stamped after the grantor's death is valid against his heir. The personal representatives or other persons claiming as kindred of one deceased grantor occupy, for the purposes of Reg. XVIII of 1827, the same position which the deceased would have occupied had he been alive. It is not correct to say that such representative or kindred of the deceased is a third party within the meaning of the Regulation. According to English law, the executors or administrators of a deceased person are implied in himself, and so far at least as regards the enactment in Reg. XVIII of 1827, the same rule applied to personal representatives of a deceased Hindu or Muhammadan. [*F.*, 5 B.H.C.A.C. 217.] When there has been a uniform series of decisions by the higher appeal Court extending over a number of years, great injury to litigants will arise if the Courts in the mofussil do not hold themselves bound by these decisions,

Stamp Act (II of 1899)—*continued.*

although it is of course competent to any mofussil Judge who may dissent from the established ruling, to record when he deems it necessary, the reasons, which lead him to dissent, but leaving it to the higher appellate Court to reconsider its former rulings. It is not proper on the part of the muffusil Judge to depart from the precedents of the higher Court, of his own accord. RAGHIA v. DHRMA JHATU, **1 B.H C. 52.**

(56)—S. 17—*See* No. 29 *supra.*

(57)—S. 22—*See* No. 20, *supra.*

(58)—*S.* 23—*Promissory note—Acknowledgment containing a promise to pay on demand—Stamp.*—An acknowledgment containing an express promise to pay the principal with interest on demand, amounts to a promissory note and should be stamped as such. MATHURBHAI v. DALPAT, **3 Bom. L.R. 839.**

(59)—*S.* 23—*Bond—Principal — Interest — Stamp duty.*—A bond secured an amount of Rs. 10 as principal money : and as regards interest the bond provided that "interest on this sum amounts to Rs. 2-8-0." *Held* that the bond should be stamped as for Rs. 10 (ten) only ; and that the provision about interest should be left out of consideration for the purposes of Indian Stamp Act, 1899. VITHU v. NATHU, **3 Bom. L.R. 133.**

(59-*a*)—S. 23—*See* Nos. 112, 113, 121, *infra.*

(60)—*S.* 24 — *Mortgage — Sale — Stamp.*—Where a mortgaged property is sold to the mortgagee along with other property not mortgaged, the stamp on the deed of sale need not cover the mortgaged property. REFERENCE UNDER STAMP ACT, II OF 1899, **4 Bom. L.R. 430.**

(61)—*S.* 24 — *Explanation—Proviso— Mortgagee.*—The benefit provided by proviso to explanation to s. 24 enures also for the benefit of the assignee of a mortgagee. REFERENCE UNDER STAMP ACT, **5 Bom. L.R. 523.**

(62)—*S.* 24—*Mortgage deed—Exemption from duty, when allowable—Statute imposing burden, construction of, in whose favour—Exemption, construction of, in whose favour.*—The proviso to s. 24 of the Indian Stamp Act (II of 1899) contemplates that, to entitle the mortgagor to a deduction thereunder, the property transferred should be identical with that mortgaged and should not merely form a portion thereof. An enactment imposing a burden requires a strict construction in favour of the subject, but an exemption must be strictly construed in favour of the State. *In re* NIRABA, *In re* LUXMAN AND GANPAT, **29 B. 203=6 Bom.L.R. 844.**

(63)—S. 24, has no connection with question of liability to registration—*See* SALE—GENERAL, 3 N.L.R. 72.

(63-*a*)—S. 24—*See* No. 121, *infra.*

(64)—*Ss.* 24, 25—*Art.* 63—*Sale of leasehold property—Rent reserved not liable to* ad valorem

Stamp Act (II of 1899)—*continued.*

duty—Stamp duty leviable only on the actual consideration money.—Where a leasehold property demised to the original lessee for a term of 999 years at the yearly rent of Rs. 39-11-0 was assigned to the trustees of a charity for a sum of Rs. 1,02,000, the trustees undertaking to pay the rent reserved by the lease, *held* that the *ad valorem* duty was payable only on the money consideration actually mentioned in the conveyance, *i.e.*, the amount of the purchase-money. *In re* STAMP ACT, **2 Bom. L.R. 401 =24 B. 257.**

(65)—S. 25—*See* No. 64, *supra.*

(66)—*S.* 26, *sch.* I, *arts.* 57 (*b*) *and* 62 (*c*)—*Stamp duty payable—Security for due fulfilment of duties as Cashier.*—An instrument was executed between a firm M, a person R, and another firm M L, and its provisions fell under two heads: Those under the first related to the transfer to M L by M of a mortgage executed by R to an assistant of the firm M and by him formally assigned to M ; and the provisions of the other part related to the accountability to the firm M L of R (who was the Cashier of M.L) in respect of the firm's funds coming to his hands as their Cashier, and constituted a mortgage deed executed as security for the due fulfilment of his duties as Cashier and as security for the repayment of any sum he might be found liable for as Cashier, to an extent not exceeding Rs. 6,000. *Held* that the first part of the instrument was only the transfer of a mortgage, and as such liable to a fixed stamp duty under art. 62, cl. (*c*) of sch. I of the Indian Stamp Act, and that the stamp duty payable as to the second part was also a fixed duty (art. 57, cl. (*b*) of sch. I) and that s. 26 of the Act had no application to the case. *Held* also, that though there was in the instrument a promise on the part of R to pay M.L. the amount payable by him under the original mortgage, as the sustenance of no part of the claim the firm involved giving effect to the promise, the claim must be held to be unaffected thereby, even if the promise could have been treated as one requiring the payment of an *ad valorem* duty. MCDOWELL AND CO. v. RAGAVA CHETTY, **27 M. 71.**

(67)—*Ss.* 31, 32, 57—*Adjudication by Collector as to duty chargeable on instrument, no "case."*—A determination by the Collector, under the powers conferred on him by s. 31 of the Stamp Act, of the stamp duty with which an instrument is chargeable, when it has been duly endorsed on the instrument, is final in respect of the instrument under s. 32 of the Act ; it is not a "case" which can be referred by the Revenue authorities to the High Court under s. 57 of the Act. The word "case" as used in s. 57 means a matter which has to be disposed of by the Revenue authorities conformably to the judgment of the High Court on the case referred to it for opinion by the Revenue authorities. REFERENCE UNDER STAMP ACT, S. 57, **25 M. 751.** [*R.*, 25 M. 752, F.B.]

(68)—S. 32—*See* No. 67, *supra.*

Stamp Act (II of 1899)—*continued.*

(69)—*Ss.* 32, 37, 57 *and r.* 16 *of the rules under the Act—Instrument chargeable with duty of one anna—Four quarter-anna stamps affixed—Whether "unstamped" or "not duly stamped"—"Stamp of sufficient amount but of improper description" under r.* 16—*Validation by Collector—Civil Court's power to revise—Validation pending appeal against order rejecting instrument—Effect—Ground for interference in appeal—Court's duty on finding instrument not duly stamped—Proper course.* — When the duty payable on an instrument is one anna, and one anna has been paid to the Government by the purchase of 4 quarter-anna Government stamps of that amount, though not of the description, which under the Act and rules should be used for the instrument in question, then the instrument "bears a stamp of sufficient amount but of improper description," within the meaning of r. 16 of rules under the Stamp Act, and should not be classed as unstamped, though the stamp used, instead of being a wrong description of "revenue stamp" (a term not used in the Stamp Act), happens to be a stamp of some other department of the same Government, whether judicial, postal, forest or telegraph, and such instrument can be validated by the Collector (23 A. 213, F.B., *Diss*). Except upon a reference under s. 57 of the Stamp Act, 1899, by the Chief Controlling Revenue Authority, a Civil Court has no power to review the correctness of a Collector's certificate. S. 32 of the Act makes the Collector's cerficate final as to the admissibility in evidence of a document, so far as its admissibility depends on its being duly stamped. The effect of the Collector's certificate under ss. 32 and 37 of the Act is that the promissory note in question which originally bore 4 quarter-anna stamps and which was validated, by the Collector pending appeal against a judgment which rejected the document as unstamped, must be deemed to have been duly stamped from the date of its execution. Where a promissory note as the one in question was rejected as unstamped, but is now to be deemed to have been duly stamped as from the date of its execution, the order of the lower Court, though it might have been right when it was passed, is now shown to have been wrong, and is therefore a good ground of appeal against its decision. Where a Court finds that an instrument was not "duly stamped" and that it conld be validated under r. 16, the proper course for the Court would be to give the party a reasonable opportunity of moving the Collector and getting the instrument validated. A lower Court's omission to give such opportunity is a good ground of appeal. TUKARAM v. SONAJI, **7 N.L.R. 26.**

(70)—*S.* 35—*Unstamped promissory note, inadmissibility of, in evidence—Suit whether maintainable on the verbal agreement embodied in the note—Admission of execution of a deed is not the same as admission of a liability thereunder.*—Plaintiff sued to recover money from the defendant, alleging that defendant had executed a pro-note in his favour on account of rent due, and that, as the said pro-note was not properly stamped, he claimed the same as a debt due under a prior book account. The suit, as based on such account, was admittedly barred by limitation at the date of its institution. It was contended on appeal that the suit was maintainable on two other grounds. *viz*:—(1) When the pro-note was executed, the defendant had agreed verbally to pay the amount in question on a certain date and that limitation, therefore, began to run from that date. (2) Plaintiff could rely upon defendant's admission of the execution of the pro-note, leaving it to him to prove the repayment of the amount. *Held* (1) as the oral agreement was, on the same day, embodied in a written agreement (pro-note), the pro-note alone can supply the evidence of the agreement and (24 B. 360 *F*; 20 P.R. 1883, *R.*) the latter cannot be proved *aliunde* (s. 91, Evidence Act); (2) the admission as to the *execution* of the deed could not be relied on, in respect of the *liability* thereunder. Under these circumstances, granting plaintiff a decree would be 'acting upon' and giving effect to the pro-note, a document, which under s. 35 of the Stamp Act, could not be admitted and acted upon by a Court for any purpose. GANGA RAM v. AMIR CHAND, **66 P.R. 1906=73 P.L.R. 1907.** 18 B. 369, 21 B. 201 F.B. *F.*)

(71)—S. 35—*Duly stamped.*—The expression "duly stamped" in s. 35 of the Act refers to the time when the document is tendered in evidence. MOTILAL v. JAGMOHANDAS, **6 Bom. L.R. 699.**

(72)—*S.* 35—*Evidence—Account signed but unstamped—Admissibility as admission.*—An account signed by the party but not duly stamped showing the balance up to date, and containing a promise to pay interest upon the consolidated balance, cannot be received as evidence in support of a claim to interest on that balance, but, as a *samadaskat*, or simple admission of the balance then due, it is receivable although not stamped. DHONDU JAGANNATH v. NARAYAN RAMCHANDRA, **1 B.H.C.R. 47.** [*R.*, 22 B. 513, 25 B. 616=3 Bom. L.R. 213.]

(73)—*S.* 35—*Unstamped instrument not admissible for any purpose—Secondary evidence.*—An instrument, which is chargeable with stamp duty and is not so stamped, is, unlike an invalid instrument which is receivable for collateral purposes, not admissible for any purpose whatsoever, save in Criminal Cases. Secondary evidence of its execution of contents is not receivable, even if it be merely for the purpose of showing the nature of possession transferred by such instrument. THAJI BEEBI v. TIRUMALIAPPA, **17 M.L.J. 308=30 M. 386.** [*F.*, 7 Ind. Cas. 320.]

(74)—*S.* 35—*Suit on an unstamped pro-note—Admission of liability by defendant—Decree whether valid.*—In a suit based on an unstamped promissory note and not on the original consideration which gave rise to it, no decree

Stamp Act (II of 1899)—*continued.*

should be passed even where the defendant admits liability. KODALI MATHAYA v. TANGOPPALA RAMAYA, **7 Ind. Cas. 320**. = **8 M.L.T. 151.** (18 B. 369, 30 M. 386, 17 M.L.J. 308, *F*; 29 M. 111, 15 M.L.J. 484, *D.*)

(75)—S. 35—*See* Nos. 36, 49, 50, 51, *supra* and No. 115, *infra.*

(76)—Ss. 35, 36—*See* CIV. PRO. CODE, 1908, O XIII, rr. 1 (2), 3 and 6, 12 M.L.J. 351.

(77)—*Ss.* 35, 36, 61—*Instrument not duly stamped, if admitted into evidence—Admission not to be questioned—Duty of appellate Court when admitted by first Court—Arrears of rent, transfer of-Interest, whether passes to transferee*—Abwab—selami *and* teherir.—S. 61 of the Stamp Act is framed for fiscal purposes, that is to say, for the protection of the Government revenue, and it does not affect the provisions of s. 36, which distinctly provides that, when an instrument has been admitted in evidence, such admission shall not be called in question at any subsequent stage of the suit. Therefore, where a document not duly stamped has been admitted into evidence by the first Court, the appellate Court should regard is as admissible in evidence, and at the same time declare that an extra duty ought to be paid and that that duty and the penalty should be leviable from the person who filed the document, and that that sum might be recovered by the Collector. Where certain arrears of rent are transferred, the interest on them, being a legal incident, also passes to the transferee. A landlord is not entitled to recover such sums as *selami wasil baki selami* and *teherir* which are *abwabs.* SYED BASIR-UD-DIN AHMED v. KALIKA PROSAD SINGH, **7 Ind. Cas. 382.** (15 C. 828, 17 C. 726, *Rel.*)

(78)—*Ss.* 35, 38, 40, 60—*Stamp—Reference to Chief Court, when may be made—Powers of Court as to document not put in evidence—Adjudication by Collector binding on Courts.*—The reference under s. 60 of the Act can only be made under the circumstances specified in it. The Judge must feel doubt as to the amount of duty to be paid in respect of any instrument under proviso (*a*) to s. 35. S. 60 does not deal with a case, where reference has been made to a Collector and his adjudication obtained.—Where a suit is dismissed without being called to hearing, no reference can be made as to a document produced in Court by the plaintiff with his plaint. A Court has no power to overhaul an account-book, produced in a case, for the purpose of putting in evidence an entry contained in it and take action under the Stamp Act in regard to entries not put in evidence. A Court acts without jurisdiction in calling upon a party to produce his account-book in Court and to impound the same, when there is no case before the Court. Under s. 40 (*a*) of the Stamp Act, the adjudication of the Collector as to the amount of duty chargeable on an instrument is final and cannot be questioned by Courts. The Chief Court declined to entertain the reference, submitted by the

Stamp Act (II of 1899)—*continued.*

District Judge, as made in contravention of the provision of s. 60 of the Stamp Act. MUSSAMMAT JAI DEVI v. GOKAL CHAND, **131 P.L.R. 1906, F. B.**

(79)—*Ss.* 35 (*b*) *and* 42—*Stamp—Penalty—Unstamped receipt.*—In applying proviso (*b*) of s. 35 of Act II of 1899, the Court should not levy the duty of one anna as well as the penalty of one rupee. And when a receipt is admitted in evidence under the proviso above referred to, it is not necessary that the receipt should be endorsed in the manner provided for in s. 42. REFERENCE UNDER S. 57 OF ACT II OF 1899, **24 A. 374, F.B.** = **A.W.N. 1902, 72.**

(80)—*S.* 36—*Instrument, insufficiently stamped—Admissibility of instrument when not to be questioned—Acknowledgment evidencing a fresh contract.*—*Held*, that an instrument once accepted, rightly or wrongly, in evidence cannot, by reason of the special provisions of s. 36 of the Stamp Act, be challenged on account of deficiency of stamp duty. Where an acknowledgment contained the words " and shall be paid," *held*, that these words evidence a fresh contract furnishing an independent cause of action. HUMAYUN v. WAJID ALI, **11 O.C. 152.** (3 O.C. 195, *D.*)

(81)—*S.* 36—*Admitted in evidence—Document objected to for want of stamp—Question regarding admissibility reduced to issue—Issue determined at the final decision of the suit—Document in the meanwhile allowed to be exhibited—Mistake of Court—Court to correct its own mistakes* suo motu.—In the course of a suit, a document was tendered in evidence; but its admissibility was objected to. An issue was accordingly raised to try the question. The Court postponed its decision until the delivery of the judgment on the whole case, and after evidence recorded on all the issues, including the issue as to the admissibility of the document. In the meantime, the document was exhibited as part of the evidence. In delivering its final judgment, the Court held that the document was inadmissible in evidence. On appeal, the lower appellate Court held that, though the document was inadmissible for want of stamp, yet, as it was as a matter of fact let in and exhibited as a piece of evidence by the Court at the trial, its admissibility could not be objected to at any subsequent stage of the case. *Held*, (1) that the document should be excluded from the evidence (2) that the party was not bound to ask the Court to correct the mistake. The Court ought to have corrected it *suo motu*, because the mistake was that of the Court, and the party had nothing to do with it and he had done all he could to get the document excluded. The expression "admitted in evidence" in s. 36 of the Stamp Act, 1899, means the act of letting the document in as part of the evidence; but it must be letting in as a result of judicial determination of the question whether it can be admitted in evidence or not for want of stamp. In other words, the Court admitting it must

Stamp Act (II of 1899)—*continued.*

have applied its mind consciously to the question whether the document is admissible or not. CHUNILAL TULSIRAM v. MULABAI, **12 Bom L.R. 466=6 Ind. Cas. 903.**

(82)—*S.* 36—*Stamp on pro-note not duly cancelled—Pro-note admitted in evidence in* ex-parte *trial*—Ex parte *judgment set aside—Admissibility in evidence*—S. 36, Stamp Act, really lays down a rule preventing only the exclusion of what already is in evidence in the proceedings. But if certain proceedings terminated and other proceedings re-commence where the document would not be regarded as being in evidence already, the section has no application. A suit was at first tried *ex parte*, at which a pro-note with a stamp not duly cancelled was admitted in evidence. The *ex parte* judgment was subsequently set aside and proceedings were commenced *de novo*. *Held* that its admissibility could be called in question again, after the *ex parte* proceedings were set aside. It is not possible to lay down any general rule as to what mode of cancellation would be effective. SOLAMALAI MUDALIAR v. VADAMALAI MUTHIRAN, **12 M.L.T. 122=23 M.L.J. 273=16 Ind. Cas. 96.**

(83)—*S.* 36—*Reg.* X *of* 1829, *s.* 3 *and sch. A, art.* 20—*Admissibility in evidence of copy of a* sulehamah *of* 1867 *the only evidence of a mortgage—Copy bearing stamp of Re.* 1—*Presumption regarding stamp on original—Document admitted in evidence—Admissibility not to be questioned on the ground of its not being duly stamped.*—In a suit for redemption of a mortgage made in 1857, the only evidence tendered to prove the transaction was a certified copy of a *sulenamah*. That copy bore a stamp of Re. 1, and the record of the suit in which the original *sulenamah* was filed having been destroyed, it did not appear what stamp the original bore. The *sulenamah* was signed by the pleaders and filed in Court. The Court of first instance admitted the copy in evidence, but the lower appellate Court was of opinion that the original *sulenamah* ought to have been stamped as a mortgage with a ten-rupee stamp, but it could not be presumed to have been so stamped and the copy was therefore inadmissible in evidence. *Held*, that, the copy having been admitted in evidence by the Court of first instance, no further question as to its admissibility could be raised in appeal, on the ground that it was not duly stamped. *Held*, further, that there was no presumption under Reg. X of 1829 sch. A, art. 20, that the original document bore the same stamp as the copy, that article only providing that on the copy should be paid " the same duty as prescribed for the original deed" and not "as paid for the original deed." *Held*, further, that in the absence of any evidence to the contrary, it must be presumed that the Court which accepted the original *sulenamah* acted according to law, and according to s. 3, Reg. X of 1829, was satisfied that the document was duly stamped before it was placed on the record. ABID HUSSAIN v. ASHAR HUSSAIN, **11 A.L.J. 506=19 Ind. Cas. 445.**

Stamp Act (II of 1899)—*continued.*

(84)—S. 36—*See* Nos. 34, 50, 51, 52, 76, 77, *supra.*

(85)—*Ss.* 36, 38—*Impounded instrument admissible in evidence on payment of penalty—Court bound to accept the instrument.*—When an instrument, not being one of the excepted instruments in sub-sec. (*a*) of s. 35 of the Stamp Act, is tendered in Court, the Court is to accept it and shall admit it as evidence on payment of the duty; and the person tendering it is entitled to compel the Court to accept the instrument if the duty and penalty are paid. S. 35 of the Stamp Act does not prevent an instrument which is not absolutely rejected or which comes within the excepted ones, from being admitted on payment of penalty. NATHU v. HANSRAJ, **9 Bom. L.R. 122.**

(86)—S. 37—*See* No. 69, *supra.*

(87)—S. 37, *sch.* 1, *art.* 1—*Document stamped with postage stamp instead of receipt stamp—Stamp of improper description, meaning of.*—The words 'stamp of an improper description' in s. 37 of the Indian Stamp Act, 1899, as well as in the Rules under the Act are not to be interpreted as including a description of stamp appropriate for purposes outside the Stamp Act altogether, but must be confined to a stamp which is used for the purpose of denoting the stamp duty chargeable on an instrument, but which is improper in a particular case having regard to the Act and the Rules. In the case of an acknowledgment, the stamp used must not only be an 'adhesive stamp,' but it must also be a stamp "for indicating the payment of duty" on the instrument under the Stamp Act. So, a postage stamp used in such a case cannot, with reference to the words in s. 37, amount to a stamp of "improper description," but should be regarded as not a stamp at all within the meaning of the Act and Rules. REFERENCE UNDER S. 57 OF ACT II OF 1899, **23 A. 213. F.B.=A.W.N. 1901, 54.**

(88)—S. 38—*See* No. 78, 85, *supra.*

(89)—S. 40—*See* No. 78, *supra.*

(90)—*Ss.* 40 *and* 42—*Stamped—Effect of Collector's certificate that document is properly stamped.*—A subordinate Judge, finding that a document upon which the plaintiff's suit depended was not properly stamped, impounded the document and sent it to the Collector, meanwhile dismissing the plaintiff's suit. The Collector certified under s. 40 of the Indian Stamp Act, 1899, that the proper amount of duty and penalty had been realized. *Held*, that the document then became admissible in evidence and the Court should have taken it into consideration. UMDA BIBI v. TIKAI RAM, **A.W.N. (1907) 38=4 A.L.J. 205.**

(91)—S. 42—*See* Nos. 79, 90, *supra.*

(92)—*Ss.* 40 *and* 44—*Duty and penalty recovered from person filing documents—Suit against Secretary of State, maintainability of*—Certain documents insufficiently stamped.

Stamp Act (II of 1899)—*continued.*

were put in evidence by the representatives in interest of the executants. The Collector recovered from the persons filing them, the duty and penalty by sale of their property. *Held*, that the Collector's order was open to review by Revenue authorities, and no suit lay against the Secretary of State for refund of penalty, realised. *Held* further, that the persons, who wish a document to be admitted in evidence, are the persons from whom a Collector can realise the duty and penalty, and if it is due from a third person, they can bring a suit and recover it from him. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. BASHARAT ULLAH, **5 A.L.J. 262=A.W.N. 1908, 130 =30 A. 271.**

(93)—S. 44—*See* No. 92, *supra.*

(93-*a*)—S. 63—*See* No. 126, *infra.*

(94)—S. 52, sch. I, art. 45—Partition-suit—Decree drawn up by mistake on Court-fee stamp—Inherent power of Court—Non-judicial stamp directed to be filed—Refund of value of Court-fee stamp—*See* PARTITION—GENERAL, 7 Ind. Cas. 94=14 C.W.N. 1101=12 C. L.J. 324.

(95)—*S.* 57— *Certificate by Head quarters Deputy Collector that documents are exempt from duty—Reference by Revenue Board to High Court.*—A Sub-Registrar, before whom certain documents were produced for registration, impounded them on the ground that they were chargeable as leases; but the Head-Quarters Deputy Collector, to whom they were forwarded for adjudication of stamp duty, certified that they were exempt from duty. The Inspector-General of Registration, disagreeing with the opinion of the Deputy Collector, referred the matter of the orders of the Board of Revenue, expressing the opinion that the documents were chargeable as agreements under art. 5 (*b*) of sch. I of the Stamp Act, 1899. The Board of Revenue expressed the view that the documents should be ranked as leases, but referred the question as to stamp duty to the High Court. *Held* (*Sir Arnold White, C.J., dissenting*) that the High Cout had no jurisdiction to decide the question. REFERENCE UNDER STAMP ACT, S. 57, **25 M. 752.**

(96)—S. 57—*See* Nos. 37, 67, 69, *supra.*

(97)—S. 60—*See* Nos. 21, 78, *supra.*

(98)—S. 61—*See* Nos. 51, 52, 77, *supra.*

(99)—*S.* 62; *cl.* (*b*)—*Receipt not stamped—If master liable.*—Where an unstamped receipt was granted by a person alleged to have been the clerk of a firm, and the sole surviving member of the firm was in consequence accused of an offence under s 62, cl. (*b*) of the Stamp Act, *held* that since there was nothing to connect the accused directly with the execution of the receipt, he had not committed any offence. GOLAM HOSSAIN ARIFF v. THE EMPEROR, **8 C.W.N. 378.**

(100)—S. 63—*See* No. 29, *supra.*

(101)—S. 67—*See* No. 22, *supra.*

Stamp Act (II of 1899)—*continued.*

(102)—*Art.* 1, *sch.* I—*Document containing memorandum or note of a debt, construction of—Not a promissory note or acknowledgment—Necessity for stamp—Admissibility of document in evidence.*—A suit was brought to recover certain amount due on a paper containing the following words:—"Account of (defendants), 8th February, 1901; interest 1 *p.c. per mensem*, payable 3rd May, 1901, Rs. 500, borrowed from (plaintiff)." The paper was stamped with a stamp of one anna. The lower Court held the paper was inadmissible in evidence on the ground that it was not properly stamped, and refused to allow the plaintiff to give any parol evidence of the debt. *Held*, the document is not a promissory note; it is not a bond and it is not an acknowledgment of a debt containing a promise to repay the debt or a stipulation to pay interest. It is nothing more than a memorandum or note drawn up between the parties as to a transaction which had just been settled between them. Even if it be an acknowledgment requiring to be stamped, it had been sufficiently stamped. Appeal allowed and suit remanded for disposal on the merits. UDIT UPADHAYA v. BHAWANI DIN, **27 A. 84=A. W.N. 1904, 169=1 A.L.J. 483.** [*R.*, A. W. N. 1906, 80=3 A. L. J. 242=28 A. 436, 4 L.B.R. 330=14 Bur. L.R. 287; *D.*, 11 C.W. N. 1122.]

(103)—*Art.* 1, *sch.* I—*Stamp—Construction of document—Memorandum of account—Acknowledgment of debt—Admissibility of evidence.*—The plaintiff sued for the recovery of certain sums of money lent by her deceased husband to the defendants, a firm of bankers, and she produced in support of her claim two documents described in the lower Courts as "*sarkhats.*" These were documents in the form of extracts from bankers' books, showing a credit and debit side and, in one case, a balance struck, but they were not signed by the parties or either of them, and they contained no acknowledgment of, or promise to pay, a debt. They were not stamped. *Held* that these papers were merely memoranda which might be given in evidence for what they were worth, but did not require to be stamped. DULMHA KUNWAR v. MAHADEO PRASAD, **A.W.N 1906, 80=3 A.L.J. 242 =28 A. 436.** (27 A. 84, *R.*)

(104)—*Sch. I, art.* 1—*Account adjusted and balanced and signed as correct, if acknowledgment inadmissible unless stamped—Debt and account, Distinction between—Limitation.*—The plaintiff had various monetary dealings with the defendant from and after 28th August, 1905; the account up to the 1st of September, 1908, was adjusted and stated between them showing a balance of Rs. 45,039-9-3 due to plaintiff, below which "I accept this correct—E. and O. E." was written by plaintiff; the defendant signed below it without affixing an one anna stamp; the balance was carried forward, further debit entries were continued and on the date of filing the suit (6th July, 1911) Rs. 58,932-1-3 were due to the plaintiff from the defendant. The trial Judge regarded the debit balance on 1st September

Stamp Act (II of 1899)—*continued.*

1908 and the words and signature below it as acknowledgment of debt by the defendant within the meaning of Stamp Act (II of 1899), sch. I, art. 1, and held it to be inadmissible in evidence and disallowed the amount as being barred by limitation. On appeal, *held* by *Jenkins, C.J.*—That the signature of the defendant admitting the balance struck to be correct (errors and omissions excepted) was not an acknowledgment of debt within the meaning of sch. I, art. 1, of the Stamp Act, and that the plaintiff was entitled to a decree for the whole amount in suit. (15 C. 162, *F.*) *Woodroffe, J.*—That the entry of the 1st September, 1908, and the acknowledgment of same by defendant was only an admission by him of the correctness of the account, and did not require to be stamped to be admissible in evidence. J. C. GALSTAUN v. W. O. HUTCHNISON, **16 C.W.N 945=39 C. 789=15 Ind. Cas. 279.** (4 C. 885, 9 C. 127, 15 C. 162, *Discussed.*)

(105)—Sch. I, art. 1—*See* Nos. 24, 97, *supra* and Nos. 112, 113, *infra.*

(105 *a*)—*Sch. I, arts. 1 and 5 (b)—Entry in creditor's account book acknowledging debt and stipulating to pay interest — Memorandum of agreement chargeable with duty of 8 annas.*—*Held* (*Ormond, J., dissenting*) that an entry in a creditor's account book, signed by the debtor and containing an acknowledgment of a debt, with the words "at a premium of one anna and six pies above the two months *tavanai* interest" was more than a mere acknowledgment of a debt, as the particular words constituted a "stipulation to pay interest," and that the document was a "memorandum of an agreement," chargeable with a duty of 8 annas, under art. 5 (*b*), Sch. I of the Act. *In re* K. M. K. R. KUMARAPPA CHETTY, **4 L.B.R. 330, F.B.=14 Bur. L.R. 287.** (35 C. 111, 25 B. 373, *F.*; 27 A. 284, *Diss.*; 22 C. 757, *R.*)

(106)—*Art. 5—Document—Lease—Rent not reserved—Stamp.*—A document whereby no rent is reserved comes under the category of agreements not otherwise provided for and is properly stamped with a duty of eight annas, under the Indian Stamp Act, sch. I, art. 5. *In re* NARAYANADAS. **3 Bom. L.R. 401.**

(107)—*Art 5—Agreement to pay a sum of money with interest on demand—Promissory note.*—An instrument evidencing an agreement to pay a certain sum of money with interest on demand is a promissory note; and can be stamped with one anna stamp. REFERENCE UNDER STAMP ACT, S. 60, **4 Bom. L.R. 912.**

(108)—*Art. 5—Acknowledgment—Agreement—Stipulation to pay interest.*—An acknowledgment bearing a one anna stamp mentioned interest of a certain rate having been agreed upon but contained no express stipulation to pay: *Held* that the acknowledgment must be treated as an agreement, because the provision about interest had reference to the future and was not covered by the past acknowledgment. LAXUMIBAI v. GANESH, **2 Bom. L.R. 1132=25 B. 373.**

Stamp Act (II of 1899)—*continued.*

(109)—*Sch. I, art. 5, exception (a)—"Agreement for sale of goods," what is.*—An instrument, which acknowledges the receipt of a certain sum of money, and further, in consideration of this payment, agrees to sell paddy at the harvest time at a certain rate, is not an agreement "for, or relating to the sale of goods exclusively," and is not therefore exempt under cl. (*a*) of the exemptions to art. 5. So it should be stamped 8 as. under art. 5 (*b*). *Per Hartnoll, J*:—"Even supposing this instrument is an agreement for the sale of goods, it seems to be more than that and to be an acknowledgment of a debt." *In re* REVENUE STAMP CASE. NO. 19 OF 1909-10 OF THE COLLECTOR, PROME, **5 L.B.R 157, F.B.=5 Ind Cas. 986.** (15 M. 152, *R.*)

(110)—*Art. 5 (b)—Agreement for exchange of goods—Exchange—Goods—Stamp.*—An agreement, purporting to exchange cotton for cotton seeds received and not in exchange for a price, requires to be stamped with an eight annas stamp, under sch. I, art. 5 (*b*) of the Indian Stamp Act, 1899. SAMARATMAL v. GOVIND, **3 Bom. L.R. 384=25 B. 696.**

(111)—Sch. I, art. 5—*See* Nos. 23, 34, 36, 105-*a*, *supra.*

(112)—*Sch. I, art. 5, cl. (b) and art. 1 and s. 23*—Hatchitta *containing implied promise to pay interest whether acknowledgment of debt, or agreement or memorandum of agreement—Stamp duty.*—A *hatchitta* ran as follows:—"Account E. B. (the debtor). The year 1312, B.S. Interest on this amount at the rate of 1 anna per month per rupee." Then followed the credit and the debit entries. *Held* that there was an implied promise to pay interest, and the document ought to be stamped as an agreement or a memorandum of agreement with an eight-annas stamp, and not as an acknowledgment of a debt with a one-anna stamp only. ENATULLAH BISWAS v. GAJARUDDI BISWAS, **11 C.W.N. 1122.** (27 A. 84, *Diss.*; 25 B. 373, *F.*; 25 W.R. 361, 4 C. 835, *D.*)

(113)—*Sch. I, art. 5, cl. (b), art. 1 and s 23*—Halchitta, *containing stipulation to pay interest—Acknowledgment or agreement—Stamp-duty.*—*Held* that the document sued upon was not a mere acknowledgment of a debt, inasmuch as it contained a stipulation that the amount should bear interest at a certain rate, and should therefore have been stamped as an agreement or memorandum of agreement with a stamp of As. 8 under cl. (*b*) of art. 5 of sch I of the Stamp Act. MULCHAND LALA v. KASHIBULLAH BISWAS, **11 C.W.N. 1120=35 C. 111.** (25 B. 373, *Rel. on.*) [*F.*, 4 L.B.R. 330=14 Bur. L.R. 287.]

(114)—*Arts. 5, 34 (= Stamp Act I of 1879, sch. I, arts. 5, 28)—Indemnity note to Railway Company by consignee, stamp duty on.*—An indemnity note, passed by a consignee in respect of delivery to him of goods by a Railway Company, for which he was unable to produce the Railway receipt was *held* not to be an "indemnity bond" falling under art. 28 of the Stamp Act (1879), but

Stamp Act (II of 1899)—*continued.*

to be only an agreement under art. 5, and liable to a stamp duty of only eight annas. REFERENCE FROM CHIEF COMMISSIONER OF CENTRAL PROVINCES, **5 B. 478, F.B.** [*D.*, L.B.R 1893—1900, 119.]

(115)—Sch. I, arts. 5 and 43 and ss. 5,6 and 35—Contract notes, containing provisions for submission of disputes to arbitration, to be proved and stamped with duty of 8 annas—*See* ARBITRATION—MISCELLANEOUS. 13 C. W N. 63=1 Ind. Cas. 371.

(116)—Sch I, art. 6—*See* No. 25, *supra.*

(117)—Sch I, art. 13—*See* No. 22, *supra.*

(118)—*Sch I, art. 15—Relinquishment of a claim to immoveable property — Value over Rs. 100—Whether release—Necessity for registration—Hindu Law—Succession — Son living joint with father--Occupancy right possessed by father—Preferential right to succeed.*—A formal renunciation of a claim to immoveable property of the value of over Rs. 100 is a release which requires a five-rupee stamp, and requires registration whether the claim is legally valid or not. (95 P.R. 1894, 96 P.R. 1895, 30 B. 304, *R.*) Under the Hindu Law, a son who has remained joint with his father is his heir and succeeds to his separate or self-acquired property (*i.e.*, occupancy right, in preference to one who has separated. ATMARAM v. LALA, **7 N.L.R. 36.** (4 N L R. 9, *F.*)

(119)—*Art. 15—Lease — Agreement to pay for the balance of the previous year—Bond.*—The agreement in a lease to pay a certain thing on account of balance for the previous year amounts to a bond, and should be stamped as such under art. 15 of schedule of the Stamp Act, 1899. RAMCHANDRA v. DHONDHOO, **7 Bom. L R. 929.**

(120)—Sch. I, art. 15—*See* Nos 24 25, *supra.*

(121)—*Art. 18, ss 23, 24 (= Stamp Act I of 1879, art. 16, ss. 23, 24)—Certificate of sale, stamp duty on.*—A certificate of sale, granted to the purchaser of property sold by public auction subject to a mortgage, is chargeable with stamp duty not only on the purchase money paid but also in respect of the principal sum due on the mortgage, the arrears of interest due thereon not being included. SHA NAGINDAS JEYCHAND v. HALALKORE NATHWA GHEESLA, **5 B. 470, F.B.** [*Not F.*, 10 C. 92=13 C.L.R. 164, 7 M. 421, F.B.; *F.*, 15 B. 532; *R.*, 6 O.C. 76, 1 S.L. R. 44.]

(122)—*Arts 23, 24*—Havala—*Letter permitting a person to collect sum due to the writer—Conveyance.*—A *havala* or a letter authorizing a person to receive from a third party a sum of money due to its writer amounts to a conveyance and should be stamped as such. NANDUBAI v. GAU, **4 Bom. L.R. 951=27 B. 150.**

(123)—*Arts. 23, 55—Conveyance—Release.*—A document which is styled as a release (under art. 55, sch. I of the Stamp Act) under which the executant not only relinquishes his rights over a certain portion of his property but receives a specific sum of money for the bargain, is a conveyance and is chargeable as such under art. 23 of the Act. *In re* HIRALAL NAWALRAM, **10 Bom. L.R. 730=32 B. 509.**

(124)—*Art. 24—Civ. Pro. Code (Act XIV of 1882), ss. 141-A, 142-A—Account books—Extracts—Stamp.*—A copy of an extract from an entry in an account book, filed under the provisions of ss. 141-A and 142-A of the Civ. Pro. Code, does not require to be stamped under art. 24 of sch. I of the Stamp Act, 1899. KASTUR v. FAKIRIA, **4 Bom. L R 223=26 B. 522.**

(125)—Sch. I, art. 24—*See* No. 122, *supra.*

(126)—*Sch. I, art. 30 (a), s. 52 (a)—Stamp duty, exemption of, refund--Attorney—Advocate—Enrolment fee, exemption of*—One B, at the time of his enrolment as an Attorney of the High Court, paid Stamp duty of Rs. 250 under art. 27, sch. I of the Indian Stamp Act (I of 1879). He had not previously paid the duty of Rs. 250 for articles of clerkship, not having served his articles in India. Subsequently, at the time of his enrolment as an Advocate of the High Court, he, without objection, paid Stamp duty of Rs. 500, under Art. 30 (*a*), sch. I of the Stamp Act (II of 1899). Afterwards B claimed exemption from Stamp duty of Rs. 500 levied at the time of his enrolment as an Advocate and asked for a refund of this amount. *Held* (on a reference from the Board of Revenue, L.P.), that exemption could be claimed and allowed, and that the amount paid should be refunded. *In the matter of* R. A. BAXTER, **9 C.L J. 621=36 C. 645=2 Ind. Cas 843.**

(127)—*Art. 32 (a)—Mortgage deed—Further charge — Stamp.*—The mortgagors mortgaged their field with possession to the mortgagee for Rs. 180; and the deed of mortgage was engrossed on a stamp paper of Rs. 2. Subsequently the same mortgagors remortgaged the same field to the same mortgagee for Rs. 250, which consideration was made up of the said Rs. 100 and other debt of Rs. 70 due to the mortgagee. This deed bore a stamp of Re. 1 only: *Held*, that the second bond should be stamped as mortgage bond with possession for Rs. 250; since it was not intended to operate merely as a further charge under a still subsisting mortgage, but as a new mortgage for Rs. 250 in which the previous one merged. MEGHA v. AGARSING, **3 Bom. L.R. 42=25 B. 370.**

(128)—Sch. I, art. 34—*See* No. 114, *supra.*

(129)—Sch. I, art. 35—*See* No. 38, *supra.*

(130)—*Art. 39—Promissory note—Promise to pay at a certain place.*—A promissory note does not lose its character as such merely because it contains a promise to pay at a certain place. DEVA RATNA v. FAKIR ADAM, **4 Bom. L.R. 428.**

(131)—Sch. I, art. 40—*See* No. 39, *supra.*

(132)—Sch. I, art 43—*See* Nos. 34, 115, *supra.*

Stamp Act (II of 1899)—*continued.*

(133)—Sch. 1, art. 45—*See* Nos. 26, 94, *supra.*

(134)—*Art.* 47 (*d*)—*Insurance Policy—Provident Society*—Ad valorem *duty.*—A Provident Society issued the certificate of membership in the following terms:—"You have on condition of your conforming to the rules and regulations of this society from time to time in force, insured your life in the class of this society at the age of, etc." *Held*, that the certificate did not come under the Stamp Act, art. 17, but fell under the art. 47 (*d*), and was liable to pay *ad valorem* duty. *In re* HIMAT PROVIDENT SOCIETY, LD., **3 Bom. L R. 43=25 B. 376.**

(134-*a*)—Sch. I, art. 47-A—*See* No. 19, *supra.*

(135)—*Art.* 48—*Power of attorney—Instrument—Stamp.*—An instrument which authorizes a person to receive certain money and sign a receipt, but which does not empower him to do so in the name of the person executing the instrument, does not amount to a power of attorney. TRIBHOWAN v. PANDURANG, **3 Bom.L.R. 697.**

(136)—*Art.* 48 (*d*)—*Power of Attorney—Stamp.*—A power of attorney, which enables the agent to recover a judgment-debt due to his principal, but which, in prosecution of this object, authorizes the agent not only to take out execution of the decree already obtained; but also, if necessary, to institute a fresh suit against the judgment-debtor for the recovery of the debt, falls under cl. (*d*), art. 48, sch. I, Indian Stamp Act, 1899. *In re* GOPALRAO, **3 Bom. L.R. 890.**

(137)—Sch. I, art. 48—*See* Nos. 21, 27, *supra.*

(138)—*Sch.* I, *art.* 53, *Exemption* (*b*)—*Transfer from Provincial to Local Funds by adjustments in Collector's accounts—Receipts by Presidents of District Board—Stamp.*—Receipts granted by Presidents of District Boards for amounts transferred from Provincial to Local Funds by adjustments in the Collector's books of account are exempt from stamp duty as being receipts for payment of money without consideration within the meaning of art. 53, Stamp Act, exemption (*b*). *In re* SECRETARY TO THE COMMISSIONER OF SALT, MADRAS, **9 Ind. Cas. 342, F.B.=9 M.L.T. 355.**

(139)—*Sch.* I, *art.* 52 (*c*)—*Stamp—Receipt for rent—Receipt for money paid out of Court in satisfaction of a decree for rent.*—Although a receipt for rent of an agricultural holding is exempt from payment of stamp under art. 53(*c*) of the Act, a receipt for payment out of Court of money due under a decree for such rent is not so exempt. EMPEROR v. DUNGAR, **A.W.N. 1908, 272=5 A.L.J. 747.**

(140)—Sch. I, art. 53—*See* Nos. 28, 29, *supra.*

(141)—*Sch.* I, *art.* 55—*Release — Document by* benami *purchaser at Court sale renouncing his claims in favour of true purchaser—Stamp.*—Where a document was executed by a certified purchaser of property sold in execution of a decree, renouncing all claims he may have or be supposed to have in respect of the property, in favour of the person who it was alleged was the true purchaser, *held*, it was a release within the meaning of art. 55, of the Act and was liable to be stamped accordingly. REFERENCE UNDER S. 57 OF ACT II OF 1899, **24 A. 372, F.B.=A W.N. 1902, 71.**

(142)—*Art.* 55—*Release—Gift—Relinquishment by a reversioner.*—A deed evidencing relinquishment of his claim by the reversioner is a release and must be stamped accordingly. KRISHNAJI NARAIN HARDIKAR v. BALAKRISHNA VENKATESH PHADKE, **11 Bom. L. R. 735=33 B. 657=8 Ind. Cas. 772.**

(143)—Sch. I, art. 55—*See* No. 123, *supra.*

(144)—Sch. I, art. 55—*See* Nos. 39, 65, *supra.*

(145)—*Art.* 58 (*a*)—*Deed of settlement—Stamp.*—A deed of settlement remains a deed of settlement within the meaning of art. 58-A (as modified by Act XV of 1904), although it records, by way of declaration or otherwise, the terms of a disposition, not made in writing, at a date anterior to the passing of the Act XV of 1904. *In re* MANSUKHRAM, **7 Bom.L R. 931.**

(145-*a*) — Sch. I, art. 58-A — *See* No. 30, *supra.*

(146)—Sch.I, art. 62—*See* Nos. 25, 66, *supra.*

(147)—Sch. I, art. 63—*See* No. 64, *supra.*

Stamp Duty.

See COURT FEES.

See COURT FEES ACT, 1870.

See STAMP ACTS.

See VALUATION OF APPEAL.

See VALUATION OF SUIT.

(1)—*S.*10, *cl* 2, *Court Fees Act* (*VII of* 1870), *s.* 10, *cl.* 2, *scope and effect of.*—S. 10, cl. 2 of the Court Fees Act, is not imperative, so as to compel the Chief Court to dismiss a suit after decree, when the default in payment of stamps (which a plaintiff-respondent to an appeal has been ordered to pay) is not wilful, the object of the section being to protect the revenue and not to impose penalties. MAJLIS v. MUNNA SINGH, **84 P.R. 1876.**

(2)—*Court-Fees Act* (VII *of* 1870), *s.* 27—*Stamp duty—Rules of Local Government—Numter of stamps.*—Under s. 27 of Act VII of 1870, the Local Government may, from time to time, make rules for regulating the supply and the number of stamps to be used under the Act. *Held* that a petition of regular appeal bearing 19 bi-color stamps of the value of Rs. 465 was sufficiently stamped according to the rules made by the Local Government. HURO MONEE v. KRISTO INDRO SHAHA, **17 W.R. 220.**

(3)—*Document executed in England and in India—Stamp duty.*—An agreement executed

Stamp Duty—*continued.*

in England, though it bears an English stamp, if it is executed again in India, has to be stamped again under the Indian stamp law. OAKES AND CO. v. JACKSON, **1 M. 134.**

(4)—*Court Fees Act* (VII *of* 1870), *s.* 7, *cl. V—Claim for portion of holding—Stamp fee.*—As there is no provision in the Court Fees Act for the value of a fractional part of a holding recorded in the Collector's register as separately assessed with land revenue being calculated on the land revenue, the stamp fee leviable when a claim is made for portion of a holding must be calculated on the market value of the land under s. 7, cl. V (*d*). HAIDAR ALI v. SONDHA, **102 P R. 1880.** [*F.*, 6 P.R. 1883.]

(5)—*Act* VIII *of* 1865, *ss.* 35, 40, *certificates of sale issued under—No stamp duty.*—Certificates of sale issued under ss. 35, 40 of Act VIII of 1865 cannot be regarded as conveyances subject to stamp duty. CASE REFERRED BY THE BOARD OF REVENUE, NO. 2 OF 1875, **8 M.H.C. 112.**

(6)—*Stamp Act* XXXVI *of* 1860, *sch. A—Security bond to Abkari renter — Exemption from stamp duty.*—A security bond executed by a third party to an Abkari renter was not exempt from stamp duty. RAMASWAMI CHETTI v. PAPPA REDDI, **1 M.H.C. 190.**

(7)—*Mistake in stamp duty—Rectification.*—A mistake in stamp duty can, in some cases, be rectified, but this is a qualified privilege; and this cannot be done where the relief to be granted is altogether distinct from that originally sought. In such a case additional stamp should not be allowed to be put on the plaint. CHOKALINGAPESHANA NAICKER v. ACHIYAR, **1 M. 40.** [*F.*, 8 M. 516, 15 M. 15; *Appl.*, 3 B. 230; *D.*, 2 A. 63, 4 M. 131, 14 B. 395, 17 B. 56.]

(8)—*Document—Sufficiency of stamp — Admissibility in evidence*—In determining whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence, you must look at the document itself as it stands, and not at any collateral circumstances which may be shown in evidence. RAMEN CHETTY v. MAHOMED GHOUSE, **16 C. 432.** (5 B.L.R. 103, *R.*) [*F.*, 27 B. 279; *R.*, L.B.R. 1893—1900, 119, 24 M. 259.]

(9)—*Unstamped document—Penalty not paid—Dismissal of suit.*—If a plaintiff declines to pay the stamp duty and penalty on an unstamped document, the Court should not dismiss the suit but should enquire into the merits on the rest of the evidence produced in the case. BISSUMBHUR DOSS v. BOISTUB CHURN DOSS, **W R. 1864, 321.**

(10)—*Written statement—Set-off—Plaint.*—A written statement containing a claim of set-off must be regarded as a plaint in regard to such set-off, and should be stamped accordingly. CHENAPPA v. RAGHUNATHA, **15 M. 29=1 M. L.J. 598.**

(11)—*Declaratory decree—Consequential relief—Appeal—Court-fees.*—*Ad valorem* stamp duty

Stamp Duty—*continued.*

is payable on an appeal from a declaratory decree giving consequential relief. A. B. MILLER v. AKHOOREE RAM, **15 W.R. 412.**

(12)—*Court Fees Act—Stamp on double probate.*—No stamp duty is payable on a double probate, that is, a probate to each of the executors, which recites, and in fact, proceeds upon the first, where leave was reserved for the second executor to take out probate when the first probate was granted. *In the goods of* BIBEE AMEERUN, **15 W R. 496.**

(13)—*Document containing request to borrow on certain conditions—Promissory Note—Proposal—Contract Act* (IX *of* 1872), *s.* 4—*Stamp duty.*—Where a document contains a request to borrow a certain sum of money on certain conditions, it is not an unconditional undertaking to pay, but constitutes only a proposal under s. 4 of the Indian Contract Act (IX of 1872). Not being a promissory note, it is not liable to stamp duty. DHONDBHAT NARHARBHAT v. V. ATMARAM MORESHWAR, **13 B. 669.** [*F.*, 7 M.L.J. 220=23 M. 156, 14 M.L.J. 65=27 M. 1; *D.*, 16 M. 283.]

(14)—*Agreement—Unstamped hundi—Admissibility.*—A was the tenant of a village under B. C was the agent and manager of B. A was in arrears of rent and drew a properly stamped hundi on his brother D for Rs. 1,000 in favour of C or his order, and there was an engagement in the hundi on the part of the drawer to deliver over to the drawee an equivalent of grain, and it was added that C would issue orders to the above effect. D on receipt of this hundi drew upon its back another hundi upon his mother-in-law in the following terms, "on demand please pay to C or to his order the within mentioned amount for grain to be supplied me by A on the order of the said C." This was signed by the drawee and beneath his signature appeared that of C. This hundi was unstamped. The amount was paid to C, but the equivalent in grain was not surrendered to D. In a suit by D against C, B, and A, where D alleged that C entered upon a binding engagement with him to deliver or permit the delivery of grain of the value of Rs. 1,000, and that he failed to fulfil his engagement, and that D was therefore entitled to damages, *held* that the latter hundi was not admissible in evidence as it was unstamped and that there was no evidence of any agreement like the one relied on by D. MAHOMED RAHAMUTTULLA SAHIB GARU v. J. T. WARD, **5 M.H.C. 391.**

(15)—*Bank memorandum intimating receipt of money—Stamp duty.*—A Bank memorandum purporting to intimate that money remitted by one person had been credited to the account of another, is not chargeable with any stamp duty, if the money is paid otherwise than "in satisfaction of a debt," or if the document cannot operate as a 'receipt or discharge' because it is not given to the party who paid the money. *In re* ACT XVIII OF 1869 AND OF THE UNCOVENANTED SERVICE BANK, LIMITED, **4 C. 829=3 C.L.R. 597.** [*R.*, 2 L.B.R. 307.]

Stamp Duty—*continued.*

(16)—*Civ. Pro. Code*, 1882, *s.* 316—*Application for sale certificate by auction-purchaser—Stamp duty.*—As s. 316 of the Civ. Pro. Code, 1882, does not require even a written application from an auction-purchaser for a certificate of sale, such application need not bear any stamp. HIRA AMBAIDAS v. TECKCHAND AMBAIDAS, **13 B. 670.**

(17)—*Certificate of sale—Property sold subject to mortgage—Stamp duty leviable on purchase money.*—In the case of a certificate of sale granted by a Civil Court in respect of property declared to be incumbered with a mortgage lien, the amount of the purchase money *plus* the amount of the mortgage due on the property should be *held* to be the consideration in respect of which the stamp duty should be levied. MEER KAISUR KHAN MURAD KHAN v. EBRAHIM KHAN MUSA KHAN, **15 B. 532, F.B.** (5 B. 470, *F.*; 9 B. 47, P.J. for 1884, p 260, *R.*)

(18)—*Stamp—Penalty—Obligor if liable to pay amount paid by obligee.*—Where both the obligor and obligee united in endeavouring to evade the law which prescribes the use of a stamp in the execution of a bond, the passing of a decree against the obligor for the amount of stamp penalty paid into Court by the obligee was contrary to the policy of law which governed such questions. GARUDA REDDI v. GUDI JANAKAYYA GARU, **1 M.H.C. 124.**

(19)—*Appeal to Privy Council—Security for costs—Mortgage-deed executed to secure, chargeable with* ad valorem *stamp—Act* X *of* 1862, *sch.* A.—*Act* XXVI *of* 1867, *sch.* B, *not applicable.*—An instrument of mortgage tendered by a party as security for costs of the appeal presented by him for transmission to the Judicial Committee of the Privy Council should bear an *ad valorem* stamp under sch. A of Act X of 1862. The instrument is one required by the Chief Court in pursuance of the rules made by the Judicial Committee and not merely in conformity with the Civ. Pro. Code, and consequently, the words in art. 1 of sch. B of Act XXVI of 1867 can have no application where the Court acting ministerially on behalf of the Privy Council receives an obligation; and a stamp of 8 As. under that article would not be sufficient for such an instrument. MAHOMED RUFFEE v. SECRETARY OF STATE FOR INDIA IN COUNCIL, **63 P.R. 1869.**

(20)—*Suit for the amount of stamp duty and penalty—Stamp Act*, 1879, *s.* 41—*Costs—Civ. Pro. Code, s.* 13.—A fresh suit is maintainable for the recovery of the amount of stamp duty and penalty paid by plaintiff in his suit against the defendant on an instrument not duly stamped, executed by the latter who was bound to bear the expense of providing the proper stamp. S. 41 of the Stamp Act does not prohibit such a suit, and ss. 13 and 43 of the Civ. Pro. Code have obviously no application, nor can stamp duty and penalty be regarded

Stamp Duty—*continued.*

as strictly within the designation of costs. ISHAR DAS v. MASUD KHAN, **6 A. 70=A.W. N. 1883. 211.**

(21)—*Court Fees Act*, VII *of* 1870, *s.* 7, *para.* 5, *applicability of—Commissioner, order of, whether final—Sale deed conveying no specific land—Suit for possession by purchaser—Valuation—Stamp.*—Where the question was not merely one relating to valuation for the purpose of determining the amount of fee chargeable, but whether a particular article of para. 5 of s. 7 of the Court Fees Act applied to a suit, *held* that the order of the Commissioner on such question was appealable as such order is not final under s. 12, cl. 1. (42 P. R. 1874, *Rel. on.*) In a suit by a purchaser for possession of a certain portion of land in a joint khata under a sale-deed which conveyed to him no specific land, the value of the land for possession of which he sues, must be deemed to be five times the revenue payable upon the whole khata, for the purpose of the Court Fees Act; and unless his plaint bears stamps on that amount, it is liable to be rejected. GANDA MAL v. MUSSAMMAT MAHTABO, **67 P.R. 1878.**

(22)—*Court Fees Act—Application for return of document—Witness—Stamp.*—There is nothing in the Court Fees Act which makes an application by a witness for the return of a document produced by him in obedience to a summons and filed with the records of a case, chargeable with stamp-duty. ANONYMOUS, **115 W.R. 237.**

Applications for new trials in Small Cause Courts—Stamp duty. **Cir. No. 32, dated the 19th December 1865, 4 W.R. Civ. Cir. Orders, p. 7.**

Return called for of original suits disposed of, and of stamp duty levied on their institution during March 1865. **Cir. No. 34, dated the 23rd December 1865, 4 W.R. Civ. Cir. Orders, p. 8.**

Explanation of Circular No. 34 of 1865, calling for return of original suits disposed of, and of stamp duty levied on their institution during March 1865. **Cir. No 7, dated the 7th March 1866, 5 W.R. Civ. Cir. Orders, p. 3.**

Calling for information regarding amount of stamp duty levied on institution of suits and total costs of suits **Cir. No. 10, dated the 23rd March 1866, 5 W. R. Civ. Cir. Orders, p. 4.**

This circular deals with explanation of Circular No. 10, regarding amount of stamp duty levied in institution of suits and total costs of suits, and further calls for the statements therein required. **Cir. No. 20, dated the 16th May 1866, 5 W.R. Civ. Cir. Orders, p. 10.**

This circular lays down a revised form of register of stamp duties levied under sch. B, s. 6, Act XXVI of 1867. **Cir. No. 30, dated the 16th September 1867, 8 W.R. Civ. Cir. Orders, p. 8.**

Stamp Duty—*concluded.*

Rule regarding the levy of stamp duty on depositions and documentary exhibits in cases. **Rev. Cir. No. 4, 21 W.R. Rev. Civ , p. 13.**

See APPELLATE COURT — POWERS OF APPELLATE COURT, 15 M. 29=1 M.L.J. 598.

Admissibility of document subject to payment of stamp duty—Finality of decision of Court of First Instance—*See* APPELLATE COURT—REJECTION OR ADMISSION OF EVIDENCE, 2 M H C. 321.

See APPELLATE COURT—REJECTION OR ADMISSION OF EVIDENCE, 3 C.L R. 79.

See CONTRACT—BREACH OF CONTRACT, 6 W.R 49.

Recital of sale—Conveyance—Stamp duty—*See* CONVEYANCE, 23 C. 283.

See COSTS—SPECIAL CASES, 3 Agra Rev. 5.

Bona fide mistake of vakil—Extension of time—Payment of deficient stamp duty—*See* LEGAL PRACTITIONERS— PLEADER—MISCELLANEOUS, 9 M.L.J. 348.

See MORTGAGE—REDEMPTION, 1 L.B.R. 96.

See SPECIAL OR SECOND APPEAL—ERRORS OF LAW OR PROCEDURE, 5 M.H.C. 330.

Stamp Duty, Refund of.

(1)—*Court fees—Review—No final disposal—Refund of stamp duty.*—Where an application in the nature of a review was not finally disposed of, there was nothing to prevent the Court from ordering refund of the stamp duty paid therefor. PROSUNNO CHUNDER ROY CHOWDHRY v. NOBO KRISTO CHATTERJEE, **18 W R. 434.** [*D.*, 20 W.R. 106= 11 B.L.R. 370.]

(2)—*Stamp duty—Refund of excess— Power of High Court—Power of Government — Court Fees Act* VII *of* 1870.—The High Court has no power to issue a certificate authorizing the Collector to refund excess stamp duty paid in by a suitor by reason of over-valuation of his suit on the part of the Civil Court. The Government, however, may order such refund, notwithstanding the absence of any special provision in the law authorizing them to do so. *In the matter of the petition of* MOULVIE SYUD ZOYNOODDEEN HOSSEIN KHAN, **11 B.L.R. 370=20 W.R. 106.**

(3)—*Stamp duty on appeal, refund of, on compromise.*—Where an appeal filed in the Sudder Court was compromised before a Bench of that Court in the presence of both the parties, before the appeal was entered in the cause list hung up in the Court room, the appellant was held entitled to refund of the full value of the stamp used for the petition of appeal. *In the matter of* GUJENDRO NARAIN ROY, **11 W.R. 188.**

(4)—*Termination of suit on adjustment of claim—Right of plaintiff to refund of stamp*

Stamp Duty, Refund of—*continued.*

duty—Rules under s. 26 *of Act* X *of* 1862 *modifying s.* 98 *of Act* VIII *of* 1859.—A refund of half the stamp-duty paid on the plaint should be allowed to the plaintiff, where an agreement by way of adjustment made between the parties has brought the proceedings before the Court to an end in such a way that no decree can issue in continuation of what has passed in Court, and the adjustment has taken place by the acts of the defendants and not by the withdrawal of the suits *ex parte*; and the circumstances are such that no decree can be obtained relating to the matter without a fresh suit between the parties upon the agreement. SOWDAGUR SING v. PIR BUKSH, **47 P.R. 1869.**

(5)—*Appeal—Compromise—Refund of stamp duty.*—Where an appealed suit is compromised pending the hearing, the appellant will not be entitled to a refund of stamp duty. THE LAND MORTGAGE BANK OF INDIA (CREDIT FONCIER INDIAN), LIMITED v. GREGORY PAUL MEHTUS, **4 B. L.R. App. 96.**

(6)—*Appeal withdrawn—Consent of parties—Refund of stamp duty.*—An appellant is not entitled to a refund of stamp duty in an appeal withdrawn by consent of parties. *In the matter of the petition of* ABDOOL HAMED CHOWDHRY, **4 B L.R. App. 96, Note.** [*F.*, 4 B.L R. App. 96.]

(7)—*Stamp duty—Adjustment of suit in Court of Small Causes—Application by plaintiff for refund of stamp duty.*—Where the plaintiff in a Court of Small Causes applied for a refund of the stamp duty paid by him on the ground that the suit had been adjusted out of Court, it was necessary for him to bring himself strictly within the latter part of s. 98 of Act VIII of 1859 as modified by s. 26 of Act X of 1862. ANONYMOUS OR TIRUMANI CHETTI v. AVADAI VALAN, **1 M.H.C. 127.**

(8)—*Remand—Stamp duty — Refund—Appeal—Costs.*—The stamp duty on a petition of appeal is refundable in a case remanded. A party succeeding in an appeal on some preliminary points is entitled to costs irrespective of the result of the ultimate decision. MASSEYK v. JUGABHANDHOO DUTT, **1 W.R. Mis. 12.**

(9)—*Examination of stamps—Responsibility of Registrar of High Court—Application for refund of stamp duty — Oral application—Mukhtear may apply for refund — Partial remand.*—The registrar of a High Court should undertake the duty of, or responsible for, the examination of stamps; it is a fiscal duty more properly belonging to a Revenue Officer of Government. An application for refund of stamp duty need not be in writing at all. A mooktear, if duly authorized, may apply for refund of stamp duty. Where an appeal was presented to the High Court in respect of property not exceeding Rs. 3,000 in value under the Stamp law then in force, and the stamp duty on such appeal was Rs. 100, and it appeared that the result of the appeal was a remand in respect to a portion of the property involved in

Stamp Duty, Refund of—*concluded.*

the suit of which the value was Rs. 1,756, it was held that, as the appellant was successful in his appeal in respect of property representing a value which must, of itself, have required a stamp of Rs. 100, and as that portion of the appeal on which he failed did not necessitate the payment of any further stamp duty, it was unnecessary to charge the appellant with any stamp duty in respect of the portion of his claim as to which he failed, but which did not involve payment of additional stamp duty. BHIKOO MOOLA v. RASH MONEE DOSSEE, **9 W.R. 357.**

This circular forwards new form of certificate for refund of stamp duty. **Cir. No. 28, dated the 13th September 1867, 8 W.R. Civ. Cir. Orders, p. 7.**

This circular deals with the amount of stamp duty refunded under note (*f*), art. 12, sch B, Act X of 1862. **Cir. No. 12, dated the 23rd March 1866, 5 W.R. Civ. Cir. Orders, p. 5.**

See COMPROMISE—COMPROMISE OF SUITS UNDER CIV. PRO. CODE, 12 W.R. 376.

Compromise of suit on day for defendants' appearance—*See* COMPROMISE—COMPROMISE OF SUITS IN CIV. PRO. CODE, Marsh. 274 = 2 Hay 213.

See COURT FEES ACT, 1870, s. 15, 11 B.L.R. 372, Note.

Right of Government to stamp fees—*See* LIMITATION ACT, 1908, arts. 149, 182, 2 B.L.R. App. 22 = 11 W.R. O.C. 67.

Refund—*See* REMAND, B.L.R. Sup. Vol. 511 = 6 W.R. Mis. 65.

Stamp Fraud.

This circular deals with the evasion of stamp law by money-lenders—Promissory notes. **25 W.R H.C. Rules, Cir. Order No. 9, dated 12th May 1876, p. 11.**

This circular deals with the responsibility of serishtadars as regards stamp frauds. **Rev. Cir. No. 4, 25 W.R. Rev. Cir., p. 8.**

This circular deals with the fraudulent use of postage stamps. **Rev. Cir. No. 2, 25 W.R. Rev. Cir., p. 30.**

Stamp Law.

(1)—*Unstamped bond—Intention to evade stamp laws—Evidence—Construction.*—Where a bond contained a stipulation to the effect that, as the obligors were urgently in want of money and unable to procure a stamp, they executed the bond on plain paper, agreeing to make good any penalty the obligees might have to pay in suing them to enforce the obligation, *held* that this was not in point of law an agreement to evade the stamp laws, though, as a matter of fact, an intention to evade the stamp laws might have been inferred. SASHI BHUSAN BANERJEE v. TARCHAND KAR, **3 B.L.R. A.C. 329 = 11 W.R. 553.**

Stamp Law—*concluded.*

This circular states that the working of the Stamp law is to be watched. **Cir. No. 19, dated the 8th July 1867, 8 W.R. Civ. Cir. Orders, p. 1.**

This circular cancels Civil Circular Order No. 20 of 1847 as inconsistent with existing Stamp law and a recent ruling of the High Court cited. **Cir. No. 24, dated the 7th August 1867, 8 W.R. Civ. Cir. Orders, p. 5.**

Stamp Vendor.

(1)—*Omission of stamp vendor to endorse particulars.*—The omission of a stamp vendor to endorse on a stamped paper the particulars required of him does not make the document not duly stamped within s.3 (10) of Stamp Act, 1879. REFERENCE UNDER THE STAMP ACT, s. 46, **11 M. 377, F.B.**

Standard Pole.

Of measurement—Jurisdiction of Collector—*See* MEASUREMENT OF LANDS, 6 B.L.R. 1, F.B. = 14 W.R. F.B. 5

Standing Crops.

(1)—*Standing crops—Immoveable property.*—Standing crops have repeatedly been held to be immoveable property and not moveable property. So long as the crops are on the ground, they must be regarded as immoveable property. When these are severed from the land they become moveable property. SURAT LALL MONDAL v. UMAR HAJI, **22 C. 877.**

(2)—*Standing crops—Limitation Act—Definitions in Registration Acts.*—Standing crops are not moveable property within the meaning of the Limitation Act. (3 B.L.R. 509, 510, 24 W.R. 294. *F.*; 3 C. 331, *R.*) The definitions in the Registration Acts are expressly given for the purposes of those Acts and ought not to govern the decision of questions raised under other Acts. PANDAH GAZI v. JENNUDDI, **4 C. 665 = 2 C.L.R. 526.**

See BOM. ACT XVII OF 1879, s.22, 6 B. 592.

See U. P. ACT XII OF 1881, ss. 42, 95, 206, 24 A. 517 = A.W.N. 1902, 50.

See ATTACHMENT—SUBJECTS OF ATTACHMENT, 11 M. 193.

Small Cause Courts, whether could attach and sell standing crops—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 14 A. 30 = A.W.N. 1891, 174.

Customs as regards, and trees on land—*See* CIV. PRO. CODE, 1908, ss. 11, 14, O. II, r. 2, s. 47, U.B.R. 1897 = 1901, Vol. II, 213.

Claim to—Right of successful claimant—*See* CLAIM, 8 Ind. Cas. 77.

Mortgage — Decree — Suit by decree-holder against purchaser for value of standing crops—*See* EMBLEMENTS, DOCTRINE OF, 13 M. 15.

See LANDLORD AND TENANT—EJECTMENT, 5 C. 135.

Standing Crops—*concluded.*

Are immoveable property within the meaning of the Limitation Act—*See* LIMITATION ACT, 1908, arts. 2, 29, 36, 9 C.W.N. 376=32 C. 459.

Assignment of bond hypothecating crops valid without registration *See* REGISTRATION ACT, 1908, s. 17, 10 A. 20=A.W.N. 1887, 270.

Execution sale of mortgaged property—Right to standing crops—*See* SALE—SALE IN EXECUTION OF DECREE—GENERAL, 2 B. 670.

Suits to establish right to—on basis of title to land not cognisable by Provincial Small Cause Court—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 21 C. 430.

Suit for declaration of title—Declaratory decree—*See* SPECIFIC RELIEF ACT, 1877, s. 42, Proviso, L.B.R. (1903—1904), Vol. II, 124.

Standing Orders of Board of Revenue, Madras.

S. O. No. 15, rr. 4, 5, 7, 11, 13 & 14—*See* DARKHAST RULES, 1 M.L.T. 278=29 M. 461; APPEAL THEREON DISMISSED, 2 M.L.T. 141 =30 M. 270.

Standing Timber.

(1)—*Standing timber-Immoveable property.*—For the purposes of the Mofussil Small Cause Courts Act, standing timber must be classed as immoveable property. UMED RAM v. DAULAT RAM, **5 A. 564, F.B.=A. W. N. 1883, 148.** [*F.*, 11 M. 193; *R.*, 10 A. 159.]

See REGISTRATION ACT, 1908, ss. 2 and 17, 5 M. L.J. 253.

See BUR. REG. II OF 1897, s. 3, U. B. R. (1902-1903), Vol. II. Civil, UPPER BURMA REGISTRATION REGULATION, p. 1.

If immoveable property—*See* LIMITATION ACT, 1908, art. 132, A W. N. 1887, 59.

Stani.

Position and powers of—Waste—Destruction of inheritance—*See* MALABAR LAW—GENERAL, 7 M.L.J. 317.

Stanom.

Suit for declaration of right to a—Maintainability—*See* DECLARATORY DECREE, SUIT FOR—MISCELLANEOUS, 1 M.W.N. 1911, 353.

Stare Decisis.

(1)—*Applicability of the maxim.*—The principle of *stare decisis* is of undoubted value in its bearing on the law of the property. KASHIRAM v. PANDU, **4 Bom. L. R. 688.** MANILAL v. VANMALIDAS, **7 Bom. L.R. 644.**

(2)—*Rule of.*—Stare decisis is a salutary rule, and where injustice is not effected by following rule of law laid down many years ago, and consistently adhered to, it is obviously inexpedient to vary that rule. ABDUL RAZAK v. MUHAMMAD IBRAHIM, **14 P.L.R. 1903.**

Stare Decisis—*concluded.*

(3)—*Principle of.*—The doctrine that 'where there is a long course of decisions, they ought not to be reversed and the law thus altered' should not be applied where the series of decisions had varied from time to time in the grounds upon which they were based. RAJA RAO VENKATA SURYA MAHIPATI RAMA KRISHNA RAO BAHADUR v. THE COURT OF WARDS, **22 M. 383=3 C.W.N. 413, P. C.=26 I. A. 83=9 M. L. J. Supt. p. 1=1 Bom. L. R. 277=7 Sar. 481.**

(4)—*Judgment of single Judge—How far binding on another single Judge.*—A Judge sitting on the original side of the High Court is ordinarily bound to follow the judgment of another Judge when the latter has decided a question of law, or laid down certain principles of practice or procedure, or judicially construed any provision of law prevailing in the country; but the former is not bound to follow the latter's findings of facts based on the evidence recorded by him, when the evidence that may be available before the Judge in a later case may be fuller and more reliable and may tend to lead him to a different conclusion. JAMSHED v. SOONABAI, **10 Bom. L. R. 417=32 B. 122.**

Rule of stare decisis—Applicability to Hindu law—*See.* HINDU LAW—ADOPTION, 17 A. 294, F.B.=A. W. N. 1895, 167.

State.

See GOVERNMENT.

Right of—To waste lands—Presumption of ownership of Government—*See* FOREST LANDS, 15 M.L.J. 147=28 M. 257.

State Land.

(1)—*Question as to land being state land.*—Questions as to land being State land or private should not be raised when they are unnecessary for the decision of claims as between the parties themselves. MAUNG AUNG BYI v. MAUNG YAN BYO, **U.B.R. 1892—1896, Vol. II, 634.** [*R.*, U.B.R. 1902—1903, II, C.P.C. 1.]

See CIV. PRO. CODE, 1908, s. 9, U.B.R. (1897-1901), Vol. II, 209, 211.

See EVIDENCE ACT, 1872, s. 116, L.B.R. 1893—1900, 651.

Attachment of produce of—Duty of Court. *See* EXECUTION OF DECREE-MODE OF EXECUTION. U.B.R. 1908, 3rd Qr., Land and Rev. Reg. 1.

Statement in Previous Suit.

Statement in previous suit — Estoppel.—The statement of a person in a previous suit that he and another were the descendants of a common grandfather and that he intended to admit the other to a share in the property might estop him under s. 115 of the Evidence Act from asserting that the other was not the descendant of a common grandfather, which was a matter of fact; but the bare statement of his intention to give that other a share in

Statement in Previous Suit—*concluded.*

the estate did not *per se* create a title to a share, though it might give rise to the inference that he knew or believed the other to be entitled to a share, and such statement as to intention availed nothing unless it amounted to a contract. DULA SINGH v. KISHAN SINGH, **86 P R. 1876.**

Statements of Objects and Reasons.

See STATUTES, CONSTRUCTION OF, 5 A. 121, F.B. = A.WN. 1882, 128, 14 A. 145 = A.W.N. 1892, 6, 10 C. 166, F.B. = 13 C.L.R. 342.

Stationery.

This circular enquires whether Judges are restricted to any particular monthly sum for the purchase of stationery, &c., and if such sum is sufficient. **Civ. Cir No. 9 dated 1st September 1869, 12 W.R. Civ. Cir. 7.**

This circular directs that charges for binding books are to be met from allowance for stationery, and not to from an item in contingent bill. **Cir. No. 3 dated 26 March, 1868, 9 W.R. Civ. Cir. 3.**

Stationery Accounts.

This circular deals with the expenditure on account of stationery in 1864 and 1865 by each Sudder Ameen in his double capacity of Sudder Ameen and Sudder Moonsiff. **Cir. No. 47, dated the 5th December 1866, 6 W.R. Civ. Cir. Order, p. 13.**

Stationery Superintendent.

This circular directs that all future applications for printed or lithographed forms are to be made to the Superintendent of Stationery. **Civ. Cir. No. 16 dated 17th June 1870, 14 W. R. Civ. Cir. 1.**

This circular draws attention to circular of June 1870 directing that applications for forms should be made to Superintendent of Stationery. **Civ. Cir. Memo. No. 13 of 13th May 1874, 21 W.R.H.C. Rules & Crs. 27.**

This circular deals with the corrigendum to be made in letter to Superintendent of Stationery circulated with Cir. Memo. No. 7, dated 17th December 1870. **Civ. Cir. Memo No. 17, dated 11th January 1871, 15 W.R. Civ. Cir. 2.**

Status.

Question of status—*Res judicata.*—*See* EVIDENCE ACT, 1872, ss. 41, 110, U.B.R. 1910, 4th Qr., 61.

Statute 8, Anne, C. 14.

Applicability to India.—The Statute 8, Anne, C. 14, does not apply to this country (*Per Peacock, C.J.*). It does not apply to a case in which a claimant is seeking to enforce the payment of her rent from another creditor for rent, even if it would, where the claim was against an ordinary execution-creditor. S. M. PADAMANI DASI v. JAGADAMBA DASI, **3 B.L R. O. C. 56.**

Statute 29, Car. II, C. 3 (Statute of Frauds.)

(1)—*Statute of Frauds* (29 *Car.* II, *c.* 3)—*Hindu and Mahomedan defendants.*—Where a contract is proved to have been entered into, but no memorandum thereof in writing has been signed by the parties, a Hindu defendant is not entitled to plead the Statute of Frauds, that statute not being applicable to Hindu and Mahomedan defendants. BORRODAILE v. CHAINSOOK BUXYRAM, **1 Ind. Jur, O.S., 70 = 1 Hyde, 51.**

(2)—*Statute of Frauds* (29 *Car.* II, *c.* 3)—*Application of, to the High Court, Original Civil Side.*—*Quaere*—Does the Statute of frauds form any part of the procedure of the High Court in its original jurisdiction? RAM SAGUR DUTT v. NOBO GOPAL MOOKERJEE, **Bourke, O.C., 367.**

(3)—*See* GUARANTEE, 5 B L R 639.

(4)—Statute of Frauds, applicability of, in the case of Parsis—Resulting trust under will, necessity of taking probate—*See* PARSIS, 6 B. 363.

(5)—Applicability to India—*See* TRUSTS, 11 Bom. L. R 85 = 5 M. L. T. 301 = 33 B. 509 = 2 Ind. Cas. 701.

(6)—*S.* 4—*Applicability to British born subjects.*—S. 4 of the Statute of Frauds applied not only to cases in which both parties were European British subjects, but also to cases in which the defendant alone was such. So, where in a suit on a covenant to pay, the defendant alone was a British-born subject, it was necessary that the contract sued upon should have been in writing. MUTTIYA PILLAI v. WESTERN, **1 M. H. C. 27.** [*R.*, 14 W. R. 305.]

(7)—*S.* 4—*Muhammadan law—Procedure.*—It may be laid down as a general proposition that the Statute of Frauds is in force in the island of Bombay. But the provisions of s. 4 of the Statute are not applicable in Bombay in suits between Muhammadans, or in which the defendant is a Muhammadan. MANIKJI MEHERVANJI v RAHIMTULLA ALUBHAI, **1 B. H. C. App. 1.** [*R.*, 14 W. R. 305.]

(8)—*S.* 4—*Hindu defendant.*—The 4th section of the Statute of Frauds does not apply to suits in which the defendant is a Hindu. NEKRAM JEMADAR v. ISWARIPRASAD PACHURI, **5 B. L.R. 643 = 14 W R. 305,** (9 M.I.A. 426, 1 M.H. C. 27; 1 Hyde 63, 1 L.H.C., 2nd Ed., App 1, *R.*)

Statute 29, Car. 2, C. 7 (Lord's Day Act).

(1)—Lord's Day Act.—Entirely unsuited to the circumstances of this country—Applicability of the Act to India—Proceedings taken on Sunday by Munsif, whether void—*See* PRACTICE AND PROCEDURE, 5 A.L J. 106 = A.W.N. 1908, 43 = 3 M.L.T. 211 = 30 A. 136.

(2)—*S.* 6.—*Mahomedan debtor, arrest of, on a Sunday, not illegal.*—The arrest of a Mahomedan debtor within the original jurisdiction of the High Court on a Sunday is not illegal. Per Holloway, J.—The provisions of the Lord's Day Act (XXIX Car., 2, c. 7), do not apply in

Statute 29, Car. 2, C. 7 (Lord's Day Act) —*concluded.*

this country. Even if the substantive portions of the statute were applicable, it did not follow that s. 6 would be. The mode of execution of judgment is exclusively determined by the Court of process. *Per Kernan, J.*—As between natives of India, the Lord's Day Act does not apply. PARAM SHOOK DOSS v. RASHEED-OOD DOWLAH BAHADOOR **7 M H C 285**. [*R.*, 30 A. 136=A.W.N. 1908, 43=5 A L.J. 106=1 M.L.T. 211]

Statute 5 and 6, Edw. III, C. 16.

See SALARY, 3 M I.A. 435.

Statute 32, Hen. VIII, C. 34.

See LANDLORD AND TENANT—FORFEITURE, 14 C. 176.

St. 13, Eliz, C. 5.

(1)—*Statute* 13, *Elizabeth*, c. 5—*Applicability to mofussil.*—The Privy Council has expressly sanctioned the adoption in the mofussil of the principles of the Statute 13, Elizabeth, c 5, for avoiding fraudulent conveyances. EUGENE-POGOSE v. THE DELHI AND LONDON BANKING CO., LD., **10 C. 951.** (10 C. 616=11 I.A. 10, *R.*)

(2)—*Statements made out of Court—Doctrine of fraudulent conveyance void against creditors.* — The doctrine of a fraudulent conveyance being void as against creditors held to be a principle of Hindu as it is of English law under 13, Elizabeth, c. 5 SHAMKISSORE SHAW v. COWIE, **2 Ind. Jur. O S., 7.** *See also*, SUDHEEKEENA CHOWDRAIN v. GOPEE MOHUN SEIN, **1 W.R. 47.**

(3)—*See* DEBTOR AND CREDITOR, 11 B. 666, 13 B. 434, 10 C. 616=11 I.A 10, 1 Hyde 178.

(4)—*See* TRANSFER OF PROPERTY ACT, 1882, s. 53, 7 Bom. L R. 267.

(5)—S. 6—*See* TRANSFER OF PROPERTY ACT. 1882, s 53, 11 C.W.N. 989=6 C.L J. 410 =34 C. 999.

Statute 27, Eliz., C. 4.

See TRANSFER OF PROPERTY ACT. 1882, s. 53, 7 Bom. L.R. 267=22 C. 185.

Statute 43, Eliz., c. 4,

See BOM. ACT III OF 1888, ss. 143, 144, 16 B. 217.

See MAHOMEDAN LAW—WILL, 1 B.H.C. 71.

Statute 2, Jac. I. C. 16.

See ENGLISH LAW, 5 M.I.A. 43.

See STATUTES, CONSTRUCTION OF, 5 M I. A 234.

Statute 3, James I, C. 7.

If applies to India—Statute 3, James I,C. 7, has not been extended to this country. C. J. WILKINSON v. ABBAS SIRKAR, **3 B.L. R. O. C. 96.**

Statute 7, Geo. I, C. 21.

S. 5—*See* JURISDICTION—ADMIRALTY AND VICE-ADMIRALTY, JURISDICTION, 5 B.H.C. O.C. 64.

Statute 13, Geo. III, C. 63 (The East India Company Act, 1772).

See MORTGAGE — ACCOUNTS BETWEEN MORTGAGOR AND MORTGAGEE. 5 A. 419= A.W.N. 1883, 43.

S. 36—*See* BEN. REG. III OF 1818, 6 B.L. R. 392.

Statute 21, Geo. III, C. 70 (The East India Company Act, 1780).

(1)—*Act* XXVI *of* 1864—*Effect of statute.*—The law or equity to be administered in the High Court does not depend upon any previous Act of Parliament. The Stat. 21, Geo. III, c. 70, which gave to Mahomedans and Hindus the right to have matters of contract and dealing between party and party, inheritance and succession, determined by their laws and usages, was an Act which was applicable to the Supreme Court. If the provision has any effect in the High Court, it is not by virtue of the Act, but by virtue of the Charter which, by its terms, introduces into it the directions contained in the Act. MADHAB CHUNDER PORAMANICK v. RAJCOOMAR DOSS, **14 B L R. 76 =22 W.R. 370.**

(2)—S. 5—*See* HIGH COURT, JURISDICTION OF—MADRAS, 8 M 24, F.B.

(3)—S. 8—*See* HIGH COURT, JURISDICTION OF BOMBAY, 4 M I.A 353.

(4)—*S.* 17 — *Contract between Hindus in Calcutta, by what law governed* —A tenancy created, by express contract, between Hindus in Calcutta is within the words "matters of contract and dealing between party and party" in s. 17 of 21 Geo. III, c. 70; and the rights of the parties thereto are governed by Hindu Law. RUSSICKLOLL MUDDUCK v. LOKENATH KURMOKAR, **5 C. 688=5 C.L R. 492.**

(5)—*S.* 17, *Construction of.*—The true construction of 21, Geo. III, c. 70, s. 17 must confine the words "their inheritance and succession" to questions relating to inheritance and succession by defendants. A question of plaintiff's succession is therefore not determinable by the laws and usages of the Gentoos, etc.—*Per Pontifex, J.* SARKIES v. PROSONOMOYEE DOSSEE, **6 C. 794=8 C.L.R. 76.** [*R.*, 6 B. 168, F.B.]

(6)—S. 17—*See* ENGLISH LAW, 5 B. 154.

(7)—S. 17—Applicability of Hindu law—*See* ENGLISH LAW, 8 C. 582.

(8)—S. 17—*See* GUARANTEE, 5 B.L.R. 639.

(9)—S. 24 — *See* JUDICIAL OFFICERS, LIABILITY OF, 2 M.I.A. 293.

Statute 37, Geo. III, C. 142 (The East India Act, 1797).

S. 8—*See* BEN. REG. III OF 1818, 6 B.L. R. 392.

Statute 36 and 40, Geo. III, C. 79 (The Government of India Act, 1800).

S. 3—*See* HIGH COURT—JURISDICTION OF —MADRAS, 8 M 24, F.B.

Statute 49, Geo. III, C. 126 (The Sale of Officers Act, 1809).

See SALARY, 3 M.I.A. 435.

Statute 52, Geo. III, C. 101 (Lord Romilly's Act).

See CIV. PRO. CODE, 1908, ss. 92, 93 and 99, 24 C. 418.

See RIGHT OF SUIT -ENDOWMENT, SUITS RELATING TO, 17 M. 462, F.B.

Statute 53, Geo. III, C. 155 (The East India Company Act, 1813).

See HIGH COURT, JURISDICTION OF - MADRAS, 1 M. 89, F.B.

S. 11—*See* ADVOCATE-GENERAL, 4 M.I.A. 190.

Statute 56, Geo. III, C. 100.

See HABEAS CORPUS, 5 B.L.R. 557.

Statute 4, Geo. IV, C. 71 (The Indian Bishops and Courts Act, 1823).

S. 17— *See* HIGH COURT, JURISDICTION OF —MADRAS, 8 M. 24, F.B.

Statute 6, Geo. IV, C. 16.

Statute, if applies to India.—The Statutes, 6th Geo. IV, c. 16, and the 2nd and 3rd Will. IV., c. 114, made to facilitate the proof of Bankruptcy, do not extend to India. CLARK v. MULLICK, **2 M.I.A. 263=3 Moo. P.C. 232 =Morton 430=1 Sar. 188.**

Statute 6, Geo. IV, C. 85 (The Indian Salaries and Pensions Act, 1825).

See SALARY, 3 M.I.A. 435.

Statute 9, Geo. IV, C. 14.

Prospective and retrospective operation of.—The Statute 9, Geo. IV, c. 14, extended to *India* by the Indian Act, XIV of 1848, *held* to apply to an action pending in the Supreme Court, at the time of its introduction into *India*. THE EAST INDIA COMPANY v. ODITCHURN PAUL, **5 M.I.A. 43=7 Moo. P.C. 85=14 Jur. 253=1 Sar. 394.**

Statute 9, Geo. IV, C. 31.

S. 8—*See* ST. 9, GEO. IV, c. 74, s. 56, 4 W.R. P.C. 109=7 M.I.A. 72.

Statute 9, Geo. IV, C. 33.

See LAND TENURE IN BOMBAY, 4 B. H. C. O.C. 1.

Statute 9, Geo. IV, C. 73.

S. 36—*Insolvency.*—Palmer & Co., having borrowed a large sum of the Bank of Bengal deposited Company's paper with the Bank to a greater amount, as a collateral security, accompanied with a written agreement authorizing the Bank, in default of repayment of the loan by a given day, "to sell the Company's paper for the reimbursement of the Bank, rendering to Palmer & Co. any surplus." Before default was made in the repayment of the loan, Palmer & Co. were declared insolvent under the Indian Insolvent Act, IX Geo. IV, c. 73, by the thirty-sixth section of which it was declared, that where there had been mutual credit given by the insolvents and any other person, one debt or demand might be set off against the other; and that all such debts as might be proved under a commission of Bankruptcy in *England*, might be proved in the same manner under the Indian Insolvent Act. At the time of the adjudication of insolvency, the Bank were also holders of two promissory notes of Palmer & Co., which they had discounted for them before the transaction of the loan, and the agreement as to the deposit of the Company's paper. The time for repayment of the loan having expired, the Bank sold the Company's paper, the proceeds of which, after satisfying the principal and interest due on the loan, produced a considerable surplus. In an action by the assignees of Palmer & Co., against the Bank, to recover the amount of this surplus, *held*, that the Bank could not set off the amount of the two promissory notes, and that the case did not come within the clause of mutual credit in the Indian Insolvent Act. YOUNG v. THE BANK OF BENGAL, **1 M.I.A 87=1 Moo. P.C. 150=1 Deacon, 622=1 Sar. 97.**

Statute 9, Geo. IV, C. 74 (The Criminal Law (India) Act, 1828).

S. 56—*Offences committed in two places—Applicability to persons amenable to the Supreme Court of Calcutta—"Within the limits of the Charter," meaning of.*—The object of Stat. 9, Geo. IV, c. 74, s. 56 was been the application and extension to the British territories in India the same provisions as had then been made for England by the recent enactment in the 9th of Geo. IV, c. 31 with respect to offences in two different places or partially committed in one place and accomplished in another. The statute extended only to persons who were otherwise amenable to the criminal jurisdiction of the Supreme Court at Calcutta as described in s. 1, and it applied only to cases in which the felony or the crime has been committed by persons who committed it partly within the jurisdiction and partly without. The statute could therefore have no application to persons not amenabe to the Supreme Court and also where the offence committed has been within one jurisdiction. NGA HOONG v. THE QUEEN, **4 W.R.P C. 109=7 M.I.A. 72=Boul. 189=1 Suther. 285=1 Sar. 598.**

Statute II, Geo. IV and I, Will IV, C. 68.

S. 1—*See* CARRIERS, 19 C. 538.

Statute 2 and 3, Will. IV, C. 51.

(1)—*Privy Council rules issued under* 2 *and* 3, *Will.* IV, *C.* 51—*Vice-Admiralty jurisdiction —Procedure.*—The Privy Council rules issued under 2 and 3, Will. IV, C. 51, do not operate, except in the cases in which they were expressly kept alive, that is to say, suits *in rem* in which there is no appearance, and other matters to which the Procedure Code cannot be applied. (17 C. 66, *R.*) [*R.*, 22 C. 511] The effect of appearance, the mode of objecting to the jurisdiction and the mode of questioning the validity of a pleading are in Vice-Admiralty cases matters governed by a settled practice under the Procedure Code. *In the matter of the ship* "FANNE SKOLFIELD," **17 C. 337.**

(2)—Rules issued under — *See* PRACTICE AND PROCEDURE, 22 C. 511.

Statute 2 & 3, Will. IV, C. 71.

See PRESCRIPTION—EASEMENTS—LIGHT AND AIR, 12 B. L. R. 406, P.C.=Sup. Vol. I. A. 175=19 W. R. 194=3 Sar. P. C. J. 236, 6 B. L. R. 85.

Statute 2 & 3, Will. IV, C. 114.

Statute, if extends to India.—The Statutes, 6th Geo. IV, C. 16, and the 2nd and 3rd Will. IV, C. 114, made to facilitate the proof of Bankruptcy, do not extend to India. CLARK v. MULLICK, **2 M.I.A. 263=3 Moo. P. C. 252= Morton 430=1 Sar. 188.**

See INSOLVENCY—MISCELLANEOUS, 2 M. I. A. 263.

Statute 3 & 4, Will. IV, C. 41 (The Judicial Committee Act, 1833).

(1)—*See* COSTS—MISCELLANEOUS, 3 W. R. P. C. 31=8 M. I. A. 225.

(2)—*See* LIMITATION — MISCELLANEOUS, 3 W. R. P. C. 31=8 M. I. A. 225.

(3)—*See* PRIVY COUNCIL, PRACTICE OF—SPECIAL LEAVE TO APPEAL AND TO DEFEND APPEAL, 2 M.I.A. 428.

(4)—S. 3—*See* PRACTICE AND PROCEDURE, 5 M.I.A. 499.

(5)—Ss. 3, 4—*See* BOM. ACT XVIII OF 1848, 5 M.I A. 499.

(6)—S 4—*See* APPEAL TO PRIVY COUNCIL —CASES WHERE APPEAL LIES OR NOT, 8 M I.A. 274, Note.

(7)—S. 4—*See* PRIVY COUNCIL, PRACTICE OF—GENERAL, 8 M.I.A. 270.

(8)—S. 4—*See* No. 5, *supra.*

(9)—S. 21—*See* LIMITATION ACT, 1908, arts. 118, 119, 182, B L.R. Sup. Vol. 506=6 W.R. Mis. 69.

Statute 3 and 4, Will. IV, c. 42.

See STATUTE, CONSTRUCTION OF, 26 A. 299, P.C.=31 I.A. 116=8 C.W.N. 521=14 M.L.J. 190=6 Bom. L.R. 505.

S. 28—*See* ACT XXXII OF 1839, 6 M.I.A. 232, 4 W.R. P.C. 8=7 M.I.A. 263.

St. 3 and 4, Will. IV, C. 85 (The Government of India Act, 1833).

S. 43—*See* CESSION OF BRITISH TERRITORY, 10 B.H.C. 37, 1 B. 367, P.C.=3 I.A. 102.

S. 43—*See* HABEAS CORPUS, 6 B.L.R. 459.

S. 43—*See* LIMITATION ACT, 1908, arts. 118, 119, 182, B.L.R. Sup. Vol. 506=6 W.R. Mis. 69.

Statute 5 and 6, Wm. IV, C. 54.

See MARRIAGE, 2 Hyde 65.

Statute 6 and 7, Will. IV, C. 96.

See HIGHWAY RATE, 3 M.I.A. 409.

Statute 1, Vict., C. 26.

S. 9—*See* SUCCESSION ACT, 1865, s. 50, cl. (3), 1 B. 547.

Statute 1 and 2, Vict, C. 110.

See ST. 11 AND 12, VIC., C. 21, 3 B.H.C. O.C. 25.

Statute 2 and 3, Vict., C. 39.

Father's right to custody — Legitimate children—English Law, Previous to—*See* CUSTODY OF CHILDREN, 1 Hyde, 99.

Statute 3 and 4, Vict., C. 56.

See SHIP, 4 M.I.A. 179.

Statute 3 and 4 Vict., C. 65.

See JURISDICTION—ADMIRALTY AND VICE ADMIRALTY, JURISDICTION, 5 B.H C.O.C. 64, 10 B.H C. 110.

Statute 5 and 6, Vict., C. 39.

Ss. 1 and 3 — *See* PRINCIPAL AND AGENT, AUTHORITY OF AGENTS, 1 Ind. Jur. O. S. 17 =1 W.R.P.C. 43=9 M.I A. 140.

Statute 5 and 6, Vict., C. 45 (The Copy-right Act, 1842).

See COPY-RIGHT, 19 B. 557, 17 C. 951.

Statute 5 and 6, Vict., C. 100.

See COPY-RIGHT, 8 B.L R. 298=16 W. R. 90.

Statute 6 and 7, Vict., C. 94.

See CONSULAR COURT, 3 B. 59.

Statute 7 and 8, Vict., C. 69 (The Judicial Committee Act, 1844).

See BOM. ACT XVIII OF 1848, 5 M.I.A. 499.

See PRACTICE AND PROCEDURE, 5 M.I.A. 499.

Statute 8 and 9, Vict , C. 16.

S. 97—*See* COMPANY—POWERS AND LIABILITIES OF DIRECTORS, 5 B.L.R, 195.

Statute 8 and 9, Vict., C. 18.

S. 92—*See* ACT X OF 1870, s. 55, 11 A. 378 = A.W.N. 1889, 104.

Statute 8 and 9, Vict., C. 30.

S. 2—*See* PRIVY COUNCIL, PRACTICE OF—RESTORATION OF APPEAL, 6 M.I.A. 491.

Statute 8 and 9, Vict., C. 109.

See ENGLISH LAW, 4 M.I.A. 339.

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848).

(1)—*Summons to insolvent and creditors—Practice.*—An application for a summons to insolvent and the petitioning creditors to be examined with reference to the debt on which the insolvency had been adjudicated should be made to the Commissioner. *In re* KHODA BUX, **1 Ind. Jur. N.S. 42.**

(2)—*Verification of schedule by affidavit.*—The insolvent must personally attest the truth of the schedule. *In the matter of* HAMILTON ANSTRUTHER, **11 B.L.R. App. 34.**

(3)—*Trading in reckless manner.*—Reckless trading, although unaccompanied by any legal or moral fraud, is a ground for suspending protection. *In re* BAGGOT, **Bourke, Ins. 5.**

(4)—*Fraudulent practice in trade—Power of Court to punish criminally.*—Certificate refused where insolvent had been guilty of fraudulent practices in trade. Certificate suspended in the case of a partner at home who, though innocent of the fraudulent practices, omitted to give notice to the parties intended to be defrauded. The Insolvency Court has no power to punish criminally for fraudulent practices in trade. This is left to the action of creditors through the channel of Criminal law. *In re* JANSEEN v. REUSS, **Cor. 13.**

(5)—*Minor, adjudication of, as insolvent.*—A minor who has traded cannot be adjudicated an insolvent on the petition of those who have supplied him with funds for his business. *In re* NOBODEEP CHUNDER SHAW, **13 C. 68.** (L.R. 18 Ch. D. 109, *Rel.*)

(6)—*Effect of final discharge - Bankruptcy Act*, 1861 - *Premia on policy of insurance.*—An insolvent obtained his final discharge in April 1863. *Held* that he was not still liable, under the provisions of the English Bankrupt Act, 1861, s. 154, for the ascertained value of certain premia on a policy of insurance which he had undertaken. GRAY v. CHICK, **Cor. 136.**

(7)—*Suit by Official Assignee—Leave to sue—Practice.*—It is not necessary for the Assignee to obtain the leave of the Court before commencing an action; the absence of such permission is matter of objection only between the assignee and the Court of bankruptcy and not between the assignee and the other party to the suit. *In re* LATAPIE. **Cor. 4.**

(8)—*Agent of company paid by commission—Trader—Broker.*—The agent of a company or private individual who procures and receives

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

parcels for transmission by his employers, or who by his personal exertions obtains passengers for their dak, although he may be entrusted with the receipt or price of carriage, and is paid by commission, is not a broker or trader within the meaning of the Insolvent Act. *In re* CAMPBELL. **2 Hyde 177.**

(9)—*Adjournment—Illness of insolvent—Protection order.*—An adjournment on the ground that the insolvent is unable to attend Court by reason of ill-health will only be granted when the insolvent enjoys the benefit of the Court's order granting him personal protection. *In re* ODOYTOO CHURN ROY, **Bourke, Ins. 3.**

(10)—*Non-resident trader carrying on business through resident* gomastha—*How the conduct of* gomastha *may amount to an act of insolvency by the principal—Firms exclusively managed by* gomastha *- Rights of creditors—Insolvency*—A man cannot commit any act of bankruptcy by an act of his agent which he has not authorised, and of which he had no cognizance. The application of the principle that the act of a *gomastha* may be taken as the act of the principal must depend upon the position and authority of the *gomastha*, and great care must be taken in applying it. The principle in 5 C. 605 which was that the act of a *gomastha*, his authority flowing from his general position, may, in some cases, be taken as the act of his principal rendering him liable within the statute, was correct. When the *gomastha* does not occupy such a position, his principal will not be adjudged insolvent on the ground of the *gomastha's* personal conduct. It cannot be held that the creditors of firms exclusively managed by *gomasthas* have no remedy by way of insolvency, whatever the *gomastha* may do. The Statute (11 and 12 Victoria) should be interpreted with reference to the facts of Indian life. KASTUR CHAND RAI BAHADUR v. DHANPAT SINGH BAHADUR, **23 C 26, P.C. = 22 I.A. 162 = 5 M.L.J. 269 = 6 Sar. 617** [*R.*, 31 C. 761 = 8 C.W.N. 553.]

(11)—*Indian Insolvent Act (Stat. 11 and 12 Vic C. 21)—Debtor filing petition in insolvency and obtaining discharge—Expunging from schedule names of creditors who do not prove their claim—Official Assignee's relation towards creditors admitted in schedule.*—Certain insolvents filed their schedule in July 1868 in Bombay and obtained their discharge on 15—8—1869. The schedule contained the names of 26 creditors, all of whom were residents of Multan and Karachi, and the aggregate amount of admitted debts amounted to Rs. 51,819-13-0. The Official Assignee filed an affidavit in which he stated that a dividend of 4 per cent. had been declared in the year 1870, and that since that time only one creditor had applied for and received the dividend. K, the largest creditor of the insolvents, applied in July 1886 for payment of the dividend on his claim of Rs. 27,500. Being unable to produce evidence, in his possession, in support of his claim after so

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848) –*continued.*

long a period, he was allowed to prove his claim from the books of the insolvent which were in the office of the Official Assignee. Thereupon, on 5th October 1887, K obtained a rule calling upon each and all of the creditors of the said insolvents to appeal and show cause why they should not come in and prove their claims against the insolvent's estate, or, in default, why their names should not be expunged from the schedule *Held* discharging the rule, that, where no fraud is proved or even alleged with regard to the claims of those creditors whose names are entered in the schedule, the Court has no powers to expunge their names therefrom. *Held*, further, that the Official Assignee was a trustee of the property in his hands for all the creditors whose names were admitted in the insolvent's schedule. It was immaterial whether they had actually proved their claims or not. *In re* DEWCURN JEWRAJ AND HEERJEE DEWCURN, **12 B 342.** (*R.*, 20 B. 636.)

(12)—*Summary proceeding under—Commissioner in Insolvency passing in effect an order for ejectment of the insolvent tenant, at the instance of the landlord—Whether valid—Jurisdiction.*—Where the Court ordered an insolvent to make over possession of a house, which she tenanted, to the Official Assignee, at the instance of the landlord. *Held*, that it is virtually an order for ejectment, and that there are no provisions in the Insolvent Debtor's Act, which enable the Court sitting in Insolvency, on a summary proceeding, to make virtually an ejectment decree, at the instance of a landlord, against his tenant. *In re* MAUD ANDERSON, **36 C. 489=2 Ind. Cas. 405.**

(13)—*Discretion of Court—Making of an adjudicating order in this country, notwithstanding existence of prior adjudicating order in another country—Presence of large assets—Convenience—Different High Courts exercising concurrent jurisdiction—Constituted Attorney in Calcutta of the firm of the debtors in London, effect of.*—The Indian Insolvency Courts have a discretion in making an adjudicating order in this country, notwithstanding the existence of a prior adjudicating order in another country, if the conditions of the Insolvency Act are satisfied and there is no valid reason to the contrary. (21 B. 297 (307), *R.*) The presence of large assets within their jurisdiction is a strong circumstance in favour of making such an order. [*R.*, 11 Bom. L R. 1032.] The same principle applies to the different High Courts in India exercising concurrent jurisdiction. But, where there is a conflict, having regard to the questions of convenience and considerations of a like nature, one Court should practically have to yield to another as it may not be just or equitable to allow the proceedings in both Courts to go on concurrently. (21 B. 297, *R.*) Case, wherein it was held that the constituted Attorney in Calcutta of the firm of the debtors in London, occupied such a position that his principals must stand or fall by his act, so that his departure must be imputed to be the departure of his principals, for the purpose of bringing the case within the statute. *In the matter of* WILLIAM WATSON, **31 C. 761 =8 C.W.N. 553.**

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

(14)—*Vesting order made under—Official assignee.*—A vesting order, made under the Insolvency Act, has not the effect of giving the Official Assignee priority over the claim of a judgment creditor, in respect of property attached, at his instance, previous to the passing of such order. The Official Assignee stands in the shoes of the insolvent and takes the property, subject to any equities which are good against the latter. MILLER v. LUKHIMANI DEBI. **28 C. 419=5 C.W.N. 761.** (14 W.R. 33, F.B. *F.*; 10 C. 150, *D.*) [*Overruled* 29 C. 428, F.B. =6 C.W.N. 577; *D.*, 25 M. 406, 29 B. 405=7 BOM. L R. 498; *Cons.*, 26 M. 673.]

(15)—*Vesting order under—Insolvency Act, III. of 1909, passed thereafter—Further proceedings governed by Act of 1848—S. 127 (2), Act III of 1909—Arbitration—Submission—Not revoked by vesting order or insolvency—Failure to pay claim—Whether a difference between parties—Official Assignee not a necessary party to arbitration proceedings—Award—Effect upon Official Assignee—Suit against insolvent—Duty of Court.*—A vesting order made under the Indian Insolvent Debtors Act, 1848, cannot be treated as one made under the Presidency Towns Insolvency Act, III of 1909, in view of the clear provisions of s. 127 (2) of the latter Act. Where the vesting order was made under the Act of 1848, all proceedings continue, and all provisions of the old Act apply thereto, as if the new Act had not been passed. Though the Court can entertain a suit against a debtor against whom a vesting order has been passed under the Act of 1848, it is nevertheless the duty of the presiding Judge to see that the decree is so drawn as not to prejudice the rights of the other creditors under the Insolvent Debtors Act. (22 C. 259, *R.*) Insolvency or the issue of a vesting order does not operate as revocation of a submission to arbitration. (4 S. L. R. 14, *R.*) Where at the time of the reference, a vesting order is in force, the proceedings of arbitrators cannot have any direct effect on the property of the insolvent, and the result of an award is to merely convert an unliquidated claim into a liquidated one which the Official Assignee or Trustee can scrutinize like any other claim. Such an award is an order merely *in personam*. The Official Assignee is not a necessary or a proper party to such proceedings. (22 C. 259, 26 M. 406, *R. and F.*) Mere failure to pay a claim constitutes a matter in difference between the parties to a submission. JAMES FINLAY AND CO. v. JESHANMAL R. KIRPALANI, **5 S. L.R. 4.** (5 S. L. R. 7, Note, *R.*)

(16)—*Vesting of insolvent's property in Official Assignee—Option of Official Assignee to accept or refuse onerous property—Lease-hold*

Statute 11 and 12 Vict., C. 21, (Insolvent Act, 1848)—*continued.*

property, possession by Official Assignee taken of, how far amounts to election to accept lease.—In a Presidency town in India, in cases of onerous property (*e g.*, lease-hold property) belonging to an insolvent and as such vesting in the Official Assignee under the Indian Insolvent Act, the Official Assignee has the right to elect whether he will accept or repudiate such property? He is not bound to take upon himself against his will the liabilities arising out of a lease-hold vested in the insolvent at the time of his insolvency. Nor can it be argued that he would be bound by the lease, unless or until he expressed his intention by words or acts not to take it as part of the assets of the insolvent, because an onerous property cannot be considered to vest in the Official Assignee except when it has been accepted by him. The taking of possession, by the Official Assignee of the insolvent's lease-hold property, is, except under exceptional circumstances, tantamount to an election on his part to accept the lease. Such acceptance of the lease would date back to the vesting order so as to render the Official Assignee liable for the rent during the period of his continuing to be Assignee of the lease, his liability ending when, with the landlord's assent, he surrenders the term, or otherwise gets rid of his obligation. ABDUL RAZAK v. J.G. KERNAN, **22 B. 617.**

(17)—*Vesting order, signing of—Practice—Attachment before judgment—Execution creditor—Official Assignee—Priority—Execution—Seizure—Vesting order—Act* VIII *of* 1859, 11 *and* 12 *Vict., c.* 21—Where the vesting orders were under the seal of the Insolvent Court, and an objection was taken to their validity on the ground that they were not signed by the Clerk of the Insolvent Court but were signed for him by the Official Assignee, and no attempt was ever made in the lower Court to have them set aside for irregularity, *held* that they were in full force and effect. The District Court was bound to regard them as such and so was the High Court on appeal. It was further held to be in conformity with practice, in the transaction of business in the office of the Insolvent Court, for the Official Assignee to sign on behalf of the Clerk of that Court in his absence. The High Court however *held* such a practice to be objectionable, requiring alteration. In cases of attachment before judgment, of moveable properties belonging to defendants, which continued till decrees and orders in execution in such suits had been passed and warrants for such execution had been lodged with the Nazir of the Court:—*Held* that without seizure those properties were bound by the warrants, as soon as they were delivered to the Nazir, and that, consequently, the attaching creditors were entitled to priority as regards the attached properties over the Official Assignee in whom the estate of the defendants had become vested by orders of the Insolvent Debtors Court of Bombay passed before sale of the attached properties, but after delivery to the Nazir of the warrants for execution. *Held*, also, that attachment before judgment

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

does not give the attaching creditor priority over the Official Assignee in whom the estate of the defendants had become vested by an order of the Insolvent Debtors Court made subsequent to attachment, but before decree and warrants for execution. GAMBLE v. BHOLAGIR, **2 B. H.C. 146.** [*F.*, 8 M. 554; *Expl.*, 1 N.W.P. 172; *R.*, 13 W R. (F.B.) 9, 14 W.R. (F.B.) 33, 8 B.H.C.O.C. 140. 2 B. 148 (F.B.), 3 B. 58. 4 B. 163, 3 B. 433. 7 C. 213, 10 C. 150 (F.B.) =13 C.L R. 433, 7 B. 452, 19 B. 232, 23 B. 428.]

(18)—*Attachment before judgment—Insolvency—Vesting order—Official Assignee—Civ. Pro. Code*, 1859, *ss.* 83, 84, 89, 246.—This was an application by the Official Assignee, under s. 246 of the Civ. Pro. Code, 1859, to remove an attachment before judgment, from goods which he claimed under the usual vesting order made upon a petition in insolvency by the defendant. The order of attachment was obtained on the 24th of November, the goods were attached on the 25th, and subsequently, in the course of the same day, the defendant presented his petition, and the vesting order was made. The plaintiff creditor insisted that the effect of the attachment before judgment was to secure the payment of his decree in this suit in priority to the claim of the Official Assignee. *Held* (1) that an attachment before judgment is not known to Courts in the United Kingdom, except so far as the process of foreign attachment may be considered to be somewhat analogous to it; (2) that the property in the goods attached is in nowise altered, but remains as before in the defendant, the Court as it were merely locking up the goods, so that they cannot be disposed of or carried away in any mode that would improperly delay or defeat the execution of the decree, if obtained; (3) that it does not in any other way interfere with a legal disposition of the attached property, beyond declaring that possession shall not be taken without its previous sanction being obtained; nor does the Court engage to the plaintiff that he shall be paid out of the goods in its custody. The Court merely undertakes that, if no subsequent order to the contrary be made, the property shall be forthcoming at the time of pronouncing the decree, to *abide* whatever order the Court shall make about it; (4) that s 89 of the Code gives a clear priority to a decree-holder over any right which the attachment before judgment creditor might be supposed to have acquired, and a voluntary assignment in trust for creditors at any time before seizure under decree would defeat the claim of such a judgment or decree-holder against goods so assigned; (5) that such assignments are much favoured by Courts of Justice, and a Court having the control over the property will consider it more equitable that it should be applied for the benefit of all the creditors than for the exclusive advantage of one; (6) that a vesting order in insolvency is in effect an assignment in trust for the benefit of the creditors, and as such it should

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

be treated as paramount to the rights which an attachment before judgment-creditor can claim by virtue of his having called the Court into action, to preserve the property during the suit; and (7) that, accordingly, in the present case the Official Assignee was entitled, on behalf of the creditors, to take advantage of this assignment in trust, and thus claim priority over the plaintiff's decree, and over the rights (if any) which the plaintiff as attachment-creditor may have acquired. JAVA RAMJI v. JADAVJI NATHA, **1 B.H.C. 224=2 B H.C. 142.** [*R.*, 8 B.H.C.O.C. 140, 20 B. 403.]

(19)—*Insolvency—Vesting order — Death of insolvent—Effect.*—An insolvent died after the petition and schedule were filed and the vesting order was made. It was contended that the proceedings in such insolvency abated. *Held* that the death could not cause the proceedings to abate. The property was, by order under s. 7 of the Insolvency Act, vested in the Official Assignee in trust for the creditors, and the death of the insolvent cannot supersede or nullify that order. The right of the Official Assignee to proceed to deal with the property cannot be affected. *In re* SITARAM ABBAJI, **10 B.H.C. 58.** [*R.*, 7 B. 438.]

(20)—*Insolvency — After-acquired property.*—Under the Imperial Statute, 11th and 12th Vict., c. 21. relating to insolvent debtors in India, the assignees have a right to subsequently acquired property of an insolvent, unless the Insolvent has obtained a certificate and discharge, but this title of the assignees is subject to two qualifications—first, when the insolvent has acquired property subject to liens and obligation; in such a case the property taken is subject to the equities and charges which affect it in the hands of the Insolvent; and, secondly, when the Insolvent carries on trade at a subsequent period, with the assent of the assignees, the property which is acquired in the subsequent trade will be subject in equity to the charge of creditors in that trade, in priority to the claim of the assignees. An uncertificated Insolvent borrowed money for the purpose of purchasing goods to carry on a business, and, in order to secure the advance made, gave a bond and agreed, in writing, to execute a mortgage of the goods so purchased to the lender to secure repayment. He afterwards executed an assignment of the goods for that purpose. The business was carried on with the knowledge of, and without any objection by, the Official Assignee. The lender never had possession of the goods assigned to him by the Insolvent, and the same remained in possession of the Insolvent until his death. *Held* (reversing the decree of the Supreme Court at Madras), that the insolvent's after-acquired property was subject to the lien of the lender, and that such lien was paramount to any claim of the Official Assignee under the insolvency. KERAKOOSE v. BROOKS, **4 W.R. P.C. 61=8 M.I.A. 339=1 Suther. 426=1 Sar. 778.**

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

(21)—*Bankruptcy—Rights of creditors.*—The principle that one creditor shall not take a part of the fund, which otherwise would have been available for the payment of all the creditors, and at the same time be allowed to come in *pari passu* with the other creditors, for satisfaction out of the remainder of that fund, does not apply, where the creditor obtains by his diligence something which did not, and could not, form a part of that fund. The Orphan Chamber of Batavia being the executors of a foreign creditor in the Island of Java, by their agent in Calcutta, proved the amount of their whole debt against the estate of A. B., who had been declared insolvent under the Indian Insolvent Act (9th Geo. IV, c. 73), and after making such proof, and receiving the dividends upon the whole debts, instituted a suit, in the Island of Java, to recover a plantation or estate there, held by one of the Insolvents as Trustee for the firm of A. B. and C.D., in equal shares; to which suit, the Assignees of the Insolvent appeared as defendants, but judgment was given in favour of the creditor, and for the sale of the estate for his benefit; the proceeds of which amounted to three-fifths of his whole debt. The assignees of A. B. filed a bill, on the Equity side of the Supreme Court at Calcutta, against the agent of the foreign creditor, resident within the jurisdiction, praying that the dividends might be refunded, and that the defendants might be restrained by injunction from receiving any further dividends, until all the other creditors were put on an equal footing with the creditor at Java, the defendant demurred, and obtained judgment against the Assignees. *Held*, on appeal, by the Judicial Committee, that the estate in Java, not passing to the assignees under the assignment, did not form any part of the fund that was available for the benefit of the general creditors, and that the creditor was, therefore, not bound to refund the dividends, nor ought to be prevented from receiving any future dividends, provided he did not receive more than 20 *s.* in the pound upon his whole debt. But, the bill having stated that the creditor had also instituted proceedings against certain debtors of the insolvents at Bencoolen; *held*, that the assignees were entitled, under the prayer for general relief, to an injunction to stay the receipt of further dividends, until the proceedings at Bencoolen were abandoned. COCKERELL v. DICKENS, **2 M.I.A. 353=3 Moo. P.C. 98=1 Mont. D.Y.D. 45=Morton 407=1 Sar. 203.**

(22)—*Act* XXVIII *of* 1865—*Execution of decree—Stay of suit—Laches.*—The effect of a winding up order under Act XXVIII of 1865 passed against the estate of a trader is to prevent the completion of an execution against his immoveable property or ordinary moveable property, if it has not been consummated by seizure and sale before the filing in Court of the resolutions, unless the leave of the Court be given to the execution creditor to proceed. Such leave ought not to be given except under

Statute 11 and 12 Vict., C. 21, (Insolvent Act, 1848)—*continued.*

special circumstances. Leave of the Court will not generally be given if there have been laches on the part of the execution-creditor. Under the Insolvent Debtors Act, 1 and 2 Vict., c. 110, mere delivery of the writ of *fi. fa.* to the Sheriff or his Deputy for execution bound the goods as against the assignee in insolvency, although there had been neither seizure nor sale under the writ. The property in the goods passed to the assignee in insolvency, but it did so subject to the right of the execution-creditor to have satisfaction of his debt by sale. The execution must be levied by seizure and sale before the date of the *fiat* or the filing of the petition for adjudication, otherwise the execution-creditor is entitled only to a rateable part of his debt with the other creditors. The practice of the High Court under the Civ. Pro. Code on the execution of decrees for money either against immoveable or moveable estate has been, in the first instance, to issue a writ of attachment and subsequently, on its return by the Sheriff duly executed, to issue a writ directing a sale. It therefore becomes necessary for the execution-creditor to come again to the Court after the attachment, and to apply for the aid of its process to compel a sale. This was not so in the Supreme Court. The writ of *fi. fa.* which issued from that Court, was an authority to the Sheriff not only to seize but also to sell. S. 250 of the Civ. Pro. Code, applies neither to executions against immoveable property nor to executions against debts due to the defendant. In order to give third parties, whose property may have been wrongfully taken in execution, as that of the defendant, full opportunity of vindicating their rights before sale, and also to give the defendant an opportunity of paying, it has not been usual to issue process for attachment and sale simultaneously even against personal property, and it would not seem to be proper to do so except under special circumstances. THE FINANCIAL ASSOCIATION OF INDIA AND CHINA, LTD. v. PRANJIWANDAS HARJIVANDAS, **3 B.H.C.O.C. 25.**

(23)—*See* BOM. ACT XXVIII OF 1865, s. 24, 9 B.H.C. 27.

(24)—Effect of insolvency being declared—Officer having jurisdiction in insolvency under Punjab Laws Act and Civ. Pro. Code, how to proceed—*See* PUN. ACT IV OF 1872, ss. 24, 27, 31, 5 P.W.R. 1909=6 P.L.R. 1909=1 Ind. Cas. 55.

(25)—*See* ARREST, 8 M. 276.

(26)—*See* COMPROMISE—GENERAL, 4 W.R. P.C. 66.

(27)—*See* INTEREST—SPECIAL CASES, 14 M.I.A. 209.

(28)—Suit to recover money from defendant who has been adjudicated as insolvent—Official Assignee not to be made a party—*See* PARTIES TO SUITS—GENERAL, 18 C. 43.

(29)—*S.* 5—*Residence within jurisdiction of High Court—Act* X *of* 1877.—The petitioner, whose zemindari and dwelling-house in the mofussil had been sold in execution of a mortgage decree, came down to Calcutta early in May and, living there for nearly two months in a hired house, filed an insolvency petition in the High Court. He remained there till the middle of September when the Courts rose for the vacation, and returned to Calcutta just before the expiry of the vacation, having in the interval gone to his native district, for the purpose of obtaining funds to carry on his insolvency proceedings. The petitioner's wife was living in his native district. *Held*, that residence within the High Court's jurisdiction, within the meaning of s. 5, Insolvency Act, had not been proved, and that the High Court had, therefore, no jurisdiction. *In re* RAMPAUL SINGH, *Insolvent*, **8 C.L.R. 14.** [*R.*, 21 C. 634.]

(30) *S.* 5—*Insolvent Debtor's Court at Bombay—Jurisdiction—"Reside"—A person residing at Shanghai cannot apply for insolvency to the Bombay Court.*—A person residing in Shanghai and carrying on business in partnership in Bombay cannot present his petition to the Insolvent Debtor's Court at Bombay to have the benefit of the Act. *In re* MANEKJI PESTONJI TALATI, **10 Bom. L.R. 84.**

(31)—*S.* 5, *Letters Patent*, 1865, *s.* 18—*Residence—Jurisdiction.*—Where the petitioner came down from Cawnpore, where he had resided for sometime, to Calcutta, to file his petition, and stated that he intended to settle in Calcutta on obtaining his discharge, *held*, that his being in Calcutta under these circumstances did not constitute residence. By s. 18 of the Letters Patent, 1865, the jurisdiction of the Insolvent Court has been narrowed to the Bengal Division of the Presidency of Fort William (*i.e.*, that portion of the Presidency over which the authority of the Lieutenant-Governor of Bengal extends). The residence of the petitioner under 5 of the Insolvent Act (10 & 11, Vict., c. 21), must be within the local limits of the ordinary original civil jurisdiction of the High Court. *In the matter of* TIETKINS, **1 B.L.R.O.C. 84.** [*R.*, 21 B. 405, 5 Bom. L.R. 454, 9 Bom. L.R. 1093; *D.*, 21 C. 634.]

(32)—*S.* 5—*Letters Patent* (1865), *cl.* 18—*Insolvency application presented by resident of Karachi, not entertainable by High Court of Bombay—High Court, exercise of insolvency jurisdiction by.*—All the powers and authorities under the Insolvent Debtors' Act, originally of the Supreme Court and then of the High Court including the power to sit in and hold the Insolvent Court as its Commissioner, form a branch of the jurisdiction of the High Court, and are, therefore, subject to any legislative restrictions of that jurisdiction whether imposed by the Letters Patent themselves or by any subsequent enactment. Further, the power of the High Court or any Judge of it under cl. 18 of the Letters Patent to exercise the jurisdiction of the Insolvent Court, whatever that jurisdiction may be, is locally limited by the clause

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

"within the Presidency of Bombay," and therefore, irrespective of s. 5 of the Insolvent Debtors' Act, cannot be exercised outside the Presidency, nor outside any area within the Presidency to which the scope of the clause may, by subsequent enactment be restricted. Assuming that, but for Act V of 1872, a Judge of the High Court would, under cl. 18 of the Letters Patent have had power to exercise original jurisdiction in the Insolvent Court over Sind as well as over the rest of the Bombay Presidency, the effect of Act V of 1872 is exactly as if the following proviso had been added to the clause:—"Provided that the said High Court, and any such Judge thereof, shall not have or exercise, and shall be deemed never to have had, any such powers and authorities within the Province of Sind." That would as effectually prevent a Judge of the High Court from entertaining in the Insolvent Court a petition by a European British subject residing at Karachi as the clause, apart from Act V of 1872, would undoubtedly prevent him from entertaining a petition from such a subject residing outside the Presidency. *In re* JAMES CURRIE, **21 B. 405.** [*Appl.*, 10 Bom. L.R. 84; *R.*, 13 C.P.L.R. 61, 9 Bom. L.R. 1093.]

(33)—*S. 5—Term "reside" explained.*—The word "reside" in s. 5 of the Insolvent Act, when applicable to the insolvency of traders, includes an occupation for the purpose of trading, whether or not accompanied by sleeping or dwelling. *In re* HOWARD BROTHERS, **11 B. L.R. 254.** [*R.*, 5 C. 605, 10 Bom.L.R. 84.]

(34)—*S. 5 — Meaning of 'residence'.*— A presented his petition at Rangoon for the benefit of the provisions of the Insolvency Act, describing himself as residing at No. 45 in 38th Street in Rangoon, although six out of his twelve creditors were residents of places outside Rangoon and all his debtors were residents of Letpadan or Tharawa. The property in his possession was in Letpadan Township, and he admitted that he had been living and carrying on business at Letpadan for the past 15 years and had come to Rangoon to file his schedule; *Held*, that the Insolvency Commissioner at Rangoon had no jurisdiction to entertain the petition. (1 B.L.R. O.C. 84, 8 C.L.R. 14, *Rel. upon.*) Where none of the partners carry on business at Rangoon, the petition of a partner asking to be relieved of partnership debts cannot be entertained by the Rangoon Court. SUBRAMANIAM CHETTY v. PICHAI ROWTHER, **10 Ind. Cas. 786.** (11 B.L.R. 254, *D.*)

(35)—*S. 5, Insolvency Act (11 and 12, Vict., c. 21), object of—Residence contemplated by s. 5, need not be permanent residence—Jurisdiction of Court.*—The residence contemplated by s. 5 of the Indian Insolvent Act, is not necessarily a permanent residence. The object of that section is to extend the benefits of the Insolvency Act to those, who are *bona fide* residents within the jurisdiction of the Court, at the time of filing of the petition. *In the matter of* F. DE

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

MOMET, **21 C. 634.** (1 B.L.R.O.C. 84 and 8 C.L.R. 14, *D.*) [*R.*, 13 C.P.L.R. 61, 1 L.B. R. 222.]

(36)—*S. 5—Jurisdiction—Residence.*—Where a person applied for the benefit of the provision of the Insolvent Act on a petition in which he described himself as "William Cockburn, of Doomarah Factory in Tirhoot," and stated in his petition "that he is now residing at No. 19 Garden Reach, in the suburbs of Calcutta, within the jurisidiction of the High Court." *Held*, the petition was rightly dismissed for want of jurisdiction. *In re* COCKBURN, **2 Ind. Jur. N.S. 326.**

(37)—*S. 5—Applicability to "British Subjects."*—Where the insolvent was the widow of a surgeon, and it appeared that, for sometime before and at the time of the presentation of her insolvency petition to the Court, she was resident at Salem, and it also appeared that she was born in England of English parents, *held*, that the Insolvent Court had jurisdiction over her and that the order for personal discharge might be issued and that the 5th section of the Insolvent Debtors' Act is as applicable to "British Subject" (in the sense in which that appellation is used in the Charter of the late Supreme Court) resident within the jurisdiction of the High Court of Madras, as to an inhabitant within the local limits of the town of Madras. *In the matter of* DOROTHEA RICKS, **3 M.H.C. 151.** [*R.*, 21 B. 405.]

(38)—*S. 5—Letters Patent of High Court, cl. 18—Insolvency—European British born subject.*—The jurisdiction of the late Supreme Courts was twofold local as respected the inhabitants of the town and island of Bombay, and personal as regarded European British-born subjects as they are now called, residing in any part of the territories subject to the Bombay Government. This latter jurisdiction, as regards civil actions, does not now exist, but, as regards the Insolvent Court, it has not been interfered with. A European British born subject who resided in the Bombay Presidency but outside the local limits of the jurisdiction of the High Court, could go to Bombay and present a petition in the Court for the relief of Insolvent Debtors and obtain the benefit of the Indian Insolvent Act, the original jurisdiction of the Supreme Court in that respect continuing to the High Court by cl. 18 of its Letters Patent. *In re* GEORGE BLACKWELL, **9 B.H.C. 461.** [*R.*, 23 B. 474, 13 C. P.L.R. 61, 9 Bom.L. R. 1093; *D.*, 21 B. 405.]

(39) *S. 7—Insolvent—Vesting order—Official Assignee—Withdrawal of the petition for insolvency—Property revested in the withdrawing insolvent.*—On the filing of a petition in insolvency a vesting order is made in favour of the Official Assignee and the property of the insolvent vests in him. The adjudication of a man, insolvent, has the same effect. On the withdrawal of the petition for insolvency the vesting order comes to a determination and must be

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

taken to be annulled; and the property of the insolvent revests in him. N. C. MACLEOD v. HAJI SAJAN LALJI, **9 Bom. L. R. 1006.**

(40)—*S.* 7—*Insolvent—Vesting order—Official Assignee—Withdrawal of the petition for insolvency—Right of Official Assignee to maintain a suit.*—On the 14th October, 1903, a petition in insolvency was filed; and a vesting order was made by the Court. On the 15th June, 1904, the insolvents took out a rule *nisi* to withdraw their petition; and the rule was made absolute on the 21st September, 1904. But the rules were not drawn up till 7th February, 1906. In the meanwhile, the Official Assignee filed a suit on the 2nd March, 1905, on behalf of the insolvents to recover a sum of money alleged to be due to the insolvent's firm in respect of certain mercantile transactions. It was objected that the Official Assignee was not entitled to maintain the suit: *Held*, that at the date of the institution of the suit the insolvency proceedings were still in force, and the assets of the insolvents still remained vested in the Official Assignee. The subsequent coming into force of the order could not vitiate the institution of the suit, and it was clear that the Official Assignee was competent to bring the suit. He was also competent to continue it, for the order of the withdrawal even after it became operative, was not effective to divest the Official Assignee and revest the property in the insolvents. The withdrawal of a petition for insolvency does not operate to discharge the vesting order. A withdrawal for which no provision is made in the Act cannot be regarded as the legal equivalent of a dismissal by consent. HAJI SAJAN LALJI v. N. C. MACLEOD, **10 Bom. L.R. 178=32 B. 321.**

(41)—*S.* 7—*Insolvent—After-acquired property of the insolvent—Construction of an Act.*—The words of s. 7 of the Indian Insolvency Act, cover the after-acquired property of an insolvent. An Act is not to be deemed to be retrospective which takes away or impairs any vested right acquired under existing laws. MACLEOD v. B. B. & C. I. RAILWAY CO., **7 Bom. L.R. 618.** (*Reversing*, 7 Bom. L. R. 337).

(42)—*S.* 7—*Insolvency—Undischarged insolvent—After-acquired immoveable property—Adverse possession for over* 12 *years—Right of Official Assignee—Extinguishment—Limitation Act* (1908), *s.* 28, *art.* 144—*Vesting order—After-acquired property—Title vesting in Official Assignee—No conveyance necessary.*—Where the insolvent obtained no order for his discharge in the nature of a certificate, and such insolvent acquired subsequently certain properties and was in possession of the same for over twelve years, his possession was adverse to the Official Assignee, and the right of the Official Assignee to the property was extinguished (Limitation Act, s. 28, sch. II, art. 144). (8 C. 556, *R.*) Where an undischarged insolvent subsequently gets by bequest certain properties, the Official Assignee becomes, under s. 7 of the Insolvency Act, entitled to those properties, without any assignment or conveyance, and the property bequeathed passed at once to the Official Assignee. P. BALAKRISHNA PILLAI v. M. P. NARAYANSAMI NAIDU, **12 M.L.T. 215=17 Ind. Cas. 14.** (17 M. 33, 2 Ch. D. 138, *R.*)

Statute 11 and 12 Vict., C. 21, (Insolvent Act, 1848)—*continued.*

(43)—*S.* 7—*Death of a partner—Insolvency application by surviving partners, if vests in the Official Assignee.*—Where out of two partners, one dies and the surviving partner filed a petition of insolvency, and a vesting order is made. *Held*, that the surviving partner's rights and obligations vested in the Official Assignee, so as to be available for the benefit of the firm. The business also could be wound up so as to bind the representatives of the deceased partner. The surviving partner's obligation to sell the partnership property and to pay partnership debts vested in the Official Assignee as an incident of the estate which vested in him, under s. 7 of the Insolvency Act. The interest of the deceased partner in the partnership assets, even if it became vested on his administrator, was subject to the obligation of the surviving partner to sell partnership property to pay partnership debts. ADMINISTRATOR-GENERAL OF MADRAS v. OFFICIAL ASSIGNEE OF MADRAS, **6 M.L.T. 188=3 Ind. Cas. 163.**

(44)—*S.* 7—*Right to sue—Official Assignee.*—The right of suit appertaining to an insolvent does not pass at his insolvency to the Official Assignee as it is not enumerated in s. 7 of this Act. DATTOOBHOY v. VALLU, **1 Bom. L. R. 828.**

(45) *S.*7—*Execution sale of judgment-debtor's undivided share in ancestral property--Insolvency of judgment-debtor prior to execution-sale—Suit for partition by the assignee from purchaser in execution.*--In the execution of a simple money decree against the judgment-debtor, a member of a joint Hindu family, his undivided share in the ancestral immoveable property was sold and the purchaser conveyed his right to the plaintiff. Prior to the ezecution-sale the judgment-debtor had become an insolvent and all his property had vested in the Official Assignee under s. 7, Insolvency Act. On the plaintiff bringing a suit for partition and possession of the share, *held*, that as soon as an order had been made under s. 7, Insolvency Act, vesting property of a judgment-debtor in the Official Assignee, the judgment-debtor had no saleable interest in such property, and that as such, the plaintiff's suit could not be maintained. SUNDRAPPAYAR v. RAMA, ARU, ARU, RAMA ARUNACHELLA CHETTIAR, **4 M.L.T. 183=18 M.L.J. 487=31 M. 493.** (11 C.L.R. 389, 3 B. 437, *R.*; 30 M. 145, *Not F.*)

(46)—*S.* 7.—*Attachment of debt—Money paid by* garnishee *to sheriff in execution—Subsequent insolvency of judgment-debtor—Priority between Official Assignee and judgment-creditor to money in the hands of the Sheriff.*—A judgment-creditor obtained a warrant for atttachment of the debt due by a third person to his judgment-debtor,

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

A prohibitory order was served on the *garnishee*. No cause having been shown, the notice to pay was made absolute. In execution against him, the *garnishee* had to pay the sheriff a sum much more than what was really due from him to the judgment-debtor. Soon after this, the judgment-debtor filed his petition in the Insolvent Court and his whole estate became vested in the Official Assignee. The Official Assignee claimed the amount which was found actually due by the *garnishee* to the judgment-debtor. *Held*, the effect of an attachment is to prevent alienation. It does not confer title. Although money was paid to the Sheriff, it could not be treated as equivalent to the actual payment to the creditor himself. What took place was really tantamount to paying the money into Court. No order was obtained for payment of the money to the creditor himself. The amount paid by the *garnishee* being much more than what was due by him, it was merely paid under protest for the purpose of getting rid of the attachment, and not in satisfaction of the amount due from him. Therefore, the money in the hands of the Sheriff must be considered as belonging to the insolvent and, in consequence, it vested in the Official Assignee. JITMAND RAMANAND v. RAMCHAND NANDRAM, 29 B. 405=7 Bom.L.R. 488. (29 C. 428, 26 M. 673, *R.*)

(47)—*S. 7—Dismissal of petition—"Null and void," effect of—Revesting property in insolvent retrospectively from date of vesting order.*—S. 7 of the Indian Insolvency Act, 1848, provides that in case, after the making of any vesting order, the insolvent's petition should be dismissed, the vesting order shall, from and after such dismissal, become null and void, subject however, to the condition that all acts done by the Official Assignee prior to the dismissal of the petition shall be good and valid, a saving which would be unnecessary if the revesting had not a retrospective effect. The use of the phrase "null and void" has the effect of revesting the property in the insolvent retrospectively from the date of the vesting order, and provision is, therefore, made for validating all acts done by the Official Assignee in the interval between the date of the vesting order and the dismissal of the insolvent's petition. KOTHANDRAM RAVUTH v. MURUGESA MUDALIAR, 27 M. 7. (20 M. 452, *Appr.*)

(48)—*S. 7—Settlement made by insolvent before insolvency—His right to sue thereon.*—An insolvent cannot bring a suit to enforce the terms of a settlement regarding landed property, made before he filed his petition in insolvency. Any rights which the insolvent had under such settlement vested, as soon as the Court made its order under s. 7 of the Indian Insolvent Act, in the Official Assignee; and a suit to enforce such rights could be maintained by the Official Assignee only. (*Herbert* v. *Sayer*, 5 Q.B. 965; *Jameson and Co* v. *The Brick and Stone Co., Ld.*, L.R. 4 Q.B.D 208, *D*.) SADODIN v. W.

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

SPIERS, 3 B. 437. [*R.*, 31 M. 493=18 M.L.J. 487=4 M.L.T. 188; *D.*, 16 B. 452, 31 M. 347 =4 M.L.T 197.]

(49)—S. 7—*See* ACT IX OF 1897, s. 4, 26 M. 440.

(50)—S. 7—*See* HINDU LAW—ALIENATION 7 B. 438.

(51) S. 7—*See* SALE—SALE IN EXECUTION OF—DECREE—WRONGFUL AND INVALID SALES, 11 C.L.R. 389.

(52)—S. 7—Insolvent judgment-debtor—*See* SALE—SALE IN EXECUTION OF DECREE—WRONGFUL AND INVALID SALES, 12 C.L.R. 60.

(53)—S. 7—Benefit of executory contract, if can vest in Official Assignee—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 3 and 6, 11 C.W.N. 566=34 C. 286.

(54) *Ss.* 7, 21, 28, 29, 31—*Sale by Official Assignee of the effects of the insolvent—Sanction by the Court—Practice.*—The Insolvent Court, acting under the Indian Insolvency Act, has no power to sanction the sale by the Official Assignee of the estate and effects of the insolvent. *In re* BHUKHANDAS, 7 Bom. L.R. 954.

(55)—*Ss.* 7, 27—*After-acquired property of insolvent—Salary—Pension—Personal earnings—Execution proceedings, stay of—Vesting order, notice of.*—After-acquired property of an insolvent, whether it consists of salary of personal earnings, or property of a different kind, must be regarded as property all alike vesting in the Official Assignee, but subject to the provisions of s. 27 of the Indian Insolvent Act as to salary and pensions, and subject to the unwritten law as to personal earnings sufficient for the maintenance, according to his position in life, of the insolvent and his family, the result being that the Official Assignee is not entitled to claim such salary or income from the insolvent except by means of an order obtained under s. 27 of the Act, nor such personal earnings at all unless and until in either case the insolvent has accumulated a margin beyond what has been required for his adequate support. Under ordinary circumstances, an insolvent is entitled when sued for a sum of money which he has admitted in his schedule, to have the suit or execution proceedings upon it stayed upon proof of its being so admitted. An attachment upon the salary of a railway servant ceases to be operative after he has filed his petition in insolvency and should be withdrawn on notice being given of the making of the vesting order. *In the matter of* C. M. J. DONAGHUE, 19 B. 232. [*Appr.*, 21 M.L.J. 78=8 M.L.T. 202=7 Ind. Cas. 801; *R.*, 13 C.P.L.R. 61.]

(56)—*Ss.* 7, 27, 48 *and* 49—*Discharge of insolvent—Earnings or salary of insolvent—Vesting in the Official Assignee Execution of decree by plaintiff having notice of his debt being included in the Schedule—Costs.*—After bankruptcy and before discharge, whatever property

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

a bankrupt acquires belongs to his trustee, save only what is necessary for his support. And for this purpose there is no difference between personal earnings and salary. So the salary of an officer vest in the Official Assignee, but the latter cannot get any of it until the Court makes an order under s. 27. (19 B. 232, *R.*) *Held* also, that the plaintiff, who execute decree against the insolvent subsequent to his having notice of his debt being included in the Insolvent's Schedule is liable, under s. 49, for the costs incurred by the insolvent by reason of such proceedings. RANGANATHA ROW v. ANANDACHARIAR, **8 M.L.T. 202=7 Ind. Cas. 180.**

(57)—*Ss* 7, 30—*Application in insolvency by undivided brothers carrying on ancestral trade vesting of family property in Official Assignee—Sale by Official Assignee—Sale in execution of decree against member of family not party to insolvency proceedings—Rights of respective purchasers — Civ. Pro. Code, s.* 266.— An application was made by all the undivided brothers of a family carrying on an ancestral trade to be declared insolvents. On the applicants being discharged. all their property including the plaiut property, was vested in the Official Assignee. Plaintiff purchased the plaint property from the Official Assignee. A son of one of the brothers, who was not a party to the insolvency proceedings in consequence of his having been a minor at the time, becoming indebted, a decree was obtained against him. In execution of the decree, his share in the plaint property was sold. Plaintiffs thereupon sued for a declaration that the execution sale was void and inoperative as against them. *Held* that as the trade was an ancestral trade and not one commenced by the managing members during the minority of the judgment-debtor, as the scheduled debts were incurred in the course of such trade and as all the adult members of the family applied for the benefit of the Insolvency Act, the debts were *prima facie* binding upon the whole family, including the judgment-debtor. There was no ground for saying that the judgment-debtor's share in the family property was not liable for the debts. The vesting order under s. 7 of the Insolvent Debtors Act vests in the Official Assignee only the real and personal estate and effects of the insolvent, and whether the petitioner be managing member or a junior member of a Hindu family, his undivided interest alone in the joint family property will under that section vest in the Official assignee and the proprietary interest of the other members even if they should be the sons of the petitioner would continue vested in them. The effect of s. 30 of the Insolvent Debtors' Act and of s. 266 of the Civ. Pro. Code, considered by *Bhashyam Ayyangar, J.* NUNNA BRAHMAYYA SETTI v CHIDARABOYINA, **26 M. 214.** [*R.*, 6 Bom. L.R. 925, 11 C.W.N. 478; *Appl.*, 27 M. 375.]

(58)—*Ss.* 7, 49—*Priority of Official Assignee —Civ. Pro. Code*, 1859, *s.* 81.—The plaintiffs brought a suit against P and Co., for the recovery of a sum of money with interest and on 15th May obtained a prohibitory order for attachment before judgment under s. 81 of Act VIII of 1859, under which they attached, on the 17th of May, the right, title and interest of P and Co., in the premises in which they carried on business in Calcutta. On the 20th of May P and Co. were adjudicated insolvents on the petition of other creditors, and the usual order was made vesting their estate and effects in the Official Assignee. On an application on behalf of the Official Assignee for an order releasing the property from attachment, the Court ordered the prohibitory order to be set aside, and the property attached thereunder to be released. BANK OF BENGAL v. NEWTON, **12 B.L.R. App. 1.**

(59)—Ss. 7, 49—*See* CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 58, 7 A. 752=A.W.N. 1885, 116.

(60)—*S.* 8—*Debtor—Adjudication—Insolvent.*—To enable the Court to adjudicate a debtor under s. 8 of the Indian Insolvency Act, three things are necessary:—(1) the debtor should have been in jail for twenty-one days without satisfying the debt for non-payment of which he was imprisoned; (2) the petitioning creditor should be the detaining creditor; and (3) the debtor shall be in prison at the time the petition is presented or is heard. *In re* AHMED ISMAIL, **4 Bom. L.R. 458=26 B. 649.**

(61)—*S.* 8—*Annulling fiat of bankruptcy.*—The annulling of the fiat contemplated by the proviso of 11 and 12, Vict., C. 21, s. 8. applies only to cases in which the original judgment has been the result of mistake of fact, misapprehension, or fraud. *In re* SREENARAIN BYSACK, **2 Hyde 180.**

(62)—*S.* 9—*Procedure—Adjudication of insolvency, application for—By petition or by a rule.*—The usual procedure for obtaining an adjudication order is by petition to the Court duly verified under s 9 of the Indian Insolvency Act (XI and XII, Vict., c. 21) and not by a rule. *In the matter of* BITHAL DASS KALLA, **12 C.W.N. 538.**

(63)—*S.* 9—*Form of petition — Wording of the section to be strictly followed.*—Petitions under s. 9 of the Act should follow the exact wording of that section. An insolvent can prove the terms of any proposed agreement on the part of the petitioning creditor to settle his claim *In re* MEGHRAJ GUNGABUX; *In re* RAMMUL DAYALMUL, **11 Bom. L.R. 81=1 Ind. Cas. 199.**

(64)— *S.* 9—*Act of insolvency — Debtor — Composition deed — Trustees* —A conveyance by a debtor, of all his property, to trustees for his creditors, is an "act of insolvency" within the meaning of s. 9 of Indian Insolvent Act. *In re* KURSANDAS RAMDAS, **3 Bom.L.R. 905.**

(65)—*S.* 9—*Act of insolvency — Debtors — Composition deed—Assignment of all goods — Trustees—Fraudulent intent.*—The execution by

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

a trader of a deed purporting to be a general assignment of all his property to trustees for the benefit of his creditors is an act of insolvency. Though a deed may not be fraudulent within the doctrines of Common law, it still may be fraudulent within the meaning of the Insolvency Act, and it is clear that the absence of pressure though relevant to the question of fraudulent preference, is not a necessary element of an act of insolvency consisting in an assignment of the whole of a trader's goods. KURSONDAS v. MAGANLAL, **4 Bom. L. R. 94 =26 B. 476.**

(66)—*S.* 9—*Non-resident trader carrying on business through resident gomasta—"Departure" —Intent to depart must be proved—Insolvency not committed by act of agent unauthorized by the principal and of which principal had no cognisance.*—A departure such as is made an act of insolvency by s. 9, 11 and 12, Vict., c. 21, is a departure by the debtor personally and cannot be committed by any other person on his behalf. Such departure must be his departure and intention to depart must be proved to be his intention. A man cannot commit an act of bankruptcy by particulars act of his agent which he has not authorized, and of which act he had no cognizance. (Ex parte *Blain*, In re *Sawers*, 12 Ch. D. 522, *R.*) *Held*, under the circumstances of the case, that stoppage of payment by the gomasta of a trader beyond jurisdiction carrying on business by gomasta within jurisdiction, was not an act of insolvency within the meaning of the Insolvent Act and that the retirement of the gomasta to his chambers on the third storey of the business premises from the second storey in which the banking business was carried on, did not amount to a departure with the intention to defeat and delay the creditors of the trader (principal). *In re* DHUNPUT SINGH, **20 C. 771.** [*Reversed*, 23 C. 26, P.C. = 22 I.A. 162.]

(67)—*S.* 9—*Assignment for benefit of creditors—Act of bankruptcy.*—An assignment of the whole of a debtor's property for the benefit of his creditors generally, constitutes an act of bankruptcy within the meaning of s. 9 of the Insolvency Act (11 and 12, Vict., c. 21.) DRIJMOHUN DOBAY v. BUNGSIDHUR, **2 C. W.N. 335.**

(68)—*S.* 9—*Delaying and defrauding creditors.*—An assignment by a debtor of all his properties to trustees in trust to pay and satisfy his debts and liabilities, where it appears that most of the creditors assent to it, and the debtor really intends that all the creditors should be finally satisfied, and the assets seem to be sufficient for the purpose, amounts to delaying and defeating creditors within the meaning of s. 9 of the Indian Insolvent Act (11 and 12 Vict., c. 21), and is, as such, an act of insolvency, as the effect of the deed is to delay payment to the creditors who are not bound to wait, but are entitled to insist on immediate payment. (1 C.M. and R. 777, *F.*) *In the matter of* BRIJMOHUN DOBAY, **2 C.W.N. 306.**

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

(69)—*S.* 9—*Adjudication of an insolvent—Departure of the person from jurisdiction with intent to defeat or delay the creditors.*—The jurisdiction to adjudge that a person has committed an act of insolvency only arises when a petition complying with the conditions set forth in s. 9 of the Insolvency Act has been presented. It must, therefore, be stated in the petition that the person sought to be adjudicated an insolvent departed from the jurisdiction of the High Court with intent to defeat or delay his creditors or with like intent departed from his usual place of business or abode within the jurisdiction. ABU HAJI SULLEMAN v. HAJI JAN MAHOMED, 8 Bom. L.R. 648.

(70)—*S.* 9—*Setting aside order of adjudication—Notice to creditors — Practice.*—Certain persons had been adjudged insolvents under s. 9 of the Insolvent Act upon the petition of certain creditors. The insolvents subsequently applied, on notice to the Official Assignee and to the petitioning creditors, for an order that the adjudication might be set aside upon such notice to their creditors as the Court might deem proper. In their petition for this order, the insolvents stated that they had come to a settlement with all their creditors, that the adjudicating and some of the other creditors had already received the amount of their composition, and that the remaining creditors had agreed to receive the amounts respectively due to them under the settlement out of the sale-proceeds of the insolvents' property in the hands of the Official Assignee. The Insolvents had not filed any schedule and no claims had been proved. The Official Assignee objected that notice must be given to all the creditors before the adjudication could be annulled. The Court held that the objection must prevail but refused to make any order. If the adjudication were improper it could be set aside; if proper, a schedule must be filed in the usual way. *In the matter of* RAJNARAYAN PAL, **13 B.L.R. App. 25.**

(71)—*S.* 9.—*Adjudication of insolvency—Non-resident trader carrying on business through resident gumashta.*—A non-resident trader, carrying on business through his gumashta, can be adjudicated an insolvent under s. 9 of the Insolvent Act, on the gumashta stopping payment and closing and leaving his usual place of business or doing any act which, if done by the trader himself, would render him liable to be adjudicated an insolvent. *In re* HURRUCK CHUND GOLICHA, **5 C. 603=6 C. L. R. 382** (11 B.L.R. APP. 26 and 11 B.L.R. 254, *R.*) [*Diss.*, 20 C. 771; *Cons.*, 23 C. 26. P.C. =22 I.A. 162; *R.*, 14 B. 189, 8 C.W.N. 553 = 31 C. 761.]

(72)—*S.* 9—*Revocation of adjudication — Stranger cannot apply for revocation—Insolvent only can do so—Review.*—Under s. 9 of the Indian Insolvent Act, the only person who can apply for a revocation of the order of adjudication is the person adjudged to have committed

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

an act of insolvency. There is no other provision in the Act, which authorizes any person other than the adjudged insolvent to apply to have the order of adjudication revoked. The Insolvent Court has power to review its own orders, but that power can only be exercised at the instance of the party entitled to invoke the exercise of it. *In re* HAJI NAN JAN HAJI MAHOMED, **11 Bom. L.R. 1032=5 Ind. Cas. 126.**

(73)—*S. 9—Application for adjudication as insolvent, time for presentation of—The words "it shall be lawful" in s. 9, meaning of.*—There is nothing in the Insolvent Act fixing any limit to the period within which a creditor may petition for adjudication as an insolvent. The petitioning creditor has a right to petition; and the Court has jurisdiction to make the order of adjudication, notwithstanding that the insolvent has been discharged from jail at the date of the petition and adjudication and notwithstanding that the act of insolvency was committed more than twelve months prior thereto. The provisions of s. 9 are imperative and do not confer any discretion on the Court. The words " it shall be lawful for the Court " occurring in the section have not the effect of giving the Court any discretion in respect of the adjudication ; because, inasmuch as they confer on the Court authority to do a judicial act in a certain case, they make it imperative on the Court to exercise that authority when the case arises and the exercise of such authority is duly applied for. *In the matter of* THUCKER BHAGWANDAS HARJIVAN, **4 B. 489.** [*R.*, 11 Bom. L.R. 1032.]

(74)—*S. 9—Order of adjudication of insolvency by the High Court—Second application for adjudication in different High Court—Discretion—Concurrent proceedings, if maintainable.*—This rule was granted at the instance of an insolvent adjudged as such in the Bombay High Court, on the 23rd April 1896, under s. 9 of the Indian Insolvent Act (Stat. 11 and 12, Vict., c. 21) to have committed an act of insolvency, calling upon the petitioning creditor to show cause why the order of adjudication should not be revoked. At the time when the above order was made, the Court was not aware that, on the 9th April, the same debtor had already been adjudged to have committed an act of insolvency, and that a vesting order had been made by the Court for the Relief of Insolvent Debtors at Madras. The main ground upon which the order was sought to be revoked was that, after the Madras Court had adjudged the debtor to have committed an act of insolvency and had made a vesting order, a second adjudication by the Bombay High Court should not have been made and ought not to be continued. *Strachey, J.*, having passed an order discharging the rule, the insolvent appealed against the order. The appellate Court, agreeing with the learned Judge, held that the prior adjudication of the Madras Court did not deprive the Insolvent Court in Bombay of jurisdiction to adjudicate the appellant an insolvent at the instance of a Bombay creditor. Also, the Court had a discretion vested in it to refuse the adjudication order, if, having regard to all the circumstances of the case, it considered that an adjudication again in Bombay would be a vain and useless proceeding. The insolvent subsequently obtained his personal discharge in Madras, and since, thereupon, there was no longer any ground for apprehending that the proceedings at Madras would be discontinued, it would not be just or equitable to allow the proceedings in the Bombay Court also to go on concurrently. The proceedings in Madras having been prior in time, and the assets of the insolvent having vested in the Official Assignee there, the Court at Madras had the prior claim to continue the proceedings, and so the best course was held to be to stay the proceedings in the Bombay Court until further orders leaving the Bombay creditors to take such steps in Madras as they might be advised to take. *Re* ARANVAYAL SABHAPATHY, **21 B. 297.** [*R.*, 31 C. 761=8 C. W.N. 553, 6 P.L.R. 1909=5 P.W.R 1909=1 Ind. Cas. 55, 45 P.R. 1910, 15 C.W.N. 244= 12 C.L J. 445=7 Ind. Cas. 691.]

(75)—*Ss. 9 and 73—Revocation of adjudication on the petition of a person aggrieved—"Person aggrieved"—Assignee by deed of the property of an insolvent may be a "person aggrieved."*—The Commissioner sitting in the Insolvency Court can annul an adjudication on the application of any person aggrieved. An assignee by deed of the property of an insolvent may be a " person aggrieved, " under s. 73 of the Indian Insolvent Act, who is entitled to come in and object to an order of adjudication. HAJI JACKERIA HAJI AHMED v. R. D. SETHNA, **12 Bom. L.R. 27=5 Ind. Cas. 618.**

(76)—Ss. 9, 92—*Joint debt—Members of joint Hindu family* —Though the members of a Hindu joint trading family may not be, in all respects, partners within the definition of the Contract Act, they may be so, for the purposes of s. 9 of the Insolvent Act. When a trader in Madras makes a promissory-note in the joint names of two persons trading as a joint Hindu family, and the debt amounts to Rs. 527, they may petition for the adjudication of the debtor's insolvency. *Ex parte* RAGAVALOO CHETTI, *In re* RANGIAH CHETTI, **15 M. 356.**

(77)—*S. 12 — Insolvent — Final discharge under his insolvency—Subsequent bankruptcy—Insolvent filing his petition—Insolvent's duty to serve his creditors at his own expense—Adjudication as insolvent—Petitioner's duty of serving notices—Adjudicated insolvent's duty to attend and point out the persons to be served.*—There is no objection to man becoming a bankrupt a second time before he has received his final discharge under the first ; the only result being that the trustee under the first bankruptcy will swallow up all the assets collected under the second, and the trustee under the latter will be entitled to nothing until all the debts

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

under the former are paid off. Where an insolvent has filed his petition under the Insolvent Debtors Act, he has the carriage of the petition and it is in his interest to bring it to a hearing; consequently, it is his duty and to his interest to serve his creditors and at his own expense in order to bring it to a hearing. Where, however, he has been adjudicated an insolvent, it is the petitioning creditor who wants the affairs of the insolvent investigated; consequently, on him rests the burden of serving notices, though it is still the duty of the insolvent to attend when required and point out the persons who are to be served. DOSSA v. BHANJEE, **3 Bom. L.R. 453=26 B. 171.**

(78)—*S.* 13—*Judgment-debtor—Interim protection order—Re-arrest under the same decree.*—A judgment-debtor who has been arrested and imprisoned in execution of a decree and has obtained an interim protection order under s. 13 of the Insolvency Act, is liable to be retaken in execution of the same decree, under the provisions of the Civil Procedure Code, 1882. SHAMJI v. POONJA, **4 Bom. L. R. 483=26 B. 652.**

(79)—*S.* 13—*Arrears of maintenance—"Debt or liability"—Protection order—Insolvent Act.*—Arrears of maintenance, included in an insolvent's schedule, are a debt or liability (notwithstanding that they may be enforceable in Criminal Courts) within the meaning of s. 13 of the Insolvent Act; and a protection order would protect the insolvent from arrest or imprisonment in respect of such debt. *Quaere.*—Whether the protection order extends to proceedings in respect of maintenance accruing subsequent to the filing of the schedule?—TOKKEE BIBEE v. ABDOOL KHAN, **5 C. 536=5 C. L. R. 468.** [*R.*, 17 C. P. L. R. 127.]

(80)—*S.* 19—*Rule* 14 *of Insolvent Court—Right of Official Assignee to commission.*—The right of the Official Assignee to his commission arises only when there are in his hands any funds realised and available for distribution among creditors. If at such time, the adjudication is annulled, the right to commission subsists. OFFICIAL ASSIGNEE v. RAMALINGA, **8 M. 9.**

(81)—*S.* 19, *Insolvency—Interest on scheduled debts—Official Assignee's commission on it.*—Where the estate of an insolvent leaves a balance with the Official Assignee after paying off the creditors, interest at 6 *per cent.* will be ordered to be paid on contract debts which expressly or impliedly carry interest. The Official Assignee will be allowed to retain his commission on it, and the balance will be ordered to be paid to the insolvent. *In re* MAHOMED MAHMUD SHAH, **13 C. 66.**

(82)—*Ss.* 19, 21, 31—*Act* XV *of* 1848 (*Supreme Courts' Officers*)—*Sale of insolvent's estate subject to mortgage—Official Assignee's commission.*—An order in insolvency proceedings was made directing the Official Assignee to sell certain immoveable properties which were subject to a mortgage, on the application of the mortgagee, with the consent of the Official Assignee. On the question as to the commission payable to Official Assignee. *Held* that the Official Assignee was entitled to commission out of the insolvent's estate, not on the *full* value of the property sold, but only on the amount coming to the insolvent's estate. (13 B.L.R. App. 9, *Commented on*)—The Official Assignee cannot claim commission on the full value of the properties, *qua* auctioneer, on account of the probibition contained in the Supreme Courts' Officers Act. Besides, a trustee having power to sell by auction cannot employ himself as the auctioneer and charge the trust estate with his commission—The practice of the Court for 30 years to allow commission on the full value of the properties sold, was overruled as being contrary to the express words of both the Indian Insolvency Act and the Supreme Courts' Officers Act. *In re* OFFICIAL ASSIGNEE'S COMMISSION, **36 C. 990=4 Ind.Cas. 697.**

(83)—*Ss* 19, 41—*Insolvency Rules, R.* 131—*Right of Official Assignee to retain commission without order of Court—Long practice—Order directing not to draw commission pending orders of Court—Validity*—*Held* that, on a true construction of s. 19, Insolvency Act, 1848, and R. 131 (3) of the Insolvency Rules 1905, an order which (after declaring a dividend) directs the Official Assignee to deliver into Court the statement of accouut prescribed by s. 41, Insolvency Act, 1848, and R. 94 of the Insolvency Rules, 1905, and further directs that all questions arising on account and as to the payment of the Official Assignee shall be reserved, and that the Official Assignee shall not draw any commission in respect of the amount to be distributed as dividend under the order in question till these questions have been decided, is proper and valid. (8 M. 79, *Expl.*) The present practice, which has for a long period prevailed, under which the Official Assignee has drawn or retained, without the order of Court, the commission to which he is entitled out of the estate of the insolvent, is wrong. *In re* MESSRS. ARBUTHNOT AND CO., **7 M.L.T. 290=5 Ind. Cas. 727.**

(84)—S. 21—*See* Nos. 54 and 82, *supra.*

(85)—*Ss.* 21 *and* 26—*Effect of death of insolvent after filing his petition, but before filing schedule.*—On the 15th of March 1862, the petitioner brought an action in the Supreme Court against the insolvent to recover a sum of money, and on the 17th of that month the usual summons was served on the insolvent. On the last mentioned day the insolvent was committed to prison on the charge of murder, notwithstanding which, on the 21 March 1862, he filed his petition in the Insolvent Court. The usual order was then passed, vesting all the insolvent's estate and effects in the Official Assignee from the date of the filing of the petition. On the 26th March 1862, the present

Statute 11 and 12 Vict., C. 21, (Insolvent Act, 1848)—*continued.*

petitioner recovered judgment in his action in the Supreme Court. The insolvent was tried and convicted and sentenced to death, and on the 14th of April 1862, before the insolvent filed his schedule in the Insolvent Court, the sentence was carried into execution. *Held* first, that s. 6 of 11 and 12, Vict., c. 21, is not imperative; and, secondly, that ss. 21 and 26 of the same Act give the Official Assignee ample powers for the ascertainment and realization of an insolvent's estate without the aid of a schedule. *In re* KALLEE CHURN KETTRY, **1 Ind. Jur., O.S. 16.**

(86)—*S.* 23—*Fixtures—Goods and chattels—Machinery—Engine—Trade fixtures—Insolvent—Official Assignee.*—On 23rd June, 1893, Vishram covenanted with the plaintiff that the machinery, engines, trade fixtures, &c., should stand charged with and continue to be a security to the plaintiff for Rs 8,000, then advanced, and power was given to the plaintiff to sell the same on default in payment. In March 1899, while there was still a large sum due to the plaintiff, Vishram filed his petition under the Act for the Relief of Insolvent Debtors, and thereby his assets became vested in the Official Assignee. The Official Assignee having contended that the articles above named were in the possession, order, or disposition of the insolvent with the consent of the true owner and so vested in him, the plaintiff filed a suit to establish his right over them. The Division Court decided in plaintiff's favour, as to such of the articles as were fixed on the ground that they were not goods and chattels, and as to such as were not fixed on the ground that the plaintiff was not the true owner On appeal by the Official Assignee:—*Held*, (1) that the articles not fixed were clearly in the Insolvent's possession: and that, therefore, the Official Assignee had a good title over them. (2) That the annexed articles were not goods and chattels in the possession, order or disposition of the insolvent as their reputed owner; and they, therefore, were in his reputed ownership; and that as to them the Official Assignee had no title. MACLEOD v. KIKABHOY, **3 Bom. L.R. 426=25 B. 659.**

(87)—*S.* 23—*Mortgagee allowing possession to remain in mortgagor firm—Insolvency of two partners of firm—Rights of mortgagee.*—The two petitioners along with another carried on business as livery stablekeepers in Calcutta under the name of Thomas Smith & Co. The petitioners actually carried on the business of the firm, the third partner being resident in England. On 3rd May, 1873, all the partners mortgaged all their stock-in-trade, by a mortgage-deed which contained a proviso that the mortgaged property should be treated and considered as the property in the order and disposition of the mortgagee, but the mortgaged property was allowed to be in the possession of the mortgagor firm. On the 10th May, 1880, the petitioners, the first two partners, filed their petition in the Court for the relief of insolvent debtors, and the estates and effects were, under

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

an order of the Court, vested in the Official Assignee, who on the same day entered into possession.—On the 12th the mortgagee entered into possession and on the 26th June, the third partner, who had meanwhile returned from England, filed his petitions. *Held* that the mortgaged property was, by the consent of the true owner, in the possession, order or disposition, of the insolvents, as reputed owners, and had vested the Official Assignee for the benefit of all the creditors, and the mortgagee's petition to be paid in full should be refused. *Ex parte Union Bank of Manchester, In re Jackson*, L.R. 12 Ex 354; *Ex parte Doman. In re Lake*, L.R. 8 Ch. App. 51. *In re Bainbridge*, L.R. Ch. Div. 218, *R.*; *Reynolds* v. *Bowley*, L.R. 2 Q.B. 41 474. *D*) *In re* MORGAN AND FORBES, **7 C.L. R. 29**. (*On appeal see* 6 C. 633=9 C L R. 385.)

(88)—*S.* 23—*Order or disposition.*—If goods are in a man's possession, order or disposition under such circumstances as to enable him by means of them to obtain false credit, the owner who has permitted him to obtain false credit must suffer the penalty of losing the goods for the benefit of those who have given the credit. *In re* F. H MARSHALL T. BOILEAN v. A. B. MILLER. **10 C. L. R. 591**. (*Ex parte Wingfield*, L. R. 10 CH D. 591, *R.*)

(89)—*S.* 23—*Doctrine of reputed ownership—Notice—Devolution of judgment-debtor's interest on Official Assignee—Civ Pro. Code.*, 1882, *s.* 372.—By an instrument dated March 1897, one B covenanted to repay by instalments a sum owing by him to P and mortgaged to P his stock in-trade and all outstandings and moneys then due and owing and thereafter to become due and payable to the mortgagor. B remained in possession. In July 1899, P brought a suit against B on his mortgage-bond, and in August 1899, upon an *ex parte* application by P, an order by way of injunction was made in the suit restraining the mortgagor from disposing of the stock in trade and outstandings and debts payable to him. This injunction was afterwards dissolved In the same month, P gave notice to N who was indebted to B that he claimed the sum under the mortgage as an outstanding due to the mortgagor. In September, 1899, B was adjudged an insolvent and the usual vesting order was made. In October, 1899 P obtained a decree in his suit by which the insolvent was directed to pay to him the principal and interest due under the mortgage-deed, and in default of payment before the end of January, the mortgaged premises were ordered to be sold. In February, 1900, N paid to the Official Assignee the debt due by him to B. In September, 1900, an order was made in P's suit against B directing that the decree should be executed by the attachment of the money in the hands of the Official Assignee. In December, P applied by summons in his suit against the insolvent for an order that the Official Assignee should pay over that money. *Held* that he was not entitled to that order as the whole right, title and interest of the

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

insolvent in and to the debt due from N to him became vested in the Official Assignee as soon as the adjudication and the vesting order were made, and so the decree obtained by P was invalid against the Official Assignee. The Official Assignee was not bound by the decree by the doctrine of *lis pendens*, because the subject-matter was not real property, and the interest devolved by operation of law. P might have applied under s. 372, Civ. Pro. Code, to have the Official Assignee added as a party in the suit in which case he would have been bound by the decree. Where a debt has been assigned notice by the assignee to the debtor will take the debt out of the disposition of the assignor. A chose in action, if it is a debt due to the insolvent in his trade or business, comes within the words "goods and chattels" as contained in s. 23 of the Indian Insolvent Debtors Act—*Per Sir Arnold White, C. J.* The instrument can only be construed as creating in favour of the plaintiff a charge or hypothecation; but a charge-holder is as much the substantial owner of and has as substantial an interest in the goods and chattels as the mortgagee thereof, and if either of them allows the mortgagor or the person creating the charge to remain in possession of the goods and chattels under circumstances which will lead to his being "reputed" as owner and to his being enabled to command credit thereby, he will be estopped from asserting his substantial interest or ownership in the property as against the Official Assignee—*Per Bhashyam Ayyangar, J.* PUNITHAVELU MUDALIAR v. BHASHYAM AYYANGAR, **25 M. 406=12 M. L. J. 282.** [*R.*, 9 C. W. N. 14; *D.*, 26 M. 230=12 M. L. J. 368.]

(90)—*S.* 24—*Insolvency—Voluntary transfer by insolvent.*—A firm trading at Calcutta stopped payment on a certain night, and was adjudicated insolvent two days after. One of its branches located at Lucknow, transferred, on the day on which the firm stopped payment, a debt due to it to the defendant, whom the Official Assignee in this case issued for the recovery of the amount, on the ground that such transfer was "voluntary" within the meaning of s. 24 of the Insolvency Act. The transfer was made by means of a draft dated the day on which payment was stopped, and purported to have been made by the debtor of the Lucknow branch under its assignment in favour of the defendant, to the amount of such debt. The greater part of the amount thus transferred was to put the defendant (who had accepted certain hundis of the firm), in funds to meet such hundis. It also appeared that there was great delay in entering up the amounts transferred, in the books of the various parties concerned. Though their Lordships of the Privy Council were not prepared to say that the transfer, in so far as it provided the defendant with funds to meet the contingent liability incurred by him by taking up the hundis, would, as a matter of law, be "voluntary" within the meaning of the Insolvency Act, yet considering that the transaction was out of the ordinary course of business, and the un-explained delay in entering up the transaction in the accounts, as well as the other circumstances of the case, it was *held* that the transfer was "voluntary" within the meaning of the Insolvency Act, and therefore void as against the Official Assignee. MILLER v. SHEO PRASAD, **6 A. 84, P.C.=10 I A. 98=13 C.L.R. 305=4 Sar. 430.** (*On appeal from* 2 A. 474.) [*R.*, 10 O.C. 305, F.B.]

(91)—*S.* 24—*Voluntary—Fraudulent—Meaning of.*—Where a promissory note was executed by the insolvents on the 10th August and title-deeds were deposited to secure the same, and a petition by a creditor to adjudicate them insolvents was presented on the 13th and it was found that the pro-note was not supported by consideration to the extent of nearly a half, it was held that the promissory note and mortgage was fraudulent within the meaning of s. 24. *Held*, also that, to the extent of the failure of consideration, the mortgage was granted to secure the property from the clutches of creditors. Where it appeared that the defendants executed the mortgage on the understanding of plaintiffs preserving the property over the extent of their debts for the defendants, such a disposition must be held to be *voluntary* and *fraudulent* and void as against the Official Assignee The mortgage even to the extent of the past debts cannot be upheld. VENKATAKRISHNAMA CHETTI v. LAKSHMI NARASIMHAM, **M.W.N 1912, 1001=17 Ind Cas. 393.**

(92)—*S.* 24—*Insolvent—Transfer of property—Fraudulent intention.*—A transfer of property made by a party in insolvent circumstances is absolutely void although there be no evidence of any fraudulent preference. Where a person conveys all his property to trustees in favour of his creditors, his act is an act of insolvency and all his property vests at once in the Official Assignee, it not being necessary to prove that the assignment is void as being fraudulent. *In re* KURSONDAS RAMJEE, **4 Bom. L.R. 154=26 B. 765.**

(93)—*S.* 24—*Voluntarily—Interpretation—Composition deed—Non-consenting creditor—Debtor declared bankrupt—Official Assignee—Vesting of the insolvent's property*—When a creditor who has not signed the deed whereby the debtor conveys all his property on trust for his creditors gets the debtor adjudicated a bankrupt, the Official Assignee is entitled to take possession of the property comprised therein as the property of the insolvent, because the deed being void the property comprised therein still remains the property of the insolvent as against the Official Assignee, who represents the non-consenting creditors. The word "voluntarily" in s. 24 of the Indian Insolvency Act, includes the sense of freely and uninfluenced by pressure or obligation. MUNMOHANDAS v. MACLEOD. *In re* KARSONDAS, **4 Bom. L.R. 647=26 B. 765.**

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

(94)— *S.* 24— *Preference of one creditor not fraudulent.*—A person in insolvent circumstances may dispose of his property in favour of one creditor even though the act may have the effect of disappointing other creditors. Where a debtor two months before insolvency transferred part of his property to a creditor in preference to others, *held*, that the conveyance was not fraudulent within the meaning of s. 24 of the Act, and could not be impeached. THE OFFICIAL ASSIGNEE OF BOMBAY v. BRIJ KISHORE, **3 A.L.J. 604=A.W.N. 1906, 250.** (2 A. 474, *F.*).

(95)—*S.* 24—*Voluntary conveyance—Fraudulent preference—Burden of proof.*—In this case the plaintiffs sued on a mortgage by deposit of title-deeds to secure the amount of a promissory note alleged to have been executed on the 10th of August by defendants 1 to 4, who absconded on the 12th August, and against whom a petition for adjudication was presented on the 13th. *Held*, that the *onus* of showing consideration for the mortgage was on the plaintiffs, and also that the mortgage was created before the date of insolvency; but that, assuming these things in favour of the plaintiffs, it lay in the first instance on the contesting defendant to show that the mortgage was void under the Act as a voluntary settlement, though not very much would be required to turn the scale. *Prima facie* a transfer to secure past debts on the eve of insolvency is void as a voluntary preference. S. 24 of the Act only requires that the dominant motive should be shown to be to prefer one creditor to another. VENKATAKRISHNA CHETTI v. LAKSHMINARASIMHAM, **8 M.L.T. 335=8 Ind. Cas. 293.**

(96)—*S.* 24—*Insolvent—Voluntary transfer—Burden of proof.*—A firm which failed in business on the 16th March, and was adjudicated insolvent on the 11th April, conveyed on the 6th and 7th April, to a creditor, property almost sufficient to discharge his claim, amounting to Rs. 1,100 in full. The Official Assignee brought a suit to recover the property, on the ground that the transfer was a voluntary one, and void under s. 24 of the Insolvent Act, 11 and 12 Vic., c. 21. *Held* that, looking to the nature of a proceeding in insolvency under the statute, and to the position occupied by the Official Assignee in regard to the estate of the insolvent, the Official assignee is entitled to the whole of such estate wherever it may be; and that any person in possession of a portion of the estate or claiming to hold it under a conveyance or transfer made within the period prohibited by s. 24 and under such circumstances as were disclosed in this case, must defend that conveyance or transfer, and establish that it was not within the mischief contemplated by the section. Such a conveyance or transfer should primarily be presumed to have been voluntarily made; and it rests upon those who seek to uphold it and who must necessarily be best able to prove the facts, to establish that it was made under such pressure as would remove it from the operation of the section. *Held* also, apart from the question of burden of proof, and looking to the judgments of the Courts below, in conjunction with the facts and dates proved, that there were materials which justified the finding that the transfer in the present case was a voluntary transaction of the kind contemplated by s. 24, and as such unsustainable. BHOLA NATH v. MACGREGOR, **A. W. N. 1889, 24.** (7 A. 340, 51 L. J. Ch. D. 556, A. W. N, 1883, 187, and A. W. N. 1887, 93, *R.*)

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

(97)—*S.* 24—*Presidency Towns Insolvency Act* (III *of* 1900), *s.* 47—*Fraudulent preference—Surety or guarantor of the principal is a creditor—Endorser of negotiable instrument is creditor of maker—Voluntary payment—Insolvent—Adjudication.*—Any surety or guarantor who might, should a bankruptcy supervene before the debts of the principal were discharged, be entitled to claim among the other creditors in bankruptcy, is himself always regarded constructively as a creditor, when the question is one of fraudulent preference. This legal position, with its attendant rights and disabilities, is not affected by the fact that the principal has not been, even could not have been, called upon to discharge the debt at the time the payment to the surety was made. The acceptor or indorser of a negotiable instrument, which has not yet reached maturity, is, for the purpose of s. 24 of the Indian Insolvency Act (11 & 12 Vic., c. 21), a creditor in regard to the maker or drawer; and any payment made by the latter to the former, if otherwise fulfilling all the requirements of s. 24, would be as much a case of fraudulent preference as though it were made to a creditor whose legal rights against the debtor were at the time of payment actually complete and enforceable at law. (1897, 1 Q B. 122, *F.*). S. 47 of the Presidency Towns Insolvency Act, 1909, occurs in a chapter which deals with ways of proving in insolvency, and describes the methods, in which, in certain circumstances, mutual debtor and creditor accounts, as between the insolvent and a creditor claiming in insolvency or being pursued by the Official Assignee for a debt to the insolvents' estate, are to be handled and adjusted. The section does not apply to a suit brought under s. 24 of the Insolvency Act on the allegation of fraudulent preference. What is a "voluntary payment" within the meaning of s. 24, discussed. (1892, 10 Morrell 15, 1899, A. C. 419, *R.*) Under s. 24, all that is necessary to be shown to bring it into operation are two facts, (1) that the payment was voluntary, (2) that it was made when the insolvent firm was in insolvent circumstances and within two months of its adjudication. R. D. SETHNA v. KALLIANJI SANGJIBHAI, **15 Bom. L.R. 113=19 Ind. Cas. 57.**

(98)—*S.* 24—*Indian Insolvency Act—'Voluntary payment'—Secretaries and Treasurers of a society—Authority to receive moneys of society—Duty to invest the same in Government paper—Mixing moneys of society with their own—*

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

Mere issue of pass book as in the case of banking customers—No issue of cheque book—Fiduciary capacity—Breach of trust—Voluntary payment—Meaning—Test—English and Indian Law.—A & Co., the secretaries and treasurers of a society, received, in their capacity as secretaries, moneys belonging to the society. A & Co. had also a banking business and treated the moneys of the Society as they dealt with the monies belonging to their banking constituents, and issued a pass book in the same form as the pass book which they issued to their banking customers. But no cheque book was issued to the society. A& Co., were insolvents at the date of suit. *Held*, that A & Co. held the funds of the society as its secretaries and treasurers, and consequently in a fiduciary capacity, and that they committed a breach of trust. It was the duty of A & Co. not to mix the money of the society with theirs, and the Society's money is recoverable from the unspent balance in their hands at the date of insolvency. (32 M. 68, 22 C. 354, *R.*) It is a well established rule of equity that, if trust money is mixed up with the trustee's private money, then, the *cestui qui trust* will have a lien on the aggregate amount, and any sum which may be drawn by the trustee for his own use will be deemed to have been taken out of his own money. If there was no appropriation, then no question of 'voluntary payment' to or preference to the Society within the meaning of s. 24 of the Indian Insolvency Act arises. The test of a "voluntary" payment is, whether it was spontaneously made by the debtor of his own motion; if so, it will be presumed to have been made with a view to give preference to one creditor over the others. If, on the other hand, the payment was made under the pressure of a demand from the creditor, or because of pressure arising from outside circumstances and influencing the mind of the creditor, such as the existence of a special agreement or a possible danger of prosecution, or if the payment was made in the ordinary course of business, such payment would not be deemed to be voluntary. There is substantially no difference between the English Law and the law as laid down in s. 24, Indian Insolvency Act, so far as the present question is concerned. (10 B.H.C. 327, *R.*) Even if A & Co. had misappropriated the trust money and thereby committed a breach of trust and subsequently wanted to repair the breach of trust by making purchases of Government Paper for the moneys misappropriated, which they were bound to do by a resolution of the Society dated 31st July 1906, the payment would not be regarded as "voluntary." MESSRS. RAMASAMY AND CO. v. THE OFFICIAL ASSIGNEE OF MADRAS, **10 M.L T. 124=21 M.L.J. 920=11 Ind. Cas. 769.**

(99)—S. 24—*See* DEPOSIT OF TITLE DEEDS, **6 B.L.R. 701.**

(100)—*Ss.* 24, 26—'*Voluntary*' *delivery—Practice*—Payments of money and delivery of goods made in the ordinary course of business

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

stand on a different footing and are not voluntary payments and transfers within the meaning of s. 24. Consequently restitution could not be enforced under s. 26 of that Act. It is undesirable to dispose of summarily under s. 26 cases involving difficult questions of title. The ordinary practice should be to leave such cases to be settled by regular suit. ADJIM ARIFF v. J. D. BAYLY, **L.B.R. 1893—1900, 75.**

(101)—*S.* 26—*Power to order any person to deliver insolvent's property to assignee—Practice—Conflict of equity.*—Under s. 26 of 11 and 12 Vic. C. 21, the insolvent Court has the power to order any person who has the possession of, or has under his power or control, any property of the insolvent, to deliver over such property to the Official Assignee; but it is discretionary with the Court to enter upon the trial of such a question and to make an order. [*Appr.*, 3 C. 434.] It has always been the practice of the Insolvent Court to abstain from making orders to deliver over goods belonging to the insolvent or to pay debts due to him, when it appears that there is really a conflict of right or equity between the insolvent and the person in whose possession the goods are or from whom payment of the debt is sought to be obtained. *In re* DWARKANATH MITTER. S M. RATANMANI DASI v. A.B. MILLER, **4 B.L.R O.C. 63=15 W R.O.C. 18. Note.**

(102—*S.* 26—*Gift by insolvent just before insolvency.*—Where a person, shortly before his insolvency, makes over his property to another, wholly without such consideration as the law could recognise, the transaction comes within 13 Eliz., c. 5 and is void as against creditors. The word 'property' in s. 26 of the Insolvent Act includes money. The trial of difficult questions of title could not satisfactorily be effected in proceedings under s. 26 of the Insolvent Act. *In the matter of* UMBICA NUNDUN BISWAS. **3 C. 434=1 C.L.R. 561.**

(103)—*S.* 26—*Insolvent's property at Shanghai—Order vesting the property in the Official Assignee at Bombay—A British subject in possession can be ordered to deliver the property to the Official Assignee—Commission to examine witness at Shanghai.*—When a trading firm is declared insolvent by the Court for the relief of Insolvent Debtors at Bombay, it can order the moveable property of the firm in Shanghai to be vested in the Official Assignee of the Insolvent Debtor's Court in Bombay and the Court can order the person in possession of the property at Shanghai to hand over such property to the Official Assignee at Bombay. If the person in possession at Shanghai is a British subject, he is subject to the insolvency jurisdiction of the Consulate Court at Shanghai and that Court can order him if requested so to do by the Insolvent Court of Bombay to produce all the moveable property, books, papers and documents of the insolvent's firm that may be in his possession. A commission can be issued by the Court for the relief of Insolvent Debtors at

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

Bombay for the examination of a British subject at Shanghai through H. B. M's Supreme Court at Shanghai. *Re* NAOROJI SORABJI TALATI, **10 Bom. L.R. 965=33 B. 462.**

(104)—*S.* 26—*Jurisdiction—Power of the Court of Insolvent Debtors outside the Bombay Presidency—Vesting order—Property outside the Presidency in the hands of a Receiver—Receiver cannot be directed to hand over the assets to the Offcial Assignee.*—The Court for the Relief of Insolvent Debtors at Bombay has no jurisdiction or power to order a Receiver appointed by the Insolvency Court having jurisdiction in Amritsar, and who is in possession of an insolvent's property, to hand over the assets to the Official Assignee in Bombay. The powers of the Commissioner in Insolvency at Bombay are limited, in the first place, to the town and island of Bombay, in the next, where British subjects are concerned, to any place within the the limits of the Presidency of Bombay. *Re* GANESHDAS PANALAL, **9 Bom. L. R. 1093.**

(105)—*S.* 26—*Jurisdiction of the Insolvent Court outside the Bombay Presidency—Person in possession of insolvent's property can be directed to hand it over to the Official Assignee.*—The Court for the relief of Insolvent debtors sitting in Bombay has jurisdiction to make under s. 26 of the Indian Insolvent Act against a person residing outside the Bombay Presidency. *In re* GANESHDAS PANALAL; R. D. SETHNA v. R. D. S. CHOPRA, **10 Bom. L. R. 77=32 B. 198.**

(106)—*S.* 26—*Debts "admitted" or "established," meaning of.*—The terms debts "*admitted*" *or* "*established*," in s. 26 of the Indian Insolvency Act, mean admitted in the Schedule or established on proof, and not that it has been alleged and not denied. *In the matter of* BUCKTWAR CHAND, **1 C.W.N. 328.** [*F.*, 29 C. 503].

(107)—S. 26—*See* Nos. 85, 100, *supra.*

(108)—*Ss.* 26, 36, *Insolvent Debtors Act*, 11 *and* 12 *Vic., C.*, 21, *rule under—Creditor—Construction.*—Under s. 26, no rule should be granted save on the application of an "assignee" or an "admitted creditor" (1 C.W.N. 328, *F.*) No man can be regarded as a creditor until his name is admitted to the schedule or until he establishes it there. The words "and it shall be lawful for the Court on those or any other occasions," in s. 36, are intended to receive a very wide application, and the Court has power to proceed under this section, as soon as there is an insolvent. *In the matter of* CHUNI LAL OSWAL, **29 C. 503.**

(109)—*Ss.* 26, 72, 73—*Evidence not recorded in writing—Scope.*—Evidence not taken down and rendered as provided by s. 72, by the lower Court, could not be gone into on an appeal under s. 73, as the appellate Court could have no means of knowing the facts on which the judgment proceeded. S. 26 empowers the Judge who finds that a debt is due to an

Statute 11 and 12, Vict., C 21 (Insolvent Act, 1848)—*continued.*

insolvent, to make an order that the whole of the debt, or part thereof, shall be paid, that is to say, that where the circumstances of the case render it necessary or proper that the Court should make an order for payment, the Court has power to make such order. *In the matter of* AJUDHIA PRASAD MOHANT JAIRAM GIR v. MILLERS, **7 B.L.R. 74=95 W.R.O.C. 16.**

(110)—*S.* 27—*Commissions on policies of insurance are assets—Salary—Emolument.*—The commission earned by an insolvent in respect of policies of insurance effected through his instrumentality is an asset and not a 'salary' or an 'emolument' under s. 27 of the Indian Insolvent Act. Such commission is not his personal earning. JAMASJI SHAPURJI v. SORABJI KAWASJI, **10 Bom. L.R. 579.**

(111)—*S.* 27—*Intimation of vesting order to Court executing decree—Duty of Court to stay execution.*—Where intimation nas been given of an order vesting in the Official Assignee the Court executing the decree is bound to stay proceedings, unless the decree-holder satisfies the Court that execution should not, for some particular reason, be suspended. DEOJI v. V.S. GILLESPIE, **13 C.P.L.R. 61.** (21 B. 205, 21 C. 634, *R.*)

(112)—S. 27—*See* Nos. 55, 56, *supra.*

(113)—S. 28—*See* No. 54, *supra.*

(114)—*S.* 29—*Suit by Official Assignee—Leave of Court to sue—Leave* nunc pro tunc—*Costs—Practice.*—To an action brought, prosecuted, or defended by the Official assignee, it cannot be objected that such action was brought, prosecuted, or defended without leave first obtained from the Court. Should, however, the Official Assignee bring, prosecute, or defend any such action without leave first obtained from the Court, he will do so at his own risk in regard to the matter of costs. Leave should be obtained before suing: it cannot be granted in the course of the suit *nunc pro tunc.* COCHRANE v. OWEN, **2 Hyde, 150.**

(115)—*S.* 29—*See* No. 54, *supra.*

(116)—*S.* 30—*Dismissal of application by Official Assignee - Person making affidavit, whether can be made liable for costs.* On the dismissal of an application by the Official Assignee to get a certain sale of the insolvent-debtor's property set aside, persons who were merely deponents to certain affidavits in the proceedings could not be held liable for costs. They are not persons "interested in the insolvent's estate," nor can they be said to have applied, appeared or opposed in the proceedings within the Bankruptcy Rules. It is the Official Assignee that must be made liable for the costs of the unsuccessful application made by him, it being open to him to take such further steps as are necessary to indemnify himself. RAMANNA NAIDU v. BRAHMAYYA-CHETTY, **23 M. 26.**

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

(117)—S. 30—*See* No. 57, *supra.*

(118)—*S.* 31—*Effects of an insolvent—Sale by Official Assignee — Sanction of the Court—Power of Court to set aside completed sale—Practice.*—Under the Indian Insolvent Act the Official Assignee has full power to sell the property and effects of an insolvent, and it is his duty to make sale of the same with all convenient speed. The sanction of the Court to the sale is not necessary. S. 31 of the Indian Insolvent Act does not vest the Court with power to set aside completed sale. WOONWALA v. MACLEOD, **8 Bom. L.R. 470 =30 B. 515.**

(119)—*S.* 31—*Arbuthnot Insolvency—Sale of properties in auction by the Official Assignee —Offer for a certain sum—Knowledge of it kept from other persons—Sale not complete—Jurisdiction of High Court to interfere.*—Where an intending purchaser at an auction-sale keeps his offer to purchase the properties as a whole at a certain sum from the knowledge of other persons, so as to defer competition, the sale though made by the Official Assignee and confirmed by the Commissioner is liable to be set aside, if other persons offer for them a higher sum. The High Court, in such cases, has jurisdiction to interfere and cancel a sale held by the Official Assignee, provided it has not become complete. THE SOUTH INDIA INDUSTRIALS, LTD. v. THE OFFICIAL ASSIGNEE OF MADRAS, **1911, M.W.N. 367.**

(120)—S. 31—*See* Nos. 54, 82, *supra.*

(121)—*S.* 32—*Arrangement for cultivation of indigo and management of factories for benefit of creditors.*—T & Co., a firm in Calcutta, the mortgagees of certain indigo factories and crops, mortgaged them to the A bank, the bank stipulating to make advances for the cultivation and manufacture of the indigo in consideration of the mortgage. T & Co., became insolvent, and the bank went into liquidation, and a provisional liquidator was appointed. On application by the Official Assignee to the Court to allow S, a leading merchant in Calcutta, to carry on the cultivation and manufacture on the ground that the whole crop would otherwise be lost to the creditors. *Held*, that the Court would grant the application, and, in exercise of the power given by s. 32 of the Insolvent Act, would order the indigo factories not to be sold until further notice, and allow the Official Assignee to make such an arrangement as being one by which the interests of the creditors would be best consulted ; the right to hold the produce of the factories to be to such extent only as the interest in them which belonged to the insolvents, and was vested in the Official Assignee, enabled him to give. *In the matter of* THOMAS AND CO., **1 Ind. Jur. N.S. 352.**

(122)—*S.* 36—*Appearance by counsel.*—A person from whom property is sought to be taken under s. 36, Insolvency Act, is entitled

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

to be represented by Council. *In the matter of the petition of* NOLIT MOHAN DOSS, **11 B.L.R. App. 33.**

(123)—*S.* 36, *legality of order obtained by an insolvent's creditor under, for examination of defendants in a previous suit by insolvent as witnesses—Practice.*—Subsequent to the filing of his suit against the present appellants as defendants, the plaintiff happened to be adjudicated an insolvent. Two of the appellants, the then defendants, had proceeded with the defence but not the other. A creditor of the insolvent having obtained an order under s. 36 of the Insolvent Act for examining the appellants as witnesses, the latter obtained a rule to cancel the order for their examination or postpone it till the disposal of the suit against them. On the rule being subsequently discharged, this appeal was preferred and it was held that the two appellants who had, in the suit by the insolvent, filed their written statements and given the inspection of the documents in their possession, ought not to be allowed to be examined as witnesses until the suit itself was heard. They had given all the information they could be required to give in the suit against them, and they ought not to be prejudiced in their defence by being subjected to an examination under s. 36 of the Insolvency Act. The examination of the remaining appellant, who had not filed his defence in the suit, nor had given any inspection, was ordered to proceed though he was not bound to answer any questions to his prejudice, if so advised. *In re* BHAGWANDAS NAROTAMDAS, **22 B. 447.**

(124)—*S.* 36—*Application by creditor of an insolvent for examination of certain persons under—Probability of benefit resulting, should be shown—Application to be preferred without delay.*—When a creditor makes an application for the examination of a person, under s. 36 of the Insolvency Act (11 and 12, Vict. c. 21), the Court must be satisfied that there is a probability of some benefit resulting from such examination. It should not be vague. It is most expedient that such application should be preferred without delay. *In the matter of* NOOR MAHOMED ABDOOL SUCCOOR, **14 Bur. L.R. 175.**

(125)—*S.* 36—*Property of insolvent discovered subsequent to insolvency—Examination of witnesses, when ordered under* s. 36—*Applicant for examination to be* bona fide *creditor of estate.*—When an application praying for an order for examination of witnesses under s. 36 of the Indian Insolvency Act has been made or supported by the Official Assignee himself, it is the duty of the Court to grant the same readily ; but, when any person other than the Official Assignee asks for such examination, the grounds of the application should be carefully considered and sifted by the Court, which should satisfy itself that the examination of the proposed witness is likely to be of some benefit to the creditors or to the estate, and has

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

not been made merely with a view to harass and annoy persons to be examined. The said section empowers the Court, on the application of the creditor, or of its own motion, to summon any person who may be suspected of having any of the estate of the insolvent in his possession, or who may be capable of giving information respecting the estate and effects of the insolvent, or his acts dealings, or conduct. Such power of examination of third persons, with a view to discovery of the insolvent's property, has been inherent in Insolvency and Bankruptcy Courts from their first establishment in England. The applicant in this case was found not to be a *bona fide* creditor, and the Official Assignee did not support his application. The Court, therefore, hesitated to admit it. The order for examination was however passed as the application happened to be supported by a Bank, which was admittedly one of the *bona fide* creditors of the estate, and the *prima facie* probability of the allegations of the original applicant was increased by being repeated by the bank. The Court, however, directed that the Official Assignee or the Bank, and not the original applicant, should conduct the examination. *In re* ALLADINBHOY HUBIBHOY, **11 B. 61.**

(126)—*S.*36—*Witnesses entitled to be represented by Counsel.*—In a case in which witnesses have been summoned to attend Court under s. 36, Insolvent Debtors Act, *held*, that, under special circumstances, counsel may properly be allowed, to attend on their behalf and to have all the powers of counsel appearing in an ordinary case. *In the matter of* CHUNI LAL OSWAL, **29 C. 507.** (3 B. 270, *F.*)

(127)—*S.* 36—*Order to examine witnesses—Right of witnesses to appear by counsel to show that the order is prejudicial to his interests.*-A person, to examine whom as a witness an order has been passed by the Court, under s. 36 of the Indian Insolvency Act, 1841, is entitled, as of right, to appear by counsel and to satisfy the Court that the order passed *ex parte*, was erroneously made. But after once the order has been made the party complaining of it ought to take out a rule to have it set aside. It is not the right procedure to apply for its revocation just before the commencement of the examination without any previous notice to the other side. *In re* MANEKJI CAWASJI, **8 Bom. L.R. 85=1 M.L.T. 50.**

(128)—*S.* 36, *witness summoned under—Right to appear by counsel.*—A witness summoned for examination under s. 36 of the Insolvent Act cannot claim, as of right, to appear by counsel. In practice, however the Judge in his discretion may grant such a request, if the special circumstances of any case should require it. *In the matter of* NURSEY KESSOWJI, **3 B. 270.** [*F.*, 29 C. 509; *Expl. and D.*, 8 Bom. L.R. 85=1 M.L.T. 50.]

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

(129)—*Ss.* 36, 37, 47, 59, 60—*Final discharge—Postponement of hearing—Maintenance—Practice.*—The benefits of the Act are intended for persons who place such property as they have in the hands of the Court with the object of such property being collected and distributed amongst the insolvent's creditors. The whole object of the Act implies that the insolvent must render every assistance in his power to enable the Court and its officer, the Official Assignee, to realize the property. To extend the benefits of the Act to a person who merely informs the Court in his schedule that he has certain debts owing to him but does nothing more, would be an abuse of the powers of the Court and contrary to the intention and scheme of this Act and of every other Act regarding bankrupts. The Act contemplates, and as a fact the vesting order vests in the Official Assignee not only all the property which the insolvent possesses or is entitled to, at the time the order is made, but also all property which he may thereafter become entitled to until he obtains a certificate of final discharge either under s. 59 or s. 60 of the Act. Consequently as an effect of the vesting order, the Official Assignee, is entitled to receive the whole of the salary which the insolvent is now or may hereafter earn. The Court is, however, empowered by s. 47 of the Act to direct that the Assignee shall make a reasonable allowance for maintenance of the insolvent until final order. MAUNG CHIT U v. OFFICIAL ASSIGNEE, **1 L.B.R. 249.**

(130)—S. 37—*See* No. 129, *supra.*

(131)—*S.* 39—"*Mutual credits,*" *meaning of.*—According to s. 39, 11 and 12, Vict. c. 21 (Insolvent Act) "mutual credits" mean simply reciprocal demands which must naturally terminate in a debt. A. B. MILLER v. THE NATIONAL BANK OF INDIA, **19 C. 146.**

(132)—*S.* 39—*Set-off.*—The defendant-company issued two policies on the life of W.S. who assigned them to A and Co., a bank, by way of securing advances made to him. A and Co. were subsequently adjudicated insolvents in 1906. W.S. died in 1907. In a suit by the Official Assignee to recover the sums on the policies: *held*, that the defendants could set off a debt due by the insolvent bank. The same result will follow with reference to the Insolvency Act (11 and 12 Vict. C. 21, s. 39). OFFICIAL ASSIGNEE OF MADRAS v. MADRAS EQUITABLE ASSURANCE SOCIETY, **8 Ind. Cas. 761=9 M.L.T. 132.**

(133)—*S.*39—*Set-off--Right of petitioning creditor to set off, costs payable by him to insolvent as against his debt.*—A petitioning creditor in an insolvency proceeding cannot set-off the costs payable by him to the insolvent as against his debt, as the former is an asset of the insolvent's estate in which all the creditors are entitled to share. Such a case is not a case of "mutual

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued*.

credit." KARRY MANGIAH CHETTY v. KANACHI RAMIAH CHETTY, **17 Ind. Cas. 164.** (1907, 2 K.B.896, L.R. 8 Ch. D. 198, 47 L.J. Ch. 414, 26 W.R. 393, 15 Beav. 458, L.R. 3 Eq. 196, *Rel. on.*)

(134)—*S.* 39—*Set-off—English and Indian Law—Claim in respect of notes discounted before insolvency and since dishonoured, whether may be set off—General lien of Bankers for general balance of accounts—S.* 171, *Contract Act.*—Under ss. 39 and 40 of the Indian Insolvency Act, anything may be set off in India which can be set off in England under the Bankruptcy law in force for the time being. (1 M.I.A. 87, *F.*) Mutual credits which may be set off include credits which have a natural tendency to terminate in debts, and not merely credits which must necessarily terminate in debts. So, claims in respect of bills and notes discounted for the insolvent before insolvency, but dishonoured by the makers after insolvency, may be set off under s. 39 (1 M I.A 87, *It. and Expl.*; 19 C. 146, *Not F.*) Under s. 171 of the Contract Act, a lien in favour of the Bankers is only for the general balance of account. *In the matter of* CANTHOM, **33 M. 53 = 5 Ind. Cas. 843 = 8 M.L.T. 83.**

(135)—S. 39—*See* SET-OFF, 6 C.L.R. 294.

(136)—*Ss.* 39, 40—*Mutual credit—Set-off—Act XV of* 1882 (*Presy. S.C.C.*), *s.* 70, *Payment under, effect.*—In August, 1906, the insolvent entered into a contract with A that he was to do shipping work for two years, that he was to receive an advance of Rs. 2,000 for which he was to execute two pro-notes in favour of the insolvents. The advance was received and the notes were executed. Two decrees were obtained against A on the two pro-notes. The first decree was passed contingent upon the opinion of the High Court, and A deposited the amount of the decree and costs in Court under s. 70, Presidency Small Cause Courts Act. The decree-holders were declared insolvents and the vesting order was made on the 30th Nov., 1908. A had on that date a claim against the insolvents for certain sums due to him for work done, and for damages for breach of contract, which after the date of the vesting order matured into a decree on 12th Feb., 1909. A applied for an order that the amount of the decree he had obtained against the insolvents should be set off against the amount of the two decrees obtained against him on the two pro-notes. The Commissioner disallowed the set-off as regards one of the decrees, on the ground that, as the Official Assignee had obtained an order for payment out to him of the amount of this decree, and the money had been paid to him, and there was nothing to set off, and this order was made pending the application for set-off to the Commissioner in insolvency. *Per C.J.—Held* for the purpose of s. 39 of the Insolvency Act the line is to be drawn at the date of the vesting order. On that date, both the decrees were unsatisfied, since the money in

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued*.

deposit in Court by way of security under s. 70, Presy. S.C.C. Act, was, at the date of the vesting order, A's money. There is no distinction between the two decrees. *Per Krishnaswamy Iyer, J.*—If s. 39 of the Insolvency Act applies, no dintinction can be made between the two decrees. The payment of the Small Cause Judge pending the application to the Insolvency Court would clearly be illegal, and the Official Assignee would be liable to refund the money received by him, to be set off against the decree to which the Insolvent's estate was liable. The time at which the right of set-off is to be determined is the date of the vesting order. The mere payment by the judgment-debtor into Court, under s. 70 of the Presidency Small Cause Courts Act, as a condition of the reference to the High Court, has not the effect of making the money so paid the property of the decree-holder. (29 M. 232, 25 A. 179, 13 W.R. 29, 12 M.I.A. 65, *It.*) Though a claim for unliquidated damages by or against the insolvent cannot be set off under the provisions as to mutual credit in s. 39, still, under s. 40 of the Insolvency Act, which makes the provisions of other statutes, hereafter to be passed, applicable, coupled with s. 38 of the English Act of 1883 which provides that there shall be a set-off in respect of mutual dealings, unliquidated damages may be proved against the insolvent's estate. (2 M. 15, 13 B.L.R. App. 2, *R.*) Mutual credit is a wider term than mutual debt, but not so wide as mutual dealings. CHENGALVAROYA MUDALY v. OFFICIAL ASSIGNEE OF MADRAS, **7 M.L.T. 207 = 5 Ind. Cas. 379 = 33 M. 467.**

(137)—*S.* 40—*Sale of mortgaged property—Sale by Official Assignee—Private contract.*—A creditor of the insolvents who had filed their petition of insolvency on 17th March 1873 and obtained their final discharge on 2nd September, 1873, applied for the sale, of certain properties which had been mortgaged to him by the insolvents, and prayed for an order directing an account to be taken of what was due for principal and interest and costs of the mortgage; that the mortgaged properties be sold under the conduct of the Official Assignee, that the applicant be at liberty to bid and to set off the amount of any purchase against the balance which should be found due to him, but that, if any other person should become the purchaser, then that the proceeds of such sale, after deducting the Official Assignee's commission, should be paid to the applicant in liquidation of his debt so far as the same might extend, and that after crediting such amount, the applicant might rank as a creditor on the insolvent's estates for any balance that might be remaining due, and that the insolvent's schedule be amended accordingly. The Court ordered the sale to be made as prayed for in the petition and directed the Official Assignee to reserve a price on the properties intended to be sold, and to advertise such sale. The Court further ordered that, after the properties should have been put up and offered for sale by public auction, if they should

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

not have been sold, or should have been bought in by the Official Assignee at the reserved price, then that the Official Assignee should be at liberty to apply to the Court for leave to sell the said properties by private contract. *In the matter of* HOWARD BROTHERS, **13 B.L.R. App. 9.** [*Commented on*, 36 C. 990.]

(138)—*S.* 40—*English Bankruptcy Act of* 1869, *s.* 31—*Unliquidated damages—Proof.*—By the operation of s. 40 of the Indian Insolvent Act taken with s. 31 of the English Bankruptcy Act of 1869, a claim for unliquidated damages arising out of a breach of contract could be proved in the Insolvent Court. *In the matter of* OMERTOLOLL DAW, **13 B.L.R. App. 2.** [*F.*, 5 Ind. Cas. 379=7 M.L.T. 207=33 M. 472.]

(139)—*S.* 40 - *Insolvent—Final discharge—Debt payable by instalment—Suit to recover instalments.*—The defendant passed in favour of the plaintiff a deed by which he agreed to return the money borrowed, in certain instalments. On the 25th January, 1900, the defendant filed an application for insolvency; at that date no instalment had become due. The second schedule was filed on the 9th January, 1901, when the first instalment had become due but it was not mentioned. The defendant obtained his personal discharge on the 19th June, 1901, at which date two instalments were due. A rule *nisi* to show cause why the final discharge should not be granted was issued on the 3rd November, 1902; and it was served upon the plaintiff on the 5th December, 1902. The plaintiff filed this suit on the 27th February, 1903, against the defendant to recover from him the instalments which had become due. On the 1st April 1903, the defendant obtained his final discharge: *Held*, that the defendant was not liable, since his discharge was a sufficient answer to the claim against him. COWASHA v. HOMI N. A. WADIA, **6 Bom. L.R. 81.**

(140)—*S.* 40—*English Bankruptcy Acts—Rules under the English Bankruptcy Laws.*—The reference to conditions and provisions in s. 40 of the Indian Insolvency Act does not import mere rules of procedure, but only those general rules of Bankruptcy law applicable for the time being to the proof of the debts in England. *In re* KALIDAS; MACLEOD v. PESTONJI, **4 Bom. L.R. 351=26 B. 623.**

(141)—*S.* 40—*English Bankruptcy Acts—Rules under the English Acts—Applicability to India.*—The words "in the same manner and subject to the like deductions, conditions and provisions as in the said statutes are or may be set forth and prescribed," in s. 40 of the Indian Insolvency Act, do not incorporate the Rules under the English Bankruptcy Act, 1883. *In re* KALIDAS KESHOWJI, **4 Bom. L.R. 227.**

(142)—*S.* 40—Cestui que trust *creditor.*—By virtue of the terms of s. 40, Indian Insolvency Act, and by s. 15 of the English Act of 1869, property held by the bankrupt in trust for others is not his property divisible among his creditors. Such property is not vested in the Official Assignee, and a *cestui que trust* creditor is not entitled to come in and prove, because what is being administered in insolvency is the insolvent's estate, of which property of this nature does not form part. *In the matter of* VARADALACA CHARRI, **2 M. 15.**

(143)—S. 40—*See* No. 136, *supra.*

(144)—*Ss.* 40, 73—*Interest after filing of the petition of insolvency, stoppage of, for purposes of dividend.*—The appellant in this case was a scheduled creditor in a petition of insolvency. Under a document executed to him by the said debtor, the latter had agreed to repay the sum then borrowed, by a fixed time, and in the meanwhile to pay commission thereon at 10 per cent. per mensem. In respect of the said commission the appellant was admitted to dividend only on its amount accrued up to the date of the filing of the insolvent's petition, and was held disentitled to dividend so far as regards the amount of commission or interest from the date of the filing of the schedule up to that of payment. The general rule in bankruptcy is that interest ceases at the date of the bankruptcy, and there shall be no proof for interest subsequent to that date. SUBBARAYALU v. ROWLANDSON, **14 M. 133.**

(145)—S. 41—*See* No. 83, *supra.*

(146)—*S.* 42—*Claims of European assistants and Native establishment a workmen of insolvent firm.*—The application for payment under s. 42 of the Insolvent Act must be taken to imply consent to a dissolution of the contract of a service by the filing of the petition. Claims, therefore, by servants of an insolvent firm are only allowed up to date of insolvency, and not to the end of the month. Claim of servant who had left insolvent's service before date of insolvency allowed, but only for so much as accrued due to him within the six months previous to insolvency. Sum agreed to be paid to an assistant as extra salary or remuneration for making up insolvent's statement to be laid before the creditors disallowed. Costs of the application allowed out of the estate. One claimant was the manager of the insolvent's business at Simla on a salary of Rs. 350 per month up to 11th April, 1867, when one of the partners wrote to him promising him commission to make his salary up to Rs. 500. During the six months previous to the insolvency he had received Rs. 3,100, being more than the salary claimed for 6 months. Claim disallowed. *In the matter of* PARKE PITTAR, **6 B.L.R. App. 144.**

(147)—*S.* 46—*Winding up of company—Payment of servants' salaries—Companies Act*, 1866, *s.* 173.—Under s. 46 of the Insolvent Act, the Court on the failure of a Bank, ordered the salaries of the employees of the Bank to be paid, the payment to be confined to the salary already learned at the date of failure of the

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued*.

Bank. The Court refused a more extended application for six months' salary in lieu of notice and the amount payable to them under their agreements as passage-money and expenses of passage, which it was contended could be granted under s. 173 of the Companies Act. *In the matter of the* COMPANIES ACT, 1866, *and of the* AGRA AND MASTERMAN'S BANK, **1 Ind. Jur. N.S. 350, 352.** *But see in the matter of the* CALCUTTA STEAM TUG ASSOCIATION, **2 Ind. Jur. N.S. 17.**

(148)—*S.* 47—*Presidency Towns Insolvency Act* (III *of* 1909), *s.* 15—*Debtor obtaining personal discharge—Right to apply again in respect of fresh debts.*—The petitioner, who had filed an insolvency case in 1904 and had been granted his personal discharge, again filed a fresh petition of insolvency in respect of debts contracted subsequent to his personal discharge. *Held*, that there was nothing in the Insolvency Act or in the new Act of 1909 to prevent an undischarged debtor from filing a fresh petition in respect of fresh debts. *In the matter of* CHARLES STEVENS, **10 Ind. Cas. 792.** (12 W.R. 428, 26 B. 171, *Rel. upon.*)

(149)—S. 47—*Insolvent—Personal discharge—Liability to pay subsequent calls—Ss.* 98, 100, *Indian Companies Act.*—Where an insolvent, who had obtained an order of discharge under s. 47 of the Insolvent Debtors Act, allowed his name to continue in the list of contributories to a certain association in which he held 20 shares, and there was no transfer of those shares and of the liabilities thereunder to the Official Assignee, *held* on the liquidation of the Company, that the Company was not barred from making a claim upon him on the ground that the call was proveable under s. 48 of the Act as the claim was incapable of valuation and that ss. 98 and 100 of the Indian Companies Act of 1862 would not afford any defence to the insolvent. *In re* THE MERCANTILE CREDIT AED FINANCIAL ASSOCIATION, LIMITED; BABA SAHIB DAMASKAR'S CASE, **8 B.H.C.O.C. 117.**

(149-*a*)—S. 47—*See* No. 129, *supra*.

(150)—*Ss.* 47, 50—*Adjournment after ... ing to imprisonment.*—The words "and declar... him entitled to his discharge," which occur ... s. 51 of the Insolvent Debtors' Act, must be looked upon, not as imperative or directory, but as permissive and en... the Court to declare, that at the termina... imprisonment, the insolvent shall be ... to his discharge without the necessity ... her hearing; but not directing the Court ... so. Looking at the many inconveniences which would result if a different construction were adopted and considering that in many cases it would operate mischievously if the Court had no power while making an order under s. 50 to deal with the other matters in the case as law and justice require, and seeing also that the words are capable of bearing this construction, a Court is bound so to construe these words. It is competent to the Court, if the circumstances require it, to make an order under s. 47, adjourning the further hearing of the insolvent's petition, and at the same time to adjudge that the insolvent shall be imprisoned under s. 50. *In re* MANIKJI SHAPURJI KAKA, **3 B.H.C.O.C. 61.**

(151)—*Ss.* 47, 50, 60—*Personal discharge under s.* 47—*Subsequent inquiry under s.* 60—*Evidence—Imprisonment.*—An insolvent who has been opposed at the times he applied for his personal discharge under s. 47, can be opposed by the same creditor on the same grounds on his application for a discharge in the nature of a certificate under s. 60. The order made on the hearing of the petition under s. 47 of the Act can be used as evidence against the insolvent when applying for his discharge under s. 60, provided that such order clearly states the offences established against the insolvent. Having been punished for the offences of which he is found guilty in the inquiry under s. 47, he can still be held liable for the same offences when the question is for a discharge under s. 60. The discharge under s. 60, of an insolvent who has already obtained his discharge under s. 47, is not as of course, but will depend upon the general conduct of the insolvent both before and subsequent to his obtaining his discharge under s. 47. *In re* N. D. COORLAWALLA, **9 B.H.C. 14.**

(152)—*Ss.* 47, 51.—An order made under s. 51 of the Insolvent Act is a final order: and a Commissioner in insolvency has no power under that section to commit an insolvent to jail, but must leave the excepted judgment-creditors to their ordinary remedies for the time mentioned in the order. SAMARAPURI v. PARRY AND COMPANY, **13 M. 150, F.B.** (8 M. 97, *overruled.*)

(153)—*Ss.* 47 *and* 51.—Where the transactions of an insolvent show gross misconduct in contracting debts, the Commissioner has power to commit him to custody, under the provi... and 51 of the Insolvency Act, ... directed that he was entitled to ... as to all the debts save and except ... debt due to a certain creditor, and as ... debt, the insolvent should be entitled ... discharged as soon as he had been in ...ody at the suit of the creditor for six ...onths. NI... v. CHARTERED MERCANTILE BANK, ... M. 97. [*Overruled*, 13 M. 150.]

(154)—*Ss.* 47 *and* 56—*Personal discharge of insolvent, order granting—Setting aside of—Appeal.*—Where an insolvent obtains his personal discharge under s. 47 of the Indian Insolvent Act (Stat. 11 and 12, Vict., c. 21), the order granting the discharge ... set aside only on the grounds mentioned ... 56. Where no such grounds can be shown, the only course open to an opposing creditor is to appeal under s. 73 from the order granting the discharge. *In re* DAYABAI SARUPCHAND, **23 B. 475.**

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

(155)—*Ss. 47, 60—Discharge under s. 47 not opposed—Final discharge opposed—Consideration of debtor's career.*—A creditor, who has not filed grounds of opposition to the discharge of the insolvent under s. 47, can be allowed to oppose a final discharge under s. 60. [*R.*, 20 B. 636.] The grounds of opposition against an order under s. 60 may include matters which might have been put forward as grounds for opposing the personal discharge under s. 47, and need not be confined to matters either not known at that time or which have occurred since. [*R.*, 20 B. 666, 9 B.H.C. 14.] A certificate under a bankruptcy is not a matter of right, but a matter of discretiona—discretion to be exercised on judicial principles; and the case of a certificate is one in which the judicial principles involve the duty of attending to the public interest and the claims of society at least as much as in any other classes of cases. Therefore, in considering whether the insolvent should or should not have a final discharge, all the circumstances of his mercantile career may be taken into account. *In re* PESTANJI SHAPURJI KAKA *and* EDALJI SHAPURJI KAKA, **8 B.H.C.O.C. 37.**

(156)—S. 48—*See* No. 56, *supra.*

(157)—*S. 49—'May,' construction of—Stay of further proceedings after the filing of the insolvent's schedule.*—S. 49 of the Indian Insolvent Act empowers the Insolvent Court to deal with (1) cases in which a decree has been passed; and (2) cases in which a suit has been instituted but a decree has not been passed. In the former case, the Court may stay the execution; in the latter, it may stay further proceedings in the suit. The word 'may,' in the section, indicates that the requisite conditions which the section lays down being fulfilled the Court will and ought to exercise the power it may exercise. The word 'may' does not vest the Court with a discretion which it can uniformly exercise in one case and renounce in the other. What discretion there is, is meant to be used in exceptional cases. HOOKAMCHAND v. NOWALORJI, **10 Bom. L. R. 345.**

(158)—*S. 49—Civ. Pro. Code (Act XIV of 1882), s. 245-B.*—The provisions of s. 49 of the Insolvency Act are not directory or imperative, but merely permissive; and even after a vesting order has been made and the Schedule of the insolvent has been filed, the Court has power, under, s. 245-B of the Civ. Pro. Code, to direct execution against the person of the defendant by his arrest and imprisonment in cases of fraud or misconduct; although the amonnt of the judgment-debt is fully admitted by the Insolvent in his schedule. BHASKAR v. SHRIDHAR, **9 Bom. L.R. 898.**

(159)—*S. 49—Decree—Execution—Insolvent—Discharge—Proceedings, stay of—Discretion—Court.*—S. 49 of the Indian Insolvency Act, 1848, gives discretion to the Court to stay or not to stay a suit or execution against an insolvent. To enforce process against a man whose estate is already vested in the Official Assignee would in ordinary cases be improper, but under certain circumstances it would be improper to stay it. If, on the other hand, there is no misconduct shown and no order of the Insolvent Court appears to the contrary, the High Court would ordinarily and properly stay proceedings under s. 49. MOTILAL v. MADHAVRAO, **7 Bom. L.R. 146.**

(160)—*S. 49—Suit for declaration—Insolvency of defendant after institution of suit—Maintainability of suit.*—Where plaintiff sued for a declaration that the house in dispute was liable to attachment in execution of his decree against defendant, and the defendant was adjudged an insolvent after the institution of the suit. *Held*, that the insolvency of the defendant was no bar to the continuance of the suit, and that the provisions of s. 49 (11 and 12 Vict. c. 21) did not apply. SRINIVASACHARIAR v. RAMANUJACHARIAR, **8 Ind. Cas. 152=8 M.L.T. 446.**

(161)—*S. 49—Decree for alimony and costs—Application for insolvency—Discharge of insolvent—Liability.*—A person who was ordered to pay a certain amount by way of alimony and costs of the proceedings amounting to Rs. 200, did not pay any amount for the alimony or for costs and applied to be declared an insolvent, without making any mention of his liability for alimony or filing the accounts. But he did not obtain *ad interim* protection. *Held* that the filing of the petition did not discharge his liability to pay alimony. GEORGE v. GEORGE, **11 B.L.R. App. 2.**

(162)—*S. 49—Effect of vesting order—Effect of insolvency on relative rights of Official Assignee and creditors—Suit pending at date of vesting order—Suits in which decrees were passed prior to vesting order.*—By ss. 7 and 11 of the Indian Insolvent Act, from the moment of the vesting order being made, all the property, real and personal, of the insolvents, and all their future rights to any such property, "whether within the territories within the limits of the charter of the East India Company, or without," and all debts due or growing due to them, become absolutely vested in the Official Assignee as trustee for the general body of creditors from the date of the insolvent's petition under s. 7 and from the date of the creditor's petition and adjudication (under s. 11). The rights of the Official Assignee for the benefit of the general body of creditors over the property of the insolvent lawfully vested in him, wherever that property may be situated, are rights that must be respected and recognized not within limits of the Prisidency Town jurisdiction only, but by all Courts, wheresoever situated, in which the Official Assignee has reason to appear on behalf of the general body of creditors. In suits founded on contract (with very few exceptions) in which the insolvent was a plaintiff, the old rule was that the suit abated, *i.e.*, came to an end, by the insolvency of the plaintiff; this remained the rule in England till 1852, when the Common Law Procedure Act provided that

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

the bankruptcy or insolvency shall not be pleaded as a bar by the defendant, unless assignees shall decline to continue and give security for costs thereof. This only affects suits pending at the time of the vesting order, in which the insolvent is plaintiff; and as to these suits and these only, it gives the assignees a power they did not before possess (and which they can exercise only within the strict limits of the statute), not indeed of being added as parties to the suit with the bankrupt (such a thing was never thought of), but of carrying on the suit on behalf of the general body of the creditors in substitution and in lieu of the insolvent. And as to suits pending at the date of the vesting order in which the insolvent is defendant they are not touched by that statute: they remain as they were at Common Law; as to them the assignees have no power whatsoever of continuing to defend them in substitution of the insolvent, far less any power of getting themselves added as co-defendants in such suits together with the insolvent. The law as to pending suits is the same in India as in England, except indeed in so far as s. 49 of the Indian Insolvent Act has supplied a procedure, for the stay of suits pending against the insolvent as defendant, which does not exist. But this clause applies only after a schedule has been filed. With regard to pending suits in which the insolvent is plaintiff, s. 106 of the Civ. Pro. Code is the same as s. 142 of the English Common Law Procedure Act of 1852. The result then is that, as to suits pending at the date of the vesting order, in which the insolvent is the plaintiff, the law in England and India is the same, *viz.*, that the Official Assignee, on certain specified conditions, may carry on such suits for the benefit of the general body of creditors, in substitution of, but not as co-plaintiff on the record with the insolvent. As to pending suits in which the insolvent is a defendant, the law in India is the same as the law in England, except that, under s. 49 of the Indian Insolvent Act, the Courts in India are specially directed, after the filing of the insolvents' schedule and before his discharge, to stay suits and all proceedings therein founded on any debt or demand inserted in the schedule, on proof to the Court's satisfaction that the debt or demand so inserted in the schedule is identical with that which forms the subject of the suits, etc., which they are asked to stay. As to any power of continuing such actions in substitution of the insolvent, or of being made parties to the suit in addition to the insolvent defendant, the Official Assignee in India has not such power, any more than the corresponding functionary in England. S. 29 of the Indian Insolvent Act gives the Official Assignee no such power, as that relates not at all to suits pending at the date of the insolvency, but to suits which, but for the insolvency, the insolvent himself might have commenced, prosecuted, or defended, and which, therefore, the Official Assignee, after the insolvency, shall not be precluded, *provided he first obtains the leave of the Court*, from commencing, prosecuting or defending in his own name as Official Assignee of the insolvent, for the benefit of the general body of creditors. This section has, therefore, no application whatever to suits commenced, prosecuted, or in the course of being defended by the insolvent at or before the date of the insolvency, *i.e.*, of the vesting order. [*R.*, 22 C. 259.] As to this neither in England nor in India have the assignee of an insolvent ever been held to have the power, after judgment and decree, *to get themselves made parties* to the suits with a view of moving for a new trial, setting aside the judgment, or for any other purpose whatsoever. They have invariably been left in such cases to try their right to the property at the time of execution, as against creditors, by action brought either against the Sheriff for an improper execution of the decree, or against the purchaser under the decree, the former mode of procedure being that generally adopted. With regard then to seizures and sales in execution by the Sheriff, after the date of the petition, on judgments obtained against the bankrupt (or insolvent) before that date, the Official Assignee in India was left to pursue his remedy against the Sheriff as prescribed by the Common Law of England. And since the Civ. Pro. Code has become the law regulating the practice of the High Court with regard to all civil suits of every description between party and party, the proper course for the Official Assignee to pursue is that prescribed by ss. 216 and 247 of the Code, *viz.*, by claim, in the first instance, to remove the attachment, and if that be refused, by order of the Court (against which order there is no appeal), then by suit to establish his right, which suit must be brought within one year. As, however, by s. 17 of the Letters Patent, the practice of the Insolvent Court (where any such practice is specially pointed out by the Insolvent Act, or the rules framed under it) is not to be affected by the amalgamation of the Courts, it would appear clear that under s. 49 of the Insolvent Act, the Official Assignee, after schedule filed, and before the discharge of the insolvent, might still apply to any Court in which a suit has been brought against the insolvent for any debt or demand admitted in the schedule, or disputed as to amount only, for a stay of process or execution. *In re* HUNT, MONNET, AND CO. V. KHOLAGIR MANGIR, **1 B. H. C. 251.**

(163)—S. 49—*See* Nos. 56, 58, 59, *supra.*

(164)—S. 50—*Lower Burma Courts Act (XI of 1889), ss. 50 and 69, cls. (b and (c)—Criminal case—Reference to the High Court.*—A petition presented to the special Court under s. 50, cl. (5) of the Lower Burma Courts Act by a person considering himself aggrieved by an order of the Recorder sitting as Insolvency Commissioner, comes before the Special Courts as a criminal case and should be dealt with under s. 69, cl. (*c*), of the Lower Burma Courts Act, where there arises a difference of opinion

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

between the members of the Special Court. YOE SWEE CHOON *alias* BA U v. THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA, RANGOON, **L.B.R. 1872—1892, 646.** (17 C. 209, *F.*)

(165)—*S.* 50—*Criminal charge—Contempt of Court — Conviction— Sentence.*—An insolvent seeking the benefit of the Indian Insolvent Act was found to defeat the object of the Act by wilfully preventing and purposely withholding the production of letters written to him. No charge was framed against him regarding this: and no pointed question was asked to him during the proceedings: yet, at the termination of the proceedings, he was sentenced to a term of imprisonment, under the provisions of s. 50 of the Act:—*Held*, reversing the sentence, (1) that the proceedings so far as they resulted in imprisonment amounted to a criminal charge; and in all criminal cases it was necessary that there should be a charge, a finding and a conviction, as a foundation for the sentence: everything should be strictly and accurately pursued; and if in any one of these three points a substantial defect should appear, it would be a ground for reversing the proceeding: (2) that no person should be punished for contempt of Court, which is a criminal offence, unless the specific offence alleged against him be distinctly stated, and an opportunity of answering it given to him. VALABHDAS v. NARONJEE, **5 Bom. L.R. 343=27 B. 394.**

(166)—*S.* 50, *insolvent adjudged to be imprisoned by order under—Offence—Criminal procedure—Notice to accused—Omission or irregularity in proceeding.*—A person who becomes adjudicated an Insolvent has ample notice in the provisions of the Insolvency Act of the conditions under which he can regain his liberty by an order of personal discharge with protection. It is in his own hands to make out the best case for himself when he is passing through his ordeal. If then a Court for the relief of insolvent debtors decides, upon the admissions of an insolvent so circumstanced (admissions which he has had further opportunity to explain away when re-examined) and upon the facts and omissions of the insolvent occurring in view of the Court, that the circumstances as the insolvent has himself made them appear are such as to convince the Court that the insolvent has acted in one or more respects in the manner described in s. 50, and proceeds to adjudge the insolvent to imprisonment, it would be difficult to hold that the insolvent has been taken by surprise even if not one of the grounds for adjudging imprisonment under s. 50 of the Act had been set out in the notice of grounds of opposition filed by any opposing creditor. The Insolvency Court, as already remarked, is a Court specially constituted and empowered to grant relief from the operation of the ordinary law under which debtors are already liable to be imprisoned. But such relief is obtainable upon conditions set forth in the Insolvency Act and

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

easily ascertainable thereform, if not already known to insolvents, by whom, or in respect of whom, the special jurisdiction of such a Court is invoked. One of the provisions of the Act is that in certain circumstances described in s. 50, the Insolvency Court may adjudge the insolvent to imprisonment instead of being granted the protection from arrest under the ordinary law which he seeks to obtain. If an insolvent by his own conduct and evidence before a Court so constituted and so empowered becomes his own self-accuser in respect of the circumstances which render him liable to be so adjudged to imprisonment by the Insolvency Court instead of being granted protection from arrest under process of the ordinary Courts, it is not easy to follow the argument that such insolvent ought not to be treated as self-condemned or even as accused in respect of such circumstances, or that the power to adjudge to imprisonment under s. 50 ought not to be exercised until some accusation has been made in some form or other by some accuser. It is not necessary for a Court of Relief for Insolvent Debtors, when exercising its power under s. 50, Indian Insolvency Act, of ordering the imprisonment of a person adjudicated an insolvent to formally call upon such person to meet and disprove the fact on which its order is based. COWRINGEE VEERASAWMY v. A. M. S. CHELLAPPA CHETTY, **L.B.R. 1893—1900, 141.**

(167)—*S.* 50, *"In case it shall appear," meaning of.*—S. 50 provides a punishment, by way of penalty, for the commission of certain offences, which punishment is to be administered by the Commissioner of Insolvency. The words "in case it shall appear," in s. 50, must mean, in case it shall by legal evidence appear that the person to be punished has committed the specific crime he is said to have committed, and that before any person can be punished under that section, he must be shown by legal evidence to have committed on some specific occasion, one or other of the offences enumerated in the section. RASH BEHARI ROY v. BHUGWAN CHUNDER ROY, **17 C. 209.**

(168)—*S.* 50—*Conviction of insolvent—Appeal under s.* 73—*Bail pending appeal.*—When an insolvent has been convicted and sentenced to imprisonment by the Insolvent Court under s. 50 of the Indian Insolvent Act (11 and 12, Vict., c. 21) and has preferred an appeal under s. 73 of the Act, the High Court has no power to admit him to bail pending the hearing and the determination of the appeal. *In the matter of* HORMARJI ARDESIR HORMARJI, **17 B. 334.**

(169)—S. 50—*See* **Nos. 150, 151,** *supra.*

(170)—*Ss.* 50, 51—*Insolvency—Court's power to make order to apply to particular debts.*—Respondent applied in March 1909 for the benefit of the Act for the relief of Insolvent Debtors in India, and an order was passed under s. 51 adjudging that he be entitled to his personal discharge *except in respect of two specified sums*, and that, in respect of those debts

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

he be discharged as soon as he shall have been in custody at the suit of each of the respective creditors for six months. Appellants urged that the insolvent should have been dealt with under s. 50, or in the alternative that his petition should have been dismissed or his personal discharge postponed. As more than a year had elapsed, the insolvent had obtained his discharge altogether: *Held*, there were grounds for passing an order under s. 51, and it was within the discretion of the Court to make an order to apply to debts as it thought fit. *Held*, further, that, although respondent had not been in custody, the effect of the order had been to act as a punishment on him. GRAHAM & CO. v. AHMED ISMAIL, **12 Ind. Cas 24.**

(170-*a*)--Ss. 50, 51--*See* WARRANT, 17 C. 209.

(170 *b*)—*S.* 50, *punishment under*—*Ss.* 50 (5) *and* 69, *cl.* (*c*), *Burma Act* XI *of* 1889—*Petition under s.* 50, *cl.* (5), *to special Court by a party aggrieved by an order under s.* 50 *Insolvent Act, a Criminal case—Remedy in case of difference of opinion.*—The punishment, which can be awarded under s. 50 of the Insolvent Act, is a punishment for something which the person to be punished has done, and is not in any way an imprisonment to which he is subject in order to compel him to do something in the future; and that brings the case within the definition of a Criminal case. (17 C. 209, *F.*) [*R.*, L.B.R. 1893-1900, 141]. A petition presented under s. 50, cl. (5) of the Lower Burma Courts Act, to the Special Court, by a person considering himself aggrieved by an order of the Recorder, sitting as an Insolvency Commissioner, made under s. 50 of the Insolvent Act, comes before the Special Court as a Criminal case. It is therefore to be dealt with, in case of difference of opinion between the members of the Court (Special), under s. 69, cl. (*c*) of the Lower Burma Courts Act. YEO SAM CHOOW v. THE CHARTERED BANK, **19 C. 605.** [*R.*, L.B.R. 1893-1900, 141.]

(170-*c*)—*Ss.* 50, 51 — *Rule* 20 —Where, at the close of the cross-examination of the insolvent, an opposing creditor applies for leave to add several fresh grounds of opposition, and all the facts relied upon in support of these grounds were known to the opposing creditors at the outset or were within their means of knowledge, the Court would refuse to grant the application. The power given to the Court by r. 20 should be exercised with great caution. Rash and reckless speculation on the part of the insolvent is not, in terms, an offence under s. 51 of the Indian Insolvent Act, though, if rash and reckless speculation be proved, the Court would be justified on account of it, in adjourning the insolvent's discharge under s. 47 of the Act. What the Court has to determine under s. 51 of the act is, whether the insolvent's debts, or any of them, were contracted without his having any reasonable or probable expectation, at the time when he contracted them, of paying the same, or whether his whole debts so greatly exceeded his means for providing for the payment thereof during the time when the same were in the course of being contracted (reference being had to his actual and expected property) as to show gross misconduct in contracting the same. Banks do not forfeit the protection which the provisions of s. 51 of the Act afford them, because they do not refuse the forward bills of the insolvent firm, which they belived to be solvent, on the suspicion that they are speculative in character. S. 50 of the act is a highly penal section, and in it the word "fraudulent" must have its ordinary meaning assigned to it. From the mere fact of a voluntary payment, fraud of a penal nature cannot be inferred. When the conduct of the insolvent in giving a fraudulent preference is made penal, the Court must be satisfied that the guilty intention necessary to constitute the offence existed in the mind of the insolvent and ought not to assume it, unless the circumstances point to no other probable conclusion. *In the matter of* HORMARJI ARDESIR, HORMARJI, **17 B. 313.**

(171)—*S.* 51, *Insolvent Act—Interpretation.*—The words "without having any reasonable or probable expectation at the time when contracted, of paying the same" refer only to a man who incurs a debt knowing that he cannot repay that debt and not to one who incurs a debt knowing that he cannot pay his debts generally. The words "if it shall appear that the insolvent's whole debts so greatly exceeded his means of providing for the payment thereof during the time when the same were in course of being contracted, reference being had to his actual and expected property, as to show gross misconduct in contracting the same," apply not to this or that debt or class of debts, but to all the debts contracted for some years past. *In the matter of the petition of* D. COWIE, **6 C. 70=7 C.L.R. 19.**

(172)—*S.* 51, *nature of order under—Personal discharge except as to opposing creditor.*—When a creditor, holding a mortgage from an insolvent, who opposes his discharge on the ground that he was induced to advance money to him on the faith of false and fraudulent representations made by him, has not taken steps to place himself in a position to issue execution against him, the Court, under s. 51, Insolvent Act, has no power to order immediate commitment. Accordingly, the Court can only make a prospective order that as to that particular creditor, the insolvent shall be entitled to his personal discharge, as soon as he shall have been in custody, at the suit of that creditor, for the period of six months. The creditor wishing to detain the insolvent for such period must place himself in a position to issue execution against the insolvent. (5 B.H.C.O. C. 55, *F.*) *Quære*—Whether an insolvent will be relieved from the penalty prescribed by s. 51, if the claim of the opposing creditor is satisfied, after the creditor has placed himself in a position to issue execution against him. *In the*

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

matter of SARAT KUMAR SEN, **26 C. 973=4 C.W.N. 32.**

(173)—S. 51—*See* Nos. 152, 153, 170, *supra.*

(174)—*Ss.* 51, 52—*Court to be governed by a language of Legislature* — "*Dischared after custody at the suit of creditors,*" *meaning of.*—A Court must be governed by the language of the Legislature, without considering what may have been its intention. *Per Couchman, C.J.*— Where, under s. 51 of the Insolvent Debtors Act, it has been adjudged that an insolvent shall be forthwith discharged from all his debts, etc., except as to certain specified debts, and as to these, that he shall be discharged as soon as he shall have been in custody, *at the suit* of the person or persons who shall be creditor or creditors for the same respectively for such period as the Court shall direct, such an order of adjudication does not itself operate as an order for the imprisonment of the insolvent; but the detaining creditor, if he wishes to arrest or detain the insolvent for such period, must, if he has not already done so, place himself in a position to issue execution against the insolvent. *In re* MANCHARJI HIRJI READMONEY, **5 B.H.C. O.C. 55.** [*F.*, 26 C. 973=4 C.W.N. 32; *Appr.*, 13 M. 150, F.B.; *R.*, 7 Bom. L.R. 146]

(175)—S. 52—*See* No. 174, *supra.*

(176)—S. 56—*See* No. 154, *supra.*

(177)—*Ss.* 56, 73—*Discharge of Insolvent—Opposing creditor taken by surprise—Appeal.*—An insolvent filed his petition and schedule. Two of his creditors filed joint grounds of opposition to his discharge, and the petition was therefore placed upon the list of opposed petitions. The principal ground of opposition was that the insolvent was not an inhabitant of and did not reside in, Bombay, and that therefore the Court had no jurisdiction to hear his petition or grant him his discharge. Misled as to the time when the petition was to come on for hearing, the creditors failed to appear when the petition was called on and the insolvent obtained his discharge *ex parte.* The appellate Court, on the ground that the opposing creditors had been taken by surprise, set aside the order of discharge and restored the case to the board. *Semble* that, under the circumstances, the Commissioner sitting in insolvency, had no jurisdiction to set aside the order of discharge. DWARKADAS LALUBHAI v. GEORGE BLACKWILL, **9 B.H.C. 319.**

(178)—*S.* 59—*Vesting of insolvent's estate in Official Assignee under vesting order—Subsequent order of discharge—Effect on vesting order—Right of creditors to receive interest on interest carrying debts—Right of insolvent to balance in the hands of Official Assignee.*—An insolvent's estate became vested in the Official Assignee under an adjudication and vesting order. All the creditors having been fully paid out the principal amount due to them out of the estate that became vested in the Official Assignee, the insolvent petitioned for and obtained, under

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

s. 59 of the Insolvent Debtors' Act, an order *nisi* in the nature of a certificate for the discharge of his person and property from the demands of his creditors. Subsequent to the order of discharge, the Official Assignee received a certain amount which became due as interest payable in respect of certain Government securities to which the insolvent had become entitled for life. Thereupon, some of the creditors applied to have interest allowed them upon their debts, and the insolvent applied for payment to him of the balance in the hands of the Official Assignee. *Held* that the order of discharge under s. 59 of the Insolvent Act did not render the vesting order void; nor did it take effect as vesting immediately in the insolvent the property vested in the Official Assignee. *Held* also that the interest which subsequently became due could not be considered as "after-acquired property," within the meaning of s. 59 of the Insolvent Act; nor could it be considered as "debt growing due to the insolvent before the Court made its order," within the meaning of s. 7 of the Act. *Held*, further, that the creditors were entitled to an order for payment of interest upon such debts as legally carried interest out of the surplus which remained in the Official Assignee's hands after payment of the scheduled amount of the debts. *Held*, moreover, that the insolvent or his legal representative was entitled to the balance still left in the hands of the Official Assignee. *In the matter of* THOMAS PEREIRA, **1 M.H.C. 217.**

(179)—S. 59—*See* No. 129, *supra.*

(180)—*S.* 60—*Trader—Discharge—Subsequent suit for debt not entered in schedule.*—Defendant, who had taken the benefit of the Insolvent Act, was sued by plaintiff for a debt contracted previously to his insolvency, the debt not having been entered in the insolvent's schedule at the time of his final discharge. *Held*, insolvent being a trader, that under the provisions of s. 60 of the Insolvency Act, taken in connection with 5 & 6 Vict., c. 122, the discharge was good and valid, and that subsequently-acquired property could not be attached for any debt discharged under the insolvency. BRETT v. SCHONERSTEDT, **2 Hyde 1.**

(181)—*S.* 60, *Insolvent Act* (11 *and* 12, *Vict.*, *c.* 21)—*Indigo planter trader.*—A person carrying on the business of an indigo planter, is a trader within the meaning of s. 60 of the Indian Insolvent Act. *In the matter of* DEMOMET, **21 C. 1018.**

(182)—*S.* 60—Mukadam *if trader.*—*A mukadam* of shipping and landing business was held not to be a trader within the meaning of the Indian Insolvent Act (11 & 12, Vict., c. 21, s. 60); and therefore he could not obtain a discharge in the nature of a certificate under s. 60 of the Act. *In the matter of* COWASJI EDALJI, **5 B. 1.**

(183)—*S.* 60—*Order absolute—Effect of order on debt not included in schedule.*—An order absolute under the Act was meant to discharge

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*continued.*

and did discharge an insolvent from all demand, which were liable to be discharged by a certificate under a flat in bankruptcy of even date with the insolvent's petition. The discharge was not intended to be confined to the debts enumerated in the schedule. DADHABHAI NASARVANJI v. MANIKJI SHAPURJI KAKA, **7 B.H.C.O C. 22.** [*R.*, 6 Bom. L.R. 81, 10 O C 305.]

(184)—S. 60—*See* Nos. 129, 151, 155, *supra.*

(185)—S. 61—*See* COMPANY—WINDING UP OF COMPANY, 10 B. 582.

(186)—*S.* 62—*Crown-debt, what is a.*—Where a debt is a debt in respect of the price of crown property (*e. g.*, opium) sold, and the amount when received would be a part of the revenue, of India, the debt is in substance a debt due to the crown. The question is not in whose name the debt stands, but whether the debt, when recovered, falls into the coffers of the State. JUDAH v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **12 C. 445.** (5 B.H.C.O.C. 23, at p. 47, *F.*)

(187)—*S.* 63—*Property settled without power of anticipation—Married Women's Property Act, 1874, s.* 8—*Insolvency of a married woman.*—Property settled upon a woman for her separate use without power of anticipation does not enure to the benefit of her creditors. S. 8 of Act III of 1874 makes it clear that married women cannot evade such restraint as can be lawfully imposed on them. *In re* MANTEL AND MANTEL, **18 M. 19.** (12 C. 522, *Diss.*) [*R.*, 30 M. 378=17 M.L. J. 363=2 M.L.T. 322.]

(188)—S. 72—*See* No. 109, *supra.*

(189)—*Ss.* 72 *and* 73—*Limitation—Evidence.*—When the time for appealing against the Commissioner's adjudication expired during the annual vacation of the High Court, and the appeal was filed on the re-opening day, it was in time. When no evidence was recorded under s. 73 of the statute, the Commissioner's notes cannot be used in appeal. ABDOOL v. MAHAMED, **14 M. 404.**

(190)—*Ss.* 72, 73—*Insolvent Court—High Court—Notes of evidence not taken—Jurisdiction to hear appeal.*—There are no provisions in the Insolvent Act as to the presentation of petitions of appeal similar to those contained in s. 336 of the Civ. Pro. Code. Though the taking down of evidence by an officer of the Insolvent Court is not a condition precedent to the right to appeal, yet in cases where it is necessary to consider the evidence, the appellate Court can only look at the notes of evidence taken down by an officer of the Insolvent Court in the manner provided by s. 72 of the Insolvent Act, and, when it appears that no such notes had been taken, has no option but to dismiss the appeal. KALLIANDAS KIRPARAM v. TRIKAMLAL GULABRAI, **9 B. H.C. 307.** (5 B.H.C.O.C. 63, *R.*) [*F.*, M. 14 404.]

(191)—*S.* 73—*Security for costs of appeal—Personal appearance of insolvent.*—On an application for deposit of securities for the payment of the costs of an appeal under s. 73 of the Insolvent Act, by an insolvent who had been sentenced under s. 50 to imprisonment for three months, where it was shown that the insolvent absconded at the time when the order under s. 50 abovementioned was being made, the Court declined to pass such order. *In re* GHASSERAM. **15 B L.R App. 10.**

(192)—*S.* 73—*Practice—Application to the High Court in its appellate jurisdiction, if lies—Petition by creditor not included in schedule.*—When at the time of the order of final discharge, a creditor's claim was by some inadvertence omitted from being entered in the schedule, and the creditor applied for relief under s. 73 of the Insolvent Debtors Act, and the insolvent acknowledged the claim and knew of the omission, *held*, that the High Court has jurisdiction to pass an order that the creditor's name should be entered in the schedule in respect of past as well as future dividends. *In re* COBBOLD, **36 C. 512=2 Ind. Cas. 572.**

(193)—*S.* 73—"*Any person who shall think himself aggrieved*" *who is—Appeal by Official Assignee, whether maintainable.*—R held a fixed deposit receipt from A & Co. The amount with interest fell due on 9th October 1906, and on the 18th October, R demanded payment, and A & Co. suspended payment on the 26th. R applied to the Official Assignee for the full amount which was refused, and the Commissioner in Insolvency passed an order as prayed for, and the Official Assignee preferred this appeal. *Held*, that the Official Assignee is a "person aggrieved" by the order appealed against, since he was brought before the Court to submit to a decision that he was bound to pay a certain sum to R, and the decision was against him. The Official Assignee was therefore entitled to appeal under s. 73 of the Insolvency Act. OFFICIAL ASSIGNEE OF MADRAS v. RAMACHANDRA IYER, **7 M.L.T. 214=33 M. 134=5 Ind. Cas. 974.**

(194)—*S.* 73—*Petition of appeal.*—The Commissioner in Insolvency has no power under s. 73 of the Insolvent Act, to extend the time for presenting a petition of appeal from an order of the Insolvent Court. *In re* GHOLAM RASUL KHAN, **1 B.L.R. O.C. 130=1 B.L.R. S.N. 3 (d).** [*R.*, 17 B. 334.]

(195)—S. 73—*See* COURT-FEES, 24 M. 160.

(196)—S. 73—*See* Nos. 75, 102, 144, 177, 189, 190, *supra.*

(197)—S. 86—*Insolvency—Entering up judgment against insolvent—Final discharge—Discretion of Court.*—In August 1892, the insolvent, at the hearing of his application for discharge under s. 47 of the Insolvency Act, was found guilty of reckless speculation and other offences and was sentenced to a term of imprisonment under ss. 50 and 51 of the Act. In December, 1894, the insolvent applied for his discharge under s. 60 of the Act. Then the Official Assignee intervened, and applied under s. 86 of the Act to enter up judgment

Statute 11 and 12, Vict., C. 21, (Insolvent Act, 1848)—*continued.*

against the insolvent for the amount of his debts. The Court made the order, and directed that judgment should be entered up. On appeal by the insolvent, *held*, reversing the order, that under the circumstances of the case, the Commissioner had improperly exercised his discretion, as there was no suggestion that the insolvent was likely to come into any property in the future, and that the order to enter up judgment against the insolvent should be discharged. *In the matter of* HORMARJI ARDESHIR HORMARJI, **19 B. 778.** [*R.*, 28 M. 16.]

(198)—*S.* 86—*Right of assignees of debts due to insolvent—Inapplicability of s.* 135 *of the Transfer of Property Act*, IV *of* 1882.—In this case, the purchasers of certain claims against the insolvent contended that they were entitled to receive from the Official Assignee the full amount of the debts entered in the schedule as due to the creditors. The insolvent contended that, under s. 135 of the T.P. Act (IV of 1882), they could not get more than the price they had paid for those claims, but it was held that they had the right to be paid the full amount of the scheduled debts purchased. If, at the time of the assignment, the debts retained their original nature of claims under promissory notes passed by the insolvent, s. 139 of the Act would apply excluding the operation of s. 135. If, on the other hand, they should be regarded as claims against the insolvent under the judgment entered up against him under s. 86 of the Insolvent Debtors Act, assuming it to be an "actionable claim" within Chap. VIII of the Act, cl. (*d*) of s. 135 would apply depriving the insolvent of the benefit of the earlier provision of the section. *In re* RUNCHOD KHUSHAL, **21 B. 572.**

(199)—*S.* 86—*Entering up judgment against insolvent—Final discharge.*—Under s. 86 of the Insolvent Act (Stat. 11 and 12, Vict., C. 21) the Court has a discretion to grant or refuse an application to enter up judgment against an insolvent for the amount of his debts. In exercising this discretion, the Court must be guided by the circumstances of the insolvency. *In the matter of* HORMARJI ARDESHIR HORMARJI, **19 B. 297.** [*Reversed*, 19 B. 778.]

(200)—*S.* 86—*Entering of judgment against the insolvent.*—An insolvent, after obtaining his personal discharge, had inherited a house worth Rs. 5,000 from his father. Under s. 86 of the Insolvency Act, the Official Assignee moved the Commissioner in insolvency and got judgment entered up against the insolvent for balance of the scheduled debts. In an appeal against the order, held, that the insolvent had no interest in the house at the time of his personal discharge, that there is no provision in the Insolvent Act, which imposed, upon an insolvent, personally discharged, the duty of disclosing to the Official Assignee, that he has become possessed of property since the order of personal discharge was made. The non-disclosure of it does not amount to fraud. Under

Statute 11 and 12, Vict., C. 21 (Insolvent Act, 1848)—*concluded.*

the English Bankruptcy Act, judgment will not be entered up, against a bankrupt, as a condition of his discharge, if he cannot command an income more than sufficient, to keep his family in good circumstances. The order of entry of judgment was set aside. ABDUL KAREEM SAHIB v. THE OFFICIAL ASSIGNEE OF MADRAS, **28 M. 168.**

(201)—*S.* 86, *execution of judgment entered up under—Applicability of provisions of Civ. Pro. Code.*—The question in this case was whether the procedure laid down in clauses 34 and 35 of the Insolvent Act, 1848, was to be adopted in enforcing execution of judgments entered up under s. 86 of the Insolvent Act or the procedure laid down in the Civ. Pro. Code, and it was held that such execution must be carried out according to the rules laid down in Chapter XIX of the Civ. Pro. Code. The Civ. Pro. Code says (s. 649) that Chapter XIX of the Code is applicable to the execution of any judicial process ordered by any Civil Court in any civil proceeding. In the execution of a judgment under s. 86 of the Act, the Insolvency Court, undoubtedly "a Civil Court" in its realisation of assets for distribution, orders the "execution of a judicial process," to wit the judgment. *In re* BHAGWANDAS HURJIVAN, **8 B. 511.** [*R.*, 11 B. 138, 21 B. 405.]

(202)—*S.* 86—*Absence of insolvent—Judgment entered against him in his absence.*—Where an insolvent after filing the petition of insolvency, but before he was declared an insolment, left the jurisdiction of the Court, without any idea of coming back, the Court ordered judgment to be entered up against the said insolvent, in the name of the Official Assignee, for the amounts of the debts or demands stated in the insolvent's schedule. *In re* C.R. ENGLISH, **7 C.L R. 378.**

(203)—S. 86—*See* LIMITATION ACT, 1908, art 183, 13 B. 520, P.C.=16. I. A. 156.

(204)—S. 86—Execution of judgment entered up under, not subject to limitation in art. 180. Limitation Act, 1877—*See* LIMITATION ACT, 1908, art. 183, 11 B. 138.

(204-*a*)—S. 92—*See* No. 76, *supra*.

(205)—*Insolvent Court Rules, Nos.* 10, 14—*Practice—Fresh petition.*—On an appeal by an opposing creditor, from an order made by the Commissioner in Insolvency, by which the petition of the Insolvent was dismissed, under Rule 10 of the Court, as the schedule had not been filed within 30 days after the filing of the petition, while at the same time leave was granted to file a fresh petition, *held*, that Rule 14 of the Bombay Insolvent Court, requiring a special application, on affidavit and notice to opposing creditors, before a fresh petition can be filed, was not intended to apply to the case of a petition being dismissed under Rule 10, by reason of the schedule not having been filed, but that it referred only to a dismissal upon the hearing of a petition. *In re* MANEKJI FRAMJI, **3 B.H C.O.C. 167.**

Statute 11 and 12, Vict., C. 42 (Insolvency Act).

(1)—S. 7.—*See* OFFICIAL ASSIGNEE, 7 Bom. L.R. 488=29 B. 405.

(2)—S. 13—*See* CIV. PRO. CODE, 1908, s. 58, 4 Bom. L.R. 483=26 B. 652.

(3)—Ss. 13 and 49—*See* CIV. PRO. CODE, 1908, O. XXI, r. 37, 9 Bom. L.R. 898.

(4)—S. 49—*See* No. 3, *supra*.

Statutes 11 and 12, Vict., C. 49 (Insolvent Act).

S. 24—*See* INSOLVENCY —ORDER AND DISPOSITION, 2 C. 359.

Statute 12 and 13, Vict., C. 83.

Right of G.I.P. Railway Company to levy terminal charges—*See* RAILWAY COMPANY, 15 B. 537.

See RAILWAY COMPANY, 16 B. 434.

Statute 17 and 18, Vict., C. 31.

S. 7—*See* CARRIERS, 19 C. 538.

Statute 17 and 18, Vict., C. 104 (Merchant Shipping Act 1854).

(1)—*Shipping Master, Power of—Discharge of seamen with consent of captain and men—Regulations of Board of Trade.*—Where the captain of a ship consents to the discharge of a seaman, who also desires to be discharged, the shipping Master has no discretion in the matter, but is bound to sanction the discharge of the seaman under the provisions of the Merchant Shipping Acts of 1854 and 1862, and the Regulations of the Board of Trade. REG. v. SHIPPING MASTER OF CALCUTTA, **1 Ind. Jur. N.S. 371.**

(2)—*Attachment—Mortgagee—Power of sale.*—An attachment on behalf of the rights of the mortgagor of a ship will not debar the mortgagee from his power of sale under the Merchant Shipping Act. AHMED MAHOMED v. AUHIN, **1 Ind. Jur. N.S. 95.**

(3)—*Non-registration of ship—Letter creating charge on ship.*—A letter, purporting to create a charge on a ship, was not registered as a mortgage under the Merchant Shipping Act. The ship not having a British register, it was held that the letter created a valid charge on the ship. SHIB CHUNDER DOSS v. COCHRANE, **Bourke, O.C., 388.**

(4)—*Merchant Shipping Act Amendment Act, s. 3—Agreement for sale of ship, whether creates any equitable title—Completion of sale of ship, necessity of registered sale-deed for.*—There can be no equitable ownership in respect of a ship apart from the legal ownership in it, and Courts therefore do not grant specific performance of an agreement for the sale of a ship. Since the passing of the Merchant Shipping Act, 17 and 18 Vic., Ch. 104, the only ownership in a vessel that can be created either in law or in equity is when the requirements of that Act have been complied with, *i.e.*, a sale deed has been executed and registered. Consequently, on the destruction of a ship delivered to the defendant under a mere agreement to sell, plaintiff, the owner of the ship, was held to be not entitled to sue and recover the purchase money due to him. RAMANADAN CHETTI v. NAGOODA MARAKAYAR, **21 M. 395.** [*Diss.*, 29 M. 526=1 M.L.T. 407.]

Statute 17 and 18, Vict., C. 104 (Merchant Shipping Act 1854)—*concluded.*

See Bom. ACT XIX OF 1838, 14 B. 170.

Statute 18 and 19, Vict., C. 115.

See COMPANY—POWERS AND LIABILITIES OF DIRECTORS, 5 B.L.R. 195.

Statute 20 and 21, Vict., C. 66.

S. 67—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1860, s. 6, 1 M.H.C. 443.

Statute 20 and 21, Vict., C. 85.

See ACT IV OF 1869, s. 22, 26 A. 553.

Statute 20 and 21, Vict., C. 160.

Ss. 3, 18 and 54—*See* COMPANY—POWERS AND LIABILITIES OF DIRECTORS, 5 B.L.R. 195.

Statute 21 and 22, Vict., C. 21.

(1)—S. 53—*Order compelling attendance of insolvent (residing more than 200 miles from Court-house) for examination—Jurisdiction.*—An insolvent filed his petition of insolvency on 4th December 1865. On his application for a personal discharge under s. 47 of the Act he was, on 15th January 1866, ordered to be imprisoned under ss. 50, 51 of the Act. He did not apply for his discharge under ss. 59, 60 of the Act. Having completed the term of his imprisonment, he left Bombay and went to Morar and ultimately settled at Aligarh in the North-Western Provinces. In August 1886, the Official Assignee was informed by a creditor of the insolvent that the latter was possessed of valuable landed property at Aligarh and also of considerable moveable property. On the 25th August 1886, the Official Assignee obtained a rule *nisi* calling on the insolvent to show cause why he should not hand over all this property to the Official Assignee for the payment of the insolvent's creditors. Under s. 58 of the Act, the Insolvent Court passed an order on 10th August 1887, calling on the insolvent to appear before it for being examined as regards certain property which the Official Assignee believed might be available for the payment of his creditors. The insolvent contended that the Court in Bombay had no jurisdiction to make such an order against a person resident more than 200 miles from the Court-house, and that, even if it had the jurisdiction, the granting of such an order was a matter of discretion, and that in the present case that discretion had been improperly exercised. *Held* that the Insolvent Court at Bombay had jurisdiction to pass the order. *In re* CAWASJI OOKERJI, **13 B. 114.** [*D.*, 9 Bom. L.R. 1093.]

Statute 21 and 22, Vict., C. 70.

See COPYRIGHT, 8 B.L.R. 298=16 W.R. 90.

Statute 21 and 22, Vict., C. 106 (The Government of India Act, 1858.)

(1)—*See* DOMICILE, 4 C. 106=2 C.L.R. 496.

(2)—*See* EJECTMENT, SUIT FOR, 1 B.L.R. P. C. 44=10 W. R. P. C. 31=12 M. I. A. 448 =2 Suther. 160=2 Sar. 382.

(3)—Ss. 39, 40, 41, 42, 65—Stay of execution—Powers of Secretary of State to offer security—*See* Civ. Pro. Code, 1908, O. XLI, rr. 5, 6, 15, C.W.N. 475=13 C L.J. 365.

(4)—S. 40—*See* No. 3, *supra.*

(5)—S. 41—*See* No. 3, *supra*

(6)—S. 42—*See* No. 3, *supra.*

(7)—*Ss.* 42, 65—*Secretary of State for India, liability of, for torts committed by servants—Torts—Police Sergeant on a Government Railway assaulting a passenger—"Debts and liabilities lawfully contracted" meaning of.*—Where a Police Sergeant, under instructions from the Station Master, assaulted the plaintiff in removing him from a compartment of the train which had been reserved for Europeans, and the plaintiff sued the Secretary of State for damages, on the ground that the reservation was wrongful and that he had a right to travel in the compartment from which he was ejected. *Held*, that a suit for a tort by a Railway servant will not lie against the Secretary of State for India. In England there is no right of suit against the Crown for the tortious acts of its servants. (8 M. I. A. 103, 5 B.H.C. App, 1, *D.*; 1 C. 11, 3 A. 885, 4 M. 344, 7 M. 466, *R.*; 28 B. 314, *Expl.*) Under s. 65 of the Government of India Act, the Secretary of State is liable only when a suit is brought against him as representing the late East India Company, or which can, by any possibility, be described as a suit which, if the Government of India Act had not been passed, might have been brought against the East India Company. Even if loosely interpreted, s. 42 of the Act restricts the liability only to that lawfully incurred on account of the Government of India. MATHRADAS v. SECRETARY OF STATE FOR INDIA, **S. L.R. 360=2 Ind. Cas. 373.**

(8)—*Ss.* 42, 65—*Liabilities lawfully contracted or incurred—Government of India—Secretary of State, suit against East India Company—Tortious act of the public servants—Chief Constable, negligence of—Suit for damages.*—In the expression "liabilities lawfully contracted or incurred." as used in St. 21 and 22 Vic. c. 106, ss. 42, 65, the word "lawfully" qualifies "contracted" alone, and not "incurred." The term "Government of India" as used in s. 42 of the Statute points to its bearing the meaning not of the Governor-General in Council, but of the superintendence, direction and control of the country. The words of ss, 42 and 65 of the statute are possibly capable of the construction that the reference in them to the East India Company is in the case of the earlier section to furnish a clue to the character of the charge, rather than to the conditions which can bring it into being, and in the latter section to indicate the mode in which liability may be enforced, and not the circumstances under which it may be incurred. The liability of the revenues of India for the tortious acts of the public servants is no greater under the statue than in the time of the East India Company. In an action of tort against the Secretary of State for India, the plaintiff to succeed must establish that the liability was one incurred, on account of the Government of India; such liability, however, can be incurred by those alone in whom the governing of the country is vested. Before it can be said that a liability on account of the Government of India had been incurred by the Bombay Government as the result of the act or omission of the Chief Constable so as to be chargeable on the revenuee, it is necessary to exclude those conditions which would afford a principal exemption from liability for the act of an agent. And it is settled law that where the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment. Hence, where a Chief Constable causes damage by an act done not in obedience to an order of the Executive Government but in performance of a statutory power vested in him by the legislature (the Chief Constable being appointed not by the Bombay Government but by an officer clothed by the legislature in that behalf), where his action is not in any sense productive of benefit to the revenues of the Bombay Government nor is it a transaction out of which profit can be derived, and where there is no ratification or adoption of the act, no suit can lie against the Secretary of State to recover damages arising from such act. SHIVABHAJAN v. SECRETARY OF STATE, **6 Bom. L.R. 65=28 B. 314.**

Statute 21 and 22, Vict , C. 106 (The Government of India Act, 1858)—*continued.*

(9)—*S.* 65—*Indian Councils Act* (24 *and* 25 *Vict., C.* 67), *s.* 22, *proviso—Right of subject to sue Government, if may be taken away by legislation in India—Act* IV *of* 1898 (*Burma*), *s.* 41 (*b*) *if* ultra vires—*Indian Legislature, control of, overprocedure, without affecting substantial right—Secretary of State for India in Council, position of, as successor of East India Company.*—The effect of s. 65 of the Government of India Act of 1858 was to debar the Government of India from passing any Act which would prevent a subject from suing the Secretary of State for India in Council in a Civil Court, in any case in which he could have similarly sued the East India Company. The Governor-General in Council not having power, under the proviso to s. 22 of the Indian Councils Act of 1861, to repeal or in any way affect, among other matters, any provision of the Government of India Act, 1858, s. 41 (*b*) of Act IV of 1898 (Burma), which debars a Civil Court from entertaining any claim against the Government to any right over land, is *ultra vires.*

Statute 21 and 22, Vict., C. 106 (The Government of India Act, 1858)—*concluded.*

Semble:—The Indian Government can legislate validly about the formalities of procedure, so long as they preserve the substantial right of the subject to sue the Government in the Civil Courts like any other defendant, and do not violate the fundamental principle that the Secretary of State, even as representing the Crown, is to be in no position different from that of the East India Company. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. J. MOMENT, **17 C.W.N. 169, P.C.=11 A.L.J. 49=13 M.L.T. 53=(1913) M.W.N. 45=15 Bom. L.R. 27=17 C.L.J. 194=24 M.L.J. 459=40 C. 391=18 Ind. Cas. 22=7 L.B.R. 10.** (5 B.H.C. App., 1, 4 I.A. 119, *R.*)

(10)—S. 65—Suit for wrongful dismissal against Crown—Maintainability—*See* DISMISSAL FROM SERVICE, 15 C.W.N. 486 note=13 C.L.J. 357.

(11)—S. 65—*See* JURISDICTION—CAUSES OF JURISDICTION, 14 C. 256.

(12)—S. 65—*See* Nos. 3, 7, 8, *supra*.

Statute 22 and 23, Vict., C. 41 (The Government of India Act, 1859).

(1)—*Grant of waste land—Delegation of power by Governor-in-Council to make grants under dharkast rules—Binding character of grant so made—Power of Civil Court to determine validity of grant—Revision of grant properly made.*—On an appeal being preferred by plaintiff from an order of assignment of the plaint lands made by a Deputy Tahsildar in favour of another in the plaint village, the Deputy Collector cancelled the assignment made by the Deputy Tahsildar and granted the lands to plaintiff. This order of the Deputy Collector was confirmed on appeal. Subsequently, the villagers petitioned the Collector that the plaint lands were required for grazing purposes and that they should be reserved as poramboke. Thereupon, the Collector permitted the then Deputy Collector to revise the order of his predecessor if he thought proper in the light of the facts that had been subsequently brought to notice. The Deputy Collector then directed that the assignment to plaintiff should be cancelled and ordered the Deputy Tahsildar to submit the necessary application for transferring the lands to grazing ground poramboke. Plaintiff was not formally placed in possession of the lands, nor had any patta been issued to him. He had, however, taken possession of the lands, and as an attempt was made to levy penal assessment from him therefor, he brought this suit for a declaration of his right to the lands. *Held* that when a person claims that a grant has been made to him by an officer on behalf of the Crown, the mere fact that the alleged grant purports to have been made under the dharkast rules does not affect the jurisdiction of Civil Courts to determine whether a grant has been made which would bind the Crown or any one claiming under it subsequent to such grant. A grant purporting to be made under the dharkast rules by an officer empowered to

Statute 22 and 23, Vict., C. 41 (The Government of India Act, 1859)—*concluded.*

make such a grant under those rules must be regarded as one made by a person authorized in that behalf so as to give it the same validity as if it was made by the Governor-in-Council himself. The various officers specially empowered by the dharkast rules to dispose of Crown lands thereunder are agents appointed by the Governor-in-Council in their official capacity by executive orders, and their acts within the scope of their respective authorities are as binding upon the Crown as if they were done by the Governor-in-Council himself. The action of Government officers in the disposal of lands under dharkast rules is not subject to any control other than that specially provided by those rules, *viz.*, by way of appeal. If such officers, however, act beyond the scope of their authority, the grant will be invalid. The mere registry of the name of the applicant can give him no title as against the Crown. When the proposal of an applicant is accepted by an officer duly authorized in that behalf by the dharkast rules, and the acceptance is communicated to the applicant, there is a valid contract and disposal of the land, unless the grant was procured by fraud, misrepresentation, or mutual mistake. The grantee cannot be divested of that title by the Collector, the Board of Revenue, or even the Governor-in-Council. Observations by *Bhashyam Ayyangar, J.*, on the subject of alienation of Crown lands under St. 21 and 22 Vict., Cap. 106; 22 and 23 Vict, Cap. 41; 32 and 33 Vict., Cap. 29; Act, XV of 1895 (India); and also under the dharkast rules. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. KASTURI REDDY, **26 M. 268=12 M.L.J. 453.** [*Appr.*, 29 M. 461=1 M.L.T. 278; *R.*, 30 M. 270=2 M.L.T. 141, 31 M. 264=18 M.L.J. 62=4 M.L.T. 69, 26 M. 742.]

St. 22 and 23, Vic., C. 41.

See LANDLORD AND TENANT—MISCELLANEOUS, 7 Bom. L.R. 27=29 B. 580.

St. 22 and 23, Vic., C. 63 (The British Law Ascertainment Act, 1859).

See HINDU LAW—INHERITANCE, 1 Ind. Jur. O.S. 109.

St. 23 and 24, Vic., C. 104 (Charter Act).

(1)—*Charter Act, s.* 15—*Interlocutory order—High Court's power of revision—Defendant examined as plaintiff's witness—Hearing adjourned—Defendant undertaking to appear on—Failure—Defence struck out—Illegality—Civ. Pro. Code, ss.* 115, 151, *O.* XI, *r.* 21, *O.* XVI, *r.* 20.—The High Court has ample powers under s. 15, Charter Act, to revise an order which is in the nature of an interlocutory order. (28 C. 680, 31 M. 60, *F.*) Where the petitioner, who was examined as a witness by the plaintiff, did not attend on the day to which the case was adjourned, although he had given an undertaking to do so, and the lower Court thereupon ordered that his defence might be struck off;

St. 23 and 24, Vic., C. 104 (Charter Act) —*concluded.*

Held, that the lower Court had no power to pass the order complained of, and that its order was not warranted by any of the provisions of the Code of Civil Procedure. MANKOLAM VASUDEVAN NAMBUDRI v. MANKOLAM SANKARAN NAMBUDRI, **10 M.L.T. 451.**

(2)—S. 15—*See* CIV. PRO. CODE, 1908, s.115, 11 Ind. Cas. 125.

(3)—S. 15—Revision of interlocutory orders —*See* EVIDENCE ACT, 1872, ss. 124, 162, 2 M.W.N. 1911, 369.

St. 23 and 24, Vic., C. 127.

See COSTS—COSTS OUT OF ESTATE, 10 B. 248.

St. 24, Vic., C. 10.

(1)—*See* JURISDICTION—ADMIRALTY AND VICE-ADMIRALTY, JURISDICTION, 5 B.H.C. O.C. 64.

(2)—S. 6 — *Jurisdiction — High Court— Charter party—Lien of ship-owners for unpaid freight.*—S. 6 of 24 Vic. c. 10 (which is extended to the Colonial Courts by 53 and 54 Vic., c. 27, s. 2 (sub-s. 2)) relates to a suit brought by the owners of any goods or the assignee of any goods, or the assignee of any Bill of Lading. It is by no means confined to a suit brought upon Bill of Lading where a contract is directly proved between the shipper and shipowner. BOMBAY FLOUR MILLS CO. v. AARVAK, **6 Bom.L.R. 466.**

St. 24 and 25, Vic., C. 73.

See COPYRIGHT, 8 B.L.R. 298=16 W.R. 90.

St. 24 and 25, Vic., C. 67 (Indian Councils Act, 1861).

(1)—*See* ACT III OF 1864, s. 3, 18 B. 636.

(2)—*See* CESSION OF BRITISH TERRITORY, 10 B.H.C. 37.

(3)—*See* CONFISCATION, 12 B.L.R. 167, P.C. =Sup. Vol. I.A. 119=18 W.R 389=3 Sar. P.C.J. 191=2 P.R. 1872.

(4)—S. 22 — *See* CESSION OF BRITISH TERRITORY, 1 B. 367, P.C.=3 I.A. 102=1 A. C. 322.

(5)—S. 22—*See* LEGISLATURE, POWERS OF, 11 A. 490, F.B.=A.W.N. 1889, 194.

(6)—*Ss.* 22, 24, 40, 43—*Power of Viceregal Council and Provincial Councils to make laws affecting prerogative of the Crown.*—Since the passing of the Indian Councils Act, not only the Viceregal Council but also the Provincial Councils can, without obtaining the previous sanction of the Crown, make laws affecting the prerogatives of the Crown, when such prerogatives have no relation to any of the matters exempted from their respective legislative jurisdiction. Even if the imposition of a duty or tax upon Crown property be regarded as affecting the prerogative of the Crown, it is competent to a Provincial Legislature to impose

St. 24 and 25, Vic., C. 67 (Indian Councils Act, 1861)—*concluded.*

such a duty or tax, which will be payable out of the current public revenue for purposes that make for the peace and good government of the Presidency or Province. MAGOR C. BELL v. THE MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS, **12 M.L.J. 208=25 M. 457.**

(7)—S. 24—*See* No. 6, *supra.*

(8)—S. 40—*See* No. 6, *supra.*

(9)—S. 43—*See* No. 6, *supra.*

St. 24 and 25, Vic., C. 104 (The Indian High Court Act, 1861).

See HIGH COURT, JURISDICTION OF.

See SUPERINTENDENCE OF HIGH COURT.

(1)—*See* ACT XVIII OF 1879, s. 36, 21 A. 181=A. W. N. 1899, 15.

(2)—*See* BUR. ACT XXI OF 1863, 6 B. L. R. App. 15.

(3)—*See* INJUNCTION—SPECIAL CASES, 13 C. W. N. 346=36 C. 233=1 Ind. Cas. 927.

(4)—*See* LEGAL PRACTITIONERS, VAKIL, 1 M. 24, F. B.

(5)—*S.* 7.—*Power of the Lieutenant-Governor, N. W. P.—Appointment of Acting Puisne Judge of High Court—Time restriction.*—The Lieutenant-Governor, N. W. P., has power under the High Court Act to appoint a Puisne Judge for an acting vacancy in the High Court; and as no time-limit is mentioned in the Act, it is left to his discretion, and it is not competent to a Court of law to invent a restriction not contemplated by the Legislature. RAO BALWANT SINGH v. RANIKISHORI, **2 C. W. N. 273, P.C.=20 A. 267=25 I. A. 54=7 Sar. 279.**

(6)—Ss. 7 and 16—*See* HIGH COURT JUDGES, 16 A. 136, F. B=A. W. N. 1894, 39.

(7)—*Ss.* 7, 17—*Letters Patent, s.* 2—*Vacancy in office of Judge-Crown not filling up vacancy —Powers of High Court not suspended.*—Whatever may be the true interpretation of s. 7 of the Charter Act with regard to the duty of the Crown to make provision for a vacancy in the office of a Judge, it is certain that while, by s. 2 of the Letters Patent, the High Court is constituted to be a Court of six Judges, no omission on the part of the Crown to fill up a vacancy under s. 7 of the Act amongst the puisne Judges can operate to discharge or to suspend the jurisdiction and functions of the Chief Justice and subsisting Judges of the Court. LAL SINGH v. GHANSHAM SINGH, **A. W.N. 1887, 179, F.B.**

(8)—*S.* 9—*Decree of High Court—Application of twelve years' limitation—Act* XIV *of* 1859, *s.*19 *—High Court—Amalgamation of Supreme and Sudder Courts.*—A decree of the High Court being one made by a Court established by Royal Charter, falls under s. 19 of Act XIV of 1859, and the limitation prescribed in that section, *i.e.*, of 12 years, is the limitation applicable to a decree passed by the High Court on

St. 24 and 25, Vict., C. 104 (The Indian High Court Act, 1861)—*continued.*

its appellate side. If s. 19 of the Act be regarded as a provision applicable on the 1st July 1862 to the Supreme Court, it became on that day applicable to the High Court by reason of its establishment. The High Court is, in fact, one amalgamated Court possessing and exercising "all jurisdiction and every power and authority whatsoever in any manner vested in any of the abolished Courts." (S. 9, High Courts Act). It is erroneous to assume that the High Court has got two parts, of which one represents the late Supreme Court and exercises its powers, the other representing the late Sudder Court with the jurisdiction and authority of that Court. Whenever therefore, any power vested in the late Supreme Court can be usefully brought to the aid of the High Court acting in its appellate jurisdiction, it would be the duty of that Court to exercise such power. KISHEN KINKER GHOSE v. BURODA KANT ROY, **8 W.R. 470.** [*Reversed*, 10 B.L.R. 101, P.C.; *F.*, 5 B.H.C. 214; *D.*, 12 W.R. 73.]

(9)—S. 9—*See* CESSION of BRITISH TERRITORY, 1 B. 367, P.C=3 I.A. 102=1 A.C. 322.

(10)—S. 9—*See* LEGISLATURE, POWERS OF, 3 C. 63=1 C.L.R. 161, F.B.

(11)—Ss. 9, 13 and 14—*See* ACT XX OF 1847, ss. 6, 14, 2 C.L.J. 511=10 C.W.N 134=33 C. 571 *on appeal from* 9 C W.N. 591=1 C.L.J. 278.

(12)—*S.* 11—*Letters Patent*, 1865, *arts.* 11, 13—*Jurisdiction—Power of Judge of High Court to appoint special bailiff.*—A Judge of the High Court in the exercise of his ordinary original civil jurisdiction directed a warrant to issue against the person of a judgment-debtor and appointed a special bailiff to execute the warrant against the judgment-debtor wherever he might be found in the Presidency of Madras. *Held* that the order was made without jurisdiction. *Held* also, that the order could not be in the exercise of the extraordinary original civil jurisdiction conferred by s. 13 of the Letters Patent of 1865. RAJAH OF RAMNAD v. SEETHARAM CHETTY, **26 M. 120.** (7 M. 56, *R.*)

(13)—S. 12—*See* JURISDICTION—SUITS FOR LAND, 21 W.R. 204.

(14)—S. 13—*See* No. 11, *supra.*

(15)—*Ss.* 13, 14, *Right of Chief Justice to appoint Judges for the hearing of cases.*—It does not follow, from the facts that no rules have been made under s. 13, Charter Act, assigning to any Judges or to any Division Bench, applications made in connection with the Presidency S. C. Court, that such an application can only be heard by the Chief Justice and all the Judges of the High Court sitting together. Whenever an application under s. 622, Civ. Pro. Code, 1882, against an order by the Presy. S. C. Courts, is made to the Chief Justice, he, by virtue of the powers conferred on him, under s. 14, Charter Act, does then and there appoint himself and the other Judge who may be sitting with him, to be the Bench to hear such application. HALADHAR MALLI v. CHOYTONNA MAITI, **30 C. 588=7 C.W.N. 547.** (29 C. 498, *D.*)

(16)—Ss. 13 and 14—*See* LETTERS PATENT, HIGH COURT, 1865. N.W.P. ss. 10 and 27, A. W.N. 1887, 199.

(17)—*Ss.* 13 *and* 40—*Privy Council—Leave to appeal—Interlocutory order — Question of jurisdiction.*—Leave to appeal to the Privy Council can be given where the order appealed from transferring a case from one Court to another is interlocutory, and raises a question of jurisdiction. MUNICIPAL OFFICER, ADEN v. ABDUL KAREEM, **6 Bom. L.R. 85=28 B. 292.**

(18)—S. 14—*See* Nos. 11, 15, 16, *supra.*

(19)—*S.* 15—*Superintendence of High Court.*—The powers conferred by the 15th section of 24 & 25, Vict , c. 104, ought not to be exercised in such a way as to indirectly do what the law forbids to be done directly. Where the lower appellate Court having jurisdiction has only erred in the exercise of it, and no appeal is allowed by law, the High Court is not at liberty to exercise its superintending power under the Charter Act. KARIM SHEIKH v. MUKHADA SOONDERY DASSEE, **15 B.L.R. 111=23 W.R. 268.** [*R.*, 1 C. 180=24 W.R. 440.]

(20)—*S.* 15—*High Court's powers of superintendence.*—The uniform practice of the High Court has not been to interfere, in exercise of the powers of superintendence under s. 15, Charter Act, except in cases in which the lower Court was not competent to deal with the subject-matter or had improperly declined jurisdiction. It is no ground for the High Court to interfere with the order of any of the Courts inferior to it by way of motion that that Court has put an erroneous interpretation upon a provision of law. *In the matter of the petition of* KASINATH ROY CHOWDHRY, **7 B. L. R. 146, Note.** (*R.*, 7 B.L.R. 144, 18 W.R. 289, 511, 1 A. 101 F.B.)

(21) *S.* 15—*Superintendence of High Court*—The High Court will not interfere, where a special appeal is forbidden and where no question of jurisdiction is involved. *In the matter of the petition of* LUKHY KANT BOSE, **1 C. 180.** (1 A. 101, *R.*) [*R.*, 9 B. 432, 9 C.W.N. 1046=2 C.L.J. 241, 33 C. 68.]

(22)—*S.* 15, *powers of superintendence of High Court under, when to be exercised—Solicitor's lien for costs.*—The power of superintendence vested in the High Court by s. 15 of the Charter Act is not to be exercised in cases where there is no danger of any such failure of justice as would render it necessary for that Court to interfere under such power. So, where a solicitor claiming a lien, for his costs, on certain documents, objected to produce them

St. 24 and 25, Vict., C. 104 (The Indian High Court Act, 1861)—*continued.*

on summons of Court, but the objection was overruled, the High Court refused to interfere under the Charter Act. SWINHOE AND CHUNDER v. HERA LAL SIRKAR. **2 C.W.N. 727.**

(23)—*S.* 15, *superintending powers of High Court under, extent of—Power to compel subordinate Court to act up in accordance with law.*—Where, while there had been no negligence on the side of the parties to a proceeding before a Court subordinate to the High Court, the subordinate Court has clearly failed to do its duty, *held* that, in dealing with and disposing of the matter under the power of general superintendence vested in the High Court by s. 15 of the Sts. 24 and 25 Vic., cap. 104, it is competent to the High Court to direct such subordinate Court to do its duty and to complete, as required by law, those acts of procedure which the legislature requires it to do, and not neglect to do, nor delegate them to the parties before it. ABDULLAH v. SALARU, **18 A. 4=A.W N. 1895, 124.** (9 A. 104, *R.*)

(24)—*S.* 15—*Civ. Pro. Code, s.* 622—*High Court—Power of superintendence—Revision.*—*Per Edge, C J.*, and *Oldfield and Brodhurst, JJ.*—Under s. 15 of the Charter Act, it is competent to the High Court, in the exercise of its power of superintendence, to direct a subordinate Court to do its duty or to abstain from taking action in matters of which it has no cognizance; but the High Court is not competent, in the exercise of this authority, to interfere with and set right the orders of a subordinate Court on the ground that the order of the subordinate Court has proceeded on an error of law or an error of fact. The power of the High Court is not limited to cases in which the Subordinate Judge declines to hear or determine a suit or application within his jurisdiction. *Per Straight* and *Tyrrell, JJ*—The word "superintendence" used in s. 15, Charter Act, contemplated and now includes powers of a judicial or *quasi*-judicial character, apart from those conferred on the Court by s. 622 of the Civ. Pro. Code. At the same time, the last-mentioned provision may properly be accepted as indicating the extent to which the Court should ordinarily interfere with the findings of such subordinate tribunals as are invested with exclusive jurisdiction to try and determine all questions of law and fact arising in suits within their exclusive cognizance, and in which their decisions are declared by law to be final. MUHAMMAD SULEMAN KHAN v. FATIMA, **9 A. 104, F. B.=A. W. N. 1886, 309.** (1 A. 101, 3 I. A. 330, 1 A. 296 *R.*; 8 A. 111, *Expl.*) [*F.*, 9 A. 486; *R.*, 18 A. 4=15 A.W.N. 124, 30 C. 155, 31 A. 59=A.W.N. 1908, 272=6 A.L.J. 52.]

(25)—*S.* 15—*High Court—Powers of superintendence—Act* X *of* 1859, *s.* 77.—Under the powers of superintendence given to the High Court, by the Charter Act, that Court is competent to direct Courts subordinate to it to do their duty and to see that they do not avoid to try and determine cases simply because a party

St. 24 and 25, Vict., C. 104 (The Indian High Court Act, 1861)—*continued.*

to the suit has not done that which he was not imperatively required to do, and which is irrelevant to the real question which the Court had to decide. In a suit for arrears of rent, an intervenor was added as a party under s. 77, Act X of 1859, but the Collector in appeal refused to notice the intervenor's claim. because the latter had not produced her title-deed. *Held* that the refusal to try the intervenor's claim was a denial of jurisdiction on the Collector's part and that the High Court was competent to interfere under s. 15 of the Charter Act, and to send back the case to the Collector for trial of the intervenor's claim. *In the matter of the petition of* SRIMATI NASSIRE JAN, **7 B.L.R. 144=15 W.R. 418** [*R.*, 1 A. 101, F.B.]

(26)—*High Court's powers of superintendence Act* VIII *of* 1879, *s.* 378—*Review of Judgment*—Whether a Subordinate Judge rejected an application for review of judgment, on the ground that he had no right to interfere, as the judgment sought to be reviewed was that of his predecessor, *held* that the High Court, under the general powers of superintendence vested in it by s. 15 of the Letters Patent, is competent to point out to the subordinate Court its error and to direct it to reconsider the application presented to it, and to dispose of it according to law. *In re* MATHRA PRASHAD, **I.A. 296.** [*R.*, 9 A. 104, F.B.=A. W.N. 1886, 309.]

(27)—*S.* 15—*Powers of revision of High Court.*—The very wide powers of superintendence over the proceedings of subordinate Courts conferred on the High Court by s. 15 of the High Courts Act, extend to cases like the above and enable the High Court to correct an abuse of powers by a subordinate Court. *In re* SIDDESHWAR BORAL, **4 C.W.N. 36.**

(28)—*S.* 15—*Application for review—Jurisdiction.*—In deciding an application under s. 15 of the Charter Act, the Court has nothing to do with the question whether the decision is right in point of law or not. It is only when a Judge declines jurisdiction or acts beyond his jurisdiction, that the parties aggrieved can move the High Court under s. 15 of the Charter Act. RAM LALL SINGH v. JANKI MAHATOON, **4 C.L.R. 14.**

(29)—*S.* 15—*Application under s.* 15 *of the High Court's Act—Delay.*—A party who prays for the interference of the High Court under s. 15 of the High Court's Act, should do so without delay. BUGGOBUTTY KOWAR v. MONEY, **2 C.L.R. 545.**

(30) *S.* 15—*Power of High Court—Execution proceedings.*—A Deputy Collector refused to make an order for restitution of an amount levied in excess of what was due under a decree, directing the applicant to institute a separate civil suit to enforce his claim. There being no appeal, the High Court, in the exercise of its general powers of superintendence, interfered

Statute, 24 and 25, Vict., C. 104 (The Indian High Court Act, 1861)—*continued.*

and directed the Deputy Collector to give restitution himself, he having power by law to do so. *In the matter of the petition of* GOBIND KOOMAR CHOWDHRY, **B L.R. Sup. Vol. 714, 7 W.R. 520.** [*F.*, 15 W.R. 170, 246; *R.*, 12 W.R. 406, 14 W.R. 212, 1 A. 101, 18 A. 4=A.W.N. 1895, 124, 30 C. 155; *Expl.*, 10 W.R. 341, 14 W.R. 9; *D.*, 9 W.R. 372, 9 W.R. 440, 13 W.R. 121.]

(31)—*S.* 15—*Order under s.* 15—*Appeal to Privy Council.* — Orders made by the High Court under s. 15 of the High Courts Act are subject to an appeal to the Privy Council. HURDEO NARAIN SAHU v. GRIDHARI SINGH, **13 B.L.R. 103=21 W.R. 263.** [*Diss.*, 30 C. 679.]

(32)—*S.* 15—*Order of remand—Judgment—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 584——*Second appeal—Ground.*—A judgment of a Judge of the High Court sitting singly and remanding a case after dealing with the whole case and setting aside the judgment and the decree of the lower Court is a judgment within the meaning of s. 15 of the Charter Act. A question as to the weight which the lower appellate Court should have given to certain documents, or that the lower appellate Court misunderstood the result of the first Court's local investigation, is no ground of second appeal. RAI BENODE BEHARI BOSE v. RAI PASUPATHI NATH BOSE, **13 C.W.N. 105=4 Ind. Cas. 329.**

(33)—*S.* 15—*Order passed without jurisdiction—Claim overvalued for purpose of giving jurisdiction.*—The plaintiff brought a suit in the Court of the Subordinate Judge of Dacca, under s. 15, Act XIV of 1859. The defendant pleaded that the Judge had no jurisdiction inasmuch as, if the suit had been properly valued, it was one cognizable by the Munsif. The Judge found that the value of the property did not exceed Rs. 500, and that the plaintiff had over-estimated the value of the claim in order to exceed the jurisdiction; but instead of returning the plaint, he proceeded to try the case on its merits, and dismissed the suit. On an application on behalf of the plaintiff to set aside the judgment as passed without jurisdiction the High Court refused to interfere under s. 15 of 24 & 25, Vict., c. 104. *In re* J. P. WISE, **10 B.L.R. App. 20.**

(34) — *High Courts Act* (24 *and* 25, *Vict.*, *c.* 104), *s.* 15—*Proof of circumstances entitling party to relief—Suit against deceased persons—Notice of execution given to representation of deceased defendant—Objection not taken—Sale properties—Application to set aside sale.*—In affording relief to parties applying to the High Court under s. 15 of the High Courts Act, it must be made quite clear that the party applying for it has not contributed by his own conduct to his being placed in the position he finds himself in. A suit to recover possession of certain lands appertaining to an indigo concern with *wasilat* was instituted against one D as manager on behalf of G.M. and Co., the proprietors of the concern. At the date of the institution of the suit no member of G.M. & Co., was alive. The suit appears to have been defended but the plaintiff obtained a decree for the recovery of the land and for *wasilat*. In execution, the decree-holder was put into possession of the land. Subsequently, the concern was sold to A by the executors of the last surviving member of G.M. and Co., the conveyance stipulating that A should take over the *dena pana* of the concern. Thereupon, on the application of the decree-holder, under s. 210 of Act VIII of 1859, to execute the decree in respect of the *wasilat* against A as the representative of G.M. and Co., a notice was issued under s. 216 of the Code calling on A to show cause why the decree should not be executed against him. Under the advise which he received that such application was groundless, he did not appear and show cause, and therefore, in his absence, the *wasilat* were inquired into and assessed. Later on the decree-holder applied again to execute the decree notice again issued, again A did not appear whether in consequence of the notice not having reached him or in consequence of advice received by him. A putni taluk M belonging to A was attached and afterwards sold without objection. The decree-holder became the purchaser and after confirmation of the sale, he was put in possession. Then A applied to the execution Court to have the sale set aside, and on its refusal, to do so, he applied to the High Court under s. 15 of the High Courts' Act for the same relief. *Held* that the petitioner was not entitled to have the relief asked for. The acts of the Court complained of, when done after notice to the party affected thereby, could not be regarded as nullities, so as to enable the petitioner to take the position that he was absolved from the necessity of taking notice and cannot entitle him to apply for setting aside the sale. As the decree-holder himself, having been the purchaser, could not successfully contend that a suit to set aside the sale would not lie, the petitioner was not entitled to have the sale set aside. *In the matter of the petition of* SAMUEL COCHRANE, **14 B.L.R. 330=23 W.R. 310.** [*R.*, 21 B. 424, F.B.]

(35)—*S.* 15 — *Crim. Pro. Code, ss.* 145, 435, 439—*Order of Magistrate in case of a dispute relating to immovable property—High Court's Powers of revision.*—*Held* that the High Court cannot exercise revisional powers in respect of proceedings under ch. XII of the Code of Criminal Procedure unless in a case where the Magistrate has acted without jurisdiction. *In the matter of the petition of* NATHU MAL, **A.W.N. 1902, 74.** (26 C. 625, *F.*)

(36)—S. 15—*See* BEN. ACT VIII OF 1885, ss. 15, 16, 14 C.W.N. 788=12 C.L.J. 1=6 Ind. Cas. 193.

(37)—S. 15—*See* MAD. ACT XXIV OF 1839, s. 4, 9 M.L.J. 323.

Statute 24 and 25. Vict., C. 104 (The Indian High Court Act, 1861)—*concluded.*

(38)—S. 15—*See* APPEAL TO PRIVY COUNCIL—CASES WHERE APPEALS LIE OR NOT, 21 W.R. 263.

(39)—S. 15—*See* CIV. PRO. CODE, 1908, ss. 109, 115, 9 Ind. Cas. 183=13 C.L.J. 90.

(40)—S. 15—*See* CIV. PRO. CODE, 1908, O. XXI, rr, 36, 100, 2 B.L.R. A.C. 310=11 W.R. 191.

(41)—S. 15—*See* CIV. PRO. CODE, 1908, O. XXI, r. 68, s. 115, 5 C. 878 F.B.

(42)—S. 15—Power of High Court to interfere with order of Subordinate Courts passed without jurisdiction—*See* COMMISSION, 3 M. L.T. 246=31 M. 60.

(43)—S. 15—Whether s. 15 empowers High Court to interfere where District Judge initiates Criminal Proceedings under s. 476, Crim. Pro. Code—Conditions under which revisional jurisdiction should be exercised by High Court—*See* CRIM. PRO. CODE, 1898, s. 476, 35 C. 999.

(44)—S. 15—*See* EXECUTION OF DECREE—TRANSFER OF DECREE FOR EXECUTION—EXECUTION OUT OF COURT'S JURISDICTION, 9 C. 295, P.C.=12 C.L.R. 361=9 I.A. 174.

(45)—S. 15—*See* INTERLOCUTORY ORDER, 15 C.W.N. 682= 10 Ind. Cas. 308.

(46)—S. 15—High Court's power to revise interlocutory orders—*See* INTERLOCUTORY ORDER, 9 M.L.T. 273=21 M.L.J. 484=9 Ind. Cas. 672.

(47)—S. 15—*See* LAND ACQUISITION, 15 B.L.R. 197.

(48)—S. 15—The power of transfer contained in—is dependent upon the exercise of appellate jurisdiction—*See* LETTERS PATENT, HIGH COURT, 1865—BOMBAY, cl. 13, 3 C.L.J. 5= 3 A.L.J. 53=10 C.W.N. 185=8 Bom. L.R. 4 =1 M.L.T. 1=16 M.L.J. 73, P.C.=30 B. 246.

(49)—S. 15—*See* LIEN, 15 W.R. 246.

(50)—S. 15—*See* LIMITATION ACT, 1908, S. 12, 12 B. 617.

(51)—S. 15 — *See* PRESIDENCY SMALL CAUSE COURTS ACT, 1882, ss. 6, 18 cls. (*a*). (*c*), 33, 18 M. 236, F.B.=5 M.L.J. 114.

(52)—S. 15—*See* RECORDER OF MOULMEIN, 6 B.L.R. 180=14 W.R. 257.

(53)—*See* REVIEW—REVIEW WHEN LIES, 5 B.L.R. App. 29.

(54)—S. 16—*See* APPEAL—MISCELLANEOUS, 3 C. 708=2 C.L.R. 278.

(55)—S. 16—*See* No. 6, *supra.*

(56)—S. 17—No. 7, *supra.*

(57)—S. 40—*See* No. 17, *supra.*

Statute 25 and 26, Vict., C. 63.

S. 3—*See* ST. 17 AND 18, VICT., C. 104, 21 M. 395.

Statute 25 and 26, Vict., C. 89 (Joint Stock Companies Act, 1862).

See COMPANY—WINDING UP OF COMPANY, 1 Ind. Jur. N.S. 335.

S. 4—*See* COMPANY—FORMATION AND REGISTRATION, 1 B. 550.

St. 27 and 27 Vict. C. 26.

See JURISDICTION—ADMIRALTY AND VICE-ADMIRALTY JURISDICTION, 10 B.H.C. 110.

Statute 26 and 27, Vict., C. 57 (Regimental Debts' Act, 1863).

(1)—*Ss.* 3, 4, 5, 6, 7, 8, 10 12, 22, and 35—*Royal Warrant, cl.* 17—*Committee of adjustment — Notice*—"*Person*"—Bona fide.—The chairman of an adjustment committee, appointed under the provisions of 26 and 27, Vict., c. 57 (Regimental Debts' Act of 1863), in a letter to the Bank, enclosing the order by which the committee had been appointed, informed it that he had given over to the widow of a deceased officer the whole of the estate of her husband by direction of the Military Secretary to Government, and requested the Bank to conform to her instructions concerning the amount of deposit receipts then in the Bank to the credit of the deceased officer. The widow had taken out no letters of administration to the estate of her husband, nor had she a preferential claim or any preferential charge against it, but she paid all the preferential charges. On receipt of the letter the Bank paid over all the moneys of the deceased officer in their hands to his widow. The first plaintiff (the granddaughter of the deceased officer), who had taken out letters of administration to his estate on 6th June, 1873, and her husband, the second plaintiff, sued to recover two-thirds of the moneys so paid by the Bank to the widow with interest. *Held* that, on payment by the widow of the preferential charges, the whole of the property remaining in the hands of the committee was "surplus" within the meaning of s. 5 of the Regimental Debts' Act of 1863, and that assuming the Agra Bank at Bombay to be "within the command," within the meaning of s. 7, the moneys of the deceased officer in the hands of the Bank, as being part of such "surplus", should have been dealt with by the committee in accordance with the provisions of s. 10 of the Regimental Debts' Act, 1863, and cl. 17 of the Royal Warrant, and should have been remitted to the Military Secretary to Government. *Held*, also, that the Military Secretary to Government was incompetent to pay or order the payment of such "surplus" to any person, save in conformity with the provisions of s. 12 of the Regimental Debts' Act of 1863. *Held*, also, that under s. 8 of the Regimental Debts' Act of 1863 it was not the duty of the widow, for the purpose of ousting the jurisdiction of the committee of adjustment, to pay the preferential charges before the committee had taken any steps under s. 7. S. 8 properly construed required that, on payment of the preferential charges, the committee of adjustment must be regarded as *functi officio,*

Statute 26 and 27 Vict., C. 57 (Regimental Debts' Act, 1863)—*concluded*.

except for the purpose of reporting, and should make over whatever property they have, which comes under the denomination of "surplus" in accordance with the terms of s. 10. *Held*, also, that a sufficient notice was given by the chairman's letter to the Bank that the committee were *functi officio*, and that the period had arrived when the civil law stepped in to regulate the case. *Quære*:—Whether the Bank could be held to be a "person" within the meaning of s. 22 of the Regimental Debts' Act of 1863; supposing that the Bank was a person within the meaning of s. 22 Regimental Debts' Act, 1863 the Bank would not even then be protected by that section, the payment by them not having been made to a "representative" as defined in the Act. *Held*, also, that s. 35 of the Regimental Debts' Act could not save the Bank, the payment not having been made in "pursuance" of the Act, and the carelessness of the Bank in paying the money having been such as to amount to positive negligence, and debar them from pleading that they acted under the *bona fide* belief that the payment was made in pursuance of the Act. E. SARSTEDT v. THE AGRA BANK, LIMITED, **12 B.H.C. 267.**

Statute 28 and 29, Vict., C. 15 (The Indian High Courts Act, 1865).

(1)—*See* HABEAS CORPUS, 6 B.L.R. 392.

(2)—*See* HIGH COURT, JURISDICTION OF—BOMBAY, 5 Bom. L.R. 869.

(3)—S. 3, interpretation of, by reference to repealed St. 24 and 25, Vict., c. 105, s. 18—*See* HIGH COURT, JURISDICTION OF—CALCUTTA, 12 C.W.N. 657=35 C. 701=7 C. L.J. 563.

(4)—S. 12—*See* JURISDICTION—SUITS FOR LAND, 6 B.L.R. 686.

Statute 30 and 31, Vict., C. 13 (Mutiny Act).

(1)—Ss. 2, 99—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF — GENERAL, **2 B.L.R.S.N. 7=10 W.R. 386.**

(2)—*S.* 99—*Small Cause Court—Jurisdiction.*—The 99th section of the Mutiny Act exempts all Military officers in all places from the jurisdiction of the Civil Courts in respect of their personal actions. HOSSEIN v. DICKENSON, **2 B.L.R.S.N. 3=9 W.R. 112.**

(3)—S. 99—*See* No. 1, *supra*.

Statute 32 and 33, Vict., C. 29.

See ST. 22 AND 23, Vict., C. 41, 26 M. 268=12 M.L.J. 453.

Statute 39 and 40 Vict., C. 46 (Slave Trade Act, 1876).

See CONSULAR COURT, 3 B. 58.

Statute 42 and 43, Vict., C. 33 (Army Discipline Act).

(1)—*Ss.* 141, 144—*Jurisdiction.*—A person subject to the Army Discipline Act, 1879, can be sued only in the Court within whose local jurisdiction he is residing. FOY v. MACTURK, **A.W.N. 1881, 79.**

(2)—*S.* 144—*Decree against person subject to military law.*—Where a decree was passed against an officer of the Native Indian Army, the Court directed, under s. 144, 42 and 43, Vict., c. 33, that the amount of the decree should be paid out of the pay of the defendant not exceeding one half of such pay. R. H. RAMSAY v. A.W.L. ANDERSON, **7 C. L. R. 336.**

(3)—S. 144—*See* No. 1, *supra*.

Statute 44 and 45, Vict., C. 58 (The Army Act, 1881).

(1)—S. 136—Pay of military officers—Attachability.—*See* CIV. PRO. CODE, 1908, s. 60, O. XXI, r. 2, 8 A.L.J. 487.

(2)—Ss. 136, 151 — *See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 25 M. 402.

(3)—Ss. 136 and 151 (3)—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 143 P.L.R. 1902.

(4)—*S.* 144—*Sub-conductor of Ordnance—Civ. Pro. Code, s.* 468.—The Sub-conductor of Ordnance on the establishment of the Indian Military Forces is a soldier within the meaning of s. 144 of the Army Act, 1881. A summons sent to him through the Commissary-General ought to be served on him (s. 468, Civ. Pro. Code), though the soldier is entitled to protection under s. 144 of the Army Act and is not compelled to appear in Court in person. ABRAHAM v. HOLMES, **11 M. 475.**

(5)—S. 144—Assistant Surgeons in the Indian Subordinate Medical Department—Warrant officers—Soldier's pay—Liability for attachment—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, **14 O.C. 82.**

(6)—S. 144, exemption under—Attachment of Military Assistant Surgeon's pay—*See* CIV. PRO. CODE, 1908, s. 60 (1) (*i*) and O. XXI, r. 48 (3), 10 P.R. 1910=23 P.W.R. 1910=5 Ind. Cas. 802=65 P.L.R. 1910.

(7)—*S.* 144, *proviso — Jurisdiction — Suit against soldier—Execution.*—The proviso to s. 144 of the Army Act, 1881, makes it clear that a suit will lie against a soldier in Her Majesty's service up to judgment, however small may be the amount of the debt. The question, whether the defendant is a soldier or not, will only arise when the plaintiff seeks to execute the decree he may obtain; and as his position may then be different from what it is at the time of the suit, it would be premature to discuss it at the time of the suit. KISANDAS BUDHMAL v. P. HALPIN, **10 B. 218.**

(8)—*Ss.* 144, 151— *See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—MISCELLANEOUS, 10 M. 319.

Statute 44 and 45, Vict., C. 58 (The Army Act, 1881)—*concluded.*

(9)—S. 148—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF — GENERAL, 21 P.R. 1887.

(10)—*Ss.* 148, 151—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 111 P.R. 1897, F.B.

(11)—*S.* 151—*Persons subject to military law—Court of Small Causes and Court of Requests—Jurisdiction—Construction.*—The Army Act gives jurisdiction to a Court of Small Causes, in all actions of debt and personal actions, against persons subject to military law (other than soldiers in the regular forces) over which such Court would ordinarily exercise jurisdiction, and provides a Court of Requests for those cases only where an action of the value of Rs. 400 or under has to be brought against such persons at a place lying beyond the jurisdiction of any Small Cause Court. The words "within the jurisdiction" in s. 151, cl. 1, refers to "actions" and not to "persons." SHERE ALI v. C. L. PRENDERGAST, **13 C. 143.**

(12)—S. 151—*See* CIV. PRO. CODE, 1908, s. 20, 93 P. R. 1900.

(13)—S. 151—*See* PRESIDENCY SMALL CAUSE COURTS ACT, 1882, s. 18 (1), 18 C. 372.

(14)—S. 151—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 110 P. R. 1890, 1 P. R. 1893, F.B., 48 P. R. 1893; 37 P.L.R. 1901.

(15)—S. 151—*See* Nos. 2, 3, 8, 10, *supra.*

Statute 46 and 47, Vict., C. 37 (English Patents Designs and Trade Marks Act, 1883).

S. 103—*See* TRADE MARK, 98 P.L.R. 1902=55 P. R. 1902.

Statute 46 and 47, Vict., C. 52 (Insolvency).

(1)—*Ss.* 7, 27—*Exemption from attachment of insolvent's salary after deducting amount payable per mensem to Official Assignee—Exemption on footing of necessaries.*—When an Insolvency Court, acting under the provisions of the Indian Insolvent Act, directs the insolvent to pay a portion of his salary per mensem to the Official Assignee, the remainder of his salary is to be regarded on the same footing as necessaries which are exempted from attachment. A Court cannot, therefore, in execution of a decree against the insolvent, direct the attachment of any portion of his salary remaining over after payment to the Official Assignee of the amount ordered to be paid. MAUNG GLAY v. ODEYAPPA, **8 Ind. Cas. 438.**

Statute 51, Vict., C. 4.

S. 7—*See* PRESIDENCY SMALL CAUSE COURTS ACT, 1882, s. 18 (1), 18 C. 372.

S. 7—Jurisdiction given to Small Cause Courts (Presidency)—S. 18, Act XV of 1882—S. 7, Army Act (1888) (51 Vict., c 4.)—*See* SMALL CAUSE COURT, PRESIDENCY TOWNS, JURISDICTION OF—GENERAL, 18 C. 144.

Statute 51 and 52, Vict., C. 4.

S. 6—*See* LIMITATION—GENERAL, A. W. N. 1897, 203.

Statute 52 and 53, Vict., C. 49 (English Arbitration Act).

(1)—*S.* 12—*Order in High Court of England, that award be enforced as judgment, whether amounts to foreign judgment*—An order obtained in the High Court of England enforcing an award under s. 12, English Arbitration Act (52 and 53, Vict. c. 49), does not operate as a judgment, on which an action can be brought as on a foreign judgment. DEEP NARAIN SINGH v. DIETERT, **31 C. 274=8 C.W.N. 207.**

Statute 53 and 54, Vict., C. 27 (Colonial Courts of Admiralty Act, 1890).

See JURISDICTION—ADMIRALTY AND VICE-ADMIRATY JURISDICTION, 29 C. 402=6 C. W.N. 773.

Statute 55 and 56, Vict., C. 14 (Indian Councils Act, 1892).

S. 5—*See* PROBATE AND ADMINISTRATION ACT, 1881, ss. 51, 52, 86, 10 Bom. L. R. 924, 32 B. 634.

Statute 57 and 58, Vict., C. 60 (The Merchant Shipping Act, 1894).

(1)—*Intention of the Act—Right to share in ship—Without registered bill of sale.*—The intention of the Act being that "interest arising under contract or other equitable interests may be enforced by or against owners and mortgagees of ships, in respect of their interest therein, in the same manner as in respect of any other personal property," it is competent to a person to establish his alleged right to his share of a ship and its income, without any registered bill of sale. P. M. P. A. ALAGAPPA CHETTY v. N. S. T. V. CHIDAMBARAM CHETTY, **1 M.L.T. 407=29 M. 526.** (21 M. 395, *R.*)

(2)—*S.* 24—*Vendee of a share in a ship—Absence of bill of sale in his favour—Right to be registered as owner.*—A person, who is only the beneficial owner of a ship and in whose favour there is no bill of sale, is not entitled to be registered as owner. First defendant, who owned a one-fourth share in a ship, executed a nominal sale-deed in favour of his agent, the fourth defendant. Subsequently he sold the one-fourth share to plaintiff. Plaintiff sued, among other things, for a declaration that he was entitled to be registered as owner of one-fourth share in the ship. *Held*, that plaintiff was not entitled to be registered as owner. RAMAN CHETTY v. ALAGAPPA CHETTY, **8 M.L.T. 407.**

(3)—Ss. 53, 55—Contract between British subject and non-British subject as to registered ship in Calcutta—Jurisdiction of Small Cause Court—Execution of Small Cause Court decree—*See* SHIP, 2 Ind. Jur. N.S. 251.

(4)—S. 55—*See* SHIP, 1 Ind. Jur. N. S. 263.

(5)—S. 55—*See* No. 3, *supra.*

Statute 58, Vict., C. 7.

S. 4—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 25 M. 402=143 P.L.R. 1902.

Statute. Construction of.

(1)—*Codification, object of—Method of interpreting a statute—Code, construction of.*—The object of codification of a particular branch of law is that, on any point specifically dealt with by it, such law should be sought for in the codified enactment, and ascertained by interpreting the language used. In interpreting a statute, the proper course is, in the first instance, to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. NORENDRA NATH SIRCAR v. KAMALBASINI DASI, **23 C. 563=23 I.A. 18. P.C.=6 M.L.J. 71=6 Sar. 667** (*F.*, 23 C. 738, F.B. 24 C. 725, F.B., 24 C. 881=1 C.W.N. 642. 24 C. 908. F.B., 27 C. 11=3 C.W.N. 660, 10 Bom. L.R. 1146; *Observed*, 30 C. 155; *R.*, 46 P.R. 1909=72 P.L.R. 1909=56 P. W.R. 1909=1 Ind. Cas. 745, 25 C. 239, 25 B. 202, 3 O.C. 325, 28 C. 517=5 C.W.N. 640, 25 M. 244, 6 Bom. L.R. 131, 74 P R. 1906=137 P.L.R. 1906. 29 A. 685=4 A.L.J. 605=A.W.N. 1907, 235=6 M.L.J. 197. 34 C. 999=11 C W. N. 889=6 C.L.J. 410, 35 C. 34=11 C.W.N. 983=6 C.L.J. 273; *D.*, 25 M. 457.]

(2)—*Act or written contract providing that something shall be done immediately—Object of statute to be had regard to.*—Where a statute or a written contract provides that a certain thing shall be done immediately, you must in construing that word, pay regard to the object of the statute or the contract as the case may be and the position of the parties and purpose for which the legislature or the parties intend that it shall be done immediately. *In re* LAND ACQUISITION ACT, **7 Bom L.R. 697=30 B. 275.**

(3)—*Essence of Code.*—The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction. GOKUL MANDAR v. PUDMANUND SINGH, **29 C. 707. P.C=29 I.A. 196=6 C W N. 825=4 Bom. L.R. 793=8 Sar. 323.** [*F.*, 26 M. 423, 10 Bom. L.R. 1113, 11 Bom. L.R. 335, 4 N.L.R. 61; *Appr.*, 27 M. 531=14 M.L.J. 155=1 Weir 419, 29 M 336=1 M.L.T. 153=16 M.L.J. 395, 35 C. 353=12 C.W.N. 359 =7 C.L.J. 470, 18 M.L.J. 89=31 M. 277=7 Cr. L.J. 329; *R.*, 27 B. 91, 32 C. 494=9 C.W.N. 372 =1 C.L.J. 118, 1 S L.R. 29, 2 S.L.R. 37; *Cons.*, 29 A. 601=A.W.N. 1907, 189=4 A.L.J. 545.]

(4)—*Statutes. Construction of — Mode of construction.*—The meaning of an Act is to be gathered solely by reference to the Act itself. MUDDOOSOODEN DEY v. BAMACHURN MOOKERJEE, **1 Hyde 100.**

Statute, Construction of—*continued.*

(5)—*Section in a statute, construction of.*—A Court is bound to construe a section in a statute according to the plain meaning of the language used, unless it finds, either in the section itself or in any other part of the statute, anything that will either modify or qualify or alter the statutory language, even if the result of such construction lead to anomalies, or be productive even of absurdity. (*Bank of England* v. *Vagliano*, L.R. App. Cas. (1891), p. 145; *St. John Hampstead* v. *Cotton*, 12 App. Cas. 6 (1886). *F.*) RAJIB PANDA v LAKHAN SENDH MHAPATRA, **27 C. 11=3 C.W.N. 660.** (23 C. 563, *R.*)

(6)—*Canon of construction — No part of statute to be rendered superfluous.*—The Canon of construction is that a statute ought to be construed so that, if it can be prevented, no clause, section or word shall be 'superfluous, void or insignificant. SWAMINATHA AIYAR v. VAITHIANATHA SASTRIAL. **15 M L.J. 116, 124. F.B.=28 M. 466.** [*R.*, 17 M.L.J. 300.]

(7)—*Ss* 26 and 17, *Civ. Pro. Code*, 1882—*Cause of action meaning of—Joinder of plaintiffs—S* 31 *(a).*—Ordinarily, a clause in a statute should be construed, so as to give some meaning to every part of it. HARAMONI DASSI v. HARI CHURN CHOWDHRY, **22 C. 833.**

(8)—*Words to be interpreted clear—No ambiguity—Rule of construction.*—The ordinary rule of construction is that, when the words to be interpreted are clear, that meaning should be attached to them which the words in their general acceptance bear. The Court should construe the law as its unambiguous words indicate in their ordinary meaning—*Per Bayley, J.* MADHUSUDAN RAGCHI v. RAGAH MAHES CHANDRA SINGH, **3 B.L.R.A.C 202.**

(9)—*General terms following particular ones—Rule of construction.*—General terms following particular ones apply only to such things as are *ejusdem generis.* BAL MOKOOND LALL v. JURJUDHUN ROY, **9 C. 271=11 C. L. R. 466.**

(10)—*Always dangerous to paraphrase enactment.*—It is always dangerous to paraphrase an enactment, and not the less so, if the enactment is perhaps not altogether happily expressed. DURGA CHOWDHRANI v. JEWAHIR SINGH CHOWDHRI, **18 C. 23, P.C.=17 I.A. 122=5 Sar. 560.**

(11)—*Language of enactment to be examined.*—In construing a particular section of an enactment, the language of the section must be first examined—*Per Banerjee, J* JAGODISHURY DEBIA v KAILASH CHUNDRA LAHIRY, **24 C. 725, F.B.=1 C.W.N. 374.** (23 C. 563, P.C., *R.*)

(12)—*Words of Act to be understood in ordinary and natural meaning—Limit of rule.*—It is a sound rule of interpreting statutes that words must be understood in their ordinary and natural meaning, unless there is clear reason to the contrary. The rule that a word used in a statute is to be understood in the same

Statute, Construction of—*continued.*

sense throughout, is only a rule of presumption, by no means inflexible, and certainly not of such character as to be irrebuttable by other rules of interpretation founded upon the especial context of statutory words or reasons and objects wherefor any special section is enacted—*Per Mahmood, J.* BAIJ NATH v. SITAL SINGH, **13 A. 224=A.W.N. 1891, 68.** [*R.*, 4 N.L.R. 78=8 Cr. L.J. 18.]

(13)—*Interpretation of statutes — Words of prohibition and words of direction, distinction between.*—There is a difference between a case where a Court omits to do something which by statute it is enacted shall be done, and a case where a Court does something which by statute it is enacted shall not be done. In the former case the omission may not amount to more than an irregularity in procedure, whilst in the latter case the doing of the prohibited thing by the Court is *ultra vires* and illegal and consequently without jurisdiction, RAMESHUR SINGH v. SHEODIN SINGH, **12 A. 510=A.W.N. 1810, 188, F.B.** [*Diss.*, 28 C. 324=5 C.W.N. 509; *Appl.*, 18 C. 496.]

(14)—*S.* 244, *Civ Pro. Code*, 1882—*Liberal interpretation to language of section — Disposal in one suit.*—A liberal interpretation ought to be given to the language of s. 244 (*c*), Civ. Pro. Code. The intention of the Legislature appears to be to dispose, in a single litigation, of all questions in reference to the subject-matter of that litigation arising between the parties once properly brought before the Court. GOWRI v. VIGNESHVAR, **17 B. 49.** [*Diss.*, 23 A. 346, 6 C.W.N. 10=30 C. 134; *F.*, 15 C.P. L.R. 106, 6 Bom. L.R. 697; *R.*, 23 M. 361 F.B., 8 Bom. L.R. 858=31 B. 33.]

(15)—*Construction of statutes — Practice of Court – Hardship.*—A practice which is in contravention of the law, even if the practice be that of a High Court cannot justify a Court in construing an Act of the Legislature contrary to the plain wording of the Act. Nor can the Court allow any extraneous considerations, such as hardship, to influence it in construing the Acts where the wording of those Acts is plain and unambiguous. BALKARAN RAI v. GOBIND NATH TEWARI, **12 A. 129, F.B=A.W.N. 1890, 39.** [*R.*, 4 N.L.R. 166, 13 C.W.N. 815.]

(16)—*Construction of Acts and sections—Duty of Courts.*—The Court will put a reasonable construction upon Acts of the Legislature and will not allow the strict language of a section to prevent such a construction being given—*Per Garth, C.J., and Morris, J.* It is the duty of Courts to expound the sections according to the plain sense of the words—*Per Prinsep, J.* GUREEBULLAH SIRCAR v. MOHUN LAL SHAHA, **7 C. 127=8 C.L.R. 409.** [*Diss.*, 9 C. 711, F.B.]

(17)—*Duty of Court in construing law.—Not to make new law—Expound existing law.*—The duty of a Court is to construe the law as it stands and not to make a new, though it may be a better law. RAI CHARAN GHOSE v. KUMAD MOHUN DUTT CHOWDHRY, **25 C. 871=2 C.W.N. 297.**

Statute, Construction of—*continued.*

(18)—*Act purporting to confer narrow and limited right—Construction.*—It could not be contended that an enactment, which purports expressly to confer a narrow and limited right, of necessity excludes a larger right, if the existence of the larger right is clearly established apart from the special enactment. But where the existence of a larger right is not clear but highly doubtful, the express creation of the narrower right tends strongly to negative the existence of the larger. KINU RAM DAS v. MOZAFFER HOSAIN SHAHA, **14 C. 809, F.B.** (14 B.L.R. 155, *overruled*; 11 M.I.A. 258, *Expl. and D.*; 8 C.402, *Appr.*)

(19)—*Substantive provisions and their essential propositions enacted.*—A statute not only enacts its substantive provisions but, as a necessary result, it also enacts as a legal proposition everything essential to the existence of the specific enactment. LEMAN v. DAMADARAYA, **1 M. 158.** (7 M.H.C. 249, *F.*)

(20)—*Enactment partly* ultra vires—*Divisibility of bad part from good – Good part valid and pending.*—An enactment partially *ultra vires*, with the bad part separable from the good, must be deemed as valid and pending in respect of the good portion. THE COLLECTOR OF AHMEDABAD v. SAMALDAS BECHARDAS, **9 B.H.C. 205.**

(21)—*Different statutes in* pari materia—*Construction as one explanatory system.*—Where there are different statutes in *pari materia*, though made at different times or even expired and not referring to each other, they should be taken and construed together as one system explanatory of each other. COLLECTOR, SEA CUSTOMS v. P. CHITHAMBARAM, **1 M. 89, F.B.**

(22)—*Restriction of jurisdiction of superior Court.*—The general presumption is against constructing a statute as ousting or restricting the jurisdiction of the superior Courts. The intention must be expressed in clear terms; not merely implied, but necessarily implied, the general rights of the Queen's subjects are not hastily to be assumed to be interfered with and taken away by Act of Parliament. Such statutes are to be strictly construed when their language is doubtful. A construction which would impliedly create a new jurisdiction is to be avoided, especially where it would have the effect of depriving the subject of his freehold or of any common law right or of creating an arbitrary procedure. No doubt when a power has been conferred in unambiguous language by statute, the Courts cannot interfere with its exercise and substitute their own discretion for that of persons or bodies selected by the Legislature for the purpose. Nor does any presumption arise against the finality of a decision by an authority with statutory powers to pronounce in respect of a duty or liability created by the statute. BALVANT v. SECRETARY OF STATE, **7 Bom. L.R. 496.**

Statute, Construction of—*continued.*

(23)—*Positive law—Analogy—Extension of law—Parity of reasoning.*—Positive law cannot be extended by analogy or parity of reasoning. JUMOONA DASSAYA v. BAMASOONDARI DASSYA, **1 C. 289, P.C.=3 I.A. 72=25 W.R. 235=3 Sar. 602.** [*Appr.*, 11 B. 727.]

(24)—*Provisions of law clear—Competency of Court to enter into questions of natural justice.*—When the provisions of law are clear, it is not competent to Courts of justice to enter into questions of "natural justice" and, having regard to the economy and social conditions of the country, the provision that the Government should be the sole judge of what is likely to prove useful to the public is both expedient and reasonable. EZRA v. THE SECRETARY OF STATE, **30 C. 36=7 C.W.N. 249.** [*Affir.*, 32 C. 605, P.C.=9 C.W.N. 454=1 C.L.J. 227=2 A.L.J. 771=7 Bom. L.R. 422.]

(25)—*Hindu Wills Act—Full and natural meaning to be given to provisos—Rule to be followed independently of consequences.*—In construing an Act of the Government of India passed in the form peculiar to the Hindu Wills Act, the sound rule of construction is to give their full and natural meaning to the provisos, and only to give effect to the enactments contained in the applied sections and chapters, so far as the latter do not contravene the full and natural meaning of the provisos, although the result of such construction might be that some of the applied sections are rendered nugatory. ALANGAMONJORI DABEE v. SONAMONI DABEE, **8 C. 637=10 C.L.R. 459.**

(26)—*Provincial Small Cause Courts Act, s. 23—"May" not mandatory—Semble.*—The word "may" in s. 23 of the Provincial Small Cause Courts Act is not mandatory. FATMA v. BANDHU LAL, **A.W.N. 1889, 4.** (A.W.N. 1888, 193, *R.*)

(27)—*Interpretation of statutes—'May' and 'Shall'—Act* XIV *of* 1859, *s.* 21, *construction of.*—The words 'must' and 'shall' may in some cases, be substituted for the word 'may,' but only for the purpose of giving effect to the intention of the Legislature. In the absence of the proof of such intention, the word 'may' should be taken as used in its natural, *i e.*, in a permissive, and not in an obligatory, sense. [*R.*, 21 C. 832.] In construing s. 21 of Act XIV of 1859, the words 'nothing in the preceding section shall apply to a judgment in force at the time of the passing of the Act' mean that nothing in the preceding section should prejudicially affect the right of a creditor under a judgment in force at the time of the passing of the Act; and the words "but process of execution may be issued, &c." mean that, notwithstanding anything in the preceding section, execution might issue, either within the time limited by the law in force when the Act is passed, or within three years next after the passing of the Act, whichever should first expire. DELHI AND LONDON BANK v. ORCHARD, **3 C. 47=4 I.A. 127, P.C.=3 Sar. 721,** [*F.*, 153 P.L.R. 1901; *Appl.*, 6 B. 26; *R.*, 2 P. 148, F.B., 5 B. 653, 7 B. 297, 7 B. 459, 90 P.R. 1904.]

(28)—*Interpretation of statutes—"May and shall."*—There is no authority for the proposition that the word "may" can, in any connection, be read as meaning "shall," though the word "shall," may, under certain circumstances *be substituted* for the word "may." *In the goods of* PREMCHAND MOONSHEE, **21 C. 832.** (3 C. 47, *R.*)

(29)—*Act* VIII *of* 1869 (*B. C.*), s. 29—"*Months,*" *meaning of the word—Act V of* 1867 (*B. C.*).—According to Act V of 1867 (B.C.), the word "months" mentioned in s. 29, Act VIII of 1869 (B.C.), means calendar months, and, in the absence of anything to the contrary, they also mean calendar months according to the English calendar. LUCHMEEPUT SINGH BAHADOOR v. RAJ COOMAREE DABEE, **23 W.R. 275.** (18 W. R. 403, 13 W.R. 183, *F.*) [*F.*, 2 C.L.R. 265.]

(30)—*Reg.* VIII *of* 1819, *s* 8, *cl.* 2—*Sale of* putni *taluq—Attestation of service of notice by three substantial persons—Meaning of "substantial."*—This was a suit for a reversal of the sale of a *putni* taluq, on the ground that the notice required by cl. 2, s. 8, Reg. VIII of 1819 had not been duly served. On second appeal the High Court agreed with the lower Courts and confirmed the sale on the ground that, as there were three attesting witnesses of comparative respectability to the service of the notice the requirements of the law had been fulfilled On an application for review, it was, however, *held* that, though the attesting parties were sufficient in number and resided in the neighbourhood, yet, with the exception of one of them, the rest were not what could be called *substantial* persons within the meaning of s. 8 of the above Regulation. It was to protect the *putneedar* from fraud that the above provision has been enacted that the notice of sale must be attested by three substantial persons, by which is meant respectable men of moderate wealth against whom, in case of false attestation, the party injured may have his remedy in a suit for damages, and unless the attesting parties answer to the above common meaning to be put upon the the words "substantial," the putneeder would be wholly without remedy in case of false attestation. GOPAL KISHORE SHOOR v. MUDUN MOHUN HOLDAR, **2 W.R 188.** [*R.*, 14 B.L.R 394.]

(31)—*Civ. Pro. Code*, 1877, *ss.* 329, 331—*Execution—Obstruction by stranger.*—In construing the words "as the Court shall see fit," in s. 329, Civ. Pro. Code, regard should be had to the circumstances in respect of which the power is to be exercised. GOVINDA NAIR v. KESAVA, **3 M. 81.**

(32)—*Bengal Act* VIII *of 1869—Act* X *of* 1859, *s.* 32—*Construction of "after passing of the Act."*—The words in Act X of 1859, s. 32, limiting suits for arrears of rent due at the passing of the Act to a period of "three years

Statute, Construction of—*continued.*

after the passing of the Act " refer to the date when the Act passed, and not to the subsequent date fixed for its coming into operation. PEARY MOHUN DOSS v. MCARTHUR, **Marsh. 637.**

(33)—*Interpretation not to create—" Casus omissus."*—It is not permissible to create a *casus omissus* by interpretation save in some case of strong necessity. EMPEROR v. RUSTOMJI, **9 Bom. L.R. 363.**

(34)—*Rules as to construction of statutes—Parliament, Powers of* — The Parliament should be presumed to know the laws and regulations of the Governor-General in Council. Though a mistaken opinion of the Legislature concerning the law does not make the law, yet it may be so declared as to operate in future. Though the construction of a statute may be erroneous, it may be so declared by Parliament as to render its adoption obligatory. ABDULLA v. MOHAN GIR, **11 A. 490, F.B. = A.W.N. 1889, 194.** [*Appl.*, 18 B. 636.]

(35)—*Acts, construction of—" Optimus legis interpres consuetudo."*—When a legislative measure of doubtful meaning has, for several years, received an interpretation that has generally been acted upon by the public. Courts should change that interpretation only for cogent reasons. PROKASH CHUNDER DASS v. TERACHAND DASS, **8 C. 82, F.B. = 12 C.L.R. 1.** [*R.*, L.B.R. 1872—1892, 574.]

(36) — *Interpretation of law in favour of suitor long continued—Change of interpretation to suitor's prejudice.*—Where for a series of years a law imposing a heavy tax on litigation has received a particular interpretation in favour of the suitor, and a course of practice has prevailed for years throughout the whole country in accordance therewith, a Court of Justice ought to be very slow in changing that interpretation or course of practice to the prejudice of the suitor, in the absence of clear and weighty reasons. KISHORE LALL ROY v. SHARUT CHUNDER MAZUMDAR, **8 C. 593, F.B. = 10 C L R. 359.** [*F.*, U.B.R. 1903, 3rd Qr., Court Fees. 1; *R.*, 10 C. 274, 13 C.W.N. 815, 4 N.L.R. 166.]

(37)—*Preamble, scope of.*—In cases of doubt, and in the absence of express provision to the contrary, the preamble must be taken as restricting and governing the rest of the enactment. SHANKARAHAI v. DIN DIAL, **12 A. 409 = A.W.N. 1890, 145, F.B.**

(38)—*Effect of preamble in an Act.*—The tendency is not to give effect to the preamble, unless it be quite clear that the Legislature can have only had in contemplation the particular mischief to which the preamble relates, and the words of the operative part are ambiguous. Unless there is good reason to the contrary, full effect ought to be given to the operative part of the statute. KRISTO NATH KOONDOO v. T. F. BROWN, **14 C. 176.** [*R.*, 16 C.P.L.R. 99, 16 C.P.L.R. 145.]

(39)—*Statute — Construction — Provision of section in Act going beyond preamble—Enacting words of statute preferred where strong enough for the purpose.*—Where the provisions of a section of an Act went beyond the scope of the preamble to the Act, the enacting words of the statute were preferred, where the words were strong enough for the purpose. CHINNA AIYAN v. MAHOMED FAKIR-UD-DIN SAHIB, **2 M.H.C. 322.** [*R.*, 6 Ind. Cas. 259 = 12 C.L J. 8.]

(40)—*Acts, Translations of—Legislative sanction.*—Official translations of Legislative Acts do not possess any legislative force or sanction. JETHA PARKHA v. RAMACHANDRAVITHOBA, **16 B. 689.** [*R.*, 21 B. 588.]

(41)—*Construction of Acts—Punctuation.*—It is an error to rely on punctuation in construing Acts of the Legislature. THE MAHARANI OF BURDWAN v. KRISHNA KAMINI DASI, **14 C. 365, P.C. = 14 I. A. 30 = 4 Sar. 772.** [*R.*, 22 A. 270, F. B.]

(42)—*Legal character of "Illustrations" to sections of Indian enactments—Indian Contract Act, s. 127, ill. (c). Per Stuart, C. J.*—Illustrations form no part of the Act, and are not absolutely binding on the Courts. They are open to the objection of being opposed to the canons of construction, which prevail in the English Courts for the interpretation of statutes. Thus it has been ruled in England that "the intention of the Legislature must be ascertained from the words of a statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute"—*Fordyce* v. *Bridges*, 1 H. L. Cases 1 = 11 Jur. 157; and "the Court knows nothing of the intention of an Act except from the words, in which it is expressed applied to the facts existing at the time." *Logan* v. *Courtown (Earl)*, 13 Beav. 22 = 20 L. J. Chanc. 347; "the language of a statute, taken in its plain ordinary sense, and not its policy or supposed intention, is the safer guide in construing the enactments" *Philpott* v. *St George's Hospital.* NANAK RAM v. MEHIN LAL, **1 A. 487** [*R.*, 20 M. 481, 34 C. 941 = 6 C.L.J. 237 = 11 C.W.N. 959, S. B.]

(43 & 44)—*Grammatical meaning not to be varied by marginal note.*—The marginal note to a rule which is unambiguously expressed cannot be allowed to vary the clear grammatical meaning of the rule QUEEN-EMPRESS v. MAHOMED, **2 Bom. L. R. 918.**

(45)—*Interpretation—Marginal notes.*—The marginal notes in an Indian Statute cannot be referred to for the purpose of construing it. BALRAJ KUNWAR v. JAGATPAL SINGH, **26 A. 393 = 8 C.W.N. 699, P.C = 31 I.A. 132 = 1 A.L J. 384 = 7 O.C. 248 = 11 Bom. L.R. 516 = 8 Sar. 639.** [*R.*, 8 O.C. 45, 8 O.C. 317.]

(46)—*Marginal notes not part of Act.*—The marginal notes to a section ought not to be treated as part of the section. C. V. SVAYAMBU AIYAR v. THE MUNICIPAL COUNCIL OF NAGAPATAM, **1 M.L.J. 37.**

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Statute, Construction of—*continued.*

(47)—*Marginal notes to section—Reference—Construction.*—The marginal notes to a section do not form part of it and cannot be referred to for the purpose of construing the section. (L.R. 22 Ch. Div. 511, 23 C 55, *R.*) PUNARDEO NARAIN SINGH v. RAM SARUP ROY, **2 C.W.N. 577=25 C. 858.** [*Diss*, 3 O.C. 125.]

(48)—*Interpretation of statute — Marginal notes.*—Marginal notes to sections do not form part of an enactment, and cannot be referred to for the purpose of construing the sections. PUNARDEO NARAIN SINGH v. RAM SARUP ROY, **25 C. 858=2 C.W.N. 577.** (23 C. 55, *R.*) [*R.*, 28 B. 129.]

(49)—*Marginal notes*—Marginal notes to sections are no part of the enactment. (*Claydon* v. *Green*, 3 C.P. 511, *Attorney General* v. *Great Eastern Railway Co.*, 11 Ch. D. 449 (465), *Sutton* v. *Sutton*, 22 Ch. D. 511, *R.*). *N. B.*—The rest of the case deals with points relating to Criminal Law. DUKHIMALLAH v. HALWAY, **23 C. 55.** [*F.*, 25 C. 858, 28 B. 129; *R.*, 7 C. W. N. 883, 16 C. P. L. R. 145; *Diss.*, 3 O.C. 120.]

(50)—*Marginal notes may be referred to.*—Indian Acts are always framed with the marginal notes which appear in the State Publications of them. The marginal notes may be looked at for assistance and for the purposes of interpreting the Acts. KAMESHAR PRASAD v. BHIKHAN NARAIN SINGH, **20 C. 609.** [*R.*, 3 O.C. 120, 16 C.P.L.R. 145, 29 B. 193=6 Bom. L.R. 735; *D.*, 2 Bom. L.R. 918.]

(51)—*English law, how far a guide in—Indian Arbitration Act, s.* 12.—The words used in s; 12 of the Indian Arbitration Act are similar to those contained in the English statute, and they may be taken to bear the same construction and confer the same powers on the Court as those exercised by the English Courts under the corresponding section of the English Act of 1889. SETH UTOOMAL VASOOMAL v. SETH HARIDAS ASANAND, **4 S.L.R. 23=7 Ind. Cas. 595.**

(52) — *English cases—Value in construing Indian Acts.*—English cases on construction of English statutes are of great assistance, sometimes in construing Acts of the Indian Legislature; but of course, it is always necessary to see that the Indian statute and the English statute resemble one another in their purposes, and not only in a portion of a section which, for convenience of drafting, has been adopted by the draftsmen of the Indian Act. PERSHAD SINGH v. RAM PERTAB ROY, **22 C 77.**

(53)—*Interest Act* XXXII *of* 1839—*Construction—English cases.*—The Interest Act was passed for the purpose of extending to India the provisions of the English Act (3 and 4 Will. IV C. 42). English decisions may therefore be referred to as a guide to construe the Act. GANESH BAKHSH v. HARIHAR BAKHSH, **26 A. 299, P.C.=31 I.A. 116=8 C.W.N. 521=14 M. L.J. 190=6 Bom L.R. 503=8 Sar. 628.** [*R.*, 7 O.C. 193; *Cited*, 11 C.W.N. 1109=17 M.L. J. 465=4 A.L.J. 750=31 B. 566=2 M L.T. 394; *R.*, 31 B. 354=9 Bom. L.R. 439.]

Statute, Construction of—*continued.*

(54)—*Land Acquisition Act* (I *of* 1894)—*Cases under English Act, how far guidance in construction of Indian enactments.*—No useful purpose is served by referring to cases decided under the English Acts, in construing Indian enactments. For, unless the English statute, and the Act of the Indian Legislature are in *pari materia*, such reference, instead of affording any help, will only tend to confuse the consideration of the matters in issue. EZRA v. THE SECRETARY OF STATE, **30 C. 36=7 C.W. N. 249.** [*Affirmed*, 32 C. 605, P.C.=9 C.W.N. 454=1 C.L.J. 227=2 A.L.J. 771=7 Bom. L. R. 422.]

(55)—*Letters Patent*, 1865, *cl.* 12—*Interpretation—English decisions—The English County Court's Act—The Common Law Procedure Act*, 1852.—The English County Court's Act, like the Letters Patent of the High Court, is directed to the marking out and limiting of the jurisdiction of the Courts; but the Common Law Procedure Act (1852), deals with matters of procedure and not of jurisdiction. Hence the decisions of English cases under the former Act are more authoritative in the interpretation of the language of the Letters Patent, than those under the latter Act. MULCHAND JOHARI MAL v. SUGANCHAND SHIVDAS, **1 B. 23.** [*R.*, 14 B 541, 11 M.L.J. 91, 29 M. 239, Foot Note.]

(56)—*Cases under English Act, how far guidance in the construction of an Indian Act?*—In construing a section of the Indian Act, cases bearing upon the construction of similar provisions of an English Act, different in its language, can be of little or no assistance. COLLECTOR OF DINAGEPORE v. GIRJA NATH ROY, **25 C. 346.**

(57)—*Interpretation of Evidence Act* I *of* 1872—*Reference to English Law.*—(*a*) Although the Indian Evidence Act is in the main drawn on the lines of the English Law of Evidence, there is no reason to suppose that it was intended to be a service copy of it. (*b*) But when any important and radical change is attempted to be introduced it may be expected that it would be provided for in a separate section enacted for that purpose. RAMCHHODDAS KRISHNA DAS v. BAPAN NARHAR, **10 B 439.**

(58)—*Land Acquisition Act* (I *of* 1894), *Construction—Earlier Act, how far a guidance.*—It is not necessary to examine the provisions of earlier Acts in order to apprehend the meaning or to construe the law now in force. EZRA v. THE SECRETARY OF STATE, **30 C. 36=7 C.W. N. 249.** [*Affir.*, 32 C. 605, P.C.=9 C.W.N. 454 =1 C.L.J. 227=2 A.L.J. 771=7 Bom. L.R. 422.]

(59)—*Appeal—Decision of two Judges on original side of High Court—Alteration of Letters Patent.*—Under the old Letters Patent, two Judges of the High Court of Bombay heard and decided a suit on the original side, and then, before the sealing of the decree in that suit, the amended Letters Patent, 1865, came into force. The question was whether the High Court had jurisdiction to hear an appeal in

Statute, Construction of—*continued.*

accordance with the practice as regulated by the old Letters Patent, which were in force when the suit was heard and decided, or whether that right of appeal was taken away by the new Letters Patent, and the only appeal which the party could have was an appeal to the Privy Council.—*Held* that (i) although a right of action is not taken away by a change in the law, unlesss something express is contained in that Act, still, in the matter of mere procedure, unless something is said to the contrary, the principle is that the new Act does apply without reference to the former law or procedure; and (ii) that, in the present case, since there is no reservation in s. 15 of the new Letters Patent that parties should retain any right of appeal which existed before its publication in respect of suits then pending this section should be deemed to have taken away the right of appeal to the High Court—constituted so as to hear an appeal from two Judges—which existed in such a case under s. 14 of the old Letters Patent. FRAMJI BOMANJI v. HORMASJI BARJORGI, **3 B.H.C.O.C. 39.** [*Cons.*, 3 C. 662, F.B.=2 C.L.R. 391; *R.*, 6 B H.C. 166, 2 B. 148, F.B., 8 B. 511, 16 C. 267, F.B., 5 B. 79, 21 B. 779.]

(60)—*Previous law, how far useful.*—*Held* also, that pre existing legislation may be referred to as an aid towards construction, subject to this, that, if the terms of an Act are clear, positive and express, they cannot be modified by indication of an intention to be gathered from previous legislation upon the same subject. JANKI BARSARAN v. RAMKUMAR DAS, **3 O.C. 325.**

(61)—*Previous state of Law.*—*Interpretation of statutes.*—When a statute is to be interpreted, it is not necessary to consider what the law was before the passing of that statute, but what the Legislature has said is to be the law after the passing of the same. *Bank of England* v. *Vaglians* GOLAB CHAND v. LALA SURAJ PROSAD, **28 C. 517=5 C.W.N. 640,** (23 C. 563 27 C. 649, 724, *R.*) [*R.*, 10 Bom.L.R. 1113.]

(62)—*Construction of legislative enactments*—*Civ. Pro. Code, ss.* 205 *and* 237, *how far Reg.* IV *of* 1831 *and Act* XXIII *of* 1838 *repealed by.*—Reg. IV of 1831 and Act XXIII of 1838 are not repealed by ss. 205 and 237., Civ.Pro. Code. The rule of construction "*leges posteriores priores contrarias abrogant*" is no doubt applicable to a new affirmative enactment, but has application only when there is such complete contrariety or repugnancy between it and a prior enactment as makes it certain that the legislature could not have intended the latter to stand. When there is an admissible construction by which both enactments can reasonably have operation together, that construction must be adopted. MAHOMED ABDUL VAKAB SAHIB v. RAMASWAMY AIYANGAR, **4 M.H.C. 277.**

(63)—*Enforcement of direct provision of Act*—*No similar provision in previous Acts.*—It would be no answer to the enforcement of any direct provision of an Act that it is not found among the previously existing laws, which the enactment is described as consolidating, amending and defining.—DAIMODDEE PAIK v. KAINH TARIDAR, **5 C. 300=4 C.L.R. 419.**

(64)—*Legislative enactment*—*Principle of interpretation*—*International comity*—*Per Sir Arnold White, C.J.*—Of course, no exception can be taken to the general proposition that every statutory enactment should be interpreted and applied, so far as its language admits so as not to be inconsistent with the comity of nations or with the established rules of international law. But, if a legislative enactment cannot be construed without contravening the principles of international law, it is none the less the duty of the Municipal tribunals governed by the enactment to give effect to it. VENKATALACHMI AMMAL v. SRIRANGAPATNAM SRINIVASAMURTHY, **11 M.L.J. 91.**

(65)—*Interpretation of Statute*—*International law.*—In the interpretation to be put on a Statute, the thing to be observed is that, so far as its language admits, such interpretation is not inconsistent with the comity of nations or with the established rules of international law. KESSOWJI DAMODAR JAIRAM v. KHIMJI JAIRAM, **12 B. 507.**

(66)—*Provisions of other enactments*—In construing a statute, provisions of other enactments, not in *pari materia*, cannot be referred to. ASSAN v. PATHUMMA, **22 M. 494.** [*Appl.*, 27 B. 330; *R.*, 4 O.C. 108, 123 P.R. 1907=82 P.W.R. 1907=3 M.L.T. 63, 32 M. 305, F.B., 27 M. 77, 31 M. 228.]

(67)—*Considerations of equity, convenience or hardships not to affect construction.*—When the language of a Statute admits but one construction, considerations of equity and convenience, hardship or injustice cannot be allowed to prevail against it; but where it is not incompatible with a construction that avoids hardship and injustice, Courts are at liberty to adopt that construction. JAGESHAR SINGH v. JAHAWER SINGH, **1 A. 311, F.B.**

(68)—*Interpretation of statutes*—*Question of hardship.*—The question of hardship should not weigh with the Judges in the interpretation of statutes. JAMNA BIBI v. SHEIKH JHAN, **24 A. 532, F. B.=A. W. N. 1902. 112.** [*R.*, 110 P. R. 1907=51 P. W. R. 1907.]

(69)—*Legislative proceedings*—*Enactments in pari materia*—*Rules as to construction of statutes.*—(*a*) Enactments in *pari materia* should be read together as if they were one law, and interpreted as consistently and harmoniously as their language will fairly admit. (*b*) An inquiry into the vicissitudes which a measure experienced in the course of its passage as a Bill through the Legislature, is not a legitimate mode of ascertaining the intention of the Legislature. WALJI KARIMJI v. JAGANNATH PREMJI, **2 B. 84.**

Statute, Construction of—*continued.*

(70)—*Construction of Act—Debates in Legislative Council on the Bill, whether may be referred to.*—It is a mistake to refer to the debates on the Bill, when before the Legislative Council, for the purpose of construing an Act. GOPAL KRISHNA PARACHURE v. SAKHOJIRAV, **18 B. 133 = P.J. 1893, 42.**

(71)—*Act, construction of—Reference to proceedings of Legislative Council.*—In construing an Act, the proceedings in the Legislative Council cannot be referred to. SURAT SUNDARI BARMANI v. UMA PROSAD ROY CHOWDHRY, **31 C. 628 = 8 C.W.N. 578.**

(72)—*Construction of Acts—Reference to proceedings of Legislature.*—It is not competent to refer to the proceedings of the Legislature as legitimate aids to the construction of a law. *Per Pigot, J., (Prinsep and Macpherson, JJ., concurring).* QUEEN EMPRESS v. SRI CHURN CHUNGO, **20 C. 1017, F.B.** (22 C. 788, P.C., *F.*)

(73)—*Interpretation of a consolidating statute—Proceedings of the Legislature—Object of consolidating a statute.*—It is not competent for Court to refer to proceedings of the Legislature as legitimate aids to the construction of law. The same reasons which exclude these considerations when the clauses of an Act of British Legislature are under construction, are equally cogent in the case of an Indian Statute. [*F.*, 22 C. 1017, F.B., 22 B. 112, 26 P.L.R. 1902 = 26 P.R. 1902, 1 L.B.R. 231; *Rel. on*, U.B.R. (1897—1901), Cr. p. 370; *R.*, P.L.R 1900, 488, F.B., 1 L.B.R. 110, F.B., 2 L.B.R. 146, F.B., 16 C.P.L.R. 145, 2 C.L.J. 546, 3 N.L.R. 40.] In dealing with a consolidating Statute, it is not required that each enactment must be traced to its original source, and, when that is discovered, must be construed according to the state of circumstances which existed when it first became law. The very object of consolidating a Statute is to collect the statutory law bearing upon a particular subject, and to bring it down to date, in order that it may form a useful Code applicable to the circumstances existing at the time when the consolidating Act is passed. THE ADMINISTRATOR-GENERAL OF BENGAL v. PREMLAL MULLICK, **22 C. 788, P.C. = 22 I.A. 107 = 6 Sar. 603.**

(74)—*History of passing of Act — Intention of legislature.*—In construing Acts of the Legislature, it has been the practice in India to take into consideration the history of the passing of an Act, and the intention of the Legislature in introducing the same (though the same practice is not followed in England for explaining a Statute). THE ADMINISTRATOR-GENERAL OF BENGAL v. PREM LAL MULLICK, **21 C. 732.** [*Reversed*, 22 C. 788, P.C. = 22 I.A. 107; *R.*, 16 C.P.L.R. 145, 2 L.B.R. 146, F.B., 9 Bom. L.R. 404.]

(75)—*Construction of statute—Reference to history of section, policy of Government or statement of objects and reason, &c.*—In construing a statute, Courts cannot go into considerations of the history of a clause, or the policy of Government with reference to any particular legislation, nor can they seek help from the Statement of Objects and Reasons, nor from the debates in the Legislative Council, or any other proceeding which preceded the passing of the Act. GOPAL PANDEY v. PARSOTAM DAS, **5 A. 121, F.B. = A.W.N. 1882, 128.** [*R.*, 11 B. 1.]

(76)—*Objects and Reasons of a Bill.—Quaere.*—Whether the "Objects and Reasons" may be resorted to, where the intention of the Legislature, as gatherable from an Act, is doubtful. Whether the vraious forms in which the Bill was brought before the Legislature ought not to be referred to. FADU GHALA v. GOUR MOHUN GHALA, **19 C. 544.**

(77)—*Construction of Acts, Reports by Select Committees and Statement of Objects and Reasons, whether may be referred to for.*—When a Court has to construe a Statute, whether of the Imperial Parliament or of the Legislative Council of India, it is the statute alone to which the Court is entitled to look. Judges having to administer the statute-law are not entitled to refer for guidance either to speeches in Parliament or in the Legislative Council of this country or to reports made by the Select Committee of that Council. KADIR BAKSH v. BHAWANI PRASAD, **14 A. 145 = A.W.N. 1892, 5.** [*F.*, 22 B. 112.]

(78)—*Reference to statement of objects and reasons in enactments.*—It is unusual to refer to the objects and reasons given for introducing a Bill into the Legislative Council, for they can safely be referred to, only as expressing the motives which were present to the particular member of that council, and in the course of legislation, the objects and reasons so stated are altogether lost sight of, and the law ultimately passed bears only a slight resemblance to the Bill, on which it professes to be based. MOOTHORA KANT SHAW v. THE INDIA GENERAL STEAM NAVIGATION CO., **10 C. 166, F.B. = 13 C.L.R. 342.** [*R.*, 19 C. 544, F.B.]

(79)—*Civ. Pro. Code*, 1859, s. 355—*Appellate Court—Competency to examine witness again—Interpretation of Acts.*—If it is made apparent to the lower appellate Court that the original Court had imperfectly taken the evidence of the defendant as between the parties and if the result is such that the Judge could not pronounce a satisfactory judgment, it would be competent to the lower appellate Court, under the provisions of s. 355, to have the defendant fully examined before himself. But in such a case he is bound to record his reasons for directing this examination, in order that the High Court may be enabled on appeal to judge whether or not the new evidence has been rightly admitted. The lower appellate Court is not competent in such a case to remand the case for re-hearing and re-trial. [*R.*, 18 M. 94.] It is not competent to a Court to speculate upon what was in the mind of the Legislature in passing a statute. The Court is bound by

Statute, Construction of—*continued.*

the words of an Act judicially construed. MOHESH CHUNDER DOSS v. MADHUB CHUNDER SIRDAR, **13 W.R. 85.** [*R.*, 7 A.L.J. 370.]

(80)—*Statute imposing duty — Action for failure to perform duty, implied.*—Where a statute imposes a duty, it without express words gives an action for failing to perform it and for wrongfully performing it. PONNUSAMY TEVAR v. COLLECTOR OF MADURA, **3 M. H. C. 35.** [*F.*, 16 C. 183.]

(81)—*Penal statutes.*—Statutes which encroach on the rights of the subjects, whether as regards person or property must receive a strict construction. SECRETARY OF STATE v. BALWANT, **5 Bom. L.R. 790=28 B. 105.**

(82)—*S.* 36, *Beng. Act* XI *of* 1859.—S. 36, Act XI of 1859, should be construed strictly and literally. BRINDABUN CHUNDER NUNDI v. RAM SUNDER MOZUMDAR, **21 C 375.** (14 M.I.A. 496, P.C., 2 I.A. 154, P.C., *R.*)

(83)—*S.* 37, *Act* XI *of* 1859 (*Revenue Sale Law*), *construction of.*—S. 37 of Act XI of 1859 should be construed strictly and in favour of holders of incumbrances and under-tenures, so as to prevent hardship as much as possible. AKHIL CHANDRA CHOWDHRY v. JATRA MOHAN SEN, **1 C.W.N. 314.** (10 M.I.A. 126, *R.*)

(84)—*Acts for protecting revenue—Construction of clauses imposing penalty—Tests.*—Two tests have been applied. (1) In an Act intended only for the raising of revenue and the protection of that revenue, a clause imposing a penalty may well be construed, not as prohibiting a transaction in such sense as to make it illegal and void but as providing a means of enforcing the liability of the person on whom the penalty is imposed. (2) Another test has been applied in various cases in order to determine whether the penalty imposed by an Act was intended to create a prohibition so as to invalidate a specific act of dealing in violation of the law in which the penalty is to be found, and that is, to see whether the penalty is imposed in general terms for the carrying on of a trade, or for the omission of some preliminaries which the law imposes on the opening of a trade, or some such general purpose as that, or whether the penalty is imposed on each specific act of dealing. In the latter class of cases the Courts have been prone to construe the penalty as creating a prohibition, and therefore vitiating each transaction. BOISTEB CHURN NAUN v. WOOMA CHURN SEN, **16 C. 436.**

(85)—*Construction of statute—Principle.*—The rule which is always to be applied in construing Acts of the Legislature which impose a tax is, that a duty or tax cannot be imposed except by clear and distinct words, and that the Acts which impose a tax or charge upon the subject cannot be extended by implication. If the express words of the enactment do not warrant or necessitate a demand of duty or charge, it is not competent to a Court of law, in construing such enactment, to extend it, or

Statute, Construction of—*continued.*

to give the words a meaning beyond their strict and literal signification, so as to include any case which may reasonably come within the spirit of the enactment. THE PORT CANNING LAND COMPANY, *Petitioners*, **16 W.R. 208.**

(86)—*Acts imposing taxes—Construction—Ambiguous wording—Municipal bye-law.*—It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language. No pecuniary burden can be imposed upon the subject, by whatever name it may be called, whether tax, due, rate or toll, except upon clear and distinct legal authority, established in proof by those who seek to impose the burthen. In cases of doubtful expression, one is always to lean against the construction which imposes a burden upon the subject. The term 'copper' in Appendix B to the Surat Municipal rules was held in this case not to include copper pots. The words "for consumption," used in the rules, when applied to copper, may be interpreted to mean for the purpose of being manufactured, and is inconsistent with the supposition that copper, already manufactured into vessels or other articles, was intended. Also where toll has once been levied on the goods being originally imported into a town, if they be taken out of the town for sale and brought back unsold, they are not liable to the Municipal toll on such re-entry into the city. DULLABH SHIVLAL v. HOPE, **8 B H.C. A.C. 213.** [*F.*, 8 B.H.C O.C. 169; *R.*, 10 B.H. C. 21, 11 B H C. 129, 6 B. 292.]

(87)—*Taxing provisions of statute—Right of Government to claim exemption when not named in statute.*—In England, owing to historical causes, the Legislature has proceeded on the view that the Crown is not bound by a statute unless named in it and it is therefore that the Crown is in many statutes expressly stated to be bound; but it is impossible to say broadly that in India the Crown is not bound by a statute, unless expressly named in it. Such express inclusion is altogether exceptional here. It would be more correct to say that, as a general rule, the Indian Legislature has proceeded on the assumption that the Government will be bound by the taxing provisions of a statute unless expressly or by necessary implication excluded from its operation. *Per Benson, J.* English Law as to the exemption of the Crown and Crown property from payment of toll, poor rates and other taxes, local or imperial, imposed by statute, rests partly upon historical reasons, and principally upon judicial decisions, which do not proceed upon a course of reasoning or principle which will be binding on Indian Courts. Exemption from payment of tolls, rates, and taxes is not in reality a prerogative of the Crown, but depends solely upon the right construction to be placed upon the Crown grant or the statute in question. According to the uniform course of Indian Legislation, statutes imposing duties or taxes bind Government as much as its subjects, unless the very nature of the duty or tax is such as to be inapplicable to Government, and

Statute, Construction of—*continued.*

whenever it is the intention of the Legislature to exempt Government from any duty, the Government is specially exempted. *Per Bhashyam Aiyangar, J.* MAJOR C. BELL v. THE MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS, **12 M.L.J. 208=25 M. 457.**

(88)—*Act not to be construed as a contract—Taxation implies no answering right.*—A statute should not be construed as if it was a contract. The power to impose tax needs no correlative right. BRANSON v. THE MUNICIPAL COMMISSIONERS FOR THE TOWN OF MADRAS, **2 M. 362.** [*R.*, 27 M. 13, 1 S. L. R. 228.]

(89)—*Law, the intention of which is to punish to be administered as Criminal Law.*—A law of the kind, the intention of which is to punish people, should be administered as the Criminal Law is administered, *i.e.*, to say, specific offences should be charged against people, not technically specific in the sense of a specific form of indictment, but that the Judge and the insolvent and every one else should know what offence the insolvent is being tried for, and the evidence should be directed to the proof of that offence, so that the accused may be in a position to produce the evidence, if he has got any, to rebut the charge of that offence; and the Judge should specifically find what offence the insolvent has been guilty of, and in his judgment and order, and in the warrant, it should appear what the man has done. *In the matter of* RASH BEHARI ROY v. BHUGUAN CHUNDER ROY, **17 C. 209.** [*F.*, 19 C. 605= L.B.R. 1872—92, 646; *R.*, L.B.R. 1893—1900, p. 141.]

(90)—*Straining Act in favour of interference with private rights.*—Courts ought not to strain an Act in favour of an interference with private rights, which is not justified by the primary sense of the language. QUEEN-EMPRESS v. HARILAL, **14 B. 180.**

(91)—*Act* XXIII *of* 1871, *ss.* 3,4,6—*Construction of Act.*—An enactment of a character so arbitrary as Act XXIII of 1871, *i.e.*, a disabling statute, ought to be construed strictly, and the Court should not extend its operation further than the language of the Legislature requires. (23 W.R. 378, Civ. Rul. *R.*) The meaning of the expression "grant of money or land revenue" even as declared by s. 3, is not of so wide a range as to include a grant of the proprietorship of the soil; and therefore any suit involving the right of a proprietor of the soil does not come within the section. RAVJI NARAYAN MANDLIK v. DADAJI BAPAJI DESAI, **1 B. 523.** (1 B. 203, *R.*), 1 *F.* B. 531, 10 A. 396, 16 B. 537; *R.*, 16 B. 731, 29 B. 480= 7 Bom. L.R. 497, 30 B. 101=7 Bom. L.R. 659.]

(92)—*Statutory prohibition refers not to transactions prior to Act.*—A statutory prohibition could have no reference to transactions which had been completed before the Act came into force. LALA HURRO PROSAD v. BASARUTH ALI, **25 C. 909.**

Statute, Construction of—*continued.*

(93)—*Affirmative general enactment not to be construed as an implied repeal.*—A Court should not construe the affirmative general enactment in a Code as impliedly a repeal of a special earlier enactment, if the latter is not so contrary to and inconsistent with the former that the two may not stand together. SABAPATI MUDALIYAR v. NARAYANASAMI MUDALIYAR, **1 M.H.C. 115.**

(94)—*New Law—Rule as to operation—Registration Act.*—A new law innovates no more than is necessary for its own proper operation, and this is especially the case with laws like those as to forms and procedure of a purely positive character. The mere circumstance that they would work more harmoniously with one system than another, is not a reason for implying a repeal of the latter, supposing it to have been the previously subsisting law, unless there be an actual repugnancy. Accordingly, the Registration Act, although giving to certain documents a special advantage, is not meant to modify the general law of sale any further. LALUBHAI SURCHAND v. BAI AMRIT, **2 B. 289=P.J. 1880, 57.**

(95)—*Bom. Act* II *of* 1865, *s.* 240.—A construction strictly in favour of the subject must be given to Acts relating to the acquisition of land for public purposes. SORABJI NASARVARJI DUNDAS v. THE JUSTICES OF THE PEACE FOR THE CITY OF BOMBAY, **12 B.H.C. 250.**

(96)—*Enactment imposing burden, Strict construction in favour of subject of.*—An enactment imposing a burden requires a strict construction in favour of the subject but exemptions in the Stamp Act must be construed strictly in favour of the State. *In re* NIRABAI, **6 Bom. L.R. 844=29 B. 203.**

(97)—*Stamp Act,* 1899—*Construction.*—An Act of this nature must be construed strictly. REFERENCE UNDER THE STAMP ACT OF 1899, **30 C. 565.**

(98)—*Stamp Act—Fiscal enactment—Construction.*—The Stamp Act being a fiscal enactment, the intention to tax a particular instrument must appear in terms clear and positive, and in case of doubt, the construction must be in favour of the subject. RAMIER v. GOULD, **13 M. 255.**

(99)—*Stamp Act—Construction—Earlier Indian and European Act on the subject.*—The Stamp Act of (1879) in India ought to be construed according to the same principles of construction as the Stamp Act in England and the Earlier Stamp Acts in this country. RAMEN CHETTY v. MAHOMED GHOSE, **16 C. 432.**

(100)—*Construction of Stamp Laws—Government Notification No.* 2955 *dated* 1-12-1882, *Effect of.*—Provisions of laws relating to stamps and cognate matters are to be construed strictly and, whenever there is any ambiguity or doubt, in favour of the subject. RADHA BAI v. NATHU RAM, **13 A. 66 A.W.N. 1890, 238.**

Statute, Construction of—*continued.*

(101)—*Stamp Act—Rule of construction.*—The Stamp Act is a Revenue Act, and the rule of construction of such Acts is, that, in case of a doubt, the construction most beneficial to the subject is to be adopted. Per Garth, C. J. and Field, J. ANONYMOUS CASE, **10 C. 274.** [*R.*, U.B.R. 1903, Court Fees, 1.]

(102)—*Stamp Act, Construction of.*—Acts of the nature of the Stamp Act should, when there is a doubt as to what construction should be placed upon their terms, be construed in favour of the subject. BISHANBAR NATH v. NAND KISHORE, **15 A. 56=A.W.N. 1892, 234.**

(103)—*Limitation Act, scope of.*—A Limitation Act is not intended to define or create causes of action, but simply to lay down the periods within which existing rights may be enforced. JIVI v. RAMJI, **3 B. 207.** [*Appr.*, 28 C. 37=5 C.W.N. 195.]

(104)—*Limitation Act—Ambiguity—Rule of construction.* — The Limitation Act, being a disabling statute, must, where it does not unequivocally and in precise language bar the proceedings, be construed strictly, *i.e.*, in favour of the right to proceed. UMIASHANKAR LAKHMIRAM v. CHHOTALAL VAJERAM, **1 B. 19.** [*F.*, 9 B. 373, 8 Bom. L.R. 892=31 B. 162; *Expl.*, 133 P.L.R. 1904=79 P.R. 1904; *R.*, 3 C.L.R. 440, 7 B. 542, 9 B. 250, 15 B. 299, 28 B. 601, F.B.=6 Bom. L.R. 612, 29 B. 480=7 Bom. L.R. 497; *D.*, 1 C.L.R. 252.]

(105)—*Two articles of Limitation Act, one general and one special—Special article to be selected.*—If there be two articles of the Limitation Act which may cover the case, the one, however more general, and the other more particular or specific, as a principle of construction, the more particular and specific article ought to be regarded as the one governing the case. SHIVLAL v. BHAVANISHANKER, **4 Bom. L.R. 72=26 B. 430.**

(106)—*Rules of construction in the Limitation Act.*—In construing the Limitation Act, a case ought not to be regarded as coming under art. 120 of the Act, unless the Court is clearly satisfied that it does not come under one of the many articles dealing with specific cases. If there be two articles, which may cover the case, the one, more general and, the other more particular or specific, as a principle of construction, the more particular and specific article ought to be regarded as the one governing the case. SHAROOP DASS MONDAL v. JOGGESSUR ROY CHOWDHRY, **26 C. 564, F.B.=3 C.W.N. 464.**

(107)—*Statutes of limitation—Their nature—Construction.*—Statutes of limitation being "statutes of repose" should be liberally construed. Such statutes, being in limitation of common right, must not be extended by construction to cases not clearly included within their terms. PARASHRAM JATHMAL v. RAKHMA, **15 B. 299.** [*F.*, 160 P.L.R. 1903=70 P.R. 1903.]

Statute, Construction of—*continued.*

(108)—*Statutes of limitation—Construction.*—Statutes of limitation are in their nature strict and inflexible enactments, and they ought to receive such a construction as the language in its plain meaning imports. LUCHMEE BUKSH ROY v. RUNJEET RAM PANDEY, **13 B.L.R. 177, P.C.=20 W.R. 375=2 Suther. 897.** [*F.*, 8 C.W.N. 500=31 C. 519, 3 A.L.J. 113=A.W.N. 1906, 23=28 A. 333; *Appr.*, 14 C.W.N. 1, P.C. =10 C.L.J. 284=6 A.L.J. 857=11 Bom. L.R. 234=19 M.L.J. 530=4 Ind. Cas. 449=33 C. 1003; *R.*, 17 B. 173, 1 C.W.N. 260.]

(109)—*Rent Recovery Act, Madras* VIII *of* 1865, *s.* 69—*"From" meaning of—Computation of period of limitation—Exclusion of day of delivery of judgment.*—The word "from" in s. 69 of Act VIII of 1865 has the same meaning as "after" and the day on which judgment was delivered has to be excluded in computing the period of limitation. GANNE KOTAPPA v. VENKATARAMIAH, **10 M.L.J. 398.**

(110)—*Statutes restricting legal rights, construction of.*—An Act of Limitation, being restrictive of the ordinary right to take legal proceedings, must, when its language is ambiguous, be construed strictly, *i.e.*, in favour of the right to proceed. THE NEW FLEMING SPINNING AND WEAVING COMPANY v. KESSAWJI NAIK, **9 B. 873.** (1 B. 19, *R.*) [*R.*, 15 B. 299, 29 B. 480=7 Bom. L.R. 497.]

(111)—*Limitation Act—Restrictive enactment—Strict construction.*—The Limitation Act, as an enactment of a restrictive character, must be strictly construed. RAMCHANDRA v. LAXMAN, **8 Bom. L.R. 892=31 B. 162.**

(112)—*Statutes of limitation—Construction—Inflexible enactments.*—Statutes of limitation are in their nature strict and inflexible enactments and ought to receive such a construction as the language in its plain meaning imports. ADMINISTRATOR-GENERAL OF BENGAL v. KRISTO KAMINI DASSEE, **31 C. 519.** (13 B.L.R. 177, *R.*)

(113)—*Limitation Act—Construction—Practice—How to apply proper article when a number of articles seem to be relevant.*—Statutes of limitation are to be strictly construed; in construing an Act, such as Act XV of 1877, where there are a variety of articles dealing with a variety of particular cases, the Court must try so to construe those articles as to make them harmonious and consistent. SATI PRASAD SEN v. JOGESH CHANDRA SEN, **31 C. 681, F.B.=8 C.W.N. 476.**

(114)—*S.* 14, *Limitation Act*, 1877—*S.* 77, *Registration Act*, 1877—*Time occupied by review, exclusion of.*—Where a special or local Act is a complete Code in itself, the provisions of the General Limitation Act will not apply to a suit falling under it. ABDUL HAKIM v. LATIFUNNESSA KHATUN, **30 C. 532=7 C.W.N. 550.** (18 C. 368, *F.*; 18 M. 99, 17 C. 263, *R.*; 10 C. 265, *Disc.*)

Statute, Construction of—*continued.*

(115)—*Limitation Act—Interpretation to be liberal.*—The Limitation Act is an act limiting or restricting a plaintiff's rights, and according to the well-known rules applicable to the interpretation of Statutes, such an act should be interpreted liberally so as not to curtail or restrict rights, unless it is clear that the legislature intended that this should be done. JOGESHUR BHAGAT v. GHANASHAM DASS, **5 C.W.N. 356.**

(116)—*Limitation Act—Rule of construction—Liberal construction.*—The Civil Courts will not construe Limitation Acts so as to make them more stringent than the legislature has made them. JAMNA DASS v. LALITARAM, **2 B. 294.**

(117)—*Limitation Act — Construction—Liberal interpretation.*—In construing Acts of Limitation, the Court is bound to give them a liberal interpretation—Beverley, J. LATIFUNNESSA v. DHAN KUNWAR, **24 C. 382.**

(118)—*Argument* ab inconvenienti—*Applicability—Cases of doubt.—New statute—Suspension of operation—Intention of Legislature—Limitation Act,* IX *of* 1871.—*Time running under—Law of limitation—Repeal—Effect.*—The argument *ab inconvenienti*, although forcible in law, is only applicable in cases of doubt, and not where the legislature is clear. A provision for the suspension of the operation of a new statute indicates that, from the day to which its operation is deferred, the Legislature intended it should regulate the bringing of suits on causes of action which had accrued before that day. Accordingly, the law of limitation applicable to suits subsequently brought upon causes of action which had accrued previously to the day to which the operation of Act IX of 1871 stood deferred, and which had not been barred under previous enactments, as well as to suits upon causes of action which accrue afterwards, is Act IX of 1871. [*R.*, 6 B. 628 ; *D.*, 2 B. 148, F.B. 6 B. 26]. Although it is true, that when once time has commenced to run under a law of limitation, it cannot be stopped, the rule is dependent on the continuance in force of the enactment under which time has been running. If the statutory pressure be removed by the total repeal of the Act, there is nothing to cause time to run against the creditor, unless the Legislature re-enact the old, or substitute some new, rule of limitation. ABDUL KARIM v. MANJI HANSRAJ, **1 B. 295.**

(119)—*Provisions of statutes, Crown how far affected by—Limitation Act* (XV *of* 1877), s. 26, *not applicable to the Crown—Rights of pasturage claimed as against Government—Profits* a prendre, *rule of English law regarding—Acquisition by custom or prescription.*—The Crown cannot be deemed to be subject to the provisions of an Act, unless the enactment itself contains words to that effect. The mere mention of the Crown in an Act cannot have the effect of making all its provisions applicable to the Crown. S. 26 of the Limitation Act of XV of 1877 contains provisions in prejudice of the rights of the Crown and there is nothing

Statute, Construction of—*continued.*

in the Act evincing any intention on the part of the Legislature to include the Crown in s. 26. Also, the section is not exclusively one providing limitation for proceedings, but relates to a matter different from limitation, *viz.*, to a branch of substantive law and the creation of rights by the enjoyment of them. The rule of English law that a claim to a profit *a prendre* cannot be acquired by the inhabitants of a village either by custom or prescription can have no application to the right of grazing claimed against the Government by the inhabitants of villages in the Presidency of Bombay. Such right of free pasturage has always been recognised by Government as belonging to certain villages and must have been acquired by custom or prescription. Such rights, however, admittedly enjoyed by the villagers according to the recognised custom, do not necessarily confer any right on any particular piece of land although it may confer the right of having sufficient land set apart for the purposes of the village. THE SECRETARY OF STATE FOR INDIA v. MATHURA BHAI, **14 B. 213**. [*Appr.*, 6 C.L.J. 218 ; *R.*, L.B.R. 1872-1892. 550, 21 B. 684, 25 M. 457, 31 C. 503. P C.; *R.*, 31 B. 86=8 Bom. L R. 904=2 M.L.T. 13, 20 M.L.J. 362=7 M.L.T. 390, 12 Bom. L R. 34.]

(120)—*Rule of construction—Limitation Act* (1877), *scope of—Preamble—Enabling terms and imperative terms, different effects of, in enactments.*—A legislative mandate cannot be evolved from inferences based upon the mere use of words without expressly enacting terms, and this rule applies with especial force where a mandate or prohibition is sought to be evolved from words in the body of the Act referring to matters which fall beyond the scope and purview of the Act as represented in its preamble. There is not a word in the preamble to the Limitation Act to show that any alteration of the nature of personal laws of marriage and conjugal relations was intended, and in the absence of explicit declaration, either in express terms or unmistakeable implication, the scope of the enactment cannot be extended beyond the preamble, unless the body of the Act points to a different conclusion by employing enacting words of "irresistible clearness." To hold otherwise would be to credit the Legislature with disturbing well-settled existing rights of persons and property by indirect and almost surreptitious methods ; and this is one of the reasons why, in interpreting statutes, it is important to bear in mind the distinctions between words and phrases which are intended to be merely declaratory or enabling, and those which are employed to convey a mandate or prohibition by directory or imperative terms. BINDA v. KAUNSILIA, **13 A. 126=A.W.N. 1891, 18.** [*Commented on*, 25 B. 644, F.B.; *R.*, 28 C. 37=5 C.W.N. 195.]

(121)—*Limitation Act, Rules as to interpretation of the provisions of—Rules obtaining in England not applicable.*—In India, in interpreting Acts of Limitation, the Courts are not bound by the rules established by a balance of authority in England. The provisions of the

Statute, Construction of—*continued.*

Indian Limitation Act should not be subjected to the rule of strict construction against their operation. S. 4 of the Act places it beyond the power of the Judge, as well as beyond that of the defendant, to ignore or waive the plea of limitation. The rules of limitation here, not being waivable, the Limitation Acts are not to be construed as imposing a burden but as being emphatically " statutes of repose." MANGHU LAL v. KANDHAI LAL, **8 A. 475=A.W.N. 1886, 233.** [*R.*, 9 A. 11=A.W.N. (1886) 245, 10 A. 587, 12 A. 79=10 A.W.N 25.]

(122)—*S.* 230, *Civ. Pro. Code—Construction of the provisions of the Limitation Act.*—Per *Innes, J.*—The right to execute decrees having been curtailed by Civ. Pro. Code, 1882, s. 230, the provisions of the Limitation Act should be construed, as far as possible, so as to prevent the defeat of *bona fide* endeavours to secure the fruits of a decree once obtained. KUNHI v. SESHAGIRI, **5 M. 141.** [*D.*, 76 P.R. 1904=132 P.L.R. 1904; *R.*, 28 M. 557.]

(123)—*Civ Pro. Code*, 1882, *s.* 54—*Limitation Act*, 1877, *s.* 4—*Construction of statutes.*—It is one of the primary rules of construction to be applied to statutes, that if Statutes of the Legislature can be read so as to reconcile them, they are so to be read, as they are not to be read as in conflict unless it is manifest and apparent that there is conflict between them. If s. 54, Civ. Pro. Code, were to be construed as giving a Court power to extend limitation, that construction would be at variance with the plain wording of s. 4, Limitation Act, 1877, and with the clear intention of the legislature as evidenced by the Act, that a suit should not be entertained unless it was instituted within the periods of limitation prescribed by that Act. JAINTI PRASAD v. BACHU SINGH, **15 A. 65=A.W.N. 1893, 29.**

(124)—*Rule of construction — Meaning of words used in a technical sense — The words "beyond the seas."*—The English Statute of Limitation applicate to Hindus and Mahomedans in India. The English Statute of Limitations, 21 Jac. I, c. 16, extends to India, and applies to Hindus and Mahomedans as well as Europeans, in civil actions in the Supreme Court. Where words have been long used in a technical sense, and have been judicially construed to have a certain meaning, and have been adopted by the Legislature as having a certain meaning, prior to a particular Statute, in which they are used, the rule of construction of Statutes requires that the words used in such Statute should be construed according to the sense in which they have been so previously used, although that sense may vary from the strict literal meaning of the words. The words in the Statute of Limitations 21 Jac. I, c. 16, s. 7, "beyond the seas," are synonymous, in legal import, with the words "out of the realm," or "out of the land," or "out of the territories," and are not to be construed literally. HER HIGHNESS RUCKMABOY v. LULLOOBHOY MOTTICHUND, **5 M. I.A. 234=8 Moo. P.C. 4=1 Sar. 423.**

Statute, Construction of—*continued.*

(125)—*Mahommadan law—Remedial statute, construction of.*—A remedial statute must be so construed as to give to it the widest operation which its language will permit. Accordingly, the words in s. 3 of Act V of 1843 "that the person from whom the property derived was a slave" must be taken to apply not only to a person who was a slave at the time of his or her death, but also to any person who had at any time been a slave. SAYAD MIR UJMUDDIN KHAN v. ZIA-UL-NISSA BEGAM, **5 C.L.R. 11, P. C.=3 B. 422=6 I.A. 137=4 Sar. 37.**

(126)—*Remedial measure- Mamlatdars Courts Act.*—The Bombay Mamlatdars Courts Act is a remedial measure and must be liberally construed so as to advance the remedy. DEU v. SITARAM, **9 Bom. L R. 1179=32 B. 46.**

(127)—*Mahomedan law—Suit by wife to recover her property in husband's hands—Admission by husband of receipt of property—Plea of purchase set up by husband*—Onus *on husband to prove* bona fides—Bona fide *purchase of immoveable property from by stranger—Suit to set aside conveyance*—Onus *on plaintiff—Holding of lands benami—Court not to make every presumption against apparent owner—Act* VIII *of* 1859, *ss.* 7, 200—*Relinquish or omit to sue, meaning of—Distinct causes of action, Test of—Mahomedan husband's right to sue his wife for conjugal rights—Decision according to Mahomedan Law—Reg.* IV *of* 1793, *s.* 15—*Defence of legal cruelty—Court's order in suit for restitution, Execution of—Imprisonment and attachment.*—This was a suit by a Mahomedan woman against her husband, after having left his protection, for recovering the value of certain company's papers and other personal estate, alleging that the above securities came to her hands whilst she was an inmate of his zenanah, that they got into the possession of the husband and were detained by him. Her case was that the securities were entrusted to him for a particular purpose, *viz.*, that of receiving the interest on them for her, and that, though they may have been indorsed, she never meant to transfer the property in them. The husband's case was that he purchased them from her on several occasions, and that, on their indorsement and delivery, he paid her the full value for them. With respect to the burden of proof, the judgment of the Courts below proceeded on the principle that, although the wife may have failed to establish affirmatively the precise case alleged by her, her husband, having admitted the receipt of the securities from her, was bound to show something more than mere indorsement and delivery; that the relation of the parties being what it was, it lay upon him to prove that the transactions which he set up were *bona fide* sales and purchases, and that he actually gave full value for what he received from her. Their Lordships of the Judicial Committee expressed that the above principle was a sound one and was in accordance with the long established practice of the Courts in India. Their Lordships therefore decided that the wife was entitled to the protection which, according to the

Statute, Construction of—*continued.*

authorities, the law gives to a purdahnasheen, and that the burden of proving the reality and *bona fides* of the purchases pleaded by her husband was properly thrown on him, and that the husband having failed to discharge this burden, there was no ground for disturbing the concurrent judgments of the Courts below. [*R.*, 4 A. 462, 8 A. 267, 12 M. 380; *D.*, 15 W.R. 329.] In this case, it appeared that some immoveable properties of the wife had been conveyed by her to a person who purchased them *bona fide*. It was the wife that came into Court seeking to be relieved from the effect of her own conveyances the execution of which she did not dispute, against one who, if not an absolute stranger, stood in no fiduciary relation to her, and it was therefore held to be upon her to establish her right to that relief. The habit of holding lands benami is inveterate in India; but that does not justify the Courts in making every presumption against apparent ownership. [*R.*, 18 W.R. 132, 9 C.W.N. 89, 6 C.L J. 472.] The words in s. 7 of Act VIII of 1859, namely, 'if a plaintiff relinquish or omit to sue for any portion of his claims,' include accidental or involuntary omissions as well as acts of deliberate relinquishment, and where the words of law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it. The correct test in all cases of this kind is whether the claim in the new suit is, in fact founded on a cause of action distinct from that which was the foundation of the former suit. [*Appl.*, 15 W.R. 408; *F.*, 2 C.L J. 490; *R.*, 9 W. R. F.B. 1=B.L.R. Sup. Vol. 774, 12 W.R. 79, 3 N.W.P. 27, 8 B.H.C. 205, 20 W.R. 450, 1 A. 543, 2 M. 352, 6 C. 142, 8 C. 483, 8 C. 819, 8 M. 520, 14 B. 31, 19 C. 352, 17 B. 573, 20 B. 469, 21 M. 153=8 M.L J. 92, 23 B. 597, 25 M. 736=12 M.L.J. 103, 29 C. 513, 26 M. 760.] On authority as well as principle, it is competent to a Mussalman husband to institute a suit in the Civil Courts of India for a declaration of his right to the possession of his wife, and for a sentence that she return to co-habitation, and such a suit must be determined according to the principles of the Mahomedan law. Their Lordships expressed that, if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. The Mahomedan law, on the question of what is legal cruelty between husband and wife, is not materially different from the English law and, according to both, there must be actual violence of such a character as to endanger personal health or safety or there must be a reasonable apprehension of it. [*R.*, 7 B.H.C. 122, 9 B.H.C. 290, 23 W.R. 178, 23 W.R. 179, 1 B. 164, 14 C. 276, 10 B. 301, 8 A. 149, 17 C. 670, 17 A. 126, 28 C. 37, 28 C. 751=5 C.W.N. 673, 25 B. 644, F.B., 4 Bom. L.R. 820, 34 C. 971=9 C.W.N. 510=1 C.L.J. 283, 7 Bom. L.R. 602, 29 A. 222=4 A.L.J. 60=A.W.N. 1907, 27, 31 B. 366=9 Bom.L.R. 451.]

Statute, Construction of—*continued.*

In this case, their Lordships expressed their doubt whether in such a case, under the new Act of procedure, regulating the Civil Courts of India, in the event of disobedience on the part of the wife to obey the order of the Court, she might be given over bodily into her husband's hands. They stated that the disobedience of such an order directing the wife to return to co-habitation would fall within s. 200 of the Code so as to be enforcible only by imprisonment or attachment of property or both. MOONSHEE BUZLOOR RUHEEM v. SHUMSOONISSA BEEGUM. **8 W.R P.C. 3=11 M.I.A. 551=2 Suther. 59=2 Sar. 259.**

(128)—*Existence of two or more remedies—Effect.*—Where the law provides two or more remedies, it cannot be said that one debars the other. SHANKARAHAI v. DIN DIAL, **12 A. 409, F.B.=A.W.N. 1890, 145.**

(129)—*Statutes, construction of—Substantive and Adjective law.*—It is a general rule in construing statutes that, in matters of substantive right, they are not to be so read as to take away vested rights, but that, in matters of procedure, they are general in their operation. The Legislature does not appear to have departed from this settled principle of legislation in the Transfer of Property Act—*Per Wilson, J.* There is a clear distinction between relief and the mode or procedure for obtaining such relief. The relief remains unaffected by a change of procedure. The rights and liabilities of a mortgagor and mortgagee, and the relief in respect of such rights and liabilities, are the same under the Transfer of Property Act as they were before, though a different procedure for enforcing such rights and obtaining such relief has been adopted by the Transfer of Property Act. The procedure for enforcing a right is no portion of that right, nor does it alter or affect it—*Per Trevelyan, J.* BHOBO SUNDARI DEBI v. RAKHAL CHUNDER BOSE, **12 C. 583, F.B.**

(130)—*Retrospective effect.*—It is not in accordance with sound principles of interpreting statutes to give them a retrospective effect. MUHAMMAD ABDUS SAMAD v. QURBAN HUSAIN, **26 A. 119, P.C.=31 I.A. 30=6 Bom. L.R. 238=8 C.W.N. 201=8 Sar. 593.** [*R.*, 31 A. 557=10 C.L.J. 297=14 C.W.N. 59, 7 Bom. L.R. 618.]

(131)—*Construction of Acts—Retrospective effect.*—An enactment affecting rights of property is not to be so construed as to give it retrospective effect, unless the intention that it shall have such effect clearly appears. TUPSEE SINGH v. RAM SARUN KOERI, **15 C. 376, F.B.** [*F.*, 21 C. 940, F.B.]

(132)—*Retrospective effect—Vested rights.*—An act is not to be deemed to be retrospective which takes away or impairs any vested right acquired under existing laws. MACLEOD v. B. B. AND C. I. RY. CO., **7 Bom. L.R. 618=7 Bom. L.R. 337.**

(133)—*Retrospective effect to be avoided.*—Where an enactment would prejudicially affect

Statute, Construction of—*continued.*

vested rights or the legal character of past transactions, it should be construed to operate in future, unless, from the language, a retrospective effect is clearly intended. KALA TIHARI v. NARAIN, **13 C.P.L.R. 143.** [*Rel. on*, 16 C. P.L.R. 135, 17 C.P.L.R. 33.]

(134)—*Cattle Trespass Act* I *of* 1871, *s.* 20—*Wrongful seizure of cattle—Suit for damages, maintainability of.*—The remedy given by s. 20 of the Cattle Trespass Act, 1871, is cumulative and does not deprive the person injured, of the right he otherwise has to recover damages by Civil suit. The Legislature in this section intended merely to give a summary remedy for recovery of damages and expenses, and release of cattle illegally seized, without making that remedy exclusive—*Per Fitzpatrick, J.* The general rule is that when a right exists at common law and a statute is passed giving a new remedy for an infringement of it, it is to be presumed, in the absence of anything to indicate the contrary, that such new remedy is meant to be cumulative and that it is not the intention of the Legislature to take away the old remedy at common law. SURJAN v. BHOWANI SAHAI, **92 P.R. 1877.**

(135)—*Acts interfering with private rights—Interpretation.*—Where an Act expressly takes away one particular remedy, which would otherwise have been open for enforcing a right of property, or in any other particular interferes with proprietary rights, but does not, in express words or by necessary implication, declare that those rights shall cease to exist, the method of interpretation which ought to be adopted is to give effect to the Act exactly so far as its words extend, and no further. *E. G.*, See the provisions as to *benami* purchases contained in the Revenue Sale Acts and those portions of the Procedure Codes relating to execution sales. KRISTO CHUNDER DASS v. O. STEEL, **12 C. 279.**

(136)—*Principle of interpretation — Taking away private right of property.*—It is a well-settled principle of interpretation that no statute is to be construed to take away private right of property, unless such an intention appears by *express words*, or by necessary implication. UMACHURN BAG v. AJADANNISSA BIBEE, **12 C. 430.**

(137)—*Retrospectivity of statutes, rule as to—Registration Act* (III *of* 1877), *s.* 50.—Every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation. KANITKAR v. JOSHI, **5 B. 442.**

(138)—*Registration Act*, 1887, *s.* 50—*Retrospective effect.*—The provisions of s. 50 of the Registration Act, 1877, have no retrospective effect. BHOLA NATH v. BALDEO, **2 A. 198.** [*R.*, 6 B. 168, F.B.]

Statute, Construction of—*continued.*

(139)—*Vested rights—Retrospectivity.*—There is a strong legal presumption against the retrospective operation of an enactment, especially where such an operation affects vested rights, unless the terms of the Act clearly and unambiguously show that such was the intention of the legislature (*Dash* v. *Venkleek*, 7 Johns. 477, *R.*) RANCHODDAS DAYALDAS v. RANCHODDAS NANABHAI, **1 B. 581.**

(140)—*Pensions Act* (XXIII *of* 1871)—*Not retrospective*—The Pensions Act (XXIII) of 1871) is not retrospective in its operation. JAMNADAS v. LALITARM, **2 B. 294.**

(141)—*Madras Act* VIII *of* 1865—*No retrospective operation.*—Madras Act VIII of 1855 has no retrospective operation. The general principle is that rights already acquired shall not be affected by the retro-action of a new law. Rules as to procedure are an exception. The law as to the acquisition of rights is that prevailing at the period of the arising of the matters of fact which generate them. Their enforcement must be according to the rules of process at the period of suit. G. LEE MORRIS, v. SAMBAMURTHI RAYAR, **6 M.H.C. 122.** [*R.*, 22 B. 884, 7 Ind. Cas. 11.]

(142)— *Dekkhan Agriculturists Relief Act*, 1879, *s.* 12.—S. 12 of the Act must be allowed a retrospective effect only in so far as it regulates the procedure of the Court. The portion of the section "and secondly with a view to taking an account between such parties in manner hereinafter provided" must be denied a retrospective effect. FATMABIBI v. GANESH BALLAL, **9 Bom. L R. 917=31 B. 630,** *reconsidering* **8 Bom. L. R. 798.**

(143)—*Act* IX *of* 1859—*Retrospective operation.*—Act IX of 1859 is plainly retrospective in its operation and includes claims to forfeited property which had been confiscated previously to its passing. MAHOMED BAHADUR KHAN v. THE COLLECTOR OF BAREILLY, **13 B.L.R. 292, P.C.=21 W.R. 318=1 I.A. 167=3 Sar. 363.**

(144)—*Act* X *of* 1859, *s.* 6.—S. 6, Act X of 1959 is retrospective. THAKOORANEE DOSSEE v. BISHESHUR MOOKERJEE, **B.L.R. Sup. Vol. 202=3 W.R. Act X, Rul. 29.**

(145)—*Semble—Repeal of Acts—Effect upon existing rights—Act* I *of* 1868, *s.* 6.—Independently of s. 6 of Act I of 1868, the repealing of an Act, would not affect rights already acquired. BESSESSUR BHUGUT v. MURLI SAHU, **9 C. 163=11 C.L.R. 409.**

(146)—*Legislation—Substantive rights—Procedure—Pending suit.*—It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. But there is an exception to this rule, namely, where enactments merely affect procedure, but do not extend to rights of action. VEDAVALLI NARASIAH v. MANGAMMA, **27 M. 538.** [*F.*, 5 M.L.T. 27=32 M. 140.]

Statute, Construction of—*continued.*

(147)—*Procedure Codes—Construction.*—The widest possible construction should be put upon Codes of Procedure as distinguished from substantive law. GOBINDA RAM MONDAL v. BHOLANATH BHATTA, **15 C. 432.**

(148)—*Construction of statutes—Rule as to retro-activity of enactments.*—*Per Westropp, J.*—As a general rule, a retro-active effect should not, in the absence of express language or necessary implication showing that the intention of the legislature is otherwise, be given to statutes or Acts. The rule does not apply where a Statute is remedial, and merely alters procedure, without diverting any pre-existing right. *Per Bayley, J.*—When, of two possible constructions, one is in strict harmony with the improvements introduced by the Act, and with the spirit of modern legislation, while the other treats the point under consideration as not having been considered by the legislature at all, the former is to be preferred. Cases as to construction of statutes relating to procedure and retrospective effect of enactments generally, reviewed and discussed at great length. *In the matter of the petition of* RATANSI KALIANJI, **2 B. 148.** [*F.*, 9 C. 446=12 C.L.R 431, 9 C.L.R. 281, 5 B. 653, 6 B. 26, 11 B. 469, 12 B. 449, 21 B. 822, 153 P.L.R. 1901, 88 P.L.R. 1904=90 P.R. 1904, 31 B. 630=9 Bom. L.R. 917, F.B.]

(149)—*Alteration in law—Laws governing a suit.*—Where the law is altered when a suit is pending, the law which existed when the suit was commenced must decide the rights of the parties. PRABHAKAR KASHINATH v. KHANDERAO ANTAJIRAO, **10 Bom. L. R. 625.**

(150)—*Alterations in procedure—Retrospectivity.*—Changes of law relating to procedure hav eretrospective effect. BALAKRISHNA PANDHARINATH v. BAPU YESAJI, **19 B. 204.**

(151)—*Procedure—Change of law—New Act to apply.*—Where a new Act has come into force after the institution of a suit, that Act will apply to matters of procedure. SEVAI ROWTAN v. THASILDAR OF PERIAKULAM, **6 M.L.J. 122.** (3 M. 98, *Rel. on.*)

(152)—*Indian Companies Act*, 1857 *and* 1866 *—Illegal contract—Effect of alteration of law on pending suits.*—This was a suit to recover from the defendants a certain sum, in specific performance of an agreement in writing made between the plaintiffs and the defendants on 1st March 1865, for the purchase and sale of a share in the *Bombay Reclamation Co.*, which the plaintiffs were ready and willing to deliver, but which the defendants had refused to accept. The plaint was amended, at the trial, by the addition of a prayer for damages, in the event of specific performance not being granted. The original Court dismissed the plaintiffs' suit on the ground that the plaintiffs could not sue on the alleged contract, as the same was void by reason of its having been entered into before the plaintiffs' company was registered and at a time when it was an illegal association. An

Statute, Construction of—*continued.*

appeal was made against this decree on the grounds that the alleged contract was not illegal nor was it rendered invalid by s. 2 of Act XIX of 1857. *Held* (i) that upon the proper construction of s. 2 of Act XIX of 1857, the contract was illegal and that the plaintiff could not sue on it; and (ii) that, although Act XIX of 1857 was repealed by Act X of 1866, still the rights of the parties in this suit must be governed by it, because the suit was commenced when Act XIX of 1857 was the Act which was in force. When a law is altered while an action is pending, the law as it existed when the action was commenced must decide the rights of the parties, unless the Legislature, by the language used, show a clear intention to vary the mutual relations of such parties. In the present case, Act X of 1866, in s. 220, far from showing any clear intention to vary the mutual relation of the parties under the previous law, indicated an intention that the relation should be preserved, because—without going to the extent of saying that the right which the party has to defend himself, in a suit brought upon the contract, on the ground that it was illegal, is a right or privilege acquired under the repealed Act,—the introduction of that provision by the Legislature, in repealing the former Act, shows an intention that the relation of the parties should be preserved. GUJARAT TRADING CO. v. TRIKAMJI VELZI, **3 B.H.C.O.C. 45.** [*R.*, 15 B. 79, 10 Bom. L. R. 625, 11 Bom. L. R. 1372=34 B. 220=4 Ind. Cas. 843.]

(153)—*Wager contracts enacted invalid after suits in Supreme Court—Act* XXI *of* 1848 *—Existing contracts not affected—Retrospective operation.*—After an action was entered in the Supreme Court at Calcutta, upon a wager contract, wager contracts were declared invalid by Act XXI of 1848. *Held*, not to affect existing contracts, or actions already commenced upon such contracts, there being no words in the Act to show the intention of the Legislature to affect existing rights. Statutes are *prima facie*, deemed to be prospective only: "*Nova constitutio futuris formam imponere debet, non praeteritis*" DOOLUBDASS PETTAMBERDASS v. RAMLOLL THACKOORSEYDASS, **5 M. I A. 109=7 Moo. P. C. 239=Perry O C. 232=1 Sar. 403.**

(154)—*Contracts made without prescribed formalities—Legality—Repeal of Act prescribing formalities—Fate of contracts*—A statute restricting Courts of Justice from hearing and determining suits upon certain contracts not entered into without the consent of Government and not registered in a particular manner, does not render those contracts illegal, and, therefore, when that statute has been repealed, such contracts may be enforced in Courts of Justice, although entered into whilst the statute was in force. GOPEE MOHUN TAKOOR v. RAJAH RADHANAT, **2 Knapp 228.**

(155)—*Pending proceedings—Subsequent passing of statute—Construction.*—Alterations in forms of procedure prescribed by subsequent statutes are retrospective in effect and apply

Statute, Construction of—*continued.*

to pending proceedings. HAJRAT ATRAMNISSA BEGAM v. VALIUNISSA BEGAM, **18 B. 429.** [*F.*, 7 Ind. Cas. 11 ; *R.*, 153 P.L.R 1901.]

(156)—*Statutes, Construction of—Law governing suit when law is changed pending suit.*—The law, as it exists when a suit is commenced, must decide the rights of the parties to the suit, unless the Legislature has expressed a clear intention to vary the relative rights of the parties to each other in the new law. Rule followed in the interpretation of Act X of 1859. BUNGSHEEDHUR DOSS v. MAHOMED KHULEEL, **1 Hay 369.**

(157)—*Rights of parties—Alteration by Legislature—Effect—Pending actions—Procedure—Madras Acts* II *of* 1894 *and* III *of* 1895.—It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. But there is an exception to this rule, namely, where enactments merely affect procedure, but do not extend to rights of action. (*Per Jessel, M.R.*, in *In re Joseph Suche and Co.*, 1 Ch. D. 50, *F.*) There is nothing in the wording of s. 31 of Madras Act III of 1895 to negative the application of this general rule. Madras Act II of 1894, when extended to the office of Village Accountant in the Venkatagiri Estate, did not take away the jurisdiction of the Court to decide the suits then pending before it. CHINNA NARASIAH v. MANGAMMA, **14 M.L.J. 340.** [*R.*, 7 Ind. Cas. 11.]

(158)—*Bombay Vatandar's Act—Application of, to pending suits.*—It is a general rule that when the Legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. BHUJANG HANMAJI KULKARNI v. SANJIVA BASWANT, **2 B. 374, Note.**

(159)—*Right of appeal is not a mere matter of procedure.*—To disturb an existing right of appeal is not a mere alteration of procedure. NANA ABA v. SHEKU ANDU, **10 Bom. L.R. 330=32 B. 337.**

(160)—*Act* XXV *of* 1857, *s.* 9—*Right of action barred—Repeal of Act—Act* IX *of* 1871.—A right of action which was extinguished by Act XXV of 1857 is not revived by the repeal of the Act. THAKOOR KAPILNAUTH SAHAI DEO v. THE GOVERNMENT, **13 B.L R. 445=22 W.R. 17.** [*F.*, 4 C. 283 ; *Appl.*, 3 C. 331.]

(161)—*Right to sue for debt barred—Effect of repeal of enactments—Right not revived.*—Where, under a previous enactment, the right to sue for a debt was barred, the subsequent repeal of that enactment would not revive the right to sue, the debt being extinguished. NOCOOR CHUNDER BOSE v. KALLY COOMAR GHOSE, **1 C. 328.** [*Expl.*, 6 C.L R. 489 ; *R.*, 7 C.L.R. 121.]

(162)—*Repeal of statute—Absence of express words—Right acquired, under repealed statute.*—

Statute, Construction of—*continued.*

The repeal of a statute or other legislative enactment cannot, without express words, or clear implication to that effect, in the repealing Act, take away a right acquired under the repealed statute or other enactment while it was in force. SITARAM VASUDEV v. KHANDERAV BALKRISHNA, **1 B. 286.** [*F.*, 1 B. 295 ; *R.*, 2 B. 148, F.B , 153 P.L.R. 1901, 90 P. R 1904=88 P.L.R. 1904]

(163)—*Conflict of statutes—Rule of interpretation—Intention of legislature.*—When enactments are apparently opposed, one must, if possible, be read as qualification of the other, so that some effect, furthering the intention of the legislature, may be given to each. SHANKER RAMACHANDRA v. VISHNU ANANT, **1 B. 67.**

(164)—*Conflict of enactments—Later to be followed.*—Where a conflict arises on a comparison of two enactments, the one of later date must be followed. AJOODHYA PERSHAD v. GUNGA PERSHAD, **6 C. 249=6 C.L.R. 367.** [*R.*, 4 A. 27.]

(165)—*Provisions of Civ. Pro. Code inconsistent with those of Probate and Administration Act - Procedure.*—If the provisions of Civ. Pro. Code are inconsistent with those of the Probate and Administration Act, those of the Code must prevail, as it is the later enactment. ESOOF HASSHIM BOOPLY v. FATEMA BIBI, **24 C. 30=1 C.W.N. 8.**

(166)—*Indian Contract Act*, 1872—*Scope.*—The Indian Contract Act, so far as it goes, is exhaustive and imperative. MOHRI BIBEE v. DHARMODAS GHOSE, **30 C. 539, P.C.=30 I.A. 114=1 C. W. N. 441=5 Bom. L.R. 421=8 Sar. 374.** [*F.*, 10 Bom. L.R. 1113, 11 Bom. L. R. 335.]

(167)—*Prerogative of Crown—Rule of Interpretation.*—The rule of interpretation that the prerogative and the advantages it affords cannot be taken away except by the consent of the Crown embodied in a statute, applies not only to the statutes passed by the British, but also to the Acts of the Indian Legislature, framed with constant reference to the rules recognised in England. GANPAT PUTAYA v. THE COLLECTOR OF KANARA, **1 B. 7.** [*F.*, 25 M. 457=12 M.L.J. 208 ; *R.*, 14 B. 213, 31 B. 86, F. B., 8 Bom. L. R. 904=2 M.L.T. 13, 12 Bom. L. R. 34.]

(168)—*Incomplete transfer—Transfer of Property Act*, 1882.—After the Transfer of Property Act came into force, a transfer of immoveable property cannot be effected in any manner not prescribed by the Act. IMMADIPATTAM THIRUGNANA v. PERIYA DORASAMI, **24 M. 377=5 C.W.N. 217=22 I.A. 46, P.C.=7 Sar. 811.** [*R.*, 29 M. 336=16 M.L.J. 395=1 M.L.T. 153, 26 M. 339.]

(169)—*Arbitrator incapable of acting—Court superseding reference—Civ. Pro. Code, s.* 319.—When one of the arbitrators becomes incapable of acting, the Court is competent to

Statute, Construction of—*continued.*

supersede the reference and decide the case itself. Ss. 318 and 319 of the Code are throughout permissive and not obligatory. BISHUN v. BHAG AND GOPAL, **66 P.R. 1870.**

(170)—The Charter of the Court is to be construed by the Acts of the Parliament to which it refers. To exclude the jurisdiction on the ground that the matter concerns the revenue, the connection must be immediate, not consequent or argumentative. To restrict it in respects of acts ordered or done according to the regulations of the Governor in Council, it must appear that they had reference to the collection of the revenue. The regulations relied upon must be set forth upon the plea or answer. Natives, bound by the rules of the service into which they enter, cannot recover back bribes which they have been (it may be improperly) compelled by the Company to give up. Interest and costs refused to a Native of this description, with reference to claims in which he succeeded. VENCATA RUNGA PILLAI v. THE HONOURABLE EAST INDIA COMPANY, **Strange's Notes of Cases, Vol. I, 174.**

(171)—*Charter Act, s.* 12—*Construction of.* —S. 12 of the Charter does not require persons to personally carry on business, within the limits specified in order to give jurisdiction to the High Court. M.R.R.M. MUTHAYA CHETTI v. JOHN HARRISON ALLAN, **4 M. 209.** [*F.*, 12 B. 507, 17 B. 662.]

Scope of preamble—*See* ACT XIX OF 1841, s. 3, 6 Ind. Cas. 259=12 C.L.J. 8.

"Representative," meaning of the term, in Act XIII of 1855—*See* ACT XIII OF 1855, 15 M.L.J. 363=28 M. 479.

Of the word 'relative' in s. 3 of the Lunatics Act (XXXV of 1858)—*See* ACT XXXV OF 1858 ss. 3, 22, 94 P.R. 1906.

See ACT IX OF 1861, 2 Ind. Jur. N.S. 193.

Effect of legislative change upon proceedings instituted before change—*See* ACT I OF 1868, s. 6, 16 C. 267, F B.

Inference from punctuation—*See* ACT IV OF 1869, s. 3 (1), 171 P.L.R. 1911.

See ACT X OF 1870, s. 55, 11 A. 378=A.W. N. 1889, 104.

Value of marginal notes—*See* ACT XVIII OF 1879, ss. 12, 13 and 14, 6 Ind. Cas. 313=8 M. L.T. 22=11 Cr.L.J. 310=20 M.L.J. 500.

Of the words 'undivided family' and 'dwelling house' in s. 4 of Act IV of 1893 (Partition) —*See* ACT IV OF 1893, s. 4, 9 O.C. 156.

Where statutory rights of an exceptional character have been created—*See* ACT I OF 1894, s. 6 (1), 11 C.L.J. 612=6 Ind. Cas. 457.

Construction of statutes conferring on private promoters or corporations, a special power of acquiring land and of encroaching upon general rights—*See* ACT I OF 1894, ss. 6, 7, 9 to 12, 2 S.L.R. 68.

Statute, Construction of—*continued.*

Meaning of the words 'Person interested' in s. 18 (1) of the Land Acquisition Act—*See* ACT I OF 1894, s. 18, 10 C.W.N. 195.

The word 'house' in s. 49 of Act I of 1894, meaning of—*See* ACT I OF 1894, s. 49, 9 O.C. 311.

Statutes conferring jurisdiction—Construction—*See* ACT IX OF 1899, ss. 8, 9, 3 S.L.R. 221=6 Ind. Cas. 857.

Principle of interpretation—*See* ACT II OF 1902, ss. 21, 26, 28, 34, 13 P. R. 1909=31 P. L. R. 1909=17 P.W.R. 1909=1 Ind. Cas. 431.

See BEN. ACT XI OF 1859, s. 31, 11 C. 359.

See BEN. ACT XI OF 1859, s. 37, 24 C. 334.

Whether benefit of the 4th exception to s. 37 of Act XI of 1859 can be extended to cover lands, included in lease, whereon buildings and tanks, etc., have not been constructed—Exception limited only to land covered by buildings, tanks, etc.—*See* BEN. ACT XI OF 1859, s. 37, exc. 4, 12 C.W.N. 1029.

See BEN. ACT IV OF 1876, s. 357, 18 C. 91.

Of the words 'such debts and liabilities' in s. 3 of Act VI of 1876 (Bengal)—*See* BEN. ACT VI OF 1876, s. 3, 4 C.L.J. 238=33 C. 1065.

Court when can override plain language of statute—Use of proviso—*See* BEN. ACT III of 1884, s. 85, 11 C.L J. 524=6 Ind. Cas. 410=14 C.W.N. 857=37 C. 697.

"May" and "shall"—Meaning of—*See* BEN. ACT III OF 1884, s. 339, 17 C. 329.

In matters of procedure, amending Acts affect legal proceedings commenced under repealed provisions—*See* BEN. ACT VIII OF 1885, s. 106, 12 C.W.N. 987.

See BEN. ACT VIII OF 1885, s. 148, cl. (*h*), 6 C.W.N. 91.

Meaning of the term 'protected interest' in s. 160 of the Bengal Tenancy Act—*See* BEN. ACT VIII OF 1885, ss. 160, cl. (*g*), 167, 9 C.W. N. 803=32 C. 911.

Act conferring new right—Retrospective operation—*See* BEN. ACT VIII OF 1885, s. 174, 14 C. 636, F.B.

See BEN. ACT II OF 1888, ss. 24, 25, 19 C. 198, Note.

Value of marginal notes—*See* BEN. ACT XV OF 1891, s. 4, 6 Ind. Cas. 392.

S. 634 of Bengal Act III of 1899 (Calcutta Municipality)—'Cause of action'—'Accrual of right to sue'—*See* BEN. ACT III OF 1899, s. 634, 9 C.W.N. 217=32 C. 277.

See BOM. ACT X OF 1876, s. 11, 20 B. 803.

See BOM. ACT V OF 1878, s. 55, 17 B. 154.

Statute, Construction of—*continued.*

See BOM. ACT XVII OF 1879, 8 B. 340.

One statute incorporated by reference into a second statute—Repeal of the first by a third —Effect on the second—*See* BOM. ACT XVII OF 1879, s. 13, cl. (c), 13 Bom. L.R. 503.

See BOM. ACT VI OF 1888, s. 31, cl. 2, 17 B. 289.

The Mamlatdars Courts Act, 1906, in so far as it disturbs an existing right of appeal is not an enactment of procedure and has no retrospective effect—*See* BOM. ACT II OF 1906, 10 Bom. L.R. 330=32 B. 337.

Acts, retrospective operation of—*See* BUR. ACT VI OF 1900, s. 27, 5 L.B.R. 148=5 Ind. Cas. 980.

Rule of—*See* C. P. ACT XVIII OF 1881, ss. 71, 138 (*a*), 5 N. L. R. 189.

Rule of construction—Words of old statute made part of new statute—Object—*See* C. P. ACT IX OF 1883, s. 41 (5), 6 N.L.R. 69=6 Ind. Cas. 819.

Statutes interfering with private rights, construction of—*See* C. P. ACT IX OF 1883, s. 41 (7), 4 N.L.R. 45.

Meaning of the word 'days' in s. 55 of the Madras District Municipalities Act—*See* MAD. ACT IV OF 1884, s. 55, 16 M.L.J. 101=29 M. 329.

"As if they were arrears of land-revenue," meaning of the phrase in s. 28 of Act I of 1886 (Madras, Abkari)—*See* MAD. ACT I OF 1886, s. 28, 28 M. 420.

See PUN. ACT I OF 1900, 53 P.L.R. 1901= 39 P.R. 1901, 153 P.L.R. 1901=4 P.R. 1902.

Expression "whether that right has accrued before or after its commencement" in s. 2 (3) of Punjab Pre-emption Act, 1903, includes right created by Act itself—*See* PUN. ACT II OF 1905, s. 2 (3), 22 P.R. 1906=48 P.W.R. 1908=122 P.L.R. 1908.

Of ss. 8, 11, 14, 15 and 22, cl. (6) of Act I of 1869, Oudh Estates—*See* U.P. ACT I OF 1869, ss. 8, 11, 14, 15 and 22, cl (*b*). 8 O.C. 45.

Value of marginal notes—*See* U.P. ACT I OF 1869, ss. 14, 15, 22. 11 Bom.L.R. 516, P.C. =8 C.W.N. 699=1 A.L.J. 384=7 O.C. 248=3 Ind. Cas. 359.

Interpretation of statutes—Marginal notes in Indian statutes—*See* U.P. ACT I OF 1869, ss. 14, 15, 22, cl. (6), 3 O.C. 120.

Construction of the word 'legatee' in s. 22 of Act I of 1869 (Oudh Estates)—*See* U.P. ACT I OF 1869, s. 22, 2 C.L.J. 194, P.C.=9 C.W. N. 1009=8 O.C. 317=15 M.L.J. 352=27 A. 634.

See U.P. ACT XVII OF 1876, ss. 173, 174, 5 O.C. 256.

Construction of the word 'sub-division' in the Oudh Laws Act—*See* U.P. ACT XVIII OF 1876, ss. 8 and 9, 9 O.C. 211.

Statute, Construction of—*continued.*

Revenue enactments passed on the same day —Interpreting terms of one Act by reference to the terms of the other—*See* U.P. ACT XVIII OF 1876, s. 9, 14 C.W.N. 817, P.C.=12 C.L.J. 40 =12 Bom. L.R. 508=8 M.L.T. 89=13 O.C. 165=7 Ind. Cas. 196.

Rule of construction of articles of Limitation Act—*See* CARRIERS, 8 Ind. Cas. 882=9 M.L. T. 169.

Of the term 'representative' in s. 244, Civ. Pro. Code—Purchaser of *putni* tenure—*See* CIV. PRO. CODE, 1908, s. 47, 9 C.W.N. 824= 32 C. 1031.

Meaning of the words "representatives" and "or their representatives" in s. 244, Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, s. 47, 8 O.C. 370.

When statutes are to be construed as operating—Retrospective operation—*See* CIV. PRO. CODE, 1908, s. 48, 7 A.L.J. 420=6 Ind. Cas. 188=32 A. 499.

S. 295, Civ. Pro. Code, 1882—'Against the same judgment-debtor'—*See* CIV. PRO, CODE, 1908, s. 73, 8 O.C. 86.

Meaning of the words "purporting to be done in official capacity" in s. 424, Civ. Pro. Code —*See* CIV. PRO. CODE, 1908, s. 80, 9 O.C. 275.

Statutes imposing restrictions upon the subject's right of suit to be construed strictly— *See* CIV. PRO. CODE, 1908, ss. 92, 93, 1 S.L.R 155.

Meaning of 'direction of the Court is necessary for the administration' and 'such further or other relief' in s. 539, Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, ss. 92 and 93, 10 C.W. N. 581=33 C. 789.

Laws affecting rights—Retrospective effect— *See* CIV. PRO. CODE, 1908, ss. 104, 105, 154, 7 A.L.J. 1070=8 Ind. Cas. 8.

Of 'substantial question of law' in s. 596 of the Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, s. 110, 59 P.R. 1905=177 P.L.R. 1905.

Of 'the value of the matter in dispute' in s. 596 of the Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, s. 110, 60 P.R. 1905=150 P.L.R. 1905.

See CIV. PRO. CODE, 1908, s. 115, 13 C. 225.

Meaning of the expression 'same matter' in s. 28, Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, O.I, rr. 3, 4 (*b*), 16 M.L.J. 39=29 M. 50.

Rule as to—Construction of provisions of the Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, O. I, r. 3, O. II, r. 3, s. 115, 7 N.L.R. 130.

Of s. 539, Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, O. I, r. 8 (1), ss. 92 and 93, 9 C. W.N. 594.

Meaning of the words 'suit' and 'plaintiff' in s. 43, Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, O. II, r. 2, O. VIII, r. 6, 1 C.L.J. 364= 32 C. 654.

Statute, Construction of—*continued.*

Of the words 'not resident' in s. 37 of the Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, O. III, r. 2, 2 A.L.J. 626=A.W.N. 1905, 221=28 A. 135.

See CIV. PRO. CODE, 1908, O.V. r. 17, O. XVI, rr. 10 to 13, 17, 18, 3 C.W.N. 307.

Meaning of the words 'Fails to present' in s. 113 of the Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, O. VIII, r. 9, 16 M.L.J. 30.

See CIV. PRO. CODE, 1908, O. XXI, r. 16 and s. 47, 26 M. 264.

Meaning of the words 'the right which the plaintiff claims to the property in dispute' in s. 283, Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 58, 61, 63, 3 C.L.J. 381.

See CIV. PRO. CODE, 1908, O. XXI, r. 64, s. 65, 6 C.L.J. 130=34 C. 836.

"Person whose immoveable property has been sold" in s. 310-A, Civ. Pro. Code—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 89, 94, s. 65, 17 M.L.J. 127=30 M. 214.

Acts of procedure — Retrospective effect—*See* CIV. PRO. CODE, 1908, O. XXIX, rr. 2, 3, 12 Bom. L.R. 730.

On points specifically dealt with by enactments, Courts cannot disregard or go outside the letter of enactments—*See* CIV. PRO. CODE, 1908, O. XLIII, rr. 5, 6, s. 104, O. XLIII, r. 1, 3 C.L.J. 67=33 C. 927.

Construction of the word 'object' in s. 23 of the Contract Act—*See* CONTRACT ACT, 1872, s. 23, 10 C.W.N. 755=33 C. 702.

Absence of a provision in an Act is not legislative withdrawal—Construction of Contract Act—*See* CONTRACT ACT, 1872, ss. 39, 73, 11 Bom. L.R. 335=2 Ind. Cas. 475=34 B. 192.

Extension of principles underlying the existing law to new phases of affairs by analogy and other methods—*See* CRIM. PRO. CODE, 1898, ss. 87 and 88, 19 P.W.R. 1906, F.B.=18 P. R. 1908=156 P.L.R. 1908.

Construction of limitation laws—*See* CUSTOMS—PUNJAB—ALIENATION, 9 Ind. Cas. 300, F.B.

Construction of Statutes of Limitation—*See* DEBUTTER PROPERTY, 10 C.L.J. 284, P.C.=6 A.L.J. 857=11 Bom. L.R. 734=19 M.L.J. 530=36 C. 1003=14 C.W.N. 1=4 Ind. Cas. 449.

See ENHANCEMENT OF RENT—ENHANCEMENT, LIABILITY TO, 6 N.W.P. 373.

Statute of limitation—*See* ESTOPPEL—ESTOPPEL BY JUDGMENT, 6 C.L.J. 621.

Relaxing or avoiding Indian Statute Law by applying principles of equity—*See* EVIDENCE ACT, 1872, s. 92, 3 N.L.R. 19.

Statute, Construction of—*continued.*

Right and jurisdiction expressly conferred by statute--When can be taken away—*See* EXECUTION OF DECREE—GENERAL, 10 M.L.T. 437.

See EXECUTION OF DECREE—EFFECT OF CHANGE OF LAW PENDING EXECUTION, 21 C. 940, F.B.

Rules of—Legislative recognition of the—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 9 C.L.J. 271=36 C. 543=1 Ind. Cas. 168.

See GUARDIANS AND WARDS ACT, 1890, ss. 34, 41, 5 C.W.N. 207.

See GUARDIANS AND WARDS ACT, 1890, s. 39, 18 B. 375.

Construction of statutes by reference to repealed statutes, when permissible—Statute 24 & 25, Vict., c. 105, referred to as throwing light on 28 & 29 Vict., c. 15—*See* HIGH COURT, JURISDICTION OF—CALCUTTA, 12 C.W.N. 657=35 C. 701=7 C.L.J. 563.

Illustrations ought not to be construed as limiting the right given by the section—Illustration (c) of S. 42 of the Specific Relief Act—*See* HINDU LAW—REVERSIONERS, 28 M. 57=14 M.L.J. 209.

See INTEREST—SPECIAL CASES, 11 W.R. P.C. 19=2 B.L.R. 44, P.C.=12 M.I.A. 157.

Meaning of the words 'total interest decreed' in Regulation III of 1872 (Sonthal Pergunnahs Usuary Laws) as amended by Regulation V of 1893, s. 24—*See* INTEREST—SPECIAL CASES, 1 C.L.J. 182.

Statute when may by held to have been repealed by another statute by implication—*See*—LEASE—GENERAL, 6 Ind. Cas. 685=12 C.L.J. 126.

Meaning of the word 'dwell' in art. 12 of the Letters Patent—*See* LETTERS PATENT, HIGH COURT, 1865—MADRAS, s. 12, 1 M.L.T. 71=16 M.L.J. 238=29 M. 239.

See LIMITATION ACT, 1908, s. 3, 22 M. 494.

S. 5, Limitation Act—Meaning of the words 'sufficient cause'—*See* LIMITATION ACT, 1908, ss. 4, 5, 3 C.L.J. 545=10 C.W.N. 986=33 C. 1323.

Construction of Limitation Act--*See* LIMITATION ACT, 1908, s. 10, arts. 120, 123, 12 Bom. L.R. 881=8 Ind. Cas. 189.

See LIMITATION ACT, 1908, s. 13, 2 N.W.P. 173.

All legislation is primarily territorial—Limit when to be placed upon the general sense of words used in statutes—*See* LIMITATION ACT, 1908, s. 14, 12 Bom. L.R. 977=8 Ind. Cas. 645.

Acknowledgment by agent—Repeal of previous Limitation Act—Revival of right to sue—*See* LIMITATION ACT, 1908, s. 19, 8 A.L.J. 1272.

Statute, Construction of—*continued.*

Construction of the words 'new plaintiff' in s. 372, Civ. Pro. Code—*See* LIMITATION ACT, 1908, s. 22, 9 C.W.N. 883.

Meaning of the word "interruption" in s. 26 of the Limitation Act (XV of 1877)—*See* LIMITATION ACT, 1908, s. 26, 73 P.R. 1905=203 P.L.R. 1905.

Suits for contribution—Interpretation of Limitation Act—*See* LIMITATION ACT, 1908, arts. 61, 99, 100 and 120, P.L.R. 1900, p. 149.

Construction of the words "wrongfully in possession" in art. 109 of the Limitation Act. —See LIMITATION ACT, 1908, arts. 109, 120, 3 C.L.J. 182.

See LIMITATION ACT, 1908, art. 171, 6 B. 26.

Construction of the words 'date of issuing notice' in art. 179 (5) of Limitation Act, 1877 —*See* LIMITATION ACT, 1908—STEP-IN-AID OF EXECUTION, art. 182, 10 C.W.N. 303=4 C. L.J. 530.

Municipalities Act, Construction of—*See* MUNICIPALITY, 6 N.L.R. 53=6 Ind. Cas. 431.

Repealing of old law—Effect of Procedure under new law—*See* POSSESSION—SUITS FOR POSSESSION, 2 A. 94.

Of the word 'lands' in s. 10 of the Punjab Laws Act—*See* PRE-EMPTION—RIGHT TO PRE-EMPT, 22 P.R. 1906=115 P.L.R. 1906.

Construction of the word 'village' in the Punjab Laws Act. *See* PRE-EMPTION — MISCELLANEOUS, 21 P.R. 1906.

When one statute may be impliedly repealed by a subsequent statute—*See* PRESIDENCY TOWNS INSOLVENCY ACT, 1909, ss. 17, 103, 12 Bom. L.R. 750.

See PROBATE—EFFECT OF PROBATE, 8 B. 241.

Meaning of the words 'persons claiming to have an interest in the estate'—*See* PROBATE AND ADMINISTRATION ACT, 1881, ss. 69 and 71, 1 C.L.J. 258.

Statutes conferring summary remedy are to be strictly applied—*See* REGISTRATION ACT, 1886, s. 53, 6 M.H.C. 4.

See REGISTRATION ACT, 1908, s. 2, 5 M.L. J. 27.

See REGISTRATION ACT, 1908, s. 17, 18 B. 92.

See REGISTRATION ACT, 1908, s. 50, 6 B. 495.

See SMALL CAUSE COURTS, PRESIDENCY TOWNS, JURISDICTION OF—GENERAL, 17 B. 662.

Where the law has been codified it is of little avail to inquire what is the law apart from such codification, and the Courts must look to the Code itself as their guide in the matter—*See* SPECIFIC RELIEF ACT, 1877, s. 57, 13 C.W.N. 255=9 C.L.J. 190=36 C. 354=1 Ind. Cas. 829.

Statute, Construction of—*concluded.*

Enactments imposing burdens how to be construed—Exemption of a deed from stamp-duty by whom and how to be proved—*See* STAMP ACT, 1899, s. 24, 29 B. 203.

See Statute 24 and 25, Vict., c. 104, s. 9, 8 W.R. 470.

Of the word 'value' in s. 19 of Act XII of 1887 (Bengal, etc., Civil Courts)—*See* SUITS VALUATION ACT, 1887, ss. 8, 9, 12, 3 A.L.J. 266, F.B.=A.W.N. 1906, 99=28 A. 545, F.B.

Construction of statutes relating to procedure —Rule of interpretation — Applicability to Indian Legislature—*See* SUITS VALUATION ACT, 1887, s. 9, 31 P.R. 1909=49 P.L.R. 1909=3 Ind. Cas. 404=36 P.W.R. 1909.

See TRANSFER OF PROPERTY ACT, 1882, ss. 2, 99, 19 M. 382=6 M.L.J. 88.

See TRANSFER OF PROPERTY ACT, 1882, ss. 59, 123, 24 A. 319, F.B.=A.W.N. 1902, 127.

See TRANSFER OF PROPERTY ACT, 1882, s. 72, 31 C. 975.

Of s. 95 of the Transfer of Property Act—*See* TRANSFER OF PROPERTY ACT, 1882, s. 95, 10 C.W.N. 626, P.C.=3 C.L.J. 481=8 Bom. L.R. 397=3 A.L.J. 360=1 M.L.T. 143 =16 M.L.J. 296=28 A. 482.

Statutes creating special right or authorizing the doing of an act which is *prima facie* a wrong to an individual—*See* TRESPASS, 13 C.W.N. 458=9 C.L.J. 298=36 C. 433=5 M.L.T. 367=2 Ind. Cas. 436.

Where language used is of doubtful import—*See* VALUATION OF SUIT, 6 C.L.J. 255, F.B. =11 C.W.N. 1133=34 C. 954.

Statute of Mortmain.

(1)—*Applicability.*—The Statute of Mortmain does not extend to the British territories in the East Indies. THE MAYOR OF LYONS v. THE EAST INDIA COMPANY, **1 M.I.A. 175=1 Moo. P.C. 175=3 State Tr. N.S. 647=1 Sar. 107.**

Statutory Charges.

Suit by vendor for the enforcement of payment of purchase-money by sale of purchased property is a suit to enforce - differing from the lien which an unpaid vendor in equity possesses for recovery of balance of purchase-money —*See* LIMITATION ACT, 1908, arts. 111, 132, A.W.N. 1908, 71=3 M.L.T. 374=5 A.L.J. 243=30 A. 172.

Statutory Duties.

(1)—*Breach of—Action—Notice—Action on a contract—Suit in contract—Distinction between —Procedure—City of Bombay Municipal Act (Bom., Act III of 1888), s. 527—Municipality—Refund of town duty.*—A person seeking the protection of an Act cannot claim that his conduct has any relation to the "execution of the Act," if he knowingly and intentionally acts in contravention of its provisions. It is

Statutory Duties—*concluded.*

an established principle of law that notice is not required where the action is brought on a contract. The exemption from this requirement, however, does not apply to all suits in contract as distinct from suits on a contract; since a tort may give rise to a suit in contract. RUNCHORDAS v. MUNICIPAL COMMISSIONER OF BOMBAY, **3 Bom. L. R. 158=25 B. 387.**

(2)—*Damage done in the exercise of statutory duties—Action—Right to sue.*—No suit lies on behalf of a man, who sustains a private injury by the execution of powers given by a statute, those powers being exercised with judgment and caution. If, on the other hand, the injury could have been avoided by reasonable and practicable precautions then a suit for damages will lie. BHOGILAL v. AHMEDABAD MUNICIPALITY, **3 Bom. L. R. 415.**

(3)—*Breach of—Right of action.*—Where a person or body of persons having statutory authority for the construction of works (whether these works are for the benefit of the public or for the benefit of the undertakers, or as in the case of the railway, partly for the benefit of the undertakers and partly for the good of the public) exceed or abuse the powers conferred by the legislature, the remedy of a person injured in consequence is by action or suit and not by a proceeding for compensation under the statute which has been so transgressed. H. H. THE GAEKWAR v KATCHAR ABAI, **5 Bom. L.R. 405=27 B. 344.** (*On appeal from* **2 Bom. L. R. 38.**)

Statutory Powers.

Statutory powers, how far a mistake of law affords protection to a person acting under—*See* MISTAKE OF LAW, 7 Bom. L.R. 337.

Stay of Criminal Proceedings.

See HIGH COURT, JURISDICTION OF CALCUTTA, B.L.R. Sup. Vol. 426=5 W.R. Mis. 24.

Pending Civil suit — *See* MAGISTRATE, JURISDICTION OF, 23 C. 610.

Stay of Execution.

See APPEAL TO PRIVY COUNCIL—STAY OF EXECUTION PENDING APPEAL.

See CIV. PRO. CODE, 1908, O. XLI, rr. 5, 6.

(1)—*Execution, stay of—High Court—Jurisdiction—Judgment-debtor intending to appeal specially to Privy Council—Inherent power—Civ. Pro. Code (Act V of 1908), s 151.*—*Per Mookerjee, J.*—A Court has inherent power to stay proceedings pursuant to its own order in view of an intended appeal, even though there is no express statutory provision in that behalf (5 C.W.N. 781, *R.*). The High Court is competent to make an order for stay of proceedings in execution of its decree in view of an application by the judgment-debtor to the Judicial Committee for special leave to appeal to His Majesty in Council. The stay, however, can be granted

Stay of Execution—*continued.*

only for a limited time, and on terms. *Per Holmwood, J.*—Stay of proceedings in execution of decree, which the law does not expressly authorize, is not to be allowed except on very good grounds shown to the satisfaction of the Court. *Per Curiam.* S. 151 of the Code of Civil Procedure does not lay down any new principle, but merely declares that the Court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. This inherent power is not capriciously or arbitrarily exercised; it is exercised *ex debito justitiae*, to do that real and substantial justice for the administration of which alone the Court exists. NUND KISHORE v. RAM GOLAM, **16 C.L.J. 508 =18 Ind. Cas. 207.**

(2)—*S.* 545, *Civ. Pro. Code*, 1882 (=*O.* XLI, *r.* 5, *present Code*)—*Order for stay of execution passed by appellate Court—Sale held before communication of such order, nature of.*—An order of an appellate Court under s. 545, Civ. Pro. Code, 1882, to stay execution of a decree against which an appeal is pending, is in the nature of a prohibitory order, and, as such, would only take effect when communicated. If property is sold before such an order is communicated to the Court holding the sale, such sale is not void and cannot be treated as a nullity. BESSESSWARI CHOWDHRANI v. HORRO SUNDAR MUZAMDAR, **1 C.W.N. 226.** (N.W.P. IV, 398, N.W.P. VI, 354, 2 A. 686, *D.*) [*F.*, 6 M.L.T. 159; *Expl. and D.*, 33 C. 927=3 C.L.J. 67.]

(3)—*Principle on which execution is stayed.*—The principle which underlies stay of execution pending appeal is this, that the successful party in the litigation, that is, the ultimately successful party, is to reap the fruits of that litigation and not obtain merely a barren success. MUSSAMAT BRIJ COOMARREE v. RAMRICK DASS, **5 C.W.N. 781.** (14 I.A. 1, 27 C. 1, P.C. =26 I. A. 281, *F.*)

(4)—*Execution—Rejection of security offered for stay of proceedings—Interference of High Court, under s.* 15 *of its Charter—Civ Pro. Code, ss.* 209, 221—*Act* XXIII *of* 1861.—S. 15 of the Charter Act does not justify the High Court in interfering with an order of a Court rejecting as insufficient, the security offered by a judgment-debtor for staying proceedings in execution till a suit brought by him against the judgment-creditor is decided. The most obvious course in such a case is that suggested by the latter part of s. 209, Civ. Pro. Code, which directs, that "whenever a suit shall be pending in any Civil Court, against the holder of a decree of such Court by the person or persons against whom the decree was passed, the Court may, if it appears just and reasonable to do so, stay execution of the decree either absolutely or on such terms as it may think just until a decree should be passed in the pending suit." Under s. 221, Civ Pro. Code (of 1859), also, a Court executing a decree has the power, in every step in execution, of staying the proceedings before

Stay of Execution—*concluded.*

proceeding further. [*R.*, 28 C. 734.] S. 38 of Act XXIII of 1861 was not intended to make the procedure and the powers of the Court which may be applicable in suits before decree, applicable to proceedings in suits after decree. those various proceedings and questions being sufficiently provided for in the Civ. Pro. Code, itself It was only intended to provide a procedure as nearly resembling Act VIII of 1859 as possible for the many other kinds of cases not being suits which come before the Civil Courts. JODOO MONEE DOSSEE, *petitioner*, **11 W.R. 494.**

(5)—*Appeal to the Privy Council—Civ. Pro. Code*, 1882, *ss* 603, 608 (=*O.* XLV, *rr.* 8, 13, *present Code*).—An application for stay of execution under s. 608, Civ. Pro. Code, cannot be granted before an appeal to the Privy Council is *finally admitted* under s. 603, Civ. Pro. Code. S. M. BIBI JARAO KUMARI v. GOPI CHAND BOTHRA, **5 C.W.N. 562.** (19 B. 10, *not followed.*)

Appeal admitted by special leave—Power of High Court to stay execution—*See* APPEAL TO PRIVY COUNCIL—GENERAL, 8 A.L.J. 449, P.C.=13 C.L.J. 529=13 Bom. L.R. 419.

Appeal to Her Majesty in Council—Application for—before admission of appeal—Civ. Pro. Code, s. 608—*See* APPEAL TO PRIVY COUNCIL—GENERAL, A.W.N. 1890, 92.

See APPEAL TO PRIVY COUNCIL—CASES WHERE APPEALS LIE OR NOT, 4 C.L.R. 125.

Order refusing—"Order passed on appeal"—"Final order"—"Fit case"—Question of substantial loss—Discretion—*See* CIV. PRO. CODE, 1908, s. 109, cls. (*a*) and (*c*) and O. XLI, r. 5, 13 C.L.J. 681.

Rent decree—Refusal to stay execution pending appeal—High Court's powers—*See* CIV. PRO. CODE, 1908, s. 115, O. XLI, rr. 5, 6 (2), 15 C.W.N. 432=9 Ind. Cas. 323.

Powers of appellate Court *re*—*See* CIV. PRO. CODE, 1908, s. 151, O XXI, r. 29 and O. XLI, r. 5, 82 P.R. 1910=149 P.L.R. 1910.

Inherent power to order, at the time of passing a decree—*See* CIV. PRO. CODE, 1908, O. XX, r. 11, 7 M.L.T. 151=5 Ind. Cas. 421.

See INJUNCTION—INJUNCTION UNDER CIV. PRO. CODE, 6 B.L.R. 571.

See LIMITATION ACT, 1908, art. 182—GENERAL, 5 C.W.N. 347.

See LIMITATION ACT, 1908, art. 182, MISCELLANEOUS, 6 C.W.N. 735.

Defendant in original suit applying to appellate Court for—Costs—*See* PRACTICE AND PROCEDURE, 25 C. 893.

See SET OFF, 1 Ind. Jur. N. S. 330.

Stay of Proceedings.

(1)—*Act* X *of* 1877, s. 20—*Two suits in different Courts in respect of same subject matter—Stay of one suit.*—An agent sued his principals for the balance of an account in respect of their dealings with him. Six months afterwards, the principals sued the agent in a different Court for an account and for damages caused by his negligence. *Held* that, as in both suits practically the same issues were triable, the agent was entitled, as having been the first to institute the suit, to proceed in the Court in which he had chosen to bring his suit, and to have the other suit stayed, but without prejudice to the right of the plaintiffs (principals) in the latter suit to institute a cross claim in the agent's suit. MECKJEE KHETSEE v. KASOWJEE DEVACHUND, **4 C.L.R. 282.**

(2)—*Crim Pro. Code* (1882), *s.* 195—*Sanction—Criminal proceedings arising out of civil litigation-Pendency of civil suit—Stay.*—Criminal proceedings for perjury or forgery, arising out of a civil litigation, should go on during the pendency of the civil litigation. *In re* SHRI NANA MAHARAJ, **16 B. 729.** [*R.*, 23 C. 610, 26 B. 785, 31 C. 858, 7 Bom. L.R. 84; *D.*, 6 C.L.J 531=11 C. W. N. 712.]

(3)—*Stay of criminal proceedings during pendency of civil suit.*—The High Court ought not to interfere with the Magistrate's discretion and order that criminal proceedings pending before him should be stayed pending the result of a civil suit dealing with the same subject matter, except on good cause shown for such interference. DWARK NATH CHOWDHRY v. EMPEROR, **31 C. 858.**

(4)—*Order directing stay of proceedings and trial of test case—Right of persons obtaining adverse decision.*—Persons obtaining an order directing the trial of one out of 44 cases as a test case and stay of proceedings in the rest, are not, after getting an adverse decision in the test case, precluded from requiring the consideration by the Court of the other cases. KASHIN PRASAD SINGH v. SECRETARY OF STATE FOR INDIA IN COUNCIL, **29 C. 140.**

Suit for divorce—Stay of proceedings till payment of costs by husband—Poverty of husband—*See* ACT IV OF 1869, 14 C. 580.

See ACT VI OF 1882, s. 134, 18 B. 65.

Suit for partition—Preliminary decree—Appeal—Powers of appellate Court to stay subsequent proceedings—*See* CIV. PRO. CODE, 1908, O. XLI, rr. 5, 6, 1 C.W.N. 264.

Order for—*Ad interim* stay—Proceedings continued in disregard of order.—*See* CONTEMPT OF COURT, 15 C. L. J. 335.

See PARTITION—RIGHT TO PARTITION, 3 P.R. 1886, Rev.

Application for—High Courts, jurisdiction of, to order security for costs pending appeal by special leave to Privy Council—Privy Council, jurisdiction of—*See* PRIVY COUNCIL, PRACTICE OF—STAY OF PROCEEDINGS IN INDIA PENDING APPEAL, 27 C. 1 P.C.=26 I. A. 281=4 C.W.N. 34.

Stay of Proceedings —*concluded*.

Exécution, denial of—Prosecution—Stay of proceeding pending civil suit—*See* REGISTRATION ACT, 1908, s. 82, 5 C. W. N. 44.

Order of adjudication of insolvency by the High Court—Second application for adjudication in different High Court—Discretion—Concurrent proceedings, if maintainable—*See* ST. 11 AND 12, VICT., C. 21, s. 9, 21 B. 297.

See TRANSFER OF PROPERTY ACT, 1882, s. 87, 6 C.W.N. 654.

Steam Tugs.

See TOWING, 1 Hyde, 293.

Step in aid of execution.

See LIMITATION ACT, 1908, art. 182.

Step-mother.

Not competent to give in adoption—*See* HINDU LAW—ADOPTION, 16 M. 384=3 M. L.J. 80.

Step-sister.

Of father entitled to succeed before mother's brother—*See* HINDU LAW—INHERITANCE, 4 Bom. L.R. 527=26 B. 710.

Stipend.

See INSOLVENCY — INSOLVENCY UNDER CIV. PRO. CODE, 6 B.L.R. 575=15 W.R. 201.

Stock-broker.

Contract in Government paper in excessive amounts as between stock-broker and stock-jobber do not amount to wagering contracts—*See* CONTRACT ACT, 1872, s. 30, 5 Bom. L R. 768.

Stolen Coin.

Bona fide holder of "Goods"—*See* CONTRACTS ACT, 1872, s. 108, 83 P.R. 1890.

Stolen Currency Note.

(1)—*Stolen currency note—Title of innocent holder for value—Contract Act*, s. 108.—A stolen currency note, when it passes into the hands of an innocent holder for value, ceases to be stolen property. The title of a *bona fide* holder, for consideration, of a currency note (of the Government of India) does not become defective by reason of a defect in the title of a previous holder. S. 198 of Contract Act is inapplicable to the case of coin or Bank notes passed in the course of business; a currency note given in payment of goods or in exchange for metal coin, cannot be said to be brought by the person selling the goods or supplying metal coin in exchange. If a *bona fide* transferee is deprived of his note by a decree of Court, he has no cause of action against the *bona fide* transferor. MATHRA DAS v. RAMANAND, 73 P.R. 1878. [*F.*, 18 P.R. 1905=114 P.L.R. 1904; *Appr.*, 83 P.R. 1890.]

Liability of *bona fide* holder of—*See* CONTRACT ACT, 1872, ss. 106 and 108, 18 P.R. 1905.

Stolen Goods.

Contract of bailment—Bailed goods stolen—Liability of bailee—*See* CONTRACT ACT, 1872, s. 151, 90. P.R. 1900.

Stolen Notes.

See CONVERSION, 1 Hyde 263.

Claim to stolen notes—Verdict of Criminal Court—Evidence of ownership—*See* EVIDENCE—MISCELLANEOUS DOCUMENTS, 3 B.L.R. App. 2.

Stolen Property.

See CONTRACT ACT, 1872, s. 76, 1 C.L.R. 339.

Deposit of stolen notes as security—Detention by Public Debt Office—Claim to return note upon suit for recovery of debt — *See* GOVERNMENT PROMISSORY NOTE, 5 C. 654 =5 C.L.R. 586.

Suit to recover stolen property or damages—Limitation—*See* LIMITATION ACT, 1908, art. 48, 229 P.L.R. 1911.

Suit to recover—*See* RIGHT OF SUIT—MISCELLANEOUS, 26 P.R. 1883.

Stoppage in Transit.

Duration of the debt—*See* CONTRACT ACT, 1872, s. 99, 11 Bom. L.R. 1250=4 Ind. Cas. 561.

Unpaid vendor—Pledgee for value of bills of lading—Rights of—*See* CONTRACT ACT, 1872, s. 99, 12 Bom. L.R. 553=34 B. 292=7 Ind. Cas. 650.

See SALE OF GOODS, 17 B. 62.

Stranger.

—to suit, managing the conduct of the suit, when bound by the decree—*See* ESTOPPEL—ESTOPPEL BY JUDGMENT, 6 C.L.J. 621.

Copy of judgment—to suit — *See* JUDGMENT—RIGHT TO COPIES OF JUDGMENT, 2 C.L.R. 553.

See PRE-EMPTION — CONSTRUCTION OF WAZIB UL-ARZ, A.W.N. 1905, 45=2 A. L. J. 689=27 A. 457.

—promoting litigation, if bound by judgment—*See* PROBATE—GENERAL, 12 C.L.J. 91=6 Ind. Cas. 912.

Street.

(1)—*Madras District Municipalities Act*, IV *of* 1884—*Amending Act* III *of* 1897, *s.* 3, *cl.* 27—*Legislature vesting street in Municipal Council, effect of—Limitation Act* XV *of* 1877, *sch.* II, *art.* 146 (*a*), *effect of*.—When the legislature has vested a street in a Municipal Council such vesting does not transfer to the Municipal authority the right of the owner in the site or soil over which the street exists. It does not own the soil from the centre of the earth *usque ad coelum*. It has the exclusive right to manage and control the surface of the soil and

Street—*concluded.*

so much of the soil below and of the space above the surface as is necessary to enable it to adequately maintain the street as a street, and it has also a certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers. [*R.*, 14 M L.J. 37, F.B.=27 M. 386, 6 A.L.J. 539 =5 M.L.T. 391; *Cited*, 30 M. 185, P.C.=4 A. L.J. 333=11 C.W.N. 585=5 C.L.J. 506=17 M. L.J. 240=9 Bom L.R. 663=2 M.L.T. 204.] The new art. 146 (*a*) of the Limitation Act cannot reasonably be restricted to streets or roads formed by the Municipality on lands belonging to or acquired by it in proprietary right—(*Per Bashyam Aiyangar, J.*)—S. SUNDRAM AIYAR v. THE MUNICIPAL COUNCIL OF MADURA AND THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **25 M. 635=12 M.L.J. 37.** [*R.*, 14 M.L.J. 37, F.B.=27 M. 386, 10 C.L.J. 613 =2 Ind. Cas. 512.]

See BOM. ACT VI OF 1873, ss. 3,17, 6 B. 686.

A passage, in a private property, kept open and having houses on both sides of it, is a street—*See* BOM. ACT III OF 1888, s. 3 (*w*), 8 Bom. L. R. 457=4 Cr. L. J. 23=30 B. 558.

In a ryotwari village, rights of the public in—*See* MAD. ACT V OF 1884, 9 Bom. L. R. 663=4 A. L. J. 333=11 C. W. N. 585=17 M. L. J. 240.

Stridhanam.

See HINDU LAW—STRIDHANAM.

(1)—*Hindu law—Benares school—Stridhan —Suit by wife for ornaments given during marriage — Civ. Pro. Code*, 1877, *s.* 208.—Under the Benares School of Hindu law, the term *stridhan* or woman's property means (conformably to its derivation) property of every description belonging to a woman, and includes gifts to the wife at the time of her nuptials, as well as gifts made to the wife by the husband himself. Ornaments "worn" by women during their husbands' lives are considered to be their peculiar property and are not liable to partition amongst the husbands' heirs; but a distinction is drawn between such ornaments as are "worn constantly," and such as are simply kept for festive occasions. It is only with respect to the former that the Hindu law (as expounded by the Benares School) recognizes the independent power of the wife, for it is from the constant wearing that a presumption is drawn that they were intended to be treated as the wife's *stridhan*; and when ornaments are merely given to a wife to be worn on festive occasions, it is a conditional gift which establishes no right of property. S. 208 of the Civ. Pro. Code does not require that in every suit for moveable property, the decree shall be for the delivery of the property, in the first instance, with an alternative decree for its value, if delivery cannot be given. The very introduction of important words—"If the decree be for the delivery of such property" shows plainly enough that the contrary is

Stridhanam—*concluded.*

possible, and that the object and scope of the section are limited to providing for an alternative decree in these cases only where the Court considers it proper to direct the restoration of the property in dispute. MUSSAMMAT RUKMAN v. GUNGARAM, **81 P.R. 1880.**

Striking off case from file.

(1)—*Act* X *of* 1859, *ss.* 54, 58, 68—*Dismissal of suit for non-appearance of plaintiff—Appearance by mookhtear—Appeal.*—On the day fixed for the hearing of a case, both the plaintiff and defendant did not appear though the plaintiff's mookhtear was present. The Court, holding that there was no appearance on the part of the plaintiff, struck the case off the file under s. 54 of Act X of 1859. The lower appellate Court on appeal held that the hearing of such appeal was barred under s. 58 of the same Act. *Held* that, though the order of the first Court in dismissing the case under s. 54 was erroneous, still, it was covered by s. 68, and that the lower appellate Court should have entertained the appeal on the ground that there had been no default since the authorized mookhtear of the plaintiff was present before the lower Court. KALEE CHUNDER CHOWDHRY v. KISTO CHUNDER BISWAS, **12 W.R. 169.**

(2)—*Execution-cases—Striking off the file—Proceedings to keep alive decree · Bona fides—Limitation.*—Where a Court executing a decree overrules the judgment-debtor's plea of limitation, and its order is upheld in appeal, and both decisions become final by operation of law, the appellate Court is not competent to go behind these orders in order to declare that the proceedings previously taken were ineffective to keep the decree alive. The only way in which execution cases can be struck off the file is under the provisions of ss. 110 and 114 of the Civ. Pro. Code and these sections relate to those cases only in which plaintiff has failed to appear either in person or by pleader. A proceeding in execution which is not followed by some substantial result is not necessarily *male fides*, irrespective of all the other circumstances by which it may be accompanied. The practice of striking an execution case off the file with the consent of the parties and commencing steps for execution afresh in the event of the judgment debtor not paying within the time allowed is objectionable and not warranted by law. GAURMOHAN BUNDOPADHYA v. TARACHAND BUNDOPADHYA, **3 B.L.R. App. 17=11 W.R. 567.** [*R.*, 7 C.L. R. 424.]

See EXECUTION OF DECREE—MISCELLANEOUS, 10 C. 416.

Striking off Execution Proceedings.

(1)—*Execution of decree—Striking off execution application—Effect.*—An order merely striking an execution petition off the file is legally inoperative as a disposal of the petition. VENKATAPPIAH v. JAGANNADHA RAO, **12 M. L.J. 24.**

Striking off Execution Proceedings—*concld.*

"Struck off the file," meaning of—*See* EXECUTION OF DECREE — APPLICATION FOR EXECUTION AND POWERS OF COURT, 15 A. 84=A.W.N. 1893, 36, F.B.

Effect—*See* EXECUTION OF DECREE — MISCELLANEOUS, 4 C. 877=3 C.L.R. 161, 11 C.L.R. 17, 13 C.L.R. 176.

Sub-agent.

See PRINCIPAL AND AGENT.

Sub-lease.

See LANDLORD AND TENANT.

See LEASE.

See TRANSFER OF PROPERTY ACT, 1882, ss. 105-108.

Sub-lease.

(1)—*Sub-lease without landlord's consent—Termination of sub-lease by determination of tenancy.*—Where a sub-lease is granted by a tenant without the consent of his landlord the determination of the tenancy determines also the sub-tenancy. SAIYAD NOOR v. RAMJI PATIL, **12 C.P.L.R. 158.** (11 C.P.L.R. 5, *F.*; 12 C.P.L.R. 134, *Diss.*) [*R.*, 3 N.L.R. 162.]

See BEN. ACT VIII OF 1885, sub-s. 1, ss. 22, 167, 28 C. 205=5 C.W.N. 310.

See BEN. ACT VIII OF 1885, ss. 49, 85, 6 C. W.N. 377.

By raiyat without consent of landlord, registered before commencement of Tenancy Act—Validity—*See* BEN. ACT VIII OF 1885, s. 85, 29 C. 148.

Grant of sub-lease by tenant—Effect of determination of tenancy on sub-lease—*See* C.P. ACT XVII OF 1889, 11 C.P.L.R. 5.

Lease without covenant against sub-letting—Sale of entire holding in execution—Sub-lessee's interest whether affected—*See* LANDLORD AND TENANT—TRANSFER OF TENANTS' INTEREST, 14 B. 384.

Ordinary tenancy—Acceptance of rent by landlord from sub-tenant with knowledge of sub-lease—Right of landlord to eject sub-tenant on extinguishment of tenant right—*See* LANDLORD AND TENANT—EJECTMENT, 15 C.P.L.R. 99.

See LEASE—CONSTRUCTION OF LEASE, Marsh 366=2 Hay, 451.

Submergence of Land.

See ALLUVION.

(1)—*Submergence of land—Subsequent emergence of submerged lands—Effect on proprietary intereset—Malik Kabza.*—The proprietary interest in lands is not extinguished by the mere submersion of those lands; in the absence of a local custom which can prevail against the general rule of law, a Malik Kabza can seek to recover his interest in submerged lands on their subsequent emergence. No such local custom was proved to prevail in Mouzah Shergrah. CHIRAGH v. TUREL KHAN, **1 P.R. 1880.** (59 P.R. 1877, *R.*)

Submergence of Land—*concluded.*

(2)—*Hereditary cultivator—Submergence of land in possession of cultivator—Subsequent accretion—Claim to land after eight years.*—Though a tenant with a right of occupancy in a holding, if a portion be submerged and there be accretions on the former substratum, may be entitled to rights of occupancy in the increment to his actual holding, in the absence of an actual abandonment or intention to relinquish his rights, still if such tenant takes no steps to assert his rights (for eight years) when occasion arises and permits the proprietor to enter into engagements with other persons, he will be estopped from afterwards asserting his rights. BAKHTAWAR v. SULTAN AHMED, **83 P.R. 1876.** [*R.*, 122 P.R. 1876, 59 P.R. 1877, 8 P.R. 1901, Rev.=54 P.L.R. 1901.]

(3)—*Land re-appearing after submersion—Right of occupancy tenant*—Wajib-ul-arz.—In a previous suit, one of the present plaintiffs, an occupancy tenant, had sued the proprietor for an equivalent of his half share in the land now in suit which was then submerged, to be made out of the shamilat, but his suit was then dismissed on the ground that there was no shamilat to give him. The present suit was brought to recover from the proprietor the holding itself which again reappeared from the river. *Held* that neither the provision in the *wajib-ul-arz* nor the decision in the previous suit prevented the plaintiff from now recovering possession. The non-payment of revenue on the land during the period of its submersion was not fatal, for the plaintiff was not bound to pay that except in the case of being supplied with land in its place. The plaintiff was in the result held to be entitled to recover the land in suit, but conditionally upon payment of the revenue paid upon it by the proprietor, since the date of the re-appearance of the land. MORID v. MUSSAMMAT RAM DEVI, **127 P.R. 1879.** [*R.*, 152 P.R. 1883.]

Sub-mortgage.

See MORTGAGE.

(1)—*Sub-mortgagee—Suit, right of—Suit, frame of.*—A sub-mortgagee is entitled to bring a suit against his mortgagor and to realize the dues on his mortgage by sale or foreclosure. It may also be open to him, but by no means obligatory, to frame his suit in such a way as to enforce the original mortgage against the mortgagor of his mortgagor. ZAKI HASAN v. DEO NATH SAHAI, **10 C.L.J. 470=4 Ind. Cas. 433.** (9 C.L.J. 429, 29 A. 385, *Appl.*)

(2)—*Mortgagor with notice of sub-mortgage-bound by it—Appeal between co-defendants—Co-defendants, contest between—Decision between co-defendants, when necessary.*—The plaintiffs brought this suit for sale of property mortgaged to them, to which a number of persons were made defendants. The first Court absolved

Sub-mortgage—*continued.*

defendants Nos. 1, 2 and 5 and the half share in village Bhatpura, which had been the subject of a sub-mortgage, from liability. The plaintiffs did not appeal. But an appeal was instituted by defendant 3, who contended that the half share in Bhatpura was liable for the debt. That appeal was dismissed. Upon second appeal by defendant 3, it was *held*, that, as the real contest was between the defendants and it was necessary to decide it in order to give the appellant the relief which he claimed, the Court could on appeal direct the sale of the half share in Bhatpura, although the plaintiffs had acquiesced in the decree exempting it from liability. *Held* further that a mortgagor is bound by a sub-mortgage of which he has notice. He cannot destroy the security of the sub-mortgagee by redeeming the mortgage. MAHAMMAD BASHI-UZ ZAMAN v. PANDIT SURAJ NARAIN, **12 O.C. 260=3 Ind. Cas. 917.** (27 A. 23, 18 B. 520, 31 C. 643, 28 M.229, 31 C. 95, 8 O.C. 140, *Not F.*)

(3)—*Sub-mortgagee, rights of, principle regulating—Formal transfer of mortgagee's interest, if necessary.*—One of the objects, which a Court of equity ought always to have in view, is to minimize the number of cases which may arise out of the relation between the parties to a mortgage. The equities between the parties may be adjusted in one suit by allowing the sub-mortgagee to bring the property mortgaged to sale for the amount of the original mortgage. Where a *Zuripeshgi* lease of property was given in favour of the defendants by D, under which the lessees were to remain in possession and pay *huqa ziri* to D, and the defendant sub-mortgaged that property with others to the plaintiff, the decree in a suit by the sub-mortgagee should be a decree for sale of the leased property for the *Zuripeshgi*, amount less any amount that might be recovered by sale of other properties and less such money as was payable by the mortgagees to D as *huqa ziri* with liberty to D to redeem the leased property by paying off the amount thus found. In this country no formal transfer or assignment of the mortgagee's interest is necessary to create a sub-mortgage. BANSI LAL BHAGAT v. DURGA PRASAD, **9 C. L.J. 429=2 Ind. Cas. 645.** [*Appl.*, 10 C.L.J. 470.]

(4)—*Rights of—Effect of redemption of original mortgage.*—*Held*, that a person who accepts a sub-mortgage of property, does so at the risk of his security disappearing by redemption of the original mortgage and that his interest in the property continues only so long as his mortgagor has interest in the property. BALDEO PERSHAD v. GUR BUX SINGH, **8 O.C. 140.** [*Not F.*, 12 O.C. 260]

See LIMITATION ACT, 1908, art. 134, 24 M. 471, F.B., 24 M. 473, Note.

Mortgage by kanomdar representing himself to be jenmi—Suit by jenmi for redemption—Right of sub-mortgagee—*See* LIMITATION ACT, 908, art. 134, 24 M. 475, Note.

Sub-mortgage—*concluded.*

Sub-mortgagee's right to sue mortgagor of mortgagor.—*See* MORTGAGE—GENERAL, 3 Ind. Cas. 311=14 C.W.N. 165.

Right of sub-mortgagee to bring to sale the original mortgagor's interest—*See* MORTGAGE GENERAL, 9 O.C. 233.

A sub-mortgagee is entitled to redeem a prior mortgage under s. 91, Transfer of Property Act, as he acquires an interest in or charge upon, the mortgaged property—*See* TRANSFER OF PROPERTY ACT, 1882, s. 91 (*b*), A W.N. 1905, 58=2 A.L.J. 162=27 A. 473.

Subordinate Court.

What are.—"Subordinate Courts" does not include Small Cause Courts. MAKHAN LAL v. AMIR BAKSH, **91 P.R. 1890.**

Subordinate Court, Duty of.

(1)—*High Courts, conflict of opinion among—Subordinate Courts, duty of.*—The lower Courts are bound to follow the concurrent decisions of the Court to which they are immediately subordinate, and are not at liberty to adopt a contrary opinion expressed by another High Court. KORBAN ALLY MIRDHA v. SHARODA PROSHAD AICH, **10 C. 82=13 C L R. 256.**

(2)—*High Court's ruling—Duty of Subordinate Court to follow.*—Subordinate Courts in the N.W.P. should follow the rulings of the Allahabad High Court and should not be guided by conflicting decisions of other High Courts. IMAM ALI v. SANDAT ALI, **A.W.N. 1882, 106.**

Subordinate Judge, Jurisdiction of.

See JURISDICTION OF SUBORDINATE JUDGE.

(1)—*Probate—Subordinate Judge—Jurisdiction—Suit to set aside probate.*—A suit brought to set aside a probate cannot be entertained by a Subordinate Judge. BULDEB SURMAH v. TARANATH SURMAH, **22 W.R. 416.**

(2)—*Sonthal Pergunnahs, suits relating to land in—Jurisdiction—Act* XXXVII *of* 1855, *s.* 2—*Act* VI *of* 1871.—An officer in the Sonthal Pergunnahs, appointed by the Lieutenant Governor of Bengal under s. 2, Act XXXVII of 1855, although invested with the powers of a Subordinate Judge under Act VI of 1871, has jurisdiction to try suits in regard to land, etc., where the value of the matter in dispute exceeds the value of Rs. 1.000. RAM RUNJUN CHUCKERBUTTY v. RAM PROSHAD DASS, **5 C.L.R. 128.**

(3)—*Sirdar of third class — Execution—Jurisdiction of Civil Courts.*—Where a person held only the rank and precedence of a Third Class Sirdar, his name being written in red ink, *held* that a Subordinate Judge had jurisdiction to try an application for execution of a decree passed against his ancestor by the Agent for the sirdars of the Dekkhan. MAHARAJGIR NARPATGIR v. ANUNDRAV KRISHNARAV, **8 B.H C.A.C. 25.** [*F.*, 9 B. 598; *R.*, 3 B. 193.]

Subordinate Judge, Jurisdiction of—*contd.*

(4)—*Act* XIV *of* 1869, *s.* 28—*Subordinate Judge invested with Small Cause powers—Jurisdiction in respect of counter claims—Act* IX *of* 1887, *s.* 33.—A Subordinate Judge invested with the powers of a Small Cause Court under Act XIV of 1869 is precluded by s. 33 of Act IX of 1887 from entertaining counter-claims exceeding the pecuniary limit of his Small Cause jurisdiction. BAROTE GAGA PARSHOTAM v. SEPOY PANJU RAMJAN, **14 B. 371.** [*Appr.*, 5 Bom. L.R. 398.]

(5)—*Jurisdiction—Small Cause suit filed as original suit—Appeal.*—Where a suit really cognizable by a Court of Small Causes is filed in a Court of Small Causes and it declines jurisdiction and the plaint is thereupon filed in the Moonsif's Court where it is dismissed as being cognizable by a Small Cause Court, and the Subordinate Judge, in appeal, decides the case, his decision is without jurisdiction and cannot be upheld. MOHESH CHUNDER MOJOOMDAR v. JHAROO KHOLEE, **20 W.R. 332.**

(6)—*Appeal referred to Subordinate Judge—Act* VI *of* 1871, *s.* 26—*District Judge—Power of review—Act* VIII *of* 1859 *s.* 376.—A District Judge has power to refer cases to the Subordinate Judge, who is to "hear and dispose of them accordingly," that is, as District Judge; therefore, a Subordinate Judge disposing of an appeal referred to him under Act VI of 1871, s. 26, does so as District Judge, and he has therefore, by implication, the same power of reviewing his judgment as a District Judge has under s. 376, Act VIII of 1859. SHAMA CHURN BHUTT v. L. PAYNE & CO., **18 W.R. 292.** [*R.*, 16 A. 363, F.B. = A.W.N. 1894, 113.]

(7)—*Act* VIII *of* 1859, *s.* 246—*Jurisdiction—Execution.*—Where an application is made to a Court charged with the execution of a decree under the provisions of Act VIII of 1859, s. 246, the only question to be determined is whether or not the judgment-debtor was in possession of the property at the time when the attachment was made. *In the matter of* GOPEE LALL PANDEY v. LEKHRAJ ROY, **21 W.R. 56.**

(8)—*S.* 10, *Bengal Act* VIII *of* 1869.—Act VIII (B.C) of 1869, s. 120, relates only to suits decided by the District Judge, not to those tried by the Subordinate Judge. MOONSHEE MAHOMED MUNOOR MEA v. SREEMUTTY JYBUNEE, **10 B.L.R. App. 29 = 19 W.R. 200.** [*Appr.*, 1 C.L.R. 39.]

Jurisdiction of Subordinate Courts to try offences under cls. *c.* to *f*, s. 13, Legal Practitioners Act—*See* ACT XVIII OF 1879, s. 13, 3 A. L. J. 811 = A.W.N. 1906, 268 = 29 A. 61.

Subordinate Judge in temporary charge of office of District Judge, whether competent to decide revenue appeals—*See* U. P. ACT XII OF 1881, s. 189, 23 A. 455, F. B.

Exercising jurisdiction which he had not and declining to exercise jurisdiction which he had—*See* CIV. PRO. CODE, 1908, s. 115, 20 C. 8.

Subordinate Judge, Jurisdiction of—*concld.*

Decree by Court for Sirdars—Execution thereof in Subordinate Judge's Court against heir of Sirdar—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 3 B. 42.

See RIGHT OF SUIT—TRUSTS, SUITS RELATING TO, 15 B. 148.

Small Cause decree of Subordinate Judge—Transfer to Munsiff's Court and execution—Sale certificate not filed—Validity of sale—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—PRACTICE AND PROCEDURE, 7 M. 592.

Small Cause decree of Subordinate Judge—Transfer to Munsiff's Court—Execution against immoveable property—Execution by Munsif—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—PRACTICE AND PROCEDURE, 8 M. 8.

Subordinate Proprietor.

See LANDLORD AND TENANT—NATURE OF TENANCY, 4 N.W.P. 172.

Sub-Partnership.

See PARTNERSHIP — MISCELLANEOUS, 1 M.I.A. 414.

Sub-Registrar.

Mortgage-deed, when said to be properly attested — Signatures of Sub-registrar and identifier on the back of the bond not sufficient to render mortgage valid—*See* DEED—ATTESTATION OF DEEDS, 26 C. 246 = 3 C.W.N. 84.

Subrogation.

See MORTGAGE—SUBROGATION.

(1)—*What and when arises—"Legal" and "Conventional" subrogation, difference between—Subrogation by part payment if allowable—Suit to enforce mortgage—Assignee of or purchaser from mortgagee—Necessary party—First and second mortgagee, questions between.*—To entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected. (11 I.A. 126 = 10 C. 1035, 33 C. 1133, 29 I.A. 9 = 29 C. 154, *R.*) It is only in the case of "legal subrogation" or subrogation as a matter of right, as distinguished from "conventional subrogation" or subrogation by reason of agreement, that the question of intention to keep the mortgage alive arises. The doctrine of subrogation is not applied for the mere stranger or volunteer who has paid the debt of another, without any assignment or agreement for subrogation, being under no obligation to make the payment and not being compelled to do so for the preservation of any rights or property of his own. Subrogation is

Subrogation—*continued.*

by redemption, and, unless there is redemption, subrogation cannot take place. The person who makes the payment cannot, by simply paying the interest as it accrues or paying or discharging a portion of the interest which has already accrued, claim a right of subrogation. He must pay the entire amount of an incumbrance which is senior to his own. Before one creditor can be subrogated to the rights of another, the demand of the latter must be entirely satisfied so that he shall be relieved from all further trouble, risk and expense. (18 B. 86, *Expl.*) In a suit to enforce a second mortgage, the first mortgagee is not a necessary party. GURDEO SINGH v. CHANDRIKA SINGH AND CHANDRIKA SINGH v. RASH BEHARI SINGH, **5 C.L.J. 611 = 36 C. 193 = 1 Ind. Cas. 913.** (1 C.L.J. 337, *F.*) [*R.*, 6 C.L.J. 612 = 12 C.W.N. 107, 6 C.L.J. 46, 3 M.L.T. 395 = 31 M. 439 = 18 M.L.J. 306, 11 C.L.J. 226 = 14 C.W.N. 617 = 5 Ind. Cas. 165.]

(2)—*Mortgage, subrogation, principle—Equity—Encumbrancer, prior and subsequent—Purchaser, assignee of, rights of.*—When money due upon a mortgage is paid, it shall operate as a discharge of the mortgage, or in the nature of an asignment of it, as may best serve the purposes of justice and just intent of the parties. It makes no difference whether the party, on payment of the money, took an assignment of the mortgage or a release, or whether a discharge was made, and the evidence of the debt cancelled. The debt itself may be held still to subsist in him who paid the money, as assignee, so far as it ought to subsist, in the nature of a lien upon the land and the mortgage be considered in force for his benefit, so far as he ought, in justice, to hold the land under it, as if it had been actually assigned to him. The doctrine of subrogation is a doctrine of equity jurisprudence. It does not depend on privity of contract express or implied, except in so far as equity may be supposed to be imported into the transaction, and thus raise a contract by implication. It is founded on the facts and circumstances of each particular case and on the principles of natural justice. While, therefore, the doctrine will be applied, in general, wherever any person other than a mere volunteer pays a debt or demand, which in equity or good conscience should have been satisfied by another, or where the liability of one person is discharged out of a fund belonging to another, or when one person is compelled, for his own protection or that of some interest which he represents, to pay a debt for which another is primarily liable, or wherever a denial of the right would be contrary to equity and good conscience, the doctrine will never be permitted, where the application of it would work injustice to the rights of those having equal or superior equities. (2 C. L. J. 288, *R.*) A purchaser of the equity of redemption, if he discharges the prior encumbrance, cannot claim to be subrogated to his rights, to the prejudice of the latter encumbrancer whose debt he had agreed to discharge. The representatives of the purchaser of the equity of redemption are not

Subrogation—*concluded.*

entitled to be subrogated to the rights of the prior mortgagee because they had constructive, if not, actual notice of the debt due to the later mortgagee, and of the circumstance that their assignor had assumed payment of it. BISSESWAR PROSAD v. LALA SARNAM SINGH, **6 C.L.J. 134.** (16 M. 301, *R.*) [*R.*, 20 M.L.J. 380.]

Carrier—Insurer—Right of suit of owner—*See* CARRIERS, 15 C.W.N. 226=38 C. 28=9 Ind. Cas. 364.

Doctrine of subrogation—*See* COMPANY—WINDING UP OF COMPANY, 18 C. 31.

Right to—*See* MORTGAGE—GENERAL, 8 A.L.J. 1289.

Right to claim, when arises—*See* MORTGAGE—GENERAL, 6 C.L.J. 46.

Presumption of intention—*See* MORTGAGE—GENERAL, 14 C.W.N. 1093.

Extent of right of—*See* MORTGAGE—GENERAL, 11 C.L.J. 226=5 Ind. Cas. 165=14 C.W.N. 617.

Co-mortgagor paying off whole debt—Charge upon the other co-mortgagor's property for his proportion of the debt—Priority over mortgage by latter of subsequent date—Subrogation—Transfer of Property Act, ss. 82, 95 and 100—*See* MORTGAGE—GENERAL, 6 A.L.J. 67=31 A. 166=1 Ind. Cas. 825=6 A.L.J. 832.

Principle of, on what based—Legal and equitable claim, if both may be urged together—*See* MORTGAGE—GENERAL, 14 C.W.N. 1089.

Effect of *lis pendens*—*See* MORTGAGE—GENERAL, 7 Ind. Cas. 473.

Principle of, when applies — Presumption of intention to keep alive first mortgage—Rebuttal—*See* MORTGAGE—GENERAL, 20 M.L.J. 380=6 Ind. Cas. 781=8 M.L.T. 132.

Lien of auction-purchaser of land — Paying off mortgage money—Purchaser in possession—Sale set aside—Subrogation—*See* MORTGAGE—GENERAL, 8 A.L.J. 663.

See MORTGAGE—REDEMPTION, 6 A.L.J. 832=13 I.A. 166=1 Ind. Cas. 825=6 A.L.J. 67.

Subscription.

Right of suit to enforce subscription promised.—A suit will lie to recover a subscription promised, if, on the strength of the defendant's promise and of similar promises, the plaintiff has been induced to incur liabilities which, but for such promises, he would not have incurred. RAI BAHADUR DEVI PRASAD v. MUNICIPAL COMMITTEE OF BHANDARA, **13 C.P.L.R. 57.** (14 C. 64, *F.*)

Of a newspaper, limitation for a suit to recover arrears of—*See* LIMITATION ACT, 1908, art. 42, 7 Bom. L.R. 190.

Subscription—*concluded.*

Suit against a trust for—Jurisdiction—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, art. 18, 20 M.L.J. 146=5 Ind. Cas. 912 =8 M.L.T. 67=33 M. 494.

Suit to recover money collected as—For building debera—Person collecting subscriptions, trustee for community—Suit for recovering of subscriptions—Suit entertainable by Subordinate Judge's Court and not on small cause side—*See* RIGHT OF SUIT—SUBSCRIPTION, 22 B. 729.

Suit for—Secretary whether competent to sue—*See* RIGHT OF SUIT—MISCELLANEOUS, 10 C.L.R. 197.

Erection of public building from—Suit for—*See* RIGHT OF SUIT—MISCELLANEOUS, 14 C. 64.

Subsistence-money.

(1)—*Subsistence money—Illegal commitment—Duty of Jailor.*—Unless subsistence money is paid before the commitment, the commitment is illegal. The jailor is bound by the words of the Act. It is for him, and not for the prisoner, to see that the money is paid. *In the matter of* THOMPSON, **Bourke, O.C. 421.**

(2)—*Subsistence-money—Fixing subsistence-money—Detention in jail on decree of defendant arrested prior to decree—Right to discharge.*—Where a defendant is arrested prior to decree under Act VIII of 1859, s. 78, and a decree is afterwards obtained against him in the suit, the plaintiff, if he wishes to detain the defendant in prison, must have him brought before the Court, and his subsistence-money fixed, in the same way as in the case of an arrest in execution of a decree; and if he fails to do so, the defendant is entitled to his discharge from prison. *In the matter of* CALLACHAND DASS, **1 Ind. Jur. N.S. 327.** S. C. RAM PERSAUD ROY v. CALLACHAND DASS, **Bourke O.C. 423.**

(3)—*Subsistence-money—Application for discharge on nonpayment of subsistence-money—Petition for discharge—Civil Procedure Code*, 1859, *s.* 278.—A prisoner was arrested on the 30th of December on a *ca. sa.*, dated the 24th of December, on which day the execution-creditor paid subsistence-money for thirty days. This failing on the 29th of January, the prisoner made a fruitless application to the Sheriff for more, and then applied to the Court for his discharge, upon which notice was directed to be given to the execution-creditor. *Held*, that no particular form of petition of discharge was required from a prisoner applying for his discharge for non-payment of subsistence-money; that subsistence-money must be paid in advance by the execution creditor before putting a writ of *ca. sa.* in force; that the discharge by the Sheriff of a prisoner detained on a writ of *ca. sa.* was equally imperative on the happening of any of the contingencies specified in s. 278 of Act VIII of 1859; and that on failure of subsistence-money the prisoner should be released, and further detention of him by the person in whose custody he is was illegal. SPEYER v. JANSSEN, **Bourke O. C. 28.**

Subsistence-money—*continued.*

(4)—*Subsistence-money — Non-payment of subsistence-money in advance—Civil Procedure Code*, 1859, *s.* 276.—The monthly subsistence-money under s. 276 of Act VIII of 1859 must be paid in advance; therefore, where a debtor was arrested and subsistence-money paid for January, but no further deposit was made till 4th February, the prisoner was held entitled to his discharge. *In re* KONOY LOLL DOSS, **Bourke O.C. 51.**

(5)—*Subsistence-money—Right of debtor to discharge—Omission to make order for allowance—Civil Procedure Code*, 1859, *ss.* 276, 278.—A debtor, having been imprisoned on a writ of *ca sa*, was brought up on a *habeas corpus* and applied for his discharge on the ground that his arrest and imprisonment were illegal, as no order for his allowance under s. 276 of Act VIII of 1859 had been made. Sufficient subsistence-money, however, was paid to the Sheriff previous to the arrest, and he was kept amply supplied with it. *Held* that ss. 276 and 278 of Act VIII of 1859 applied as much to the execution of a mofussil decree as to an arrest by writ of the High Court; that no one is to be imprisoned in execution of a decree unless subsistence-money for a month in advance be paid to the person to whose custody he is committed; that a similar payment must be received in advance every successive month pending the imprisonment; that if any such payment be not made, the prisoner is entitled to be released; that the "allowance" referred to in s. 276 of Act VIII of 1859 meant subsistence-money of 4 annas per diem that s. 276 of Act VIII of 1859 enacted only that the prisoner shall have an allowance of 4 annas per diem paid monthly, unless the Court shall specially fix a less amount; that an order for an allowance to the prisoner was not necessary, and was intended only as a relief to the execution-creditor; that the omission to have such order made did not render the arrest and imprisonment illegal; that in the absence of such order, s. 278 of Act VIII of 1859 ensured 4 annas a day as subsistence-money for the prisoner. AGA ALI KHAN v. JOYDOYAL PARSAUD, **Bourke O.C. 52.**

(6)—*Subsistence-money—Order for allowance—Application for discharge in absence of order—Civ. Pro. Code*, 1859, *ss.* 276, 278.—S. H and two other debtors in the custody of the Sheriff on a *ca. sa.*, appeared on a *habeas corpus* for the execution creditor to show cause why they should not be discharged. S. H had been arrested in execution of a decree in a suit which was begun under the old procedure in the Supreme Court, and the question was whether the procedure in his case should be regulated by Act VII of 1855 or Act VIII of 1859. The grounds relied on by all three prisoners (besides the above in S. H's case) were, that no order for their allowance had been made by the Court, nor had they been brought before it for that purpose. *Held* that the case of S H was to be

Subsistence-money—*continued.*

regulated by the old procedure, and as under Act VII of 1835 no order for allowance was necessary, he must be remanded to jail. *Held* also (*Peacock, C.J, dissentiente*) that a prisoner arrested on a *ca. sa*, must, within a convenient time, be brought before the Court to have his allowance fixed; that an "allowance" within the meaning of s. 276 or 278 of Act VIII of 1859 meant subsistence-money fixed by order of the Court; that the Court must have the prisoner before them to exercise their discretion upon a matter which must be determined before he can be formally committed to prison, and which may be so determined as to entitle him to be discharged; that a decree must be carried into execution by and under the direction of the Court which pronounces it by means of a special application to the Court, and an order passed thereupon; that a jailor or other officer cannot lawfully receive a prisoner for debt under commitment unless the preliminary payment of subsistence has been made in compliance with the order of the Court; and that the jailor cannot lawfully detain a judgment-debtor when the time limited for payment of any subsistence-money under the order of the Court passes without the payment accordingly. *In re* SUMBO CHUNDER HALDAR. *In re* DOORGA-PERSAUD MITTER. *In re* RAKHAB DOSS, **Bourke O. C. 59.**

(7)—*Act* VIII *of* 1859, *ss.* 276, 278—*Subsistence-money.*—S. 276, Act VIII of 1859, must be construed strictly before the committal of a judgment-debtor, the execution creditor paid into the hands of the jailor subsistence-money for 27 days at 4 annas per diem. Two days after, a further sum of 4 annas was paid to make up any deficiency. *Held* that the requirements of s. 276 of Act VIII of 1859 had not been complied with and the prisoner was therefore entitled to be discharged under s. 278. DUTT v. CORNELIUS, **5 B.L.R. App. 79.**

(8)—*Act* VIII *of* 1859, *ss.* 276, 278—*Subsistence-money—Discharge.*—S. 276, Act VIII of 1859, ought to be construed strictly. S. 276 says that sufficient subsistence-money must be paid to the jailor before the commencement of the month for which it is paid. On the 30th September, plaintiff paid to the jailor subsistence-money for 30 days, the jailor then having a balance of 4 annas over from the subsistence-money for September. *Held* that s. 276, Act VIII of 1859, had been sufficiently complied with. HALADHAR DEY v. AMBIKA CHARAN BOSE, **5 B.L.R. App. 80.**

(9)—*Civil Gaol fund—Subsistence-money.*—Where the defendants, who were arrested in execution of a decree, were released at the request of the creditor before they had been sent to Civil Gaol, the creditor was entitled to a refund of the balance of subsistence money that remained at the time of his debtor's release. S. 10 of Act IV of 1865 (Bom.) is not applicable to such a case *Ex parte.* KASHINATH BALALOK, **5 B.H.C.A.C. 84.**

(10)—*Plaintiff's failure to pay subsistence money—Discharge of defendant from jail—*

Subsistence-money—*concluded.*

Second arrest barred.—The discharge of a defendant from confinement in jail, owing to the plaintiff's failure to pay subsistence money at the rate fixed by the Court, is a bar to a second arrest and imprisonment in execution of the decree. C. APPIAH CHETTY v. CHENGADOO, **4 M.H.C. 76.**

(11)—*Omission of Nazir to re-arrest judgment-debtor released—Nazir liable to plaintiff in damages for negligence—Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 28, *time for payment of batta for maintenance of debtor in jail.*—Where a Nazir allows a debtor in the civil jail to be released, having overlooked the existence of a fresh warrant for his arrest in execution remaining in his hands unexpired, he could be held liable in damages to the holder of the decree for his negligence in having allowed the judgment-debtor to escape. The batta required to be paid for the maintenance of a judgment-debtor in the jail did not, under the law as it stood at the end of 1876 and until October 1877, (*viz.*, Act VIII of 1859, s. 282), become payable until he had been arrested and brought up before the Court and such Court had made the order for the committal of the judgment-debtor to jail in execution of the decree. KASTURCHAND v. RAVJI SADASHIV, **4 B. 65.**

See ARREST, 8 M. 21.

Non-payment of subsistence-money—Arrested person discharged from Court-house—Effect—Discharge from jail—*See* CIV. PRO. CODE, 1908, s. 58, 9 B. 181.

See WARRANT, 1 Ind. Jur. N.S. 315.

Subsisting Decree.

(1)—*Civ. Pro. Code*, 1882, *s.* 316—"*Subsisting decree*," *meaning of.*—The words "subsisting decree" mean a decree unreversed and in full force, and not a decree, the execution of which is not barred by limitation. SARODA CHURN CHUCKERBUTTY v. MAHOMED ISUF MEAH, **11 C. 376.**

Sub-soil Rights.

Right of landlord to—*See* LANDLORD AND TENANT—MISCELLANEOUS, 9 C.W.N. 292.

Holder of mineral rights entitled to the incidental—for boring into the land to ascertain if there are minerals underground—*See* LESSOR AND LESSEE, 3 C.L.J. 103=33 C. 462.

Substantial Injury.

Material irregularity—Inference of material irregularity from substantial injury — *See* INJURY, 6 C.W.N. 48.

Substantive Offence.

See CRIM. PRO. CODE, 1898, ss. 197, 468, 7 C.W.N. 494=30 C. 905.

Substituted Service.

See CIV. PRO. CODE, 1908, O.V, rr. 9 to 20.
See SUMMONS.

When may be accepted—*See* ACT I OF 1895, ss. 8, 10 and 31, 5 C.L.J. 555.

See NOTICE, 4 C.L.R. 397.

Mortgage—Foreclosure proceedings—Service of notice—Substituted service when permissible—Demand by registered notice—Burden of proof—Evidence—*See* BEN. REG. XVII OF 1806, 63 P.L.R. 1902=48 P.R. 1902.

Sub-tenant.

See LANDLORD AND TENANT.

See LEASE.

See SUB-LEASE.

Succession.

See BUDDHIST LAW—INHERITANCE.

See CUSTOMS—PUNJAB, INHERITANCE.

See HINDU LAW—INHERITANCE.

See MAHOMEDAN LAW—INHERITANCE.

See MALABAR LAW—INHERITANCE.

(1)—*Succession to Palliam — Right of females.*—Females are not precluded by any rule of descent, custom, or usage of the Cumbala Tottier caste from succeeding to a Palliam. THE COLLECTOR OF MADURA v. VEERACAMOO AMMAL, **9 M.I.A. 446=2 Sar. 43.**

(2)—*Rule of descent—Private and public property of Hindu sovereign.*—There is a distinction between the public and private property of a Hindu Sovereign, as upon his death his private property goes to one set of heirs, and the Raj and the public property to the succeeding Rajah. The general rule of the Hindu Law of inheritance is partibility. The succession of a single heir, as in the case of a Raj, is the exception. THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. KAMACHEE BOYE SAHABA, **7 M.I.A. 476=13 Moo. P.C. 22=7 W.R. (Eng.) 722=4 W.R.P.C. 42=1 Suther. 373=1 Sar. 684.**

(3)—*Hereditary office — Succession.* — Hereditary office means an office to which the person in the direct line of heirs not otherwise disqualified is entiled to succeed on the occurrence of a vacancy, however that vacancy be caused, whether by the death, resignation or dismissal of the last holder. It is erroneous, therefore, to hold that a person is not the heir to an hereditary office until the death of his immediate predecessor. GOPINADHA PANDA v. RAMACHANDRA PUNIGRAHI, **6 M.L.J. 255.** [*R.*, 7 M.L.T. 189.]

(4)—*Succession—Persons governed by two systems of law—Succession to property how determined—Mahomedan law.*—Where persons are governed by two systems of law (*e.g.*, Mahomedan law and Marumakkattayam law, as in this particular case), *held*, that, in the absence of usage to the contrary, property inherited under

Succession—*continued.*

the Mahomedan law will pass in further descent according to that law. MUKKATPARKUM KODARAKAUDY MAMMAD HAJI v. KATHKAYILPAKUM KOSHIPURANKARADY, **19 M.L.J. 736=7 M.L.T. 221=4 Ind. Cas. 1081.** (8 M. 238, 22 M. 494, 27 M. 77, *R.*)

(5)—*Succession Certificate Act* (VII *of* 1889), *s.* 4—*Curator under Act* XIX *of* 1841—*No certificate necessary.*—A curator appointed under Act XIX of 1841 is not a person claiming to be entitled to the effects of the deceased person whose estate he is appointed to manage, within the meaning of s. 4 of the Succession Certificate Act, and he is, therefore, not required to take out a certificate under it before he can obtain a decree. The Curator is not a representative of the deceased person, but is merely entrusted by the Court with certain powers over the estate for a temporary purpose, amongst which is the power to sue in his own name, given him by s. 9 of Act XIX of 1841. And this view is confirmed by the provisions of s. 23 of the Succession Certificate Act, for which there would have been no necessity had the provisions of s. 4 applied to the Curator, since it contemplates his exercising his authority until a certificate under the Act has been granted. BABASA v. NARSAPPA, **20 B. 437.** [*R.*, 37 C. 754=12 C.L.J. 252=6 Ind. Cas. 416.]

(6)—Bhagdari *lands in Broach District—Succession—Special custom—Males and females, preference between—Hindus and Mahomedans.*—The custom prevailing in the District of Broach as regards the succession to *Bhagdari* lands, was that on the death of the *Bhagdar* without male issue, his nearest male relations (after the death of his widow) whether claiming through males or through females, succeeded to those lands to the exclusion of the *Bhagdar's* female relations, such as daughter or sister. There is no difference in this particular between Hindus and Mahomedans. *Quære*:—Whether, under that custom, females were absolutely excluded from inheritance, or whether male relatives claiming through males were preferred to male relatives claiming through females? PRANJIWAN DAYARAM v. BAI REVA, **3 B. 482.**

(7)—*Hindu law—Mitakshara—Sister's son heir to mother's brother.*—In the absence of nearer relatives, a man may be heir to his mother's brother as regards property subject to the Mitakshara. AMRITA KUMARI DEBI v. LAKHINARAYAN CHUCKERBUTTY, **2 B.L.R. F.B. 28=10 W.R. F.B. 76.** (1 Sel. S.D.R. 43, 3 Sel. S.D.R. 37, 6 Sel. S.D.R. 301, Mad. S.D.R. 1860, 247, 1 M.H.C. 85, S.D. R.N.W.P. 1865, 200, Agra L.J. 1864, 17, 1 W.R. 74, 4 W.R. 13, 1 B.L.R. P.C. 44, *R.*) [*F.*, 18 W.R. 331, 8 M. H. C. 88; *Rel. on*, 2 B. 388: *R.*, 6 B.H.C.; O.C. 1, 5 B. 110, P.C., 5 B. 597, 5 M. 69, 9 A. 467, 13 M. 10, 22 C. 339, 20 A. 191, 6 C.L.J. 190; *Cons.*, 2 M. 304.]

(8)—*Hindu Law—Inheritance—Brothers.*—Under the Hindu Law, a united brother takes

Succession—*continued.*

in preference to the separated brother who does not inherit. *Quære*—As to the effect of re-union on inheritance. KESHABRAM MAHAPATTAR v. NANDKISHOR MAHAPATTAR, **3 B.L.R. A.C. 7=11 W.R. 308**. [*R.*, 7 P.R. 1870, 25 M. 149=11 M.L.J. 353, 5 C.L.J. 417.]

(9)—*Hindu Law—Mitakshara—Succession.*—Under the Mitakshara, if there be no kindred belonging to the same general family and connected by funeral oblations, the succession devolves on kindred connected by oblation of water. Gentiles must be exhausted before the cognates can succeed. MUSST. DIGDAYI v. BHATAN LAL, **5 B L.R. 448, Note=11 W.R. 500**. [*R.*, 5 B.L.R. 433, 5 B L.R. 442=14 W.R. 117.]

(10)—*Non-talukdari property, rule of succession applicable to—Talukdar, acquisitions by—Succession.*—Certain properties were granted to G by a *sanad* which provided that it should descend to male heirs only under the rule of primogeniture. G and his successors acquired other property. *Held* that the devolution of the acquired property was not governed by the *sanad*. *Held* further, that a zemindar cannot make his property descendible in a manner not recognised by the ordinary law to which he is subject. RAJENDRA BAHADUR SINGH v. RANI RAGHUBANS KUNWAR, **11 O.C. 256**. (17 I.A. 173, 28 I.A. 100, *R.*)

(11)—*Succession to property of Armenian Christian residing in Oudh at the time of annexation—Lex loci with reference to the English law of succession—Territorial Law of Oudh on the introduction of British rule—Executory trust—Will, construction of—Justice, equity and good conscience—Intention of testator—Indian Limitation Act, sch. II. arts. 134, 136, 140 and 144—Champerty—Sale in execution of decree upon mortgage executed by holder of life-interest—Purchaser for value without notice.*—J, an Armenian Christian, who was residing at Lucknow at the time of the occupation of Oudh by the British Government in 1856, made a will on the 21st September 1863 by which he appointed his wife his executrix and guardian of his daughter and made the following bequest of his house known as "Dolly House:"—"I give and devise to my beloved daughter the said V (then follows a specification of the property including Dolly House) "upon trust to be settled and assured for her use during her natural life and at her decease to vest in her issue and failing any such to revert to my said beloved wife absolutely." In 1867 V married Q and in 1875 she mortgaged the house to S.N. The mortgagor obtained a decree for the sale of the property which was put up for sale in March 1880 and was purchased by him. In July 1883 he sold it to the defendant No. 1, who in September 1883 sold it to the defendant No. 2. V died in February 1880 leaving her surviving two sons E and A. E after his mother's death made a gift of his rights under the will of J to his minor son and in October 1901, after obtaining as his minor son's guardian, the permission of the District Judge under Act VIII of 1890, sold the house to the plaintiffs. In the same month the plaintiff brought a suit against the defendant claiming a moiety of the house. On the contention that by his will the testator intended to create an executory trust, *held*, that the will did not create an executory trust but devised the property to the testator's daughter for life and after her death to her issue. No part of a will ought to be rejected as destitute of meaning if a reasonable construction can be placed on it, but it may be rejected as such, if such a construction cannot be placed on it. *Held*, that no reasonable construction could be placed on the words "upon trust to be settled and assured for her use," and that therefore they should be rejected as destitute of meaning. *Held*, that on the introduction into the province of Oudh of British rule, there did not exist in British India generally a territorial law, namely, the English law in the modified form in which it was applicable within the city of Calcutta, applicable to persons not having a personal law of their own, and that consequently such a law did not become a territorial law in Oudh when it came under British rule. *Held*, therefore, that J's will was to be construed according to justice, equity and good conscience, *i.e.*, excluding all such rules of English law as the rule in *Shelley's* case and the rule in *Wild's* case, and construing the will in accordance with the intention of the testator, his intention appeared to have been that his daughter should enjoy the property for life, and that after her death, if she left issue her surviving, it should pass to her issue. *Held*, therefore, that V did not take an estate tail in the property, but an interest therein for life, and that on her death her sons became absolute owners of the property. *Held*, further, that art. 134, sch. ii of the Indian Limitation Act, did not govern the suit, but if either art. 136 or art. 140 or art. 144 was applicable, the suit was within time, having been brought within twelve years from the date of the death of V. *Held*, further, that the sale to the plaintiffs was not champertous, inasmuch as it was not an unfair and illegitimate transaction got up merely for the purpose of spoil, or of litigation, to be carried on from corrupt or other improper motives. *Held*, further, that the execution-sale to S.N., did not pass the absolute ownership of the property but merely the life interest of V, and that therefore the plea that the defendants were purchasers for value without notice was of no avail. NAWAB FARRUKH BEGAM v. SHEIKH AHMAD ALI, **6 O.C. 305**.

(12)—*Religious institution—Succession—Custom.*—Where questions arise as to the succession to the management of a religious institution, regard must be had to the custom of the particular institution. RAMJEE DOSS v. RUGBEER DOSS, **52 P. R. 1867.**

(13)—*Byraghi Faqir—Right to inherit—Custom.*—There is no established custom showing,

Succession—*continued.*

that a Bhyragi Faqir, who has not given up the world, cannot succeed to property in his natural family. (1 W.R. 209, 1 B.L.R. 114, 15 P.R. 1874, 1 P.R. 1868, *R.*) BANSI v. MIHAN SINGH, **24 P.R. 1880.** [*R.*, 7 P.R. 1892, 93 P.R. 1899.]

(14)—*Kadiri Fakirs—Succession to inheritance—Custom.*—As regards succession to inheritance there is no custom prevalent among the Kadiri Fakirs (of the Khangah Shabgadda in Garhi Sahu village near Labore), by which a chela excludes all natural heirs however near in degree; and such chela is entitled to succeed only in the absence of sons or relatives of the deceased fakir. ALAM SHAH v. BULAKI SHAH, **57 P. R. 1880.**

(15)—*Hindu Law—Inheritance—Son claiming extra share as* laik beta—*Equal division among sons—Alteration of succession.*—A jagirdar who was the father of the parties to this suit, having died in 1867, was succeeded in the jagir by the plaintiff, his eldest son, and the defendants. No special order was made at the time of the succession in reference to the shares of the sons or of the eldest son, the plaintiff. Plaintiff now sued his brothers for certain crops as '*huq sirdari*,' one share more than his brothers, on the ground that he was the eldest son and qualified to be *laik beta* of the deceased jagirdar. It appeared that in 1860, the deceased jagirdar had, along with a number of others at the invitation of the authorities, signed a document which alone, it was intended, should be of force to determine the legal devolution of their jagirs By this document they declared in favour of equal division among all the sons, and in the case of jagirs not less than Rs. 1,000, they assigned a double share to the son who is fit, *laik beta*. In 1865, the jagirdar made an equal division of the jagir as well as his liabilities among his sons. The question was whether the deceased jagirdar was or was not competent to depart from the arrangement of 1860, whether the arrangement was or was not binding on the jagirdars, and whether it established a canon of inheritance by consent. Now, the jagir had long previously been granted, and the engagement had not been taken at the time of grant. It was out of the hands of Government, who had no authority at that time to impose any condition or exact any terms in regard to the inheritance or succession to it. The promise on the part of the numerous jagirdars, if promise it was, must be regarded as a purely voluntary one unsupported by any consideration moving from the Government. For any interest belonging to the Government in the matter, the jagirdar was perfectly free to alter his intention in regard to his jagir, and, although he had at one time said that there should be a '*laik beta*,' yet freely to dispose of his jagir among his sons conformably to Hindu law, if he afterwards thought fit to do. The arrangement was thus not binding as between the jagirdars and the Government: It was therefore not binding as between the parties to the suit. SIRDAR SUJAN SINGH v. MAN SINGH, **68 P.R. 1869.**

Succession—*continued.*

(16)—*Adopted son's right of inheritance—Disinherison for neglect to support adoptive father.*—An adopted son is entitled, by reason of the fact of adoption, to succeed to his adoptive father's ancestral property, and cannot, on the ground of his having neglected to support his adoptive father, be disinherited by him. JHUNDA v. SAHIBA, **15 P.R. 1877.** [*R.*, 17 P. R. 1878.]

(17)—*Inheritance—Agricultural Brahmins of the Amritsar District—Succession to adopted son dying childless.*—Found, that no such well-established custom prevails. MUSSAMAT SADA KOAR v. RAM SINGH, **21 P R. 1890.**

(18)—*Informal adoption—Adopted son dying without issue—Inheritance—Custom.*—Where the original proprietor, a Bhular Jat of the Lahore district, died sonless, but leaving two daughters and a step-son, who was allowed to succeed him, on what title it was not clear, but apparently as an adopted son, for the step-son called himself henceforth a Bhular Jat (he was by birth a Man Jat) his succession having been accepted by the collaterals of the original proprietor, and the step-son also being sonless, adopted the son of one of the original proprietor's daughters, who had married a Manhes Jat, and the adopted son likewise dying without issue, the estate was taken by the male collaterals of the original proprietor (who, however, claimed as heirs male of the step-son), and was claimed by the adopted son's brother's sons, who were also great grand-sons of the original proprietor through the daughter:—*Held* by *Lindsay, J.*, that the adoption, which had been found to be an informal customary adoption, must be held to be an adoption in the kritrima form, the effect of which was to create a purely personal tie between the adoptive father and the adopted son. *Held* by *Smyth, J.*, that, in the absence of a custom to the contrary, it must be held, upon a consideration of the nature of the relationship which an informal adoption creates between the adoptive father and the adopted son, and the rights which it confers upon the latter, that the property passes not to the heirs of the adoptive father, but to the natural heirs of the adopted son; further, the relationship being purely personal, confined to the adoptive father and adopted son, and not extending to the other members of the adoptive father's family, the latter cannot be considered as in any sense the heirs of the adopted son. DEWA SINGH v. NIHAL SINGH, **9 P.R. 1880.** (43 P.R. 1879, 97 P.R. 1879, 122 P.R. 1879, *R.*) [*F.*, 89 P.R. 1885; *Appr.*, 18 P.R. 1900=14 P.L.R. 1900, 79 P.R 1901=107 P.L. R. 1901; *Relied on*, 37 P.R. 1910=62 P.W.R. 1910=6 Ind. Cas. 712; *R.*, 34 P.R. 1883, 14 P.R. 1884, 85 P.R. 1888, 147 P.R. 1889, 12 P.R 1992, F.B., 138 P.R. 1894, 37 P.R. 1910 =50 P.L.R, 1910.]

(19)—*Hereditary cultivator—Daughter's sons—Right of succession.*—Where the village *wazib-ul-arz* contains a statement that collaterals also can succeed to hereditary village cultivation

Succession—*continued.*

and that succession can also be permitted when there is relationship and family dependency. a grandson by a daughter who lived with the hereditary cultivator comes within that definition and is entitled to succeed his maternal grandfather, when there are no other nearer relations of the deceased. TANNE v. NUBBEE BAKSH. **19 P.R. 1867.** *See* MAYDA v. HARJAS, **96 P.R. 1867.**

(20) — *Hereditary cultivator— Succession—Sister's son.*—As a general rule, no one can succeed to the right of an hereditary cultivator, unless he be a descendant in the direct male line of the person who originally obtained the cultivation. The exception is where relationship exists, and also family dependency is established on the part of the claimant. In this case, there were nearer relations than the plaintiff who was a sister's son of the deceased, but they did not object to the plaintiff's claim to succeed. But it was held that notwithstanding the waiver of their rights by these relations it was open to the proprietors of the village to object to the plaintiff's claim. Moreover, rights to hereditary cultivation cannot be transferred and therefore, as against the proprietors, such waiver can have no effect MAYDA v. HURJAS, **96 P.R. 1867.** [*R.*, 18 P. R. 1868.] *See* TANNE v. NUBBEE BAKSH, **19 P.R. 1867.**

(21)—*Chimbah Jats of Sialkot District—Widow.*—Right of widow of son who has died sonless before his father MUSSAMMAT JIWAN v. HARI SINGH, **61 P.R. 1889.**

(22)—*Raiens of Karnal—Interest of widow or mother in lands inherited—Custom.* — *Held*, that no special custom, as distinguished from the general custom of the Punjab under which a widow or mother succeeding by inheritance to land takes only a life interest in the property was established to prevail among the Raiens of Karnal. MUSSAMMAT IZZO v. MUSSAMMAT LADO, **34 P.R. 1880.** [*R.*, 52 P.R. 1885.]

(23)—*Lands—Inheritance—Dispute between descendants of male and female line of common ancestor.*—Plaintiffs and defendants were the common descendants of one Aja, the former in the male line, the latter in the female line. At the settlement, the names of the latter were entered as proprietors of more than half of the lands of Aja. Plaintiffs claimed preference on the ground that they were in the male line. *Held* that the Commissioner had decided rightly and equitably in throwing the whole into the common stock and dividing it equally between the litigants. KHAN MALLICK v. KHODA BUKSH, **73 P.R. 1866.**

(24)—*Jats of the Her got, Hoshiarpore district—Succession of whole blood and half blood—Custom—Application of Hindu Law.*—Where the plaintiffs, cousins of the half blood, sued the defendants, cousins of the whole blood, for the property of a deceased cousin of the whole blood, *held* that among the Jats of the Her got, in Hoshiarpur district, to which the parties belonged, there was no established custom by which the relatives of the half-blood can

Succession—*continued.*

claim equal shares with the relatives of the whole blood. that therefore the plaintiffs' case must be decided according to Hindu Law which postpones the succession of the half-blood in favour of the whole blood. MEHTAB SINGH v. JOWAHIR, **21 P.R. 1880.** [*R.*, 187 P.R. 1883, 150 P.R. 1888, 75 P.R. 1889, 4 P.R. 1891 F.B., 83 P.R. 1894.]

Arrears of pension, succession to—Heirs—Succeeding grantee—*See* ACT VI OF 1849, 3 Agra 44.

See BOM. ACT III OF 1876, 2 Bom. L R. 613.

To property acquired from the profits of *talukdari* property—*See* U.P. ACT I OF 1869, ss. 3, 8, 10, 22, 23, 9 Ind. Cas. 83.

To acquired property of talukdar—*See* U.P. ACT I OF 1869, ss. 22, 23, 9 Ind. Cas. 76.
See COMMON LAND, 76 P.R. 1888.

To property left by deceased head of religious institution, upon what depends—Mohunt's power to alter—*See* DEBUTTER PROPERTY, 1 Ind. Cas. 216.

See ENGLISH LAW, 5 B. H. C. O.C. 172.

Religious institution—Custom and practice—*See* HINDU LAW — RELIGIOUS ENDOWMENT, 7 C.W.N. 145.

Religious endowment—Priest—Succession—*See* HINDU LAW—RELIGIOUS ENDOWMENT, A W.N. 1881, 52.

Impartible Polliapat held by one member of family—Mode of descent—*See* IMPARTIBLE ESTATE, 8 M.H.C. 157.

See JAGHIR, 108 P.R. 1901.

See JOINT TENANCY, 57 P.R. 1868.

Succession to foreign state—Jurisdiction of Court in British India to decide the question as to who is entitled to succeed—*See* JURISDICTION—GENERAL, 12 C.W.N. 777=8 C.L. J. 1=4 M.L.T. 27=35 C. 777.

Whether Transfer of Property Act deals with cases of—*See* LEASE—GENERAL, 5 Ind. Cas. 500=11 C.L.J. 401=37 C. 377.

Slayer's right to inherit property of person slayed—Mahomedan Law—Public policy—*See* MAHOMEDAN LAW—INHERITANCE, P.L.R. 1900, p. 455=74 P.R. 1900.

Succession Act, 1865—Succession to estate of intestate Native Christian—*See* NATIVE CHRISTIANS, 9 M. 466.

Indian Succession Act — Applicability to Native Christians previously following Hindu law—*See* NATIVE CHRISTIANS, 10 M. 69.

See NAWAB OF TONK, 30 C. 843, P.C.=67 P.R. 1903=112 P.L.R. 1903.

Poliem, mode of—Holder if liable for debts of predecessor—*See* POLIEM, 3 M.H.C. 303.

See POSSESSION—ADVERSE POSSESSION, 9 W.R. 98.

Succession—*concluded.*

See RELIGIOUS INSTITUTIONS, 32 P.R. 1867, 76 P.R. 1874.

Liability to pay arrears of rent of predecessor in interest—*See* RENT, 16 C.P.L.R. 55.

Succession—Survivorship — Recognition by landlord of right as heir of deceased tenant—Effect—*See* RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT, 23 P.L.R. 1910=6 Ind. Cas. 499.

See RIGHT OF OCCUPANCY—TRANSFER OF RIGHT, 1 P.R. 1868.

Succession Act (X of 1865).

[REP. IN PT. ACT XXIV OF 1867; ACT VII OF 1870; ACT XV OF 1877; (AS TO LOWER BURMA), ACT VI OF 1900, S. 48. REP. IN PT. AND AM.—ACT VI OF 1889, SS. 2 TO 7, 9, 10; ACT XII OF 1891. AM. ACT VI OF 1881; ACT II OF 1890, S. 9. ACT V OF 1902, S. 9, SS. 187, 242, 244, 246, 250 AM. SS. 242A, 246A, 277A, INS., ACT VIII OF 1903, S. 2. APPLICATION OF PART III. PART IV (EXCEPT S. 25). PART V AND S. 43 RESTRICTED, ACT XXI OF 1865, S. 8. APPLICATION OF SS. 190 AND 239 RESTRICTED, ACT VII OF 1901, S. 3. APPLICATION EXT., ACT XXI OF 1870 (AS AM. BY ACT V OF 1881, S. 154). DECLARED IN FORCE—IN THE SONTHAL PARGANAS, REG. III OF 1872, S. 3, AS AMENDED BY REG. III OF 1899, S. 3; IN THE ARAKAN HILL DISTRICT (EXCEPT SS. 329 AND 330 AND THE SCHEDULE), BUT NOT SO AS TO AFFECT NATIVE CHRISTIANS, REG. IX OF 1874, S. 3; IN UPPER BURMA (EXCEPT THE SHAN STATES), ACT XIII OF 1898, S. 4; IN BRITISH BALUCHISTAN, REG. I OF 1890, S. 3.]

See ADMINISTRATOR.

See EXECUTOR.

See HINDU WILLS ACT, 1870.

See LETTERS OF ADMINISTRATION.

See PROBATE.

See PROBATE AND ADMINISTRATION ACT, 1881.

See WILL.

(1)—*Applicability of.*—The Indian Succession Act, 1865, while to a large extent embodying the rules of the English law, yet departed in many particulars from those rules, and was not only made applicable to persons of European descent, or those to whom the system derived from the Ecclesiastical Courts might naturally be applied, but was made the law for all persons in British India other than Hindoos, Mahomedans and Buddhists, including for instance, the Parsees who form so important a part of the community in some districts of India. MIRZA KURRATULAIN v. NAWAB NUZHAT-UD-DOWLA, **7 Bom. L.R. 876=9 C.W.N. 938=1 C.L.J. 594, P.C.=33 C. 116=15 M.L.J. 336=2 A.L.J. 758=32 I A. 244=8 Sar. 839.**

Succession Act (X of 1865)—*continued.*

(2)—*Illegitimacy—Scope of Act.*—The Succession Act does not say anything about illegitimate persons. DE MOLLO v. BROUGHTON, **11 B L.R. App. 6.**

(3)—*Relationships contemplated by the Act—Illegitimate children outside the scope of the Act—Gift of the residue to such charities as the trustees may think deserving.*—The relationships contemplated by the Indian Succession Act, 1865, are only those flowing from lawful wedlock. The gift, by a will, of the residue to "such charities as the trustees may think deserving" is a good gift, the objects being wholly charitable. SMITH v. MASSEY, **8 Bom. L.R. 322=30 B. 500.**

(4)—*Native Christians*—The Indian Succession Act governs the succession in Native Christian families; since the passing of that Act, such families have not been at liberty to adhere to the Hindu Law of succession. Right to ancestral property before Succession Act—alteration. A member of a Native Christian family, observing the Hindu Law of succession till the enactment of the Succession Act of 1865, and acquiring an interest in the ancestral property at his birth, will not be deprived of that right, by virtue of the subsequent Act. PONNUSAMI NADAN v. DORASAMI AIYAN, **2 M. 209.** [*F.*, 9 M. 466; *Cons.*, 10 M. 69, 129 P.R. 1889, U.B.R. 1897—1901, Vol.II, 488; *R.*, 31 C. 11.]

(5)—*Inheritance—Succession of daughter among Native Hindu converts to Christianity—Hindu law—Custom—Object and meaning of Act* XXI *of* 1850—*Punjab Laws Act*, IV *of* 1872, *ss.* 5 *and* 6—*The Indian Partition Act* IV *of* 1893. *What is partition—Partition of business not allowed on equitable grounds—In partition of immoveable property when only money decree allowable*—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 561—*When no right of cross appeal.*—F, a Bengali Hindu convert to Christianity, died in 1888, leaving G, H, and E. his three sons, M daughter, and P a son of his predeceased daughter C. In 1889, E also died. The estate of F consisted of two houses and a business styled George Alfred and Co., which included a Medical Shop, a Press, and a Soda Water Factory. M was maintained and educated by her brothers with whom she lived until her marriage in 1897. In 1899, M attained majority, and in 1902 she claimed ¼ share of F's estate, under Indian Succession Act X of 1865. Her claim was resisted solely by G whose principal pleas were:—(*a*) The business belonged to him exclusively. (*b*) The Indian Succession Act was not applicable. (*c*) By family custom M was not entitled to any share. *Held*, that (*a*) all Christians are bound by the provisions of Act X of 1865 in matters relating to succession, whether intestate or testamentary; but also, as pointed in I.L.R., XXXI Bombay, p. 25, this Act does not affect the rights of co-parcenership as between those to whom it applies; (*b*) A Native convert to Christianity, living in this Province, is not

Succession Act (X of 1865)—*continued.*

debarred from either proving that he has adhered to his old personal law as regards inheritance, &c., notwithstanding that he has denounced his original religion, or from establishing any family custom, applicable to the parties, such as, that daughters are excluded from succession by sons, &c., as provided for in s. 5 (*a*) of Act IV of 1872 ; and (*c*) The plain object of Act XXI of 1850 is, not to confer on any party the benefit of the provisions of Hindu or Mahomedan Laws, but, to prevent them from depriving any party or parties of any property, which, but for the operation of such laws, they would be entitled to receive. (9 M. I.A. 195, *F.* ; 63 P. R. 1895, 102 P. R. 1904, Civil Appeal No. 1413 (unreported), 11 A. 100, 4 A. 343, 19 B. 783, *R. & D.*) *Held* also, that, (*a*) although the business is the family property, yet, its division is inexpedient and inequitable, on the ground, that it had been carried on by the sole exertions of G, who had specially qualified himself for the same, and M is to get ¼th price of the whole existing stock ; (*b*) There is absolutely no law or authority now in force independently of the provisions of Act IV of 1893 to justify a money decree in a suit for partition of immoveable property, and M is entitled to get of that property by partition ; (10 C. 675, *D*) ¼ (*c*) Where in a partition case of moveable and immoveable property, a mere money decree is given only in favour of plaintiff in lieu of his share, it is not a decree for partition in favour of all the parties concerned as laid down in 23 P. R. 1905. *Held*, further, that a party accepting the decree of the 1st Court by reason of not appealing, or filing cross-objection, as provided in s. 561, Civ. Pro. Code against it is incompetent to take cross-objection against the said decree in further appeal. *Found*, in this case, not proved, that F continued to attach himself to Hindu society, or to observe Hindu usages, after his conversion. MRS. EDITH SUSAN MUKERJEE v. MRS. GEORGE ALFRED, **52 P.W.R. 1907.**

(6)—*Contingent or executory bequests.*—In regard to contingent or executory bequests, the Succession Act, 1865, has laid down a hard and fast rule, which must be applied, whenever it is applicable, without speculating on the intention of the testator. NORENDRA NATH SIRCAR v. KAMALABASINI DASI, **23 C. 563=23 I.A. 18=6 M.L.J. 71=6 Sar. 667.** [*R.*, 33 C.947 =10 C.W.N. 695=3 C.L.J. 502; *F.*, 3 C.W.N. 478.]

(7)—*Act* X *of* 1865—*Codicil—Execution of codicil appointing executor — Formalities, whether same as in execution of a will.*—A codicil is, according to the definition in Act X of 1865, considered as forming an additional part of the Will, and consequently it must be executed in the same mode as a will; it requires attestation just as a Will, whether altering it or doing anything else. MAJOR S.B. GOAD v. DAVID COLYER, **33 P.R. 1876.**

(8)—*Succession Act* (X *of* 1865), *estate vested in administrator under—Purchaser of share before administration, suit for partition not maintainable by—Administration suit, the proper remedy.*—Where the property of a deceased person becomes vested in his administrator under the Succession Act, it remains in him until he distributes the estate and the widow of the deceased person has no saleable interest in any part of such estate until, in the course of the administration thereof, her share is determined and allotted to her. Till then, the only process, by which a purchaser of the interest of such a widow in the estate can legally obtain such interest, is by a suit for the administration of the entire estate, and to such a suit, the widow, if alive, must be made a party. If she is not alive letters of administration to her estate must first be taken out and the administrator must be made a party. SRIRANGAMMAL v. SANDAMMAL, **23 M. 216=9 M.L.J. 338.**

(9)—This circular prescribes a form, to be submitted quarterly, of all grants of probate and letters of administration made under Part XXXI, Act X of 1865, Cir. No. 32, dated the 28th Sepetember 1867. **8 W.R. Civil Circular Orders, p. 11.**

(10)—*See* BEQUEST, 6 M.L.J. 71, P.C.=23 C. 563=23 I.A. 18.

(11)—*See* BUDDHIST LAW--INHERITANCE, L.B.R. 1872—1892, 402.

(12)—Applicability to Native Christians—*See* CONVERTS, 36 P.R. 1909=1 Ind. Cas. 697.

(13)—*See* DOMICILE, 4 C. 106=2 C.L.R. 496.

(14)—*See* HINDU LAW—WILL, 1 B. 269.

(15)—*See* MAHOMEDAN LAW—WILL, 7 Bom. L.R. 876=9 C.W.N. 938=1 C.L.J. 594, P.C.

(16)—Succession to estate of intestate Native Christian—*See* NATIVE CHRISTIANS, 9 M. 466.

(17)—*See* NATIVE CHRISTIANS, 15 M.L.J. 235.

(18)—Applicability to Native Christians previously following Hindu law—*See* NATIVE CHRISTIANS, 10 M. 69.

(19)—*S.* 2—*General law in British India.*—Since the passing of the Indian Succession Act, 1865, the Courts must look to that Act and that alone, for the law of British India applicable to all cases of testamentary and intestate succession.—The words "applicable to all cases" operate as a repeal of the pre-existing law subject to the exception in the section. DE SOUZA v. THE SECRETARY OF STATE, **12 B.L.R. 423.** [*F.*, 2 C. 208.]

(20)—*Ss.* 2, 3—*Minor—Age of minority—Act* XL *of* 1858.—The definition in the Indian Succession Act of "minor" and "minority" does not apply in cases where a person enters into a contract on his own behalf and not in any representative character under that Act—

Succession Act (X of 1865)—*continued.*

the law in it being applicable to cases of intestate or testamentary succession. SULTAN CHAND v. SMYTH, **12 B.L.R. 358=21 W. R. 221.** [*R.*, 8 C.L.R. 419.]

(21)—*Ss.* 2, 331—*Succession*—"*Hindu*"—*Conversion to Christianity—Dying as Christian—Acquisition of title by adverse possession—Pleading.*—The Indian Succession Act is of universal application in this country, unless a person claiming to be excepted can show that he is specifically excepted from the operation of its provisions. A Hindu, who has embraced the Christian faith and continues to be a Christian up to the time of his death, is not a "Hindu" within the meaning of s. 331, Succession Act, and all questions of succession to his estate upon intestacy are to be determined by the Succession Act. The test to be applied in determining whether the plea of title by adverse possession should be allowed to be urged, though not explicitly raised in the plaint, is, how far is the defendant likely to be prejudiced if the point is permitted to be taken. NEPEN BALA DEBI v. SITIKANTA BANERJEE, **12 C.L.J. 459=8 Ind. Cas. 41.**

(22)—*Ss.* 2, 331—Koli *caste of fisherman—Hindus converted to Christianity—Inheritance—Custom—Evidence.*—The Indian Succession Act (X of 1865) and the rules of inheritance prescribed by it, govern succession among Hindus who have become Christians; and evidence to show that they and the community to which they belong have retained the Hindu custom of inheritance, is inadmissible. DAGREE v. PACOTTI SAN JAO, **19 B. 783.** [*F.*, 15 C.W.N. 158; *D.*, 36 P.R. 1909=52 P.W.R. 1907=1 Ind. Cas. 697.]

(23)—S. 3—*See* No. 20, *supra.*

(24)—S. 4—*Applicability of section.*—Succession Act (X of 1865), s. 4, does not not apply in respect of the moveable property of persons not having an Indian domicile. MILLER v. THE ADMINISTRATOR—GENERAL OF BENGAL, **1 C. 412.** [*Cons.*, 23 C. 506; *R.*, 2 C.L.R. 431.]

(25)—S. 4—*Is of prospective operation.*—The provisions of s. 4 are prospective, and leave rights unaffected, which had already been acquired before the Act was passed. SARKIES v. PROSONOMOYEE DOSSEE, **5 C. 794=8 C.L.R. 76.**

(26)—*S.* 4—*Suit for divorce—Adultery—Wife's right to costs.*—In a suit by the husband for a divorce from his wife on the ground of his wife's adultery, it appeared that the wife had no separate property of her own. *Held* that the wife was entitled to an order that her husband should deposit her costs of the suit. It was also *held* that s. 4 of the Indian Succession Act did not affect the wife's right to costs. BROADHEAD v. BROADHEAD, **5 B.L.R. App. 9.** [*Not F.*, 5 C. 357=5 C.L.R. 1; *F.*, 19 B. 293.]

(27)—*S.* 4—*Marriage settlements in restraint of anticipation—Married Women's Property Act (III of 1874), s. 8—Separate estate of married woman—Preamble—Absolute owner—Husband acquiring interest in property—Retrospective effect—Contract entered into before Act—Contract made after Act—Clause against anticipation in marriage settlement.*—A husband T and wife R, who were married in 1868, after the passing of the Indian Succession Act, executed two joint and several promissory notes, one in 1871 and another in 1872, before the passing of the Married Women's Property Act (III of 1874) in favour of the plaintiff. Under a Marriage settlement, certain property was vested in two persons G and S, upon trust, among other things to pay over the whole of the profits of such trust estate from and after the marriage of T and R to them jointly upon their joint receipt, but in case the husband T should become insolvent, then to the wife R, upon her separate receipt free from the debts or control of T and without power for R to alienate or in any manner anticipate the same; and certain other trust estate was vested in G and S upon trust to pay over the whole of the profits thereof unto and to the use of R for and during the term of her natural life for her separate use and free from the debts or control of the husband T, without power of anticipating or alienating the same. Plaintiff sued the husband and the wife and the trustees of the wife's marriage settlement on the said two pro-notes and prayed *inter alia*, that the trustees might be directed to pay to the plaintiff the suit amount out of the income of the said trust fund. *Held* that s. 4 of the Indian Succession Act did not prevent the operation of the clause in the marriage settlement in restraint of anticipation, such restraint being created not by the marriage but by the settlement. The Legislature, when using the words "absolute owners" in the proamble of Act III of 1874 did not intend to make a declaration which would have the effect of extending the provisions of s. 4 of the Indian Succession Act. It was intended to describe the legal effect of s. 4, and the word 'absolute' is used with reference to the husband not acquiring any interest in the property. [*R.*, 11 B. 348, 30 M. 378=17 M.L.J. 363=2 M.L.T. 322.] Act III of 1874 has not retrospective effect, and is not intended to affect contracts made before the passing of the Act, and to alter the rights of persons or the obligations arising out of them. *Obiter:*—Where a contract is made after Act III of 1874 came into operation, there will be a remedy against the separate property of the wife, although there is a clause against alienation or anticipation in the marriage settlement. PETERS v. MANUK, **13 B.L.R. 383=22 W. R. 175.** (*Sanger* v. *Sanger*, L. R. 11 Eq. 470, *R.*)

(28)—S. 4—*See* ACT IV OF 1869, 5 C. 357=5 C.L.R. 1.

(29)—S. 4—Wife with English domicile—Suit without joining husband—*See* PARTIES TO SUIT—GENERAL, 15 C. 35.

(30)—*Ss.* 4, 44—*Person with English domicile marrying wife with Indian domicile—Succession to moveable property of wife.*—

Succession Act (X of 1865)—*continued.*

Where a marriage between a person whose domicile is English and another whose domicile is Indian has been effected, on the death of the wife, the husband has the right to succeed to the whole of his wife's moveable property to the exclusion of her next of kin. (1 C. 412, *Cons.*) Ss. 4 and 44 read together should be understood as laying down a general rule as to the immediate effect of marriage on moveable property belonging to each or either of the married persons not comprised in an ante-nuptial settlement, and not as laying down a rule intended to affect the law of succession. HILL v. ADMINISTRATOR-GENERAL OF BENGAL, **23 C. 506.**

(31)—*S.* 5—*See* FOREIGN STATE, 11 C. 17.

(32)—*S.* 23—*Amendment of probate—Succession Act, s.* 23.—Amendment of error in probate allowed. *In the goods of* J. WHITE, **4 C. 582.**

(33)—*Ss.* 25, 46, 105—*Converts—Co-parcenership between persons converted from the Hindu religion — Difference between co-parcenership and inheritance.*—Parcenership can be a part of the law governing the rights of a Christian family converted from the Hindu religion. The Indian Succession Act, 1865, deals with the *devolution* of rights on intestacy; it does not purport to enlarge the category of heritable property. The act does not affect rights of co-parcenership as between those to whom it applies. The difference between co-parcenership and inheritance is radical. In the case of inheritance property devolves on death, it survives in, the case of co-parcenership; on inheritance new rights are acquired, on survivorship the enjoyment of existing rights is increased by the removal of one from the body of co-sharers. FRANCIS GHOSAL v. GABRI GHOSAL, **8 Bom. L.R. 770=30 B. 33.**

(33-*a*)—S. 44—*See* No. 30, *supra.*

(33-*b*)—S. 46—*See* No. 33, *supra.*

(34)—*S.* 47—*Hindu wills—Power of a Hindu father to appoint a testamentary guardian of his minor son by his will.*—S. 47 of the Indian Succession Act being not applicable to Hindu wills, a Hindu father has no statutory power to appoint a guardian to his son after his death. BUDHILAL v. MORARJI, **9 Bom. L.R. 553=31 B. 413.**

(35)—*S.* 48—*Application to set aside will—Undue influence—Burden of proof—Law applicable to wills.*—The *onus probandi* lies, in every case, on the party propounding a will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. If a person writes or prepares a will under which he takes a benefit, that is a circumstance, which ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce, unless the suspicion is removed and it is judicially satisfied that the paper propounded does express the true will of the deceased. MR. CECILLA KING v. ARTHUR ABREU, **5 L.B.R. 1909, 141.**

(36)—*S.* 48—*Undue influence, what constitutes—Will of a Mahomedan.*—As to what constitutes undue influence in this country a useful guide is afforded by s. 48 of the Indian Succession Act. It is true that that section does not apply to the Wills of Mahomedans, but still it is a useful guide for all as to what does or does not constitute undue influence. KHAS MEHAL v. THE ADMINISTRATOR-GENERAL OF BENGAL. **5 C.W.N. 505.**

(37)—*S.* 48 (*g*)—*Will procured by wife's importunity—Undue influence.*—Where a wife persuades her husband to make a will in her favour, but the influence which she exerted on the testator was not such as to deprive him of the exercise of his judgment and volition, the wife's conduct does not amount to undue influence as defined in the Indian Succession Act. MORISON v. THE ADMINISTRATOR-GENERAL OF MADRAS, **7 M. 515.**

(38)—*S.* 50—*Difference between signing and affixing the mark—Impression of facsimile of testator's signature on will — Validity.*—The word "signing" means the writing of the name of a person so that it may convey a distinct idea to somebody else that the writing indicates a particular individual whose signature or sign it purports to be. A "mark" is a mere symbol and does not convey any idea to a person who notices it, often even to the person who makes it. The impression of the *facsimile* of a testator's signature on his will by some other person in the presence and by the direction of the testator is not the making of a mark, but really the affixing of the name to the document. It comes strictly within the meaning of the words used in s. 50, Act X of 1865. The use of pen and ink is not necessary for signing. NIRMAL CHUNDER BANDOPADHYA v. SARATMONI DEBYA, **25 C. 911=2 C.W.N. 642.** (11 W.R. Eng., 854, *Appl.*)

(39)—*S.* 50, *Testator's acknowledgment of his signature — Effect on will — Attestation.*—A testator's signature at the commencement of the will, when the witnesses signed the same, and the fact of his admission to several of the witnesses that the paper signed by them is his last will and testament, amount to a sufficient acknowledgment of his signature to his will. The fact that the witnesses have not seen him sign it or observed any signature to the paper attested by them, will not affect the acknowledgment of signature by the testator. (1 B. 547, 6 C. 17, 11 C. 429, *F.*) There is sufficient attestation and the requirements of s. 50, Succession Act, are satisfied, if the will is registered by the testator, and on the back of the will is the signature of the testator to the certificate of admission of execution, testified to by the signature of the Sub-Registrar and of one of the attesting witnesses. AMARENDRA NATH CHATTERJEE v. KASHI NATH CHATTERJEE, **27 C. 169.** [*R.*, 4 O.C. 408.]

Succesion Act (X of 1865)—*continued.*

(40)—*S.* 50—*Will—Attestation*—When the testator does not himself sign, but some other person signs in his presence and by his direction, then, besides this other person, who has so signed at the request of the testator, there must be two witnesses who should sign the will in the presence of the testator. *In the matter of the petition of* HEMLOTA DABEE, **9 C. 226.**

(41)—*S.* 50—*Attestation of Will—Sufficient attestation under the section, what would be.*—The two attesting witnesses to a will, must, under s. 50 of the Succession Act, sign their names *after* the testator shall have executed the will. (5 C. 738, 3 B. 382, *F.*) [*F.*, 27 C. 169; *R.*, 11 C.L.R. 359, 9 C. 226.] If, on admission by a testatrix of her signature on the will before a Registrar of Assurances and on her identification before the Registrar by one of the attesting witnesses, both the Registrar and identifying witness sign their names as witnesses to the admission, it would be sufficient attestation under s. 50 of the Succession Act. HURRO SUNDARI DABIA v. CHUNDER KANT BHUTTACHARJEE, **6 C. 17 =6 C.L.R. 303.** (1 C. 150, *F.*) [*F.*, 11 C. 429, 16 C. 19, 27 C. 169; *R.*, 4 O.C. 408; *Doubted*, 76 P.L.R. 1905.]

(42)—*S.* 50—*Attestation of will—Attesting witnesses must sign after testator.*—The signatures of the attesting witnesses to a will, required by s. 50 of Act X of 1865, must be affixed after the testator has signed or affixed his mark. *Quære.*—Whether a marksman can attest a will? BISSONATH DINDA v. DOYARAN JANA, **5 C. 738=5 C.L.R. 565.** (3 B. 382, *R.*)

(43)—*S.* 50—*Attestation and subscription—Signature.—Signature by mark—Attestation.*—One of the attesting witnesses to the will of a British born subject who died in India possessed of personal property was a native servant of the testator, who, at his attestation, wrote some words in the Persian character of which the translation was "This is Mr. Wynne's signature," without any signature or mark. On an application for probate of the will: *Held* that the servant of the testator did not write the Persian words with the intention at the time that those words or any of them, should be considered as his signature or mark and that those words would not be considered a sufficient subscription of the will. (*In the Goods of Maddock*, L.R. 3 P. & M. 169, *R.*) A signature by mark would be a sufficient signature by a witness even under the Indian Succession Act, as it would be under the English Act. *In the goods of* WYNNE, **13 B.L.R. 292.** [*Diss.*, 11 C. 429.]

(44)—*S.* 50—*Will—Attestation by witnesses, valid, mode of.*—S. 50 of the Indian Succession Act, prominently makes a marked distinction between the action of the testator and that of the witnesses, as regards the mode of their respective signatures; so that the direction therein contained regarding the signing of a will by witnesses is not satisfied by their affixing their marks, but they must sign, to give validity

Succession Act (X of 1865)—*continued.*

to their attestation. (13 B.L.R. 392, *dissented from*, and 3 B. 382, *F.*) Where, on a presentation of a will by a testator before Registrar, the testator admits his signature on it and is identified before the Registrar, and both the Registrar and the identifier sign on the will, testifying to the testator's admission of his signature, it would be sufficient attestation under cl. 3 of s. 50 of the Indian Succession Act. NITYE GOPAL SIRCAR v. NAGENDRA NATH MITTER, **11 C. 429.** (6 C. 17, *F.*) [*Doubted*, 15 M. 261; *D.*, 1 N.L.R. 14; *F.*, 27 C. 169; *D.*, 26 C. 246; *R.*, 16 C. 19.]

(45)—*S.* 50—*Will—Attestation—Strict proof not necessary.*—To prove the due execution of a will for the purposes of getting probate of it, strict affirmative proof of due attestation is not absolutely necessary, and if, from the circumstances, the Court can reasonably come to the conclusion that the will has been duly attested, probate may be granted. (*Wright* v. *Sanderson*, L. R. 9 Pro. Div. 149, *R.*) *Held* upon the evidence in this case that the will was duly attested in accordance with law. SIBO SUNDARI DEBI v. HEMANGINI DEBI, **4 C.W.N. 204.**

(46)—S. 50—Witnesses not signing in testator's presence—Will invalid—*See* COURT FEES ACT, 1870, sch. II, arts. 1, 11, 9 M.L.T. 314=21 M.L.J. 481=9 Ind. Cas. 538.

(47)—S. 50—*See* EVIDENCE ACT, 1872, s. 115, 4 O.C. 408.

(48)—S. 50—*See* HINDU LAW—WILL, 74 P. R. 1891.

(49)—S. 50—Provision as to attestation, whether applies to other Acts—*See* TRANSFER OF PROPERTY ACT, 1882, s. 59, 3 M.L.T. 300=18 M.L.J. 219=31 M. 250.

(50)—*S.* 50, *cl.* (3)—*Will—Acknowledgment of signature by testator—English Wills Act* (I *Vic., Cap.* 26), *s.* 9.—If a testator produces a paper and makes the witnesses understand that it is his will, that is an acknowledgment of his signature, if the Court is satisfied that his signature was on the will when the witnesses attested it. It is not essential that the witnesses should see him sign it, or that they should observe any signature on the paper which they attest. (*Cooper* v. *Bockett*, 4 Moore P.C. 419; *G. Willim* v. *G. Willim*, 2 Sw. & Tr. 200; *Smith* v. *Smith*, L.R. 1 P. & D. 143; *Bockett* v. *Howe*, L.R. 2 P. & D. 1. *R.*) The provisions of the English Wills Act (I Vic. Chap. 26), s. 9 with regard to the acknowledgment by the testator of his signature to his will, are substantially the same as those of the Indian Succession Act (X of 1865) s. 50. MANICBAI v. HORMAS BOMANJI, **1 B. 547.** [*F.*, 27 C. 169.]

(51)—*S.* 50, *cl.* 3—*Will, proof of execution of*—When a document which on the face of it purports to have been executed as a will and attested, is proved to have been duly executed in the presence of witnesses in the assembly,

Succession Act (X of 1865)—*continued.*

the presumption, in the absence of evidence to the contrary, is that the requirements of attestation under s. 50 of the Act were satisfied. To raise this presumption, it is not necessary that there should be a regular attestation clause. NITAI CHAND SAHA BANIKIYA v. NAGANI DASSYA, **10 C.L.J. 499=3 Ind. Cas. 427.** (4 C.W.N. 204, *F.*)

(52) *Ss.* 50, 261, 263—*Grant of letters of administration*—"*Order*"—"*Decree*"—*Will, execution of. Mark of testatrix affixed with the assistance of one of the witnesses.*—*Held* that an appeal from an order of a District Judge granting letters of administration under Act No. X of 1865 was properly brought as a first appeal from an order. *Held*, also that where one of the witnesses to a will held and guided the hand of the testatrix while she was affixing her mark by way of signature to the will, this was not an affixing of the mark of the testatrix by the witness so as to disqualify him from being a witness within the ruling in 11 B.H.C. 87. ARTHUR LANE v. HEDEYAT-UL-LAH KHAN, **A.W.N. 1895, 127.** (11 B.H.C. 87, *D.*)

(53)—*S.* 54—*Bequest—Attesting witness—Validity of.*—Under s. 54 of the Indian Succession Act, a bequest, made to an attesting witness or his wife by a will, is void, though the attestation of the witness is not indispensable. THE ADMINISTRATOR-GENERAL v. LAZAR STEPHEN, 4 M. 244.

(54)—S. 56—Doctrine of implied revocation—Applicability to Hindu wills—*See* HINDU LAW—WILL, 16 M.L.J. 491.

(55)—Ss. 56 and 57—Revocation of will—English Law—*See* HINDU LAW—WILL, 17 M.L.J. 269=30 M. 369=2 M.L.T. 242.

(56)—S. 57—*See* No. 55, *supra.*

(57)—*S.* 58, *Hindu will, unattested alterations in—Letters of administration.*—Having regard to the terms of s. 58 of the Indian Succession Act which is made applicable to Hindus by the Hindu Wills Act, if some subsequent alterations, which were unattested, were made in a will properly attested, by the testator in the presence of the Registrar, those alterations should have been attested, like the will itself, by two persons signing in the presence of the testator. So letters of administration in the above case should issue, not with the copy of the will, but with the copy of the will without the alterations. RAGHUBAR DYAL v. RAM RAKAN LAL, **1 C.W.N. 428.**

(58)—*S.* 58—*Application for probate of will wherein pencil alterations made before execution—Photographic* facsimile *of will attached to probate—Practice.*—On an application for probate of a will wherein the testator had made certain pencil alterations before execution, the Court directed that a photographic *facsimile* of the will, taken in the presence of the Registrar and of the executors, be attached to the probate, as the pencil alterations were likely to fade away in course of time (*Gaun* v. *Gregory*, 1854, 3 De G.M. & G. 777; *Shea* v. *Boschetti*, 1854, 18 Beav. 321, *Relied on*; *In the goods of Hall*, 1871, L.R. 2 P. & D. 256, *D.*) The provisions of s. 58, Act X of 1865, do not apply to this case. *In the goods of* BROUGHTON, **29 C. 311=6 C.W.N. 477.**

Succession Act (X of 1865)—*continued.*

(59)—*Ss.* 58, 242—*Will—Unattested alterations prior to execution—Effect—Amendment of s.* 242 *by s* 2 *of Act* VIII *of* 1903—*Jurisdiction of District Judge—Effect upon.*—S. 58, Act X of 1865, has no application to unattested alterations made in a will prior to its execution. Where the alterations are in themselves of no importance and were evidently intended to merely make the terms of the will more explicit and formal:—*Held*, that the alterations may be left out of account, the intention of the will having been perfectly clear even without them and being not affected by them, and that they did not invalidate the will. The effect of the amendment of s. 242 of Act X of 1865 by s. 2 of Act VIII of 1903 is to give the District Judge jurisdiction to grant probate, but he will have to certify that the value of the property and effects affected beyond the limits of the province does not exceed Rs. 10,000. NAGENDRA NATH BANERJEE v. P. N. BANERJEE, **21 P. R. 1913=19 Ind. Cas. 692=221 P.L.R. 1913.**

(60)—*Ss.* 62, 164—*Will—Construction—Extrinsic evidence.*—A clause in a will ran as follows:—"My trustees shall give to my brother Pestonji Framji Mistry, Rs. 1,500, namely, fifteen hundred, without interest, and they shall get him to vacate the place in my house which he now occupies." The testator was indebted to the legatee in a sum of Rs. 1,500 which did not bear any interest; and in lieu of interest the legatee was residing in the house at a reduced rent. In a suit by the legatee to recover Rs. 1,500 given to him by the will, the trustee contended that it appeared from the will that that was not an ordinary bequest, but was intended to be no more than the satisfaction of the debt owed by the testator. This fact was sought to be proved by conclusive evidence of three facts; (1) that the testator owed the legatee Rs. 1,500; (2) that that sum was not carrying interest; and (3) that in lieu of interest the legatee was residing in the house, referred to in the clause at a rent reduced in proportion to what would otherwise have been interest on Rs. 1,500:—*Held*, that no extrinsic evidence, under s. 62 of the Indian Succession Act, could be let in to construe the clause, which, though in an unusual form, had no uncertainty or ambiguity about it. There was no possibility of any ambiguity about the person to be benefited; for the testator had directed his trustees to give to the plaintiff, naming him, a definite sum of money. Nor was there any ambiguity about the property to be given, which was Rs. 1,500. S. 62, Succession Act, empowers Courts to avail themselves of extrinsic evidence for the purpose of determining questions as to what person or what property is denoted by any words used in a will. Where there is an ambiguity in the language used by the testator, the Judge is

Succession Act (X of 1865)—*continued.*

entitled by the use of extrinsic evidence to put himself in the testator's shoes or seat himself in the testator's chair. But where the testator has left no uncertainty as to the person to be benefited and the property by which the benefit is to be conferred, the Judge is precluded from going outside the actual words used by the testator. Where the language of the will presents no ambiguity, the Judge ought not to imagine ambiguity in its application to different sets of existing facts, and so to initiate an inquiry into those facts. PESTONJI FRAMJI MISTRI v. FRAMJI BEJANJI BILLIMORIA, **12 Bom. L.R. 863=8 Ind. Cas. 180.**

(61)—*Ss.* 62, 164, 292—*Probate and Administration Act, s.* 112—*Satisfaction—Legacy given by the testator—Debt due by the tesator—Suit by legatee—Assent of executor—Khoja Mahomedan—Will—Hindu Law.*—S. 164, Succession Act, abolishes the doctrine of satisfaction. Although the Act does not apply to Hindus, Mahomedans and Buddhists, it cannot be doubted that it was the intention of the Legislature, to announce what they considered to be a generally correct principle of interpretation universally applicable unless overridden by some special provision of local law or usage. S. 112 of the Probate and Administration Act corresponding with s. 292 of the Succession Act, *criticised. Quære.*—Whether a Khoja Mahomedan is, for all testamentary purposes, to be treated as though he were a Hindu governed by Hindu Law. HASANALLI MOLEDINA v. POPATLAL PARBHUDAS, **14 Bom. L.R. 782=17 Ind. Cas. =37 B. 211.** (6 Bom. L.R. 601, 29 B. 133, *Criticised.*)

(62)—*S.* 78—*Will—Power of appointment—Appointment by general bequest—Power created after will.*—A general power of appointment may be exercised by will executed previously to the creation of the power and that too by mere residuary gift. DINSHAW v. DINSHAW, **9 Bom. L.R. 488=31 B. 472.**

(63)—*S.* 80 — "*Without any qualifying terms.*"—*Meaning of.*—The expression "without any qualifying terms" in s. 80 of the Succession Act, 1865, refers to the bequest and not to the relations. PESTONJI v. KHURSHEDBAI, **7 Bom. L.R. 207.**

(64)—Ss. 80, 81, 83, 84—*See* SHELLY'S CASE, RULE IN, 1 Bom. L.R. 393.

(64-*a*)—S. 81—*See* No. 64, *supra.*

(65)—S. 82—*See* HINDU LAW—GIFT, 5 C.W.N. 300.

(66)—S. 82—*See* HINDU LAW—WILL, 10 Bom. L.R. 604=12 C.W.N. 729=35 C. 896=5 A.L.J. 460=18 M.L.J. 287=8 C.L J. 48=35 I.A. 118, P.C.

(67)—Ss. 82, 93—*See* HINDU LAW—WILL, 24 C. 646=1 C.W.N. 578.

(68)—*Ss.* 82, 111—*Life estate—Estate of inheritance—Executory gift over.*—A testator left an adopted son and gave authority to his widow to take three sons in adoption one after the death of another. The will contained a provision that the adopted son shall succeed to the estate on the death of the testator, and that, on the death of one adopted son and until the adoption of another son the estate shall remain in the ownership and possession of the widow as ordinary heir, the estate to vest in the adopted son immediately on adoption: *Held*, that the adopted son would take not a life interest but an estate of inheritance, subject to a condition of defeasance. *Held*, also, that the executory gift over did not take effect. MANIKYAMALA BOSE v. NANDA KUMAR BOSE, **4 C.L.J. 357. = 33 C. 1306=11 C.W.N. 12.** (23 I. A. 18, *Appl.*) [*R.*, 4 Ind. Cas. 386=7 M.L.T. 236.]

(69)—*Ss.* 82, 111, 125—*Testator—Will—Absolute gift—Subsequent provisions making the gift defeasible on happening of certain events—Non-happening of those events—Gift remains absolute — Executory bequest—Distribution—Parsi Law*—Palak *son.*—By his will, a testator provided that his two sons P and J, were "proprietors half and half alike and in equal shares" of his whole estate (cl. 2). The further clauses of the will provided that none of the heirs had power to alienate the property in any way; and that,if any heir carried on any trade which resulted in loss, the risk of it was to be on that heir (cls. 3, 8). P, the elder of the two sons, having been of weak intellect, the testator by his will provided that his younger son J was to look after the whole estate and both the heirs were to equally enjoy half and half alike the whole estate. If P had a son born to him, half of the estate was to be made over to him on his attaining full age. If he had no son born to him, then J was directed to give away his son as *palak* to the former, and all the clauses of the will were made applicable to the *palak* son. P died without having a natural son ; and on the third day after his death, J gave his own son B as *palak* to P, a dispute having arisen between the *palak* and the heirs of P about his share in the estate :—*Held*, (1) that, under cl. 2 of the will, each of the two sons P and J took an absolute estate in the moiety of the testator's property, (2) that the restrictions on the powers of enjoyment (cls. 3, 8) having been repugnant to the absolute gift already made under cl. 2, were invalid and inopertive under s. 125 of the Indian Succession Act. (3) That, though the absolute estate given to P was made defeasible in the event of his having a son and that son attaining majority, the absolute gift became indefeasible inasmuch as that event did not happen. (4) That there was no legacy given to B as *palak*, either as a *persona designata* or as a *palak* son. (5) That, even assuming that there was an executory bequest to the *palak* son, the bequest was void under s. 111 of the Succession Act. JEHANGIR DADABHAI v. KAIKHUSRU KAVASHA, **13 Bom. L.R. 141.**

(70)—Ss. 82, 116—*See* HINDU LAW—WILL, 12 C.W.N. 729, P.C. = 35 C. 896=35 I.A. 118=4 M.L.T. 23=18 M.L.J. 287=5 A.L.J. 460=10 Bom. L.R. 604=8 C.L.J. 48.

Succession Act (X of 1865)—*continued.*

(71)—Ss. 82, 187—*See* HINDU LAW—WILL, 3 Ind. Cas. 475.

(71-*a*)—S. 83—*See* No. 64, *supra*.

(71-*b*)—S. 84—*See* No. 64, *supra*.

(72)—*Ss.* 90, 94—*Will—Bequest in favour of testator's children "or the survivors or survivor of them"—Attestation of will by one of them—Residuary bequest in favour of widow—Death of widow—Right of non-attesting children—Applicability of doctrine of acceleration.*—A testator directed that the interest of all his moneys in any Bank in fixed deposits and also the interests on all his Railway shares be enjoyed by his wife for life, and that, after the death of his wife, the deposits and the shares "be divided into equal shares between my three children, James Joseph Barefoot, Cornelius Barefoot, and Florence Dinah Barefoot, or the survivors or survivor of them." James Joseph Barefoot was appointed a trustee under the will. Then there was a residuary bequest in these terms: "and as to the residue of all my estate, I will and devise to my wife all my property except the fixed deposits and Railway shares aforesaid, together with all property not hereinbefore referred to, for her sole use and benefit and to be disposed of as she may think fit and proper." James-Joseph Barefoot was an attesting witness to the will. On the death of the widow, Florence sued for a declaration that James Joseph was incapacitated from taking under the will and that she was entitled to the moiety of the property bequeathed. *Held* that, as James Joseph Barefoot was an attesting witness to the will, the bequest to him was void under the provisions of s. 94 of the Succession Act. The effect of the words "or the survivors or survivor of them" was, in the circumstances of the case, to take the case out of the ordinary rule that a legacy lapses where the legatee dies during the lifetime of the testator. The doctrine of acceleration did not apply as Cornelius and Florence did not survive James Joseph. The shares of James Joseph therefore fell into the residue and did not go to Cornelius and Florence. CAMANI v. BAREFOOT, **26 M. 433.**

(73)—Ss. 90, 100, 102 and 103—*See* HINDU LAW—WILL, 15 B. 326.

(74)—*Ss.* 90, 105—*Charitable gifts—Hospitals, gifts to—Corporate bodies—Property subject to trust incapable of taking effect.*—Charitable gifts to hospitals, which are recognised as existing public institutions, are good charitable gifts, provided always, when the Succession Act applies, that the provisions of s. 105 as to registration and deposit are complied with. To validate such a gift it is not necessary that the institution to be benefited should be a corporate body; it is sufficient if there be some responsible authority charged with the general administration of the funds of the institution. Under s. 90 of the Succession Act, property which is the subject-matter of a trust which is incapable of taking effect, *prima facie* falls into the residue, and it can only be prevented from doing so by the express directions of the testator. FANINDRA KUMAR MITTER v. THE ADMINISTRATOR-GENERAL OF BENGAL, **6 C W.N. 321.** (L.R. (1893), 3 Ch. D. 348, L.R. (1883), 23 Ch. D. 218, *R.*)

(75)—Ss. 92, 96—*See* HINDU LAW—WILL, 24 M. 299.

(76)—*Ss.* 92, 96, 128—*Will of Hindu in City of Madras - Legacy to son—Appointment of son as executor—Death of son during lifetime of testator leaving issue - Right of issue to claim legacy.*—S. 96 of the Indian Succession Act can only apply to a case where the legatee predeceases the testator, whether he has been named an executor or not. S. 128 implies that the executor survives the testator. It cannot apply to a case where the executor predeceases the testator. And it does not affect the case contemplated by s. 96. A Hindu in the City of Madras executed a will giving a legacy in favour of her son and appointing the son her executor. The son predeceased his mother, leaving a son behind. *Held* that, as s. 128 is absolute and applies only if the son survived and refused to act as executor, the legacy in favour of the testatrix's son did not lapse on account of the predecease of the son during his mother's lifetime but enured to the benefit of the grandson of the testatrix. RAMASAMY IYAH v. KUPPUSAMY IYAH, **13 M.L.J. 351.**

(77)—S. 93—Presumption in favour of joint tenancy—*See* GIFT, 7 M.L.T. 379=6 Ind. Cas. 7=20 M.L.J. 377=M.W.N. 1910, 74=34 M. 80.

(78)—S. 93—*See* No. 67, *supra*.

(79)—S. 94—*See* No. 72, *supra*.

(80)—*S.* 96—*Act* XXI *of* 1870 (*Hindu Wills*)—*Tagore case.*—Where a testator gave a legacy to his son's daughter, who, however, died during the lifetime of the testator, leaving an only child who survived the testator, *held* that the child could recover the legacy left to her mother (the legatee), as the latter was in point of law, within the meaning of s. 96, Succession Act, a person in existence at the death of the testator, because a lineal descendant of hers survived the testator. The rule in the Tagore case, when it speaks of a person being in existence in the contemplation of *law*, refers not to the Hindu Law, but to general principles of jurisprudence. JITU LAL MAHTA v. BINDA BIBI, **16 C. 549.**

(81)—S. 96—*See* Nos. 75, 76, *supra*.

(82)—*Ss.* 96, 321—*Wills executed by Hindus, interpretation of—Justice, equity and good conscience.*—In interpreting a will executed by a Hindu, the lower appellate Court applied the provisions of s. 96 of the Act. *Held*, that, under s. 331 of the Succession Act, the provisions of the Act did not apply to wills executed by Hindus in Oudh. RAM KISHEN SINGH v. SRIPAL, **9 O.C. 159.**

(83)—S. 98—*See* ACT XXI OF 1865, 7 Bom. L.R. 207.

Succession Act (X of 1865)—*continued.*

(84)—*Ss.* 98, 101, 102—*Residuary gift in a will—Vested interests—Postponement of distribution.*—Where a testator gave his residuary estate to trustees in trust for his nephews and nieces, to be paid in certain proportions and at certain times, with benefit of survivorship between and among them, it was held, on a claim, as upon on intestacy, on the allegation that the residuary gift under the will was void for remoteness under ss. 101 and 102, that, on a construction of the will, the legatees took vested interests, subject to be divested on death before the contingencies in the will happened, that the will only postponed the distribution and that the legacies were, therefore, valid. *Semble*:—S. 98 applies only to vested interests. MASEYK v. FERGUSSON, **4 C. 304.** [*R.*, 6 A. 583.]

(85)—S. 100—*See* No. 73, *supra.*

(86)—*S.* 101—*Rule against perpetuity.*—One of the clauses of a will ran: "As to my other property which there is, that is, the property situated on the east side of the house of my step-brother, I give the same to my younger son Chiranjivi Mahadev for his life. He shall have no authority either to mortgage or to sell the said property. He shall only receive the income of the said property and I give the property after his death to his son or to his sons in equal shares should there be (any such son or sons). In case he leaves no son behind him by Mukhtyars shall get a son adopted by his wife and thus perpetuate his name. And they shall give the said property to him on his attaining the age of twenty-one years." *Held*, on a construction of the above clause, that the bequest in favour of a sod of Mahadev who might be adopted at any time after Mahadev's death by a widow who might not have been living at the testator's decease was void under s. 101 of the Indian Succession Act, 1865. KASHINATH v. CHIMNAJI, **8 Bom. L.R. 268 = 30 B. 477.**

(86-*a*)—S. 101—*See* No. 84, *supra.*

(87)—Ss. 101, 102—Disposition of residuary estate—Construction of ss. 3 and 4 of the Hindu Wills Act—*See* HINDU WILLS ACT, 1870, ss. 3, 4, 4 M.L.T. 306.

(88)—Ss. 101, 102, 159—*See* HINDU LAW—WILL, 20 B. 450.

(89)—*S.* 102—*Gift to a class—Some of whom cannot take—Effect.*—Where there is a gift to a class and some persons constituting such class cannot take in consequence of the remoteness to the gift or otherwise, the whole bequest must fail. A gift by a Hindu to a person not ascertained or capable of being ascertained at the time of the death of the testator cannot take effect; therefore, the gift, to the unborn male issue of the son and grandsons of the testator must fail. A Hindu cannot under any circumstances make a gift by will to an unborn person or persons. SRIMATI BRAMAMAYI DASI v. JAGES CHANDRA DUTT, **8 B.L.R. 400.** (4 B.L.R.O.C. 103, *F.*) [*Not F.*, 12 C. 663; 32 C. 992=9 C.W.N. 749=1 C.L.J.482; *F.*, 3 Bom. L.R. 857=26 B. 449; *R.*, 12. M. 393.]

Succession Act (X of 1865)—*continued.*

(90)—S. 102—*See* Nos. 73, 84, 87, 88, *supra.*

(91)—S. 103—*See* No. 73, *supra.*

(92)—*S.* 105—"*Relative,*" *meaning of—Death of testator leaving widow—Bequest for charitable uses—Validity.*—A testator died two days after bequeathing certain property to charitable uses. He left a widow surviving him. The question was whether the bequest was valid. *Held* that the term "relative" in s. 105 of the Succession Act referred to kindred only as set forth in the table of consanguinity annexed to s. 24 of the Act and had no application to any relationship by marriage. Consequently, the bequest was not invalid by reason of the existence of the widow. ADMINISTRATOR GENERAL OF MADRAS v. SIMPSON, **26 M. 532.**

(93)—S. 103—*See* No. 73, *supra.*

(93-*a*)—S. 105—*See* Nos. 33, 74, *supra.*

(94)—S. 106—*See* ACT XXI OF 1865, 7 Bom. L.R. 207.

(95)—S. 107—*See* REGISTRATION ACT, 1908, ss. 17, 18, 21, 25 and 77, 7 Bom. L.R. 742=30 B. 304.

(96)—*S.* 111—"*Time is mentioned for the occurrence of the event,*" *meaning of—Construction—Gift over void—Estate taken is absolute.*—Where a will fixes the nearer limit of time beyond which the specified uncertain event is to happen, but does not fix either any definite point of time at which or any further limit of time within which that event is to happen, it does not amount to the mentioning of time for the occurrence of that specified uncertain event within the meaning of s. 111 of Succession Act. [*D.*, 33 C. 947=10 C.W.N. 695=3 C.L.J. 502.] S. 111 of the Succession Act does not embody simply a rule of construction for giving effect to the intention of the testator. It lays down a hard and fast rule regulating the validity of certain classes of contingent bequests, which must be applied wherever it is applicable, without speculating on the intention of the testator. The language of illustrations (*d*) and (*e*) to the section. does not control the meaning of the section (23 C. 563, *F.*) [*D.*, 33 C. 947=10 C.W.N. 695=3 C.L.J. 502.] Where a testator by his will bequeathed a legacy to one K with the proviso that if "after the expiration of nine years from my death, K should die without son or grandson, then M shall get K's properties," and the uncertain event, *viz.*, the death of K without son or grandson did not happen before the expiry of 9 years from the testator's death, *i.e.*, before the period of distribution, *held*, that this case came under s. 111 of the Succession Act and the gift over, *i.e.*, the legacy to M, could not take effect, as the specified uncertain event contemplated did not happen before the period of distribution, and K took an absolute indefeasible estate in the legacy. MONOHUR MUKERJEE v. KASISWAR MUKERJEE, **3 C.W.N. 478.** (18 W.R. 359, 9 M. I.A. 123, *R.*)

Succession Act (X of 1865)—*continued.*

(97)—*S.* 111—*Period of distribution—Will—Construction—Marginal notes and alterations in will—Probate.*—Marginal notes and alterations made by the testator in his will, which are unattested, cannot be admitted to probate. A testator bequeathed a portion of his property to his son and provided that, if the son died "without marrying, or, if married, without any lineal heir," his share should revert equally to his surviving sisters or their heirs. A question having arisen as to the validity of the restriction: *Held*, that the restriction imposed by the testator upon his son was nugatory and the son took the whole of his inheritance absolutely. SARDAR NOWROJI PUDUMJI v. PUTLIBAI, **15 Bom. L.R. 352=19 Ind. Cas. 832.**

(98)—*S.* 111—*Scope—Bequest—Real and personal property.*—S. 111 applies to bequest of all descriptions of property, there being no difference in India between real and personal property. NARENDRA NATH SIRCAR v. KAMALA BASINI DASI, **23 C. 563=23 I.A. 18, P.C.=6 M.L.J. 71=6 Sar. 667.**

(99)—*S.* 111—*Construction of will—Bequest to daughter—Absolute estate.*—Where in a will a legacy was given in the following words:—"On my death, my daughter Surjamoni, who has got sons, ahd who is a resident of.....shall possess as owner and possessor of all the rights of gift, sale, etc., in respect of all my property moveable and immoveable, and on the death of my aforesaid daughter, the sons born of her womb will equally own all my property." *Held*, upon a construction of the will, that it was the intention of the testator to give to Surjamoni an absolute estate. GOBINDA CHUNDER GUPTA v. BENODE CHUNDER DUTT, **12 C.W.N. 44.**

(100)—S. 111—*See* HINDU LAW—WILL, 6 M.L.J. 71, P. C. 23 C. 563=23 I.A. 18, 24 C. 406.

(101)—S. 111—*See* Nos. 68, 69, *supra.*

(102)—*Ss.* 111 *and* 116—*English law—Principle of the sections.*—The principle well established by *Jones* v. *Westcomb* and various other English cases has been codified in India in s. 116 of the Indian Succession Act (X of 1865) which section applies to Hindus (15 C. 282, *F.*). S. 111 of the Succession Act applies only when the prior bequest is capable of taking effect and is not *ab initio*, void. If the bequest has failed, *ab initio*, the principle laid down in s. 116 applies. The rule, which has been applied to a bequest in a Will executed before the 1st September, 1870, of immoveable property, by a husband to his wife, *viz*, that she takes only a limited estate, when there are no express words creating an absolute estate, cannot apply to a married daughter. Though under Hindu law, a married daughter takes, by inheritance, a limited estate, she takes an absolute estate under a devise by will, unless her interest is curtailed by express words or necessary implication. (16 M. 466, 24 C. 406, 24 W.R. 395, 24 C. 646; 2 C.L.J. 5=9 C.W.N. 784, *F.*) The words in the Will, "to my daughters and

Succession Act (X of 1865)—*continued.*

their respective sons I give, devise and bequeath the same," give, an absolute estate to the daughters, and not a limited or joint estate. 'Sons' in this case was intended to have the same effect as "sons, grandsons, etc." Where it would be premature to decide whether an absolute gift is defeasible in the event of either daughter dying without male issue, the question was left undecided until it is ascertained what the events are. RADHA PROSAD MULLICK AND PEARY LALL MULLICK v. RANI MONI DASSEE, **3 C.L.J. 502=10 C.W.N. 695, S.B. =33 C. 957.** (24 I.A. 76=24 C. 834, *F.*) [*On appeal.*, 35 C. 896, P.C.=35 I.A. 118=12 C.W.N. 729=8 C.L.J. 48=5 A.L.J. 460=10 Bom. L.R. 604=18 M.L.J. 287.]

(103)—*Ss.* 111, 187—*Bequest to daughters on marriage—Testator's death before marriage—Effect—Grant of letters of administration with will annexed to a legatee—Grant limited on appeal, but letters not amended—Effect—Necessity for fresh letters of administration—Effect of grant of probate pending suit and before decree.*—The clause in a will relating to the two daughters of the testator ran thus:—"When they will be married and if they desire to live in separate houses, the person in whose management my property will be at the time will make separate houses for them in the vicinity of my house from the income of my property. For the maintenance of my daughters I fix an allowance of Rs. 600 a year." *Held* that the will dealt with the maintenance in a clause which stood by itself, and that the payment of maintenance was not made contingent on the marriage of the ladies, and s. 111, Succession Act, had therefore no application. In this case, another legatee obtained grant of letters of administration with the will annexed, but the High Court afterwards modified the grant by limiting it to the realisation of the legacy given to the applicant, who however died before the letters could be recalled and altered accordingly by the District Court. *Held* that probate of the will had been granted within the meaning of s. 187 of the Act, and that the subsequent limitation of the grant, even if right, is immaterial. Where probate was obtained subsequent to suit but before decree, *held*, this was sufficient compliance with s. 187 of the Act. KUMAR CHANDRA KISHORE ROY v. PRASANNA KUMARI DASI, **9 M.L.T. 71, P.C.=8 A. L.J. 96=15 C.W.N. 121=21 M.L.J 116=13 Bom. L.R. 67=13 C.L.J. 58=9 Ind. Cas. 122.**

(104)—S. 114—*See* HINDU LAW—WILL, 23 M. 613=10 M.L.J. 214.

(104-*a*)—S. 116—*See* Nos. 70, 102, *supra.*

(105)—S. 117—*See* HINDU LAW—WILL, 2 N.L.R. 123.

(106)—S. 125—*See* No. 69, *supra.*

(107)—*S.* 128—*Legacy to person appointed executor—Rebuttal of presumption—Parol evidence inadmissible.*—The language of s. 128 of the Succession Act is peremptory and leaves no room for a presumption; it is not left to the Court to decide whether the legacy is given to

Succession Act (X of 1865)—*continued.*

the person named in his character as executor. It is assumed that it was so given and the prohibition follows. Parol evidence to rebut the presumption is not, unlike the case in England, admissible in India. PROSONO COOMAR GHOSE v. ADMINISTRATOR-GENERAL OF BENGAL, **15 C. 83.**

(108)—S. 128—*See* NO. 76, *supra.*

(109)—S. 159—*See* HINDU LAW—WILL, 3 C.L.J. 515.

(110)—S. 159—*See* NO. 88, *supra.*

(111)—S. 164—*See* NOS. 60, 61, *supra.*

(112)—*S.* 172—*Suit for share of inheritance and suit for maintenance—Civ. Pro. Code,* 1882, *s.* 43—*Doctrine of Election.*—Where a Hindu testator, in bequeathing all his property, included therein the share of his brother's widow, but made a suitable provision for her maintenance, and the widow recovered the provision by suit, *held*, a subsequent suit by her for recovery of her share in the ancestral property would not be barred under s. 43 of the Civ. Pro. Code, though such suit would be precluded with regard to the doctrine of election under s. 172 of the Succession Act, as the widow must have known that the maintenance was provided for her *in lieu of her ancestral property.* PRAMADA DASEE v. LAKHI NARAIN MITTER, **12 C. 60.**

(113)—*S.* 179—*"Property of deceased" does not include property held by deceased as executor or administrator.*—"Property of the deceased" in s. 179 of Act X of 1865 means only the actual property of the deceased, whether held by him for his own benefit or the benefit of others, and does not mean property vested in him as executor or administrator under the Indian Succession Act. Therefore, under the Indian Succession Act, the executor of an executor is not derivate executor of the original testator, even though such testator died before 1866. DE SOUZA v. THE SECRETARY OF STATE, **12 B. L.R. 423.**

(114)—*S.* 179—*Hindu Wills Act—Grant of limited probate.*—The application for the grant of limited probate in this case to the son and executor of the testator was refused. The will in question was made subsequently to the passing of the Hindu Wills Act, XXI of 1870, by which certain sections and amongst them, s. 179 of the Indian Succession Act (X of 1865), were declared applicable to all wills of Hindus made on or after the 1st of September 1870. Under this section, the interest of the executor in the property of the deceased is not limited as it is in cases falling under s. 18 of Act XXVII of 1860. There is no provision in the Succession Act which authorises the Court to grant probate limited to part of the estate in cases where, under s. 179 of the Act, the whole estate is vested in the executor. *In re* THAKER MADHAVJI DHARAMSI, **6 B. 460.** [*R.*, 26 B. 571=4 Bom. L.R. 9.]

(115)—S. 179—*See* PARTIES TO SUIT—GENERAL, 12 B. 621.

Succession Act (X of 1865)—*continued.*

(116)—Ss. 179, 187, 188, 240 and 242—*See* PROBATE—GENERAL, 4 C. 1=2 C.L.R. 422.

(117)—Ss. 179, 187, 191—*See* ACT II OF 1874, s. 31, 21 C. 732.

(118)—Ss. 179, 187, 260—Suit by executrix—Necessity for production of copy of will as well as the grant of administration—Non-production thereof, effect on suit—*See* BEN. ACT VIII OF 1885, s. 167, 32 C. 710.

(119)—*Ss.* 180 *and* 212—*Application for Letters of Administration with copy of will, proved abroad, annexed—Original will deposited and registered in Scotland—Copy produced being copy certified under the hand and seal of Notary Public to be true copy of original granted by Assistant Keeper of Register of Deeds—No certificate of having been compared with original—Not shown to be admissible in England—Copy not admissible under s.* 63, *Evidence Act.*—Where, in an application, under ss. 180 and 212 of the Succession Act, for letters of administration with copy of the will, proved abroad, annexed, the original will, described as a trust disposition and settlement having been deposited and registered in Scotland, a copy certified, under the hand and seal of a Notary Public, to be a true copy of the original granted by the Assistant Keeper of the Register of Deeds, neither purporting to be a copy made from the will itself nor bearing any certificate that it had been compared with the original, nor shown to be a copy admissible in England to prove the original, was produced: *Held* that the copy produced was not a properly authenticated copy of the will and inadmissible as secondary evidence, under s. 63 of the Evidence Act, and that the applicant should produce a copy certified, by the Keeper or Assistant Keeper of the Register, to be a true copy of the original will. *In the matter of the estate of* ADAM ROBERTSON WHYTE, **14 Bur. L.R. 33.**

(120)—*Ss.* 180, 212—*Letters of Administration—Agent of the executor.*—The Agent for an executor duly appointed by him applied for letters of administration under s. 180 of the Indian Succession Act, 1865. *Held* that s. 212 was the appropriate section and letters of administration were directed to be issued to the Agent under that section limited for the use and benefit of the executor. *In re* THE WILL OF SIR HENRY MARION DURAND, **28 P.R. 1871.**

(121)—*Ss.* 180 *and* 212—*Letters of Administration—Application for limited grant after probate of will in England—Application not maintainable.*—Where, after a will had been duly proved by the executors in England, the attorney of the executors applied to the High Court for a grant of Letters of Administration limited until the executors should obtain probate in India, purporting to apply under s. 212 of Act X of 1865, it was *held* that the application could not be sustained, first, because only a copy of the will, and not the original, was produced, and, secondly, because the executors

Succession Act (X of 1865)—*continued.*

could not, under the circumstances, ever obtain probate of the will in India. S. 180 of the Act might have been applicable, but that the authority of the executors' attorney did not empower him to apply for more than a limited grant. *In the goods of* ASHTON, **A.W.N. 1905, 251.**

(122)—*Ss.* 181, 186, 187, 196—*Will—Probate—Residuary legatee — Administration suit—Probate of the will.*—The plaintiff instituted a suit for the construction of a will, and for a declaration that certain property was at the time of the death of the testator at his disposal and that the same has been validly disposed of by his will in favour of plaintiff and one Dharamshi in equal shares, and for administration. The Court below construed the will and decided in plaintiff's favour, but directed that the decree should not be drawn up until the plaintiff obtained letters of administration with the will annexed. The plaintiff appealed: *Held*, that notwithstanding the terms of s. 181 of the Indian Succession Act, 1865, the plaintiff as residuary legatee could obtain a grant that would satisfy the requirements of s. 187 of the Act; and that until he had done so, he was not entitled to establish his claim in a Court of law. GORDHANDAS v. RAMCOOVERBAI, **3 Bom. L.R. 874=26 B. 267.**

(123)—*S.* 182—*Executor by implication.*—Where, by a will executed by a Hindu testator, all his property, including his liabilities, is left to his sons, they are not entitled to apply for probate of the will, on the ground that they have been appointed executors by implication. *Ex parte* VITTAL DOSS, **15 M. 360.** [*R.*, 1 N.L.R. 164, 15 P.W.R. 1907=73 P.L.R. 1908.]

(124)—*Ss.* 182, 264—*Executor by implication—Reference—Jurisdiction of High Court.*—When the clauses in a will clearly indicated that the testator gave, to a porson mentioned in the will, full powers to collect and receive all debts and manage the estate for a period of nine years, after the expiry of which he was to distribute it to the various legatees, in the manner directed, such person was held to be an executor and entitled as such to probate of the will (*In the goods of Baylis*, 1 Prob. and M. 21, *F.*). Though a District Judge erroneously refers a matter relating to probate under s. 611 of the Civ. Pro. Code, yet, the High Court can, acting under the concurrent jurisdiction given to it by s. 264 of Act X of 1865, treat the matter as if originally brought before it. *In the matter of* MONOHUR MOOKERJEE, **6 C.L.R. 228.**

(125)—*Ss.* 183, 187, 198, 215—*Will—Christian testatrix—No provision for appointment of executor—Minor son not sole residuary legatee—Power of Court to appoint executor—Grant of letters of administration to minor or his mother.*—Where, by the will of deceased Christian testatrix, no one is expressly appointed executor, probate or letters of administration with the will annexed should be taken out by somebody; otherwise, under s. 187, Succession Act, the legatees acquire no title to the property. It is open to the Court to grant, under s. 198, letters of administration with the will annexed to one of the persons having a beneficial interest in the estate; but such letters cannot, under s. 183, be granted to a minor. And where the minor is not a sole residuary legatee, letters could not, under s. 215, be granted to his mother. MA SAW v. MA THIT, **6 L.B.R. 118 = 18 Ind. Cas. 187.**

(126)—S. 186—*See* NO. 122, *supra.*

(127)—*S.* 187—*Hindu Wills before* 1870—*Probate—Letters of administration.*—S. 187 of the Succession Act not being applicable to wills made before 1870, executors or legatees under them need not take out probate or letters of Administration to establish their rights in a Court of justice. KRISHNA KINKUR ROY v. RAI MOHAN ROY, **14 C. 37.** [*R.*, 17 C. 272, 25 C. 103.]

(128)—*S.* 187—*S.* 2, *Hindu Wills Act*, 1870—*Wills of Hindus executed prior to* 1*st September*, 1870, *Probate or Administration to.*—An application may be made, and probate or letters of administration granted in respect of wills executed before the first day of September, 1870. But s. 187 of the Succession Act, which, by s. 2 of the Hindu Wills Act, was made applicable to wills subsequent to the 1st September, 1870, has not been incorporated in the probate Act and it follows from this that although it is fully competent to a Court to grant probate or letters of administration in respect of wills antecedent to the 1st September, 1870, still it is not obligatory upon executors or persons claiming letters of administration to obtain such probate or letters of administration, before they can establish their right in respect to any property of the deceased in a Court of justice. KRISHNA KINKAR ROY v. PANCHURAM MUNDUL, **17 C. 272.** [*F.*, 18 A. 260=16 A.W.N. 44, 2 O.C. 33, 2 N.L.R. 123.]

(129)—*S.* 187—*Hindu Wills Act*, 1870, *s.* 2—*Estate of deceased Hindu—Legal representative.*—A Hindu defendant in a pending civil suit died leaving a will which, however, was not proved. His step-brothers were added as representatives, and a decree by consent was passed. The mother of the deceased then got a decree that she was entitled to the estate of her son as against the step-brothers, and subsequently sued to set aside the original decree on the ground that the will, not having been proved, ought to be ignored, since s. 2 of Act XXI of 1870 makes the provisions of s. 187 of the Succession Act applicable to Hindu wills in Madras. *Held*, though the executors can establish no right without taking out probate, the will cannot be ignored for all purposes whatever, and since the existence of the will was proved and the mother was not entitled under it, she could not now sue to set aside the original decree. JANAKI v. DHANU LALL, **14 M. 454.** [*R.*, 20 M 446, 30 C. 1044, 8 C.W.N. 843, 10 C.W.N. 566, 2 C.L.J. 484, 2 N.L.R. 123, 6 C.L.J. 719=11 C.W.N. 1078, 19 M.L.J. 671.]

Succession Act (X of 1865)—*continued.*

(130)—S. 187—*Will—Application by legatee for Letters of Administration—Grant limited to recovery of legacy only—Suit by another legatee to recover legacy—Maintainability—Proof of will only essential.*—Letters of administration with a copy of the will annexed in respect of the entire estate left by the testator was granted by the District Judge to a legatee to whom the testator had bequeathed an allowance for maintenance. On appeal, the High Court directed that the Letters should be limited to the realisation, by the grantee, of that allowance only. But, before fresh letters in terms of the High Court's order could be issued by the District Judge, the legatee died. Subsequently, another legatee to whom also the testator had bequeathed an allowance for maintenance, brought a suit for recovery of the same. *Held*, that s. 187 of the Act was no bar to the recovery of the plaintiff's claim. If a will is once proved and Probate or letters of Administration granted, that would entitle any one of the legatees or any one claiming under the will to obtain relief from Court. S. 187 of the Act does not contemplate that every legatee claiming under a will should have to obtain separate Probate or Letters of Administration in respect of the estate or a portion of the estate in order to be entitled to maintain a claim for the legacy. KUMAR CHANDRA KISHORE ROY v. PROSANNA KUMAR DASS, **10 C.W.N. 864=4 C.L.J. 523.**

(131)—S. 187—*See* CERTIFICATE OF ADMINISTRATION—EFFECT OF CERTIFICATE, 23 W.R. 252.

(132)—S. 187—*See* SPECIFIC PERFORMANCE, 15 B. 657.

(133)—S. 187—*See* Nos. 71, 103, 116, 117, 118, 122, 125, *supra.*

(134)—S. 188—*See* NO. 116, *supra.*

(135)—S. 190—*One executor* de son tort *suing another—Debts due to executor* de son tort—*Recovery—Remedy—Letters of administration.*—The father of the defendants (a Parsi) died intestate leaving behind him a widow, three daughters and two sons (the plaintiff and his brother). Without taking out letters of administration to the estate of their deceased father, the plaintiff and his brother managed the estate and collected the rents and outstandings due to the estate. Letters of administration were obtained by the widow and the three daughters, but they were limited to the extent of their interest in the estate of the deceased. The plaintiff brought the present suit against his brother and other members of the family for recovering Rs. 61,948-8-0 which he alleged to be due to him in respect of monies advanced to his deceased father when he was alive. *Held*, that the suit must fail under s. 190 of the Indian Succession Act (X of 1865), because neither the plaintiff nor any other member of the deceased's family had taken out letters of administration in respect of the deceased's whole estate. The letters of administration taken out by the widow and the three daughters purporting to deal only with such shares in the estate as they may be entitled to were not such as are contemptated by s. 190 of the above Act, and that the only course open to the plaintiff was to take proceedings to obtain the appointment of an administrator of the estate who either would administer it by the payments of the debts and the distribution of the surplus (if any) amongst the heirs after taking an account of all property already received out of it by the creditors or heirs, or who could be compelled to do so by an administration suit. FRAMJI DORABJI GHASWALA v. ADARJI DORABJI GHASWALA, **18 B. 337.** [*R.*, 20 M.L.J. 984=8 M.L.T. 77=M.W.N. 1910, 272=7 Ind. Cas. 242.]

(136)—S. 190—*Letters of administration to estate of deceased Parsi—Right of suit.*—The land in dispute belonged originally to a Parsi who died intestate. After his death, one of his brothers without taking out letters of administration sold the land to the plaintiff. The defendant asserted a right of way over it and obtained an injunction in the *Mamlatdar's* Court, restraining the plaintiff from obstructing him in the enjoyment of his alleged right. Thereupon the plaintiff filed the present suit to have the *Mamlatdar's* order set aside, and for a declaration that the land belonged to him and that the defendant had no right of way over it. Both the lower Courts dismissed the suit on the preliminary point that the plaintiff could not establish his right to the land in the absence of letters of administration to the estate of the deceased to whom the land originally belonged. *Held*, reversing the decrees, that s. 190 of Act X of 1865 did not apply. Neither party relied as the basis of his own right on the previous title of the deceased owner. There was no question about administration, nor could the result of the suit prejudice the rights of any heirs who might possibly exist. TULJARAM v. BAMANJI KHARSEDJI, **19 B. 823.**

(137)—S. 190—*Letters of administration—Firm—Family firm—Debt contracted by manager—Liability of members of the family.*—K and his three sons constituted a family firm. It was managed by K during his lifetime; and after his death, by one of his sons, A. During his management, A executed a *san* mortgage-bond to the plaintiff, for paying off a judgment-creditor who had attached one of the family properties. The mortgage bond was attested by E, another son of K. The plaintiff brought a suit to recover the mortgage-money; but it was dismissed on the ground that the estate of K was not legally represented by A at the time when he passed the mortgage-bond (s. 190, Succession Act, 1865). On appeal: *Held*, reversing the decree, (1) that, as the mortgage-debt was incurred after K's death, it could not be a debt of K and could not give rise to any claim against the estate of K; and that s. 190, Succession Act, 1865, had therefore no application; (2) that the claim was made upon a mortgage which purported to bind the partners

Succession Act (X of 1865)—*continued.*

in the family firm and a certain property which was specified in the mortage-deed, and the interest which was intended to be conveyed was the interest of the three sons of K who were bound under s. 43 of the Transfer of Property Act to satisfy the mortagee's claim out of that interest. AHMEDABAD UNITED CO. v. ARDESHIR, **14 Bom. L.R. 644=36 B. 515=16 Ind. Cas. 684.** (L.R. 7 Ch. 123, *F.*)

(137-*a*)—S. 190—*See* No. 211, *infra.*

(138)—S. 191—*See* No. 117, *supra.*

(139)—S. 196—*See* No. 122, *supra.*

(140)—*Ss.* 196, 229 "*May*" *in the sections directory.*—The word "may" in ss. 196 and 229 of Act X of 1865, is not to be construed as merely permissive, but as directory, and as showing the course which the Legislature intends shall be adopted. So, where an executor dies before fully administering the estate, as between the residuary legatee and the executor, of the deceased executor, the former is the preferential claimant for letters of administration. DE SOUZA v. THE SECRETARY OF STATE, **12 B. L.R. 423.** [*Appl.*, 25 W.R. 489; *R.*, 16 M. 71.]

(141)—S. 198—*See* No. 125, *supra.*

(142)—*S.* 206—*Grant of letters-of-administration to creditor—Execution of decree—Limitation Act*, 1877, *art.* 179.—An application for execution of a decree against a deceased judgment-debtor does not comply with the provisions of cl. (4), art. 179, of the Limitation Act if it does not give the name of the legal representative of the deceased. A judgment-creditor does not cease to be a creditor for the purpose of s. 206 of the Succession Act through execution of his decree being barred under art. 179, sch. II, of the Limitation Act. E. SOLOMON & CO. v. S. A. JOHNSON, **U.B.R. 1892-1896, Vol. II, 635.** (4 C. 583, 5 C. 897, *R.*)

(143)—*Succession Act* (X *of* 1865), *Ss.* 208, 209, *applicability of—Wills of Hinaus.*—Ss. 208, 209 apply to cases of the grant of letters of administration with will annexed to the estates of Hindus, in respect of wills executed after 1st September, 1870. ISHUR CHUNDER SURMAH v. DOYAMOYE DEBEA, **8 C. 864.**

(144)—S. 209—*See* No. 143, *supra.*

(145)—S. 212—*See* Nos. 119, 120, 121, *supra.*

(146)—S. 215—*See* No. 125, *supra.*

(147)—S. 217, *Administrator appointed under—Creditors advancing money to such administrator, position of.*—*Held*, that an administrator appointed under s. 217 of the Indian Succession Act possesses all the powers conferred by the Act upon an ordinary administrator. *Held*, further, that creditors dealing with an administrator appointed under s. 217 are in the same position as those advancing money to an ordinary administrator appointed under some other section of the Act. *Held* also, that the words "for the use and benefit of the lunatic" in s. 217 create a special liability as between the administrator and the lunatic on whose behalf he is appointed to act, but they do not affect the position of creditors dealing with such administrators. BONY, B. v. J. EDWARDS, **12 O. C. 390.** [*R.*, 12 O. C. 414.]

(148)—*S.* 221—*Administrator—Limited grant—Plea of purchase for value without notice.*—A person obtaining a limited grant under s. 221 of the Indian Succession Act, does not by virtue of it acquire, nor has he, power rightfully to dispose of any interest outside the limits of that grant. Hence, where a person has conveyed to him by the husband the property which stands in the name of his deceased wife, and such person obtains a limited grant to the estate of the deceased under s. 221 of the Indian Succession Act, he cannot, by virtue of the grant, convey the rights which the heirs of the deceased have in the property. The plea of a purchase for value without notice should be specifically put forward either in the written statement or in the issues. DE SILVA v. DE SILVA, **5 Bom. L. R.** 784, *on appeal from*, **4 Bom. L.R. 849.**

(149)—S. 229—*See* No. 140, *supra.*

(150)—*S.* 234, *Object of.*—The object of s. 234 of the Succession Act is the same as s. 50 of the Probate and Administration Act, BRINDA CHOWDHRAIN v. RADHICA CHOWDHRAIN, **11 C. 492.**

(151)—*S.* 234 — *Revocation of probate — Hindus, applicability of section to—Probate, who cannot apply, revocation of.*—S. 234 of the Indian Succession Act applies to Hindus, and an application to revoke probate of the will of a Hindu may be made under this section. When once probate in solemn form has been granted, no one who has been cited or has taken part in the proceedings, or who was cognizant of them, can afterwards seek to have it cancelled. *In re* PITAMBAR GIRDHAR, **5 B. 638.** [*R.*, 11 C. 492, 18 C. 45, 17 M. 373 27 C. 927.]

(151-*a*)—S. 234—*See* Nos. 160, 180, *infra.*

(152)—*Ss.* 234, 250, 261—*Probate, revocation of—minor—Practice—Contested and uncontested cases.*—The absence of citation upon an infant whose interests are affected by a will would be just cause for revoking the probate under s. 234 of the Indian Succession Act, and he would be entitled to require the executor to prove the will in his presence. In applying for the probate of a will which affects the interests of a minor, the proper course is to serve the minor with a notice and have a proper guardian *ad litem* appointed for him. [*R.*, 12 C.W.N. 6.] Although it is quite true that s. 250, Indian Succession Act, which provides for the issue of citation, does not render it *obligatory* on the Court to issue any special citation, but merely declares that it shall be lawful for the Court to do so, yet it is not only desirable but necessary in the ends of justice that this power should be exercised when it appears that some of the heirs whose interests are effected by the will are minors. It is stated that according to the law in India there is no distinction between proving

Succession Act (X of 1865)—*continued.*

a will in "Common form" and proving it in "Solemn form." But the sections of the Indian Succession Act point clearly to a difference between cases which are contested and cases which are not contested, and s. 261 lays down the procedure in contentious cases. WALTER REBELLS v. MARIA REBELLS, **2 C. W. N. 100.**

(153)—*Ss.* 234 *and* 259—*Revocation of letters of administration.*—When a District Court has made a grant limited as to its local operation, the Chief Court cannot amend the grant made by the District Judge so as to give it operation beyond the limits of the District Judge's jurisdiction to make a grant. When the attorney for the executrix and the District Judge were both aware that effects of the testator existed in British India outside the Punjab, but in spite of this the one applied for probate, and the other granted letters of administration, not with the will but with a copy of the will annexed and the will was not filed, as prescribed by s. 259 of the Succession Act, *held*, that the proceedings to obtain the grant were so defective in substance that the grant should be annulled under s. 234 of the Act. *In the goods of* ARTHUR JAMES GRANT, **37 P.L.R. 1902=1 P. R. 1902.**

(154)—S. 235—*See* JUDICIAL COMMISSIONER, ASSAM, 12 W.R. 424.

(155)—*S.* 237—*Exemplification of Will—Probate—Order to produce testamentary paper.*—Testator died in Calcutta, leaving a will, whereof he appointed A, B, C, and D executors. D, the mother of the testator, had carried on business in partnership with the testator in Calcutta, and a considerable portion of the testator's estates was in India. A renounced probate and the will was proved in England by B and C who sent their agents in Calcutta an exemplification of the will for the purpose of obtaining a grant of probate or letters of administration to the estate in India. On an application by D for an order directing the agents to bring the exemplification into Court with a view to obtaining probate thereof, *held* that the exemplification was an instrument which the Court would order to be produced under s. 237, Succession Act. *In re* WILLIAM NEWTON, **8 B.L.R. App. 76.**

(155-a)—S. 239—*See* NO. 183, *infra.*

(156)—*S.* 240—*Probate or Letters of Administration—Deceased not having lived in or left effects within limits of Presidency—High Court—District Court—Jurisdiction—Letters Patent*, 1862, *cl.* 34.—Where the deceased did not live in, or leave goods or effects, within the limits of the Presidency of Madras, the High Court of Madras had no jurisdiction to grant probate or letters of administration to his estate. The jurisdiction of the District Courts are similarly circumscribed under s. 240 of the Succession Act. *In the matter of* ROSE LEARMOUTH, **24 M. 120.**

(157)—S. 240—*See* NO. 116, *supra.*

Succession Act (X of 1865)—*continued.*

(158)—S. 242—Question of status—*Res judicata*—*See* EVIDENCE ACT, 1872, ss. 41, 110, U.B.R. 1910, 4th Qr., 61.

(159)—*See* Nos. 59, 116, *supra.*

(160)—*Ss.* 242 *and* 234—*Amending Act* VIII *of* 1903—*Application for extension of certificate—Revocation of the grant of probate—Court Fees Act*, s. 19 (c).—An application for probate to have effect throughout the Province of Sind was granted. But the testator also left some money due from a Life Insurance Company, the head office of which was situated at Bombay; and the Company refused to pay the money as the probate had no effect in Bombay. *Held*, on an application for the extension of the probate to the whole of India; (1) that no extension could be ordered inasmuch as the preliminaries required by Act VIII of 1903 had not been complied with, and that those preliminaries were not mere empty formalities; (2) that the grant might be annulled under s. 234, Expln. 4, of Act X of 1865, in order that a fresh grant might be applied for, which will be exempt from further Court-fee under s. 19 (c) of the Court Fees Act, 1870. APPLICATION BY ELIZABETH A. DESOUZA FOR PROBATE OF WILL OF ALFRED JAMES DESOUZA UNDER ACT X OF 1865, **1 S.L.R. 177.**

(161)—*Ss.* 244, 256—*Probate—Executor—Security—Jurisdiction*—If there was property in the possession of the testatrix at the time of her death, which was claimed by her as being in her possession in her own right, it was not for the Court, in considering whether probate should be granted or not, to enter into the question whether the title, under which she held the property, was good or bad. It is sufficient, for the purpose of giving jurisdiction under Act X of 1865, that property claimed as her own should be actually in the possession of the deceased. The Court refused to depart from its uniform practice of granting probate without taking a security bond from the executor named in the will, in spite of the words of ss. 3 and 256 of Act X of 1865. RUN BAHADOOR SINGH v. MAHARANEE RAJRUP KOER, **4 C.L.R. 498.** [*D.*, 7 C. 84.]

(162)—*S.* 246—*Grant of letters of administration by District Judge—Subsequent application to High Court.*—The petitioner, after obtaining letters of administration to a deceased's estate from the District Judge, found, subsequently, that the deceased had left property outside the jurisdiction of the District Judge and applied to the High Court for grant of letters of administration. The High Court directed the petitioner to obtain the revocation of the letters granted by the District Judge before applying to the High Court. *In the goods of* ROSE ANNE D'SILVA, **25 A. 355=A.W.N. 1903, 62.**

(163)—*Ss.* 246, 261—*Letters of administration—Caveator propounding will—Former application for probate withdrawn—Civ. Pro. Code*, 1882, *s.* 373.—When an application for probate of a will has been withdrawn before

Succession Act (X of 1865)—*continued.*

it became contentious, the applicant is entitled as caveator to propound the same will in opposition to an application for grant of letters of administration to the estate of the deceased. Though the provisions of the Code of Civil Procedure are applicable to suits under the Indian Succession Act, s. 261, still, when an application for probate has been withdrawn before it became contentious, s. 373, Civ. Pro. Code, is not applicable, and will bar a subsequent propounding of the will. PAKIAM PILLAI v. INNASI FERNAND, **19 M. 458.**

(164)—*S.* 250—*Practice—Citations—Mode of issuing citations—Payment for advertisements in newspapers.*—In this case it was held that the costs of citations directed by the Court to be issued by means of advertisement in a newspaper must be deposited before the citations should issue. *In the goods of* H.D. SHRIVELL, **A.W.N. 1903, 30.**

(165)—*S.* 250—*Probate and Administration Act* (V *of* 1881), *s.* 81—*Caveator—Interest of the caveator.*—The provisions of s. 250, Succession Act, 1865, and s. 81, Probate and Administration Act, 1881, are that the interest, which entitles a person to put in a caveat, must be an interest in the estate of the deceased person, that is, there should be no dispute whatever to the title of the deceased to the estate, but that the person, who wishes to come in as caveator must show some interest in that estate, derived from the deceased by inheritance or otherwise. PIROJSHAH BHIKAJI v. PESTONJI MERWANJI, **12 Bom. L.R. 366=6 Ind. Cas. 523=34 B. 459.** (17 C. 48, *F.*)

(165-*a*)—*S.* 250, *and ss.* 234, 244—*Probate—Proceedings for revocation of probate*—Locus standi *of objector—Interest in testator's estate*—*Held*, that an objector claiming specific property adversely to, and not through the testator, is not a person who has such an interest in the estate of the deceased as will entitle him to ask for a revocation of a grant of probate. *Held* also, that an executor of a will is under no obligation to set out in the application for probate a complete or any list of the heirs and relations of the testator. RALPH v. HALE, **7 P.R. 1902=2 P.L.R. 1902.**

(166)—S. 250—*See* No. 152, *supra*,

(167)—*S.* 254—*Application for probate—Power of testator to dispose of property, whether can be questioned.*—Where, on an application for probate of a Will, certain persons objected to the granting of probate on the ground that the testator had no power to make a disposition of the property in dispute, *held*, that the District Judge was right in having refused to go into the questions thus raised, and in having granted probate. NANHU KOER v. SOMIRUN THAKUR, **8 C.L.R. 287.** [*R.*, 17 C. 48, 1 L.B.R. 157.]

(168)—*S.* 256—*Administration bond—Discharge of surety—Refusal—High Court Original Side Rules, Rule* 470—*Practice.*—Where sureties were appointed under s. 256 of the Succession Act, and their bond provided that, on the fulfilment of the conditions specified in the bond, the bond shall be void and of no effect:—*Held*, on application by the sureties for cancelling the bond on the ground that the administration was complete—*Per C.J.*—There is no provision of law to make an order to vacate an administration bond. Rule 470 of the Original Side Rules applied to an application to vacate a bond during the pendency of the administration, with a view to having another surety appointed in the place of the surety whose bond is vacated. The English practice with regard to the substitution of sureties appears to be that the Court will not discharge an original surety to the administration bond and allow another to be substituted for him; and this practice has been followed in this Court. Nor was there any provision in the English Probate Rules. *Per Krishnaswami Iyer, J.*—The principle of law is that, as the bond becomes void on the happening of a condition, it is allowed to work itself out on the happening of that condition, and if, as a matter of fact, the administration has become complete, the bond becomes void. If it is not, the bond is in force. There is no need for the Court being invited to make a declaration on the subject. *In re* ARTHUR GERALD NORTON KNIGHT, **7 M.L.T. 160=5 Ind. Cas. 311=33 M. 373.**

(169)—*S.* 256—*Administration, to whom to be given—Assignment.*—*Per Curiam.*—Under s. 256 of the Indian Succession Act, an administration bond should be given to the "Judge of the District Court." In the case of the High Court, such bond may be given in the name of the Chief Justice. Under s. 257, such a bond may be assigned to "some person, his executors, and administrators." The Administrator-General is such a person. This section is not confined to private individuals only. In the case of the High Court, such a bond can only be assigned by the Court through one of its officers, *e.g.*, the Registrar on the Original Side. In making the preliminary order granting the Letters, the Court does not guarantee that the evidence upon which the order is made is true. The grant of Letters, having been obtained fraudulently, was void *ab initio*. The invalidity of the grant does not render the surety bond void. Whether the shares sold by the administrator are or may be recoverable from the purchasers does not affect the liability of the sureties; since there is a present loss to estate, they are bound to make it good. *Per Mitra, J.*—The grant being void *ab initio* all acts done under it are also void. (6 C.W.N. 787, *R.*) The sale of shares was not in due course of administration, ss. 242 and 269 of the Indian Succession Act are not intended to afford protection to unwarrantable and fraudulent dispositions by an administrator, whose title rests on a grant absolutely void. S. 262 affords protection to debtors making *bona fide* payments to an executor or administrator before revocation of the grant. But it does not protect

Succession Act (X of 1865)—*continued.*

purchasers. DEBENDRA NATH DUTT v. THE ADMINISTRATOR-GENERAL OF BENGAL AND BANKU BEHARI BANERJI v. THE ADMINISTRATOR-GENERAL OF BENGAL, **3 C.L.J. 422, S.B.=10 C.W.N. 673=33 C. 713.** [*Affirm.*, 35 C. 955, P.C.=35 I.A. 109=12 C.W.N. 802 =8 C.L.J. 94=10 Bom. L.R. 648=18 M.L.J. 367 ; *F.*, 12 C.W.N. 481.]

(170)—*S.* 256—*Effect of breach of condition in bond executed under—Damages recoverable by assignee of bond—Indian Contract Act* (IX *of* 1872), *s.* 74, *exception.*—In an action brought on the breach of a bond given in accordance with s. 256 of the Indian Succession Act and assigned over to the plaintiff, he cannot recover more damages than he could prove to have resulted to himself or those interested in the bond on which he relies. A bond of this description cannot be regarded as an instrument covered by the exception to s. 74 of the Indian Contract Act, so that the whole sum mentioned in the bond might become payable on the breach of a condition therein. LACHMAN DAS v. CHATER, **10 A. 29=A.W.N. 1887, 279.** [*R*, 16 M. 474.]

(171)—*S.* 256—*Letters of Administration limited to particular purpose—Form of administration bond—Practice.*—S. 256 requires a bond to be given in every case, but in such form as the Judge shall from time to time by any general or special order direct. It is only open to the Court to make a special order as to the form of the bond. The administration bond may follow the English form ; and, in the case of a limited or special administration, it should provide that the administrator "will exhibit a true and perfect inventory of the said estate and effects limited as aforesaid and render a just and true account thereof whenever required by law so to do." *In the goods of* GUBBOY, **26 C. 408=3 C.W.N. 364.**

(172)—*S.* 256—*See* No. 161, *supra.*

(173)—*S.* 257—*Grant of administration to widow of testator—Application by creditors for assignment of administration bond.*—On the death of one G, his widow obtained grant of administration with the Will annexed on her executing an administration bond with a surety. The petitioners, to whom the testator owed a sum of money on a pro-note were not paid by the administratrix though there were sufficient assets in her hands, and they consequently applied to the Court for the assignment of the administration bond to some person who might bring a suit thereon, with a view to be adjustment of their claim. *Held*, that it would be competent for the High Court to pass an order empowering the persons to whom the bond might be assigned to sue as a trustee, and so to secure to the petitioners substantially the relief they sought. *In the goods of* GEORGE SAUNDERS, **6 N.W.P. 62.**

(174)—S. 257—*See* GUARDIAN — DUTIES AND POWERS OF GUARDIANS, **5 A. 248=A.W.N. 1883, 12.**

Succession Act (X of 1865)—*continued.*

(175)—*S.* 258—*Grant of letters with will annexed.*—Letters of administration with will annexed may be granted after expiration of 7 clear days from the testator's death. *In the goods of* WILSON, **1 C. 149.**

(176)—*S.* 259 — *Practice—Mode of issuing citations.*—In the case of an application made by the attorney of the executors, who had taken out probate of the will in Canada, for letters of administration with a copy of the will annexed in respect of certain property left by the testator in India, it was held under the special circumstances of the case, that citations might issue by registered letter from the Court with acknowledgment due. *In the goods of* FREDERIC NICHOLSON, **A.W.N. 1903, 31.**

(177)—S. 259—*See* No. 153, *supra.*

(178)—S. 260—*See* No. 113, *supra.*

(179)—S. 261—*See* Nos. 52, 152, 163, *supra.*

(180)—*Ss.* 261 *and* 234—*Reference to arbitration—Legality of—Ground for revocation of probate.*—Although according to s. 261 of the Act, the proceedings in contentious cases should, under the Civ. Pro. Code, take, as far as possible, the form of a regular suit, a Court, in which an application under s. 234 is pending has no power to delegate the decision of the question to arbitration, even with consent of parties. The words " the grant has became useless and inoperative through circumstances " in s. 234, referring to an application for revocation of probate, do not apply to a case where one of two executors appointed by a will and granted probate, finding it impossible to work harmoniously in concert, with his co-executor, applies for revocation of probate. CAMPBELL v. SIMPSON, **72 P.R. 1894.** [*D.*, 75 P.R. 1900.]

(181)—*S.* 263, *Act* XXVII *of* 1860—*Whether order of District Judge as to security appealable on the ground of the security being insufficient.*—The Indian Succession Act provides by s. 263 that the orders made by the District Judge shall be subject to the appeal to the High Court under the rules contained in the Code of Civil Procedure so far as these rules are applicable. So far as that section furnishes the Court with a guide by analogy as to whether this order is appealable or not, the conclusion is that it is not so, because no provision is made by the Code of Civil Procedure for an appeal against an order made, whether in pursuance of the directions of the High Court or otherwise by the District Judge, founded on the ground that security insufficient in point of quality has been accepted. Such orders are not appealable at all. So, the fact that the security accepted by the lower Court is insufficient cannot give a right of appeal. LUCAS v. LUCAS, **20 C. 245.** (1 C. 127, *R.*)

(182)—S. 263—*See* APPEAL—MISCELLANEOUS, 2 C.L.R. 589, 27 C. 5.

(183)—S. 263—*See* COURT FEES, A.W.N. 1889, 27.

Succession Act (X of 1865)—*continued.*

(184)—S. 263—*See* No. 52, *supra.*

(185)—*S.* 264—*Probate order—Reference to High Court—Concurrency of jurisdiction of High Court.*—A District Judge's order on a probate application is not final and cannot be referred to the High Court under s. 617 of the Civ. Pro. Code. But the High Court may, as a Court of concurrent jurisdiction, entertain such an application under s. 264 of the Indian Succession Act. *In the matter of* MONOHUR MOOKERJEE, **5 C. 756=7 C.L.R. 228.**

(186)—S. 264—*See* JURISDICTION OF CIVIL COURTS, 1 P.R. 1902.

(187)—S. 264—*See* No. 124, *supra.*

(187-*a*)—S. 265—*See* EXECUTOR, 21 B. 400.

(188)—*Ss.* 265, 266 *and* 239—*Executor of his own wrong—Intermeddling with estate of deceased—Estoppel—Civ Pro. Code*, s. 368.—S. 368 of Civ. Pro. Code, read with ss. 265 and 266 of the Indian Succession Act (X of 1865) seems to show that an "executor of his own wrong" though not a legal representative, may, after a Court has allowed the plaintiff to have him joined as representing a defendant governed by the Succession Act and dying *pendente lite*, be estopped by his own conduct before suit from denying a limitation with regard to the representative capacity. Personal services rendered to the relatives of the deceased, because of the ties of friendship or the connection between employer and employed, in order to preserve personal effects from theft, depreciation or loss, afford no ground for natural belief that the functions of an executor or administrator have been assumed. They come, moreover, well within the rule of law that intermeddling with the goods of the deceased for the purpose "of preserving them, * * * * * * or for the intermediate necessities of his property, does not make an executor of his own wrong." If the goods are valuable and not required for the immediate necessities of the deceased's family or property, the safer course would be to invoke the jurisdiction of the District Judge under s. 239 of the Succession Act to appoint a custodian to take and keep temporary possession. Any creditor of the deceased can take that course (or can set the Administrator-General in motion wherever Act II of 1874 applies) But ss. 265 and 266 of the Indian Succession Act are so framed that they need not deprive a European, employed away from his country and relatives and without fixed abode, of the kindly services of friends or employers, and need not expose such friends or employers to be sued by creditors of the deceased if they, in the exercise of such kindly services, secure the preservation of the personal effects of small value, and, being under no obligation to warehouse such property (otherwise uncared for) hand it over to the custody of persons better entitled to possession than themselves. MUTHIYAN CHETTY v. THE IRRAWADDY FLOTTILLA COMPANY, **L.B.R. 1893—1900, 305.**

Succession Act (X of 1865)—*continued.*

(188-*a*)—*See* No. 1888, *supra.*

(189)—*S.* 269—*Powers under—Application for Letters of Administration* de bonis non.—The Succession Act does not give the Court jurisdiction, when granting probate or letters of administration under its provisions, to include in such grant authority to dispose of property in respect of which the grant is made, such power of disposal being expressly given by s. 269 of the Act. So, in an application for letters of administration *de bonis non*, it is not necessary to ask for leave to dispose of the property concerned. *In the goods of* MARY HEMMING, **23 C. 579.**

(189-*a*)—S. 269—Liability of deceased's estate for unsecured debts incurred by administrator—*See* ADMINISTRATOR, 12 O.C. 414.

(190)—S. 269—*See* EXECUTOR, 1 A 710. F.B.

(191)—*S.* 277—*Executor or administrator—Failure to file an inventory—Jurisdiction of Court to take action* suo motu.—Following the settled practice of the Calcutta High Court it was *held* that the Court (of Judicial Commissioner of Sind), as a Court of Probate, will not ordinarily act *suo motu* (or as a matter of course and routine), under s. 277 and cite an executor or administrator to account for the property that has come into his possession in pursuance of the authority granted to him, but will await the disclosure of special reason for such action. *Re-petition by* JEHANGIRJI *and* BYRAMJI, **3 Sind. L.R 197=4 Ind. Cas. 1163.**

(192)—*S* 282—*Execution against the estate of deceased—One year—Civ. Pro. Code*, 1859.—An application for execution against the estate of a deceased debtor was resisted by the executor on the ground that under Act X of 1865, he was entitled to one year before he could be called upon to pay debts. *Held* that as the Civ. Pro. Code, had made no provision for carrying out the theory of s. 282 of the Indian Succession Act, execution could be issued. ABDOOL RAHMAN v. RYPER, **70 P. R. 1871.**

(193)—*S.* 282—*Interest on claim based upon decree—Distribution of assets by administrator.* The only claims to priority which s. 282 of Act X of 1865 (Succession Act) was intended to exclude, were claims on the ground that the debt is a speciality debt and on other grounds *ejusdem generis*, *i.e.*, on the ground that the debt is a debt of record or a debt due to the Crown. A debt secured by a lien on property stands on a totally different footing, the executor or administrator taking such property subject to the charge. Where an administrator had obtained a decree against the (deceased) intestate and that decree did not provide for the payment of interest, *held* that he was not entitled to pay himself interest from the assets of the deceased. The administrator of the estate of a deceased debtor is not justified in paying certain creditors of the deceased in full when he had notice of the claims of the other creditors of the deceased before he had actually made the payments. DIALU MAL v. MR. O. BRYAN, **11 P.R. 1878.**

Succession Act (X of 1865)—*continued.*

(194)—*S.* 282—*Priority—Act* VIII *of* 1859, *s.* 203—*Execution of decree against representative of deceased person.*—S. 282 of the Indian Succession Act does not interfere with the right of a decree-holder, under s. 203, Act VIII of 1859 to have his decree satisfied out of the property of a deceased person (or out of the property of the defendant, the representative, if it should appear that he has not duly applied the property of the deceased) to the exclusion of other creditors after deducting the expenses chargeable under ss. 279 to 281 of the former Act. NILKOMUL SHAW v. REED, **12 B.L.R. 287=17 W.R. 513.** [*F.*, 22 M. 194 ; *R.*, 17 B. 637, 25 C. 54, 29 B. 96=6 Bom. L.R. 853.]

(195)—S. 282—*See* ACT II OF 1874, s. 35, 25 C. 54.

(196)—S. 282—*See* RES JUDICATA—RES-JUDICATA IN EXECUTION PROCEEDINGS, 29 B. 96=6 Bom. L.R. 853.

(197)—*Ss.* 287, 288, 290 *and* 291—*Abatement of legacies—Specific bequest—General bequest.*—A bequest of a rent-producing property on trust, the trustees to apply the rents and profits for the benefit of a legatee, is not a specific bequest ; for the object of the testator's bounty will not necessarily attain a specific, that is to say, a fixed and named annual sum, as the rents and profits are liable to fluctuate. BAI BHIKALJI M. R. MODY v. BAI DINBAI, **13 Bom. L.R. 319.**

(198)—S. 288—*See* No. 197, *supra.*

(199)—S. 290—*See* No. 197, *supra.*

(200)—S. 291—*See* No. 197, *supra.*

(201)—S. 292—*See* No. 61, *supra.*

(202)—*Ss.* 297 *and* 326—*Payment of legacies—Executor's year—Construction of will—Such debts.*—The combined effect of ss. 297 and 326 of the Indian Succession Act, 1865, is that a residuary legatee becomes entitled to the residue after the executors have paid the testator's debts and legacies, and that no legatee can insist upon being paid within a year from the testator's death, which is, therefore, "called the executors' year." For one year from that death, no legacy, residuary or otherwise, can be claimed. One year is given by the law to the executors to liquidate the estate. On the expiration of that year the moment the estate is liquidated the legatees can insist upon being paid ; the moment the debts and legacies have been paid, the residuary becomes entitled to the residue and if there are more than one residuary, the residue then becomes divisible. Where a will is silent, the law says that as soon as on the expiration of "the executors' year" the executors have liquidated the testator's estate, that is, reduced it into possession, and paid his debts and legacies, the residue becomes "free for enjoyment by the heirs" or, in other words, "divisible" whether it is actually divided or not is immaterial, if it is in a condition to be divided. One of the clauses of a will provided that the share of the testator's

Succession Act (X of 1865)—*continued.*

sons should be made over to him absolutely "if at the time the said residue is divisible my son—shall have no debts due by him or any liabilities likely to result in a debt or debts of more than Rs. 5,000," but "if otherwise the said share shall be held or settled" by the executors "upon trust until the said—(son) shall be free from such debts and liabilities or until he shall die :" *Held*, on a construction of the above clause that the words "such debts" could not be treated as meaning all debts whenever contracted but they meant only "those debts," which existed at the time the residue became divisible. MACLEOD v. SORABJI, **7 Bom. L.R. 755.**

(203)—S. 321—*See* No. 97, *supra.*

(204)—S. 326—*See* No. 202, *supra.*

(205)—*S.* 331—*Probate—Limited probate—Probate duty—Court Fees Act* (VII *of* 1870), *sch.* I, *art.* 11.—Under the High Court Charters of 1862 and1865 the testamentary and intestate jurisdiction of the High Court remained the same as it was at the time when the supreme Court Charter was granted, qualified, however, by Act XXVII of 1860. s. 18, with respect to Hindus, Mubammedans and others not usualy designated as British subjects. The result is that in cases to which the Indian Succession Act does not apply, probates and letters of administration granted by the High Court in respect of such persons take effect only for the purpose of recovering debts and securing debtors paying the same, except so far as is otherwise provided in Act XXVII of 1860, and where probate is only granted in respect of such debts as may be due to the estate, the amount of probate duty payable by the executors will be per cent. on the amount of such debts, as regulated by the Court Fees Act (VII of 1870), sch. I, art. 11. *In re* HAJI ISMAIL HAJI ABDULLA, **6 B. 452** [*Appr.*, 6 B. 703 ; *R.*, 8 B. 474, 8 B. 241.]

(206)—*S.* 331—*Act* XXVII *of* 1860—*Native Christians*—A Native Christian cannot apply for a certificate of heirship to his deceased ancestor under Act XXVII of 1860. Native Christians are not "Hindus" within the meaning of the term as used in s. 331 of the Indian Succession Act (X of 1865) and therefore they are affected by the provisions of that Act and cannot proceed under Act XXVII of 1860. JOSEPH VATHIAR OF NAZARATH. **7 M.H.C. 121.** [*Appr.*, 2 M. 209 ; *R.*, 10 M.69. P.L.R. 1900, 251, 31 C. 11, P.C.]

(207)—S 331—*See* HINDU LAW—ALIENATION, 3 A. 55.

(208)—S. 331—*See* NATIVE CHRISTIANS, 1 Bom.L.R. 53=23 B. 539.

(209)—S. 331—*See* Nos. 21, 22, *supra.*

(210)—S. 332—*See* PRE-EMPTION—GENERAL, L.B.R. 1893—1900, 26.

(211)—*Ss.* 332, 190—*Letters of administration—Chins who are not Buddhists and Chins who are Buddhists—Probate and Administration Act*, s. 85—There are no rules under s. 332

Succession Act (X of 1865)—*concluded.*

of the Indian Succession Act (X of 1865) exempting people of the Chin race from the provisions of that Act. If Chins are Buddhists they will be governed by the provisions of the Probate and Administration Act (V of 1881). Under s. 85 of that Act it would be open to the Judge to refuse letters of administration. S. 190 in Act X of 1865 has no counterpart in Act V of 1881. A suit in respect of the property of an intestate Buddhist Chin can be maintained without letters of administration having first been granted. The necessity of stating clearly under what Act and sections letters of administration are issued pointed out. The proviso of s. 53 of Civ. Pro. Code, prohibits the amendment of a plaint so as to convert the suit into one of another and inconsistent character. An application for letters of administration cannot be converted into an application under the Guardians and Wards Act, VIII of 1890. MA HLA v. MAUNG PYIN, **1 L.B.R. 193.**

Succession Certificate.

Effect of obtaining—*See* CO-SHARERS — SUITS BY CO-SHARERS, 1 Ind. Cas. 205.

Application for execution by heir who has not obtained a--*See* EXECUTION OF DECREE—EXECUTION BY OR AGAINST REPRESENTATIVES, 9 Ind. Cas. 800.

Grant of, to mother acting as guardian of minor son's property — *See* HINDU LAW—GUARDIANSHIP, 2 M.L.T. 246.

Production of, to collect debt due to deceased joint creditor—Right of suit—*See* JOINT-CREDITORS, 18 C.W.N. 509=9 C.L.J. 331=2 Ind. Cas. 254.

First judgment deciding case but deferring passing decree till filing of—Subsequent judgment reversing decision arrived at in first judgment—Legality—Civ. Pro. Code, 1882, s. 202. *See* JUDGMENT—GENERAL, 6 A.L.J. 54=31 A. 153=1 Ind. Cas. 820.

Dismissal of previous suit for non-production of succession certificate —*See* RES JUDICATA—ADJUDICATIONS, 18 M. 466=5 M.L.J. 189.

Succession Certificate Acts.

See CERTIFICATE OF ADMINISTRATION.

Succession Certificate Act (XXVII of 1860).

[REP., ACT VII OF 1889.]

(1)—*Certificate to collect debts—Effect.*—The granting of a certificate does not and cannot determine any question of title, or decide what property does or does not belong to the estates of the deceased. It merely enables the person or persons to whom the certificate is granted to collect the assets belonging to the deceased; and the certificate is conclusive of his or their representative title as against all debtors to the deceased. A certificate cannot be granted for the collection of fractions of the debts of the deceased. WASELUN HAK v. GOWHURUN NISSA BIBI, **1 B.L.R. S.N. 7 C=10 W.R. 105.** [*Cons.*, 4 B.L.R. A.C. 149.]

Succession Certificate Act (XXVII of 1860)—*continued.*

(2)—*Application for certificate under—Limitation.*—A Hindu woman applied for a certificate of administration under Act XXVII of 1860, to enable her to collect the debts due to the estate of her brother who died 7 years back and whose property had been taken possession of by his so called heir-at-law. The applicant urged that at the time of her brother's death she was pregnant and subsequently gave birth to a son, who died in infancy and that as representative of that son, who was the legal heir of her deceased brother, she was entitled to the certificate. The lower Court rejected the application on the ground of lapse of time. *Held*, that the Judge ought not to have rejected the application and that he must proceed to an enquiry under the Act. SRIMATI DURGADASI DEBI v. JADUNATH MOOKERJEE, **2 B.L.R. App. 26.** (6 W.R. 398, *R*)

(3)—*Recovery of debts of deceased—Certificate of Administration—Act* XXVII *of* 1860.—Where payment of a debt due to a deceased person is not being withheld for fraudulent or vexatious motives, but from a reasonable doubt as to the party entitled to it, the plaintiff, in a suit to recover it, is bound to produce a certificate under Act XXVII of 1860, before he can obtain a decree or execute a decree already obtained by the deceased, though he may institute his suit or apply for execution without such a certificate, provided it is filed before decree or before execution issues. JANAKI BALAV SEN v. HAFIZ MAHOMED ALI KHAN, **13 C. 47.** [*F.*, 19 C. 482; *Doubted*, 15 C. 54; *D.*, 19 C. 336; *R.*, 22 C. 143, 23 C. 87, F.B., 7 C.L.J. 658=12 C.W.N. 145.]

(4)—*Act* XXVII *of* 1860—*Certificate—Jurisdiction.*—Where a certificate having been granted by a Zilla Judge under Act XXVII of 1860, application was made to have it cancelled on the ground that the Judge had no jurisdiction to grant it, inasmuch as the deceased, at the time of the death, was not ordinarily residing within the zilla, *held* that the Judge should have called on the applicant to give evidence in support of his allegation, and that he should have served notice on the opposite party to show cause why the certificate should not be recalled. *In the matter of the petition of* JAGESWAR DHAR, **6 B.L.R. App. 128=14 W.R. 464.**

(5)—*Certificate under Act* XXVII *of* 1860—*Fraud—Jurisdiction.*—One EK. obtained on a stamp sufficient to cover Rs.2,000 only, a certificate to collect the debts of her alleged father—HB. The debts due to the estate having turned ought to be larger than had been supposed, she applied for the cancelment of the first certificate, and the grant of a fresh one on a higher stamp. Meantime, B represented to the Judge that she was the widow and sole heir of HB, and that EK was in no way connected with the deceased, asking for inquiry into the alleged fraud, and the grant of certificate to herself. This application having been rejected, an appeal was preferred to the High

Succession Certificate Act (XXVII of 1860) —*continued.*

Court which was also dismissed. Before decision of the appeal, B intervened on EK's second application, praying that orders might be stayed until the decision. The Judge refused to entertain B's petition, and returned it to her vakeel. An order was afterwards obtained from the High Court suspending the grant of the further certificate to EK. *Held*, that, under the special and remarkable circumstances on this case, which called for the most careful inquiry and scrutiny, the Judge should have made inquiry into B's allegation and, if he had ascertained that they were correct, should have refused to grant E K, an extension of her certificate, and should have taken steps to have the parties who committed the fraud punished in the Criminal Court. Every Court has inherent authority to make inquiry into fraudulent abuses of its own processes. MUSSAMAT BHIHUN v. MUSSAMAT ELAHI KHANUM, **8 B.L.R. Ap. 44, Note=11 W.R. 153.** [*F.*, 8 B.L.R. Ap. 13; *R.*, 17 W.R. 174.]

(6)—*Act* XXVII *of* 1860—*Certificate—Powers of District Court.*—Application for a succession certificate. Objection was raised by a relation of the deceased, who was alleged to have made an oral gift of all his property to the objector, in respect of which he intended to file a suit. The District Judge ordered the grant of a certificate to the applicant on his depositing a certain amount as security, and binding himself not to alienate any of the landed or other property of the deceased until the case in the Civil Court was settled, and also directed the objector to bring the suit within one year. *Held*, that the orders of the lower Court in respect of security being given not to alienate the landed estate of the deceased and binding the objector to bring the suit within one year were not orders that could be made under Act XXVII of 1860. PADAM PRASAD v. CHOTEY LAL, **A.W.N. 1881, 157.**

(7)—*Rival claimants—Discretion of Judge to grant certificate to person best entitled to it—Grant of more than one certificate.*—Where there are rival claimants for a certificate, under Act XXVII of 1860, to collect debts due to the estate of a deceased person, the Judge is not bound to give certificates to each of them to enable them to collect the debts according to their own shares, but he has a discretion to grant the certificate to that person who shall appear to be best entitled to obtain it. *Quære*:—Whether Act XXVII of 1860 contemplates the grant of more than one certificate, or of a joint certificate, when there are rival claimants for the same? RANI RAISUNNISSA BEGUM v. RANI KHUJUNNISSA, **4 B.L.R. A.C. 149=13 W.R. 143.** (1 B.L.R.S.N. 7, 12 W.R. 38, *R.*)

(8)—*Act* XXVII *of* 1860—*Act* X *of* 1865, *s.* 331—*Native Christians.*—A Native Christian cannot apply for a certificate of heirship to his deceased ancestor under Act XXVII of 1860. Native Christians are not "Hindus" within the meaning of the term as used in s. 331 of the Indian Succession Act (X of 1865), and therefore they are affected by the provisions of that Act and cannot proceed under Act XXVII of 1860. JOSEPH VATHIAR OF NAZARETH, **7 M.H.C. 121.** [*Appr.*, 2 M. 209; *R.*, 10 M. 69; P.L.R. 1900, 251; 31 C. 11, P.C.]

(9)—*Applicability of—Presidency towns—Natives.*—Act XXVII of 1860 (excluding the sections relating to power to grant certificates) applied to the Presidency towns, and to the Hindus, Mahomedans and others, who at the time of the passing of the Act were not usually designated by the term British subjects. The intention of the Legislature, must be ascertained from the words of a statute, and not from any general inferences to be drawn from the nature of the objects dealt with by the statute. MUTHAMMAL v. THE BANK OF MADRAS, **7 M. 115.**

(10)—*Object—Certificate of administration—Holder, a trustee.*—The object of Act XXVII of 1860 is, not to enable parties to litigate questions of disputed title, but to enable debtors to pay the debts due by them with safety to the representatives of deceased Hindus and others; and to facilitate the collection of such debts by removing all doubts as to the legal title to demand and receive the same. It enables debtors to get sufficient acquittances when they pay money due to the estate of the deceased, and preserves that estate from loss by giving some one the right to collect the debts, lest they should be lost, *e.g.*, by the operation of the law of limitation The holder of a certificate under Act XXVII of 1860 is a trustee liable to account for the monies received by him to the legal heir or representative of the deceased. PRANKISTO BISWAS v. NOBODIP CHUNDER BISWAS, **8 C 868.** [*R.*, 15 C. 574, U.B.R. 1892—1896, Vol. II, 639.]

(11)—*Debt due to deceased person—Suit by legal representative—Certificate to collect debts.*—Where, in a suit for recovery of a debt due to a deceased person, the defendant denied the title of the plaintiff, not frivolously or vexatiously (there being good reasons to doubt the validity of such title), and the plaintiff failed to produce a certificate under Act XXVII of 1860, although the Court gave him time for the same, *held*, that the lower Court had not acted improperly in dismissing the suit under the circumstances. BATASI v. MAHESH, **5 A. 555=A.W.N. 1883, 133.**

(12)—*Act* XXVII *of* 1860, *certificate under—Right of suit of the representative of deceased creditor.*—A certificate under Act XXVII of 1860 is not necessary to give to a person, claiming to be the representative of a deceased creditor, the right to institute a suit to recover a debt due to the estate of the deceased, or the right to present an application for execution of a decree obtained by the deceased. But such a certificate, or a probate, or letters of administration must be produced by the person proceeding as representative, before a decree or order can be

Succession Certificate Act (XXVII of 1860) —*continued.*

passed, or process of execution issued for payment of the debt due, except the Court should think that payment is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled. GOVINDAPPAH v. KONDAPPAH SASTRULU, **6 M.H.C.R.** 131. [*R.*, 13 C. 47, 23 C. 87, F.B.; *D.*, 6 C. 370.]

(13)—*Debt due to endowment—Pro-note in favour of former manager—Suit by successor—Heirship certificate.*—Where a pro-note was executed to the former manager and founder for a debt due to an endowment, and the manager was succeeded by his son, who, in his turn, was succeeded by the manager's widow who continued the management of the endowment even after her adopted son got into possession of the rest of her husband's estate, it was held, in a suit by her on the pronote, that she was entitled to sue as manager, and that she could get a decree without producing an heirship certificate. She did not sue as being entitled to the effects of her deceased husband, or for a debt due to her deceased husband, but as manager. MALLIKARJUNA v. SRIDEVAMMA, **20 M. 162, P.C., =24 I.A. 78=1 C.W.N. 497=7 Sar. 205.** [*R.*, 28 B. 215=5 Bom. L.R. 932.]

(14)—*Certificates under*—Wakf *property and private debts—Successors to trusts—Legal heirs*—Where an application for a certificate under Act XXVII of 1860 is opposed by one claiming to be the legal heir, and alleging that the Will is spurious, the only point to be determined is the validity of the Will. A party may by Will appoint a stranger to succeed him in the trust of *wakf* property, while his legal heir succeeds to his private property; the former in such a case would be entitled to collect debts due to the deceased as trustee, and the latter to recover debts due to him in his private capacity, and each may have a certificate granted to collect his respective debts. MIRZA DAND ALI v. SYED NADIR HUSSEIN, **3 B.L.R.A.C. 46=11 W.R. 333.**

(15)—*Act* XXVII *of* 1860— *Scope and object of the Act—Rival claimants for certificate—Procedure—Trial of questions of title*—The title, which the Court under Act XXVII of 1860 really determines, is not the title to the estate of the deceased person, but the title to the certificate; but in a case where there are rival claimants, each claiming the effects of the deceased person, such a title cannot be determined unless the question of title to the estate itself is to some extent at least gone into. And when this title depends upon a question of fact, that question must be gone into, before it can be held who has the preferential claim to be the representative of the deceased, and entitled as such to a certificate to collect the debts due to the deceased—*Per Ghose, J.* ASHGAR REZA v. ABDUL HOSSEIN, **15 C. 574** [*R.*, 23 C. 431.]

(16)—*Act* XXVII *of* 1860 — *Certificate to collect debts—Inquiry as to title—Questions for decision.*—In administering the provisions of Act XXVII of 1860, the Courts are not to enter on the determination of intricate questions of law or of fact, but to issue a certificate to the person who has *prima facie* the clearest title to the succession, such as the natural heir, and to leave a person, whose claims to a superior title is disputed on reasonable grounds, to establish that title by a regular suit. SURFOGI v. KAMAKSHIAMBA, **7 M. 452.** [*R.*, 5 M.L.J. 36, 23 C. 431; *D.*, 15 C. 574.]

(17)—*Investigation of title—Certificate to collect debts.*—No question of title, *e.g.*, whether a certain person was adopted by another) can be judicially determined between parties as the result of an enquiry made under Act XXVII of 1860. [*Appl.*, 6 C. 303=7 C.L.R. 475; *R.*, 15 C. 574.] No certificate to collect the debts of an intestate, dead for more than forty years, can be granted, the presumption being that there could not be, owing to the operation of the law of limitation, any debts due to him, which could be recovered. KOONJ BEHARY CHOWDHRY v. GOCOOL CHUNDER CHOWDHRY, **3 C. 616.**

(18)— *Act* XXVII *of* 1860, *certificate for collection of debts under, not grantable to several claimants' jointly.*—Two widows, J and H were the rival claimants in this case for a certificate of heirship under Act XXVII of 1860, to enable them to collect the debts due to the estates of their deceased father-in-law and his sons, their deceased husbands. The District Judge having granted a joint certificate in the name of both J and H, J preferred this appeal against such order, and the High Court *held* that the granting of the certificate to both the widows would be frustrating the object of the Act; and, further, in the present case, the husband of one of the widows having predeceased his father, the other widow in whom alone the estate vested on her husband's death had the better claim to a certificate authorising her to get in the debts due to the estate. JAMANABAI v. HASTUBAI, **11 B. 179.** [*F.*, 15 B. 684; *D.*, U. B.R. 1897—1901, Vol. II, 563.]

(19)—*Certificate for collection of debts—Grant of joint certificate.*—Act XXVII of 1860 does not authorise a Judge to grant a certificate to several persons jointly; where there are several claimants, it is his duty to decide which of them has the best right. MADAN MOHAN v. RAMDIAL, **5 A. 195=A.W.N. 1882, 215.** [*F.*, 15 B. 684.]

(20)—*Right to collect subsequent debts of deceased Hindu by son adopted by widow.—Right of such adopted son to certificate to collect debts accruing during minority*—The estate of a deceased Hindu vests in the son adopted by his widow, subsequent to his death, under genuine *unoomoti puttra*, immediately on the adoption and the adopted son is entitled to collect the debts, accruing due subsequent to the death of the adoptive father, in his own right and not as representative of the deceased. Such adopted son has no *locus standi* to apply for a certificate, to collect the debts, that accrued due during his minority, while the estate was under his

Succession Certificate Act (XXVII of 1860) —*continued.*

adoptive mother's management, under Act XXVII of 1860. NARAIN MAL v. KOOER NARAIN MYTEE, **5 C. 251.**

(21)—*Act* XXVII *of* 1860—*Certificate granted to father—Right does not descend to son after father's death.*—The effect of a certificate under Act XXVII of 1860 is to entitle the person so obtaining the certificate to the right of collecting debts, and, under that Statute, to give full receipts to the debtors of the deceased. Such right is purely personal, and cannot be subjected to the law of inheritance. BANSI v. TIKA, **A.W.N. 1887, 248.**

(22)—*Certificate to collect debts—Consideration of nearness of kinship and residence.*—Considerations of nearness of kinship and nearness of residence to the place, where most of the debtors reside, should not warrant a Judge, in awarding a certificate to collect debts, to a person, in preference to another, who has *prima facie* the better title to the beneficial ownership of the debts. [*Appl.*, 6 C. 303 = 7 C.L.R. 475.] A father's brother's grandson has a right to a certificate under Act XXVII of 1860, in preference to a brother's daughter's son. *In re*, OODOY CHURN MITTER, **4 C. 411.** (15 B.L.R. 35 = 23 W.R. 117, *F.*) [*F.*, 11 C. 343; *Appl.*, 15 C. 780.]

(23)—*Act* XXVII *of* 1860—*Application for certificate—Competition between heirs of one of full blood and heirs of another of half blood.*—A certificate under Act XXVII of 1860 was only evidence of the representative title of the grantee as against the debtors to the estate. Where the competition was between two heirs, one of the half blood and the other of the full blood, the High Court on appeal preferred the latter, who was in possession of the title-deeds and had performed the *shradh* of the deceased, and gave him a certificate in respect of the whole estate. HURRO KRISTO DOSS v. RAMA NUNDO DOSS, **22 W.R. 274.**

(24)—*Act* XXVII *of* 1860—*Karnavan, debtor to tarwad—Refusal of certificate to collect debts.*—Ordinarily a certificate under Act XXVII of 1860, to collect debts, would be issued to the Karnavan, but where he is a debtor to the tarwad under circumstances which justify the tarwad in withholding their confidence from him, the discretion of the Judge is properly exercised in refusing the certificate. MADHAVA PANIKAR v. GOVINDA PANIKAR, **5 M. 4.**

(25)—*Act* VIII *of* 1859, *s.* 101—*Hindu Law—Mahomedan Law.*—A certificate under Act XXVII of 1860 cannot be granted to any number of representatives of the deceased, either under the Hindu or the Mahomedan Law, as it would not facilitate the collection of debts to grant certificates to separate applicants entitled to fractional shares of the estate. If some of the share-holders do not consent to one certificate being granted to all, it is within the competency of the Court under Act XXVII of 1860 to select one or more of those share-holders who would consent to act, and appoint him or them as representatives of the deceased. If this could not be done, a Receiver might be appointed under s. 101 of Act VIII of 1859. SRIMATI AMIRUNNISSA BARKAT v. SRIMATI AFIATUNNISSA, **3 B.L.R.A.C. 404 = 12 W.R. 307.** [*R.*, 7 A. 313, F.B. = 5 A.W.N. 34.]

(26)—*Act* XXVII *of* 1860—*Sale for arrears of revenue—Balance of sale proceeds in deposit with Collector—Right of widow of owner to apply for certificate of administration.*—On the death of the owner, an estate was sold for arrears of revenue. The widow of the owner applied to the Collector for payment to her of the balance of the sale proceeds in deposit with him. The Collector called upon the applicant to produce a certificate under Act XXVII of 1860. The Judge to whom the application under the Act was made rejected the same, on the ground that the case was not governed by the provisions of the Act, inasmuch as the sum in deposit was not in any sense a debt due to the deceased at the time of his death. *Held*, that the sale proceeds, although they might have been recovered after the decease of the owner, were clearly payable to his estate, and there was nothing in the provision of the law which prevented the Judge from entertaining an application under the Act from his widow in respect thereof. MUSSAMAT TRIPOORA SUNDUREE. APPELLANT, **22 W.R. 45.** [*R.*, 24 W.R. 203.]

(27)—*Representative of assignee by devise of debt—Suit to recover debt.*—The representatives of an assignee by devise of a debt cannot sue to recover the debt, without having first taken out probate of the will of the testator, or having obtained a certificate under Act XXVII of 1860 to realise the debts of his estate. SHODONE MOHOLDAR v. HOLALKHORE MOHOLDAR, **4 C. 645 = 3 C.L.R. 462.** [*R.*, 13 C. 47.]

(28)—*Execution of decree by heir—Certificate to collect debts—Civ. Pro. Code* (1859), *s.* 208.—A certificate under Act XXVII of 1860 to collect debts due to a deceased person, is not indispensably necessary to enable an heir to apply, under s. 208 of the Civ. Pro. Code (1859), for the execution of a decree held by the deceased. A person, who has not obtained a certificate, may apply under that section. It will, of course, be open to the Court, in the exercise of the discretion vested in it, if there is any doubt that the person applying for execution is entitled by inheritance to the rights decreed, to refuse the application until a certificate has been obtained. KARAM ALI v. HALIMA, **1 A. 686.**

(29)—*Execution of decree—Order refusing representative to execute decree until certificate granted for collection of debts—Appeal—Civ. Pro. Code, s.* 244—*Certificate for collection of debts whether absolutely necessary for representative to execute—Objections to title.*—The order of a Court refusing to allow the representative of a deceased decree-holder to execute the decree, and staying such execution until

Succession Certificate Act (XXVII of 1860) —*continued.*

he should have obtained a certificate to collect debts, is one passed under s. 244 and as such subject to appeal. The possession of a certificate under Act XXVII of 1860 is not an imperative condition precedent to the institution of execution-proceedings by the representatives of a deceased decree-holder. In such cases, the Court should consider whether the objections to execution are vexatiously raised, or are *bona fide* objections on the part of the judgment-debtor to the title of the person seeking to execute the decree. HOTILAL v. HARDEO, **5 A. 212=A.W.N. 1882, 191.** [*R.*, 13 C. 47, 23 C. 87, F.B.]

(30)—*Certificate of administration—Jurisdiction to recall—Judge sitting on original side, power of—Act* XXVII *of* 1860.—*Norman, J.*, ruled that sitting on the original side of the Court, he would not grant a certificate of administration in supersession of the one which had been granted by the Judge of the 24 Pargannahs, under Act XXVII of 1860. *In the goods of* SHAMLAL DAS, **5 B.L.R. App. 21.**

(31)—*Act* XXVII *of* 1860—*Certificate of administration, power to re-call.*—A Judge is competent to entertain a petition to re-call a certificate granted by him under Act XXVII of 1860, if the certificate has been obtained by means of false and fraudulent statements. *In the matter of the petition of* BHABADA DASI, **8 B.L.R. App. 13.** (9 W.R. 394, 8 B.L.R. App. 14, Note, *F.*)

(32)—*Suit to annul certificate for collection of debts—Maintainable.*—A suit is not maintainable to annul a certificate for the collection of debts granted under Act XXVII of 1860. The intended operation of the Act is to make the right to the certificate conclusively determinable in the manner specially provided; and the representative title of the certificate-holder is left open to question only in a suit or proceeding to enforce a claim to assets realized under the certificate or to other property of the deceased. PERINGADI IBRAYI v. P. PERINGADI AMANATH, **5 M.H.C. 283.** [*F.*, 22 W.R. 312; *Appr.*, 5 M.H.C. 417.]

(33)—*Certificate—Power of District Court to cancel—Appeal.*—Under Act XXVII of 1860, the District Court has no power to cancel a certificate granted to collect the debts of a deceased person. Where the Judge erroneously orders a cancellation, an appeal lies against the order under the general provisions of the Procedure Code. VENKATAMMA v. CHENGALRAYAPPA, **7 M. 555.**

(34)—*Certificate — Appeal by person not appearing in first Court.*—A person who did not appear in the Court of the District Judge to oppose an application for the grant of a certificate under Act XXVII of 1860 was not in a position to contest the order of the District Court in the character of an appellant. TAPESHRA KUARI v. AJUDHIA KUARI, **A.W.N. 1881, 162.**

Succession Certificate Act (XXVII of 1860) —*continued.*

(35)—*Appeal—Order as to deposit of security.*—No appeal lies against orders under Act XXVII of 1860 relating to deposit of security by grantee of a certificate of heirship. MONMOHINI DASSEE v. KETHER GOPAL DEY. **1 C. 127=24 W.R. 362.** (2 N.W.P. 146, *F.*) [*F.*, 3 A. 304, 19 M. 199=5 M.L.J. 37; *R.*, 20 C. 245, 1 A. 287.]

(36)—*Act* XXVII *of* 1860—*Order for certificate passed subject to conditions—Appeal not maintainable to vary conditions—Application for reconsideration of order.*—The present applicants for a certificate under Act XXVII of 1860, dissatisfied with the conditions subject to which their application was granted, omitted to apply for the grant of a certificate and none had therefore been granted by the Court below. The Chief Court held that if there be any appeal from the order it should purport to be under the first clause of s. 6 of the Act, but that clause, however, does not contemplate or give an appeal to a successful petitioner against an order in his favour with a view to varying the terms for the grant of a certificate. An application with such object must be made to the Court which passed the order and to that Court only which is competent to reconsider its order at any time before the certificate is actually granted. MUSSAMMAT PARBATTI v. DWARKA DAS, **133 P.R. 1879.**

(37)—*Act* XXVII *of* 1860, *person holding certificate under—Order directing him to furnish security in case in which there had been sale of portion of property held as security, nature of and appeal from—Act* VII *of* 1889.—Where an order, by which a person who had obtained a certificate under Act XXVII of 1860, was directed to furnish security to the extent to which the security originally furnished had been diminished by the sale of a portion of the property, *held*, that neither under Act XXVII of 1860 nor under the provisions of Act VII of 1889 (Succession Certificate), does an appeal lie from such an order. It is not an order relating either to granting, refusing, or revoking of a certificate. ALTA SOONDARI DASI v. SRINATH SAHA, **20 C. 641.**

(37-*a*)—*Right of an heir—Certificate under s. 73 of Act* VIII *of* 1859.—In a suit by a co-heir for administration and division of the estate of a deceased person, plaintiff is entitled to have an account of the entire personal estate; and to follow the property into the hands of any person who has misappropriated it; and such right is not taken away by the fact that another co-heir holds a certificate under s. 73, Act VIII of 1859. NGA THA YA v. MI KHAN MHAW, **5 B.L.R. 371=13 W.R. 443.**

(38)—*Order refusing to grant administration certificate—Appeal.*—There is no appeal from an order under this Act, after proper enquiry, refusing to grant a certificate of administration to any claimant. RAM CHAND v. MUSSAMMAT RUKMAN DEVI, **103 P.R. 1883. F.B.** (117 P.R. 1831, 58 P.R. 1833, 78 P.R. 1836, *R.*) [*R.*, 68 P.R. 1890.]

Succession Certificate Act (XXVII of 1860) —*continued.*

(39)—This circular directs that no copies of decision ofthe Courts in cases of certificates under Acts XXVII of 1860 and XI of 1858 be granted unless the certificate has been previously issued. Civ. Cir. No. 17, dated 23rd June 1870. **14 W.R. Civ. Cir. 1.**

(40)—This circular calls for a return of the duty levied on Probates and Letters of Administration under the Succession Act, and on Certificates under Act XXVII of 1860. Civ. Cir. No. 20, dated 13th July 1871. **16 W.R. Civ. Cir. 4.**

(41)—*See* ACT XI OF 1876, s. 4, 8 C. 300=11 C.L.R. 274.

(42)—Collection of debts in succession—*See* APPEAL—ORDERS, 117 P.R. 1881.

(43)—*See* APPEAL—ACTS AND REGULATIONS, 1 Ind. Jur. N., s. 365, 13 W.R. 395, 17 W.R. 566, 20 W.R. 312, 50 P.R. 1868.

(44)—*See* ATTACHMENT—MISCELLANEOUS, 11 W.R. 532.

(45) — *See* CERTIFICATE TO COLLECT DEBTS. 94 P.R. 1887.

(46)—*See* CIV. PRO. CODE, 1908, O. XXII, r. 3 (1), A.W.N. 1882, 73.

(47)—*See* COSTS—SPECIAL CASES, 3 W. R. 23.

(48)—*See* COURT FEES ACT, 1870, sch. II, s. 17, art. 3, 16 W.R. 259.

(49)—*See* DEBTOR AND CREDITOR, 10 W. R. 105=1 B.L.R. S.N. 7.

(50)—*See* DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE, 22 W.R. 301.

(51)—*See* DECLARATORY DECREE, SUIT FOR—REVERSIONERS, 16 W.R. 214.

(52)—*See* DELEGATION OF POWERS, 142 P.R. 1889.

(53)—*See* ESTOPPEL—STATEMENTS AND LEADINGS, W.R. 1864, 198.

(54)—*See* EVIDENCE—DECREES, JUDGMENTS AND PROCEEDINGS IN SUIT, 18 W. R. 514.

(55)—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 11 W.R. 204.

(56)—*See* EXECUTION OF DECREE—EXECUTION BY AND AGAINST REPRESENTATIVES, 15 W.R. 476.

(57) — *See* GOVERNMENT PROMISSORY NOTES, 15 W.R. 267.

(58)—*See* HINDU LAW—ADOPTION, 12 W. R. 356.

(59)—*See* HINDU LAW—DEBTS, 2 A. 513.

(60)—*See* HINDU LAW — INHERITANCE, A.W.N 1882, 79.

(61)—*See* HINDU LAW—JOINT FAMILY, 11 C.L.R. 514.

Succession Certificate Act (XXVII of 1860) —*continued.*

(62)—*See* HINDU LAW—PARTITION, 8 B.L. R. 385=17 W.R. 102, 6 W.R. 139, 13 W.R. 199.

(63)—*See* HINDU LAW—PRESUMPTION OF DEATH, 8 W.R. 421.

(64)—*See* HINDU LAW—WIDOW, 8 B.L.R. 389, Note, 8 B. L. R. 390, Note, 8 B. L. R. 395, Note.

(65)—*See* LIMITATION ACT, 1908, art. 13, Marsh, 573=2 Hay 633, 8 W.R. 126.

(66)—Application for certificate to collect debts due to a deceased person—*See* LIMITATION ACT, 1908, art. 181, 8 M. 207.

(67)—*See* LIMITATION ACT, 1908, art. 182 —Miscellaneous, 4 M.H.C. 89.

(68)—*See* MAHOMEDAN LAW—ACKNOWLEDGMENT, 11 W.R. 426.

(69)—*See* PROBATE—POWER OF HIGH COURT TO GRANT PROBATE, 1 Ind. Jur. N. S. 10=Bourke Test 3.

(70)—*See* RENT, SUIT FOR, 13 W.R. 356.

(71)—*See* RES JUDICATA—MATTERS IN ISSUE, 24 W.R. 111.

(72)—*See* REVIEW--GROUNDS FOR REVIEW, 18 W.R. 413.

(73)—*See* REVIEW—REVIEW WHEN LIES, 5 M.H.C. 417, 24 W.R. 376.

(74)—*See* RIGHT OF APPEAL, 24 W.R. 92.

(75)—*See* SALE—SALE IN EXECUTION OF DECREE—PURCHASERS, RIGHT OF, 14 W.R. 448.

(76)—*See* SUCCESSION ACT, 1865, s. 263, 20 C. 245.

(77)—*See* SUPERINTENDENCE OF HIGH COURT, 6 W.R. Mis. 53.

(78)—*S.* 2—*Suit by heir of Muhammadan wife for his share of dower-debt—Absence of succession certificate—No objection by defendant —Suit tried as administration suit and decreed —Validity.*—Where one of the heirs of a Muhammadan wife sued for his share of the dower-debt due to the deceased without producing the requisite certificate under Act XXVII of 1860, but the defendants did not raise any objection to the suit upon that score, but the suit was tried as an administration suit: *Held*, that the defendants could not raise that objection in second appeal, as the defect in the claim had been removed by the procedure adopted in trying the suit by the lower Court. HAKIMUNNISSA v. ABDULLA, **A.W.N. 1888, 202.**

(79)—*S.* 2—*Debt due to deceased person's estate—Suit by legal representative—Certificate to collect debts.*—It is not an imperative condition precedent to the institution of a suit by the legal representative of a deceased person, for a debt due to his estate, that such legal representative should first obtain a certificate under Act XXVII of 1860. In such cases, the Court

Succession Certificate Act (XXVII of 1860) —*continued.*

should consider whether the objections raised by the debtor are vexatious or are *bona fide* objections to the title of the plaintiff. LACHMI v. GANGA PRASAD, **4 A. 485 = A.W.N. 1882. 122.** [*F.*, 5 A. 212; *R.*, 13 C. 47, 23 C. 87, F.B.]

(80)—*S.* 2—*Suit by representative of deceased creditor—Special defence of want of certificate under Act* XXVII *of* 1860, *not put in issue—Duty of appellate Court—Interpretation.*—In respect of a very special defence (*e.g.*) (the want of a certificate under Act XXVII of 1860 in a suit by the representative of a deceased creditor) where no issue has been raised upon it, and no evidence given, and it has not been pressed in the first Court, an appellate Court ought not to entertain the question. The want of such a certificate does not of itself bar a suit by such representative. *Semble.*—The word "debtor" in s. 2 of Act XXVII of 1860 does not include the purchaser of a mortgaged property, who is in no sense a debtor. The section is limited to cases of personal decrees against the debtor. ROGHUNATH SHAHA v. PARESH NATH PUNDARI, **15 C. 54.** (13 C. 47, *questioned,*) [*F.*, 4 C.W.N. 558 = 26 C. 839; *Appl.*, 19 C. 336; *Appr.*, 22 C. 143; *R.*, 12 C.W.N. 145.]

(81)—*S.* 2—*Bond given to secure debt due to estate of deceased—Suit by heir—Waiver of protection implied.*—Where the debtor to the estate of a deceased Hindu, executed a bond unconditionally in favour of the heir to secure the debt, he cannot, afterwards, compel the heir to produce a certificate under Act XXVII of 1860. When a suit is brought upon a specific contract, any defence available to the debtor must arise out of the contract, and he cannot be permitted to rely on the prior state of things which had merged into it, in order to add to its terms. KOTTAM ZEMINDAR v. PITTAPUR ZEMINDAR, **9 M. 171.**

(82)—*S.* 2—*Exception "doubt as to the party entitled."*—The "doubt as to the party entitled" contemplated in the section, is not a speculative or possible doubt, but a reasonable doubt so far as the facts are ascertainable, after due inquiry, from faithworthy persons, either connections of the deceased or from others. The exception in s. 2 is not satisfied by the mere absence of "a reasonable doubt as to the party entitled"; but, there must also, be present, fraudulent or vexatious motives in withholding payment. MUTTAMMAL v. THE BANK OF MADRAS, **7 M. 115.**

(83)—*Suit by only son and heir alone for recovery of debt—Certificate of Administration—Act* XXVII *of* 1860, *s.* 2—*"Vexatiously withheld"*—The only son and heir of a deceased Hindu, could not, when the widow was the administratrix of the estate, sue alone for recovery of a debt though he was beneficially entitled to it, when there was no vexatious or fraudulent withholding of the debt within the meaning of s. 2 of Act XXVII of 1860. A debt cannot be said to be "vexatiously withheld" under the section, simply because the debtor omits to pay it, in a case where there is no doubt as to the person entitled to receive it. CHUNDER COOMAR ROY v. GOCOOL CHUNDER BHUTTACHARJEE, **6 C. 370.** [*R.*, 7 M. 115, 13 C. 47.]

Succession Certificate Act (XXVII of 1860) —*continued.*

(84)—*S.* 2, *Act* XXVII *of* 1860—*S.* 4, *Act* VII *of* 1889 (*Succession Certificate*)—*Suit for sale of certain mortgaged property—Personal relief not granted—Case of representative of deceased plaintiff—Suit on mortgaged bond.*—The language of s. 2 of Act XXVII of 1860 is similar to the provisions of s. 4 of the Succession Certificate Act. Where a decree was made for a sale of certain mortgaged property, but the personal relief was not granted on the ground of lapse of time, *held*, that this was not "a decree against debtor for payment of his debt" within the meaning of s. 4, Act VII of 1889. (15 C. 54 and 19 C. 336, *Approved*) [*F.*, 28 B. 630 = 6 Bom. L.R. 582; *R.*, 29 M. 77.] Whether the Act would apply not only to the case of a person claiming by succession to the original creditor, but also to a case where, upon the death of such person during pendency of suit, another person is substituted as plaintiff in his place, is an open question. BID NATH DAS v. SHAMANAND DAS, **22 C. 143.** [*R.*, 20 M. 232, 26 C. 839 = 4 C.W.N. 558, 12 C.W.N. 145 = 7 C.L.J. 658.]

(85)—S. 2—*See* JURISDICTION—CAUSES OF JURISDICTION, 13 W.R. 24.

(86)—*S.* 3—*Certificate for collection of debts—Jurisdiction of District Court.*—The District Court is competent to grant a certificate under Act XXVII of 1860, in respect of the whole of the property of a deceased person in the Province. *Petition of* TRIBENI SAHAI, **A.W.N. 1882, 69.**

(87)—S. 3—*See* APPEAL—ORDERS, 58 P.R. 1883.

(88)—S. 3—*See* MAHOMEDAN LAW—DOWER, 19 W. R. 315.

(89)—*Act* XXVII *of* 1860, *ss.* 3, 6—*Grant of certificate under s.* 3—*Whether appealable—Application for supersession of certificate under s.* 6.—No appeal lies from the order of a lower Court, *i.e.*, a District Court, granting a certificate to a person under s. 3 of Act XXVII of 1860, though such appeal may be treated as an application to supersede the certificate under the second part of s. 6 of the Act. (76 P.R. 1881, *F.*) Where the claim of an applicant was founded on her being the heir of her son, and it was not denied that she was unchaste during her son's lifetime, the Chief Court refused to supersede the certificate granted by the District Court to the opposite party. (4 C. 550, *R.*) MUSSAMAT PREMI v. WADHAWA SINGH, **34 P.R. 1885.**

(90)—Ss. 3, 6—*See* APPEAL—ORDERS, 76 P.R. 1881.

(91)—*Ss.* 3, 24—*Application for certificate—Power of District Court to grant certificate—"District Court," meaning of.*—A certificate

Succession Certificate Act (XXVII of 1860) —*continued.*

under s. 3 of Act XXVII of 1860 may be granted by the District Court within whose jurisdiction the deceased ordinarily resided, or, if at the time of his death he had no fixed place of residence, then, by the District Court within the jurisdiction of which any part of the property of the deceased may be found. The expression "District Court" as defined in s. 24 of the Act, means the principal Civil Court of original jurisdiction of a zilla or district. SRI GOSWAMI GOPAL LALJI v. SRI GOSWAMI JAIDEO LALJI, **A.W.N. 1885, 39.**

(92)—*S.* 4—*Succession certificate—Effect—Disputed succession — Payment to certificate-holder.*—The proprietor of an estate died leaving a son and the plaintiff, the widow of a predeceased son. The second defendant claimed to be the adopted son of the son who had died in the meanwhile, and his widow successfully asserted her right disavowing second defendant's claim as adopted son. The first defendant executed a hypothecation bond in favour of the plaintiff, and in her name alone, for a sum of money including debts, principal and interest, then found to be due to her, but originally incurred by him in favour of her deceased father-in-law and brother-in-law. The plaintiff also obtained a certificate under Act XXVII of 1860, the opposition of the second defendant who again claimed as the adopted son of the brother-in-law being overruled. In the present suit, the plaintiff sued the first defendant, the mortgagor, and the second defendant, the alleged adopted son to whom the hypothecated property had been sold by the first defendant in discharge of the mortgage-debt, in recognition of his superior right as adopted son, *held* that, under the circumstances of the case, the first defendant was not competent to withdraw from his contract under the bond with the plaintiff, or to sell to the second defendant the hypothecated property by way of payment of the bond-debt. RAM DAS v. SUDDI, **A.W.N. 1882, 32.**

(93)—*S.* 4—*Certificate to collect debts—Effect of certificate against debtors.*—A certificate given to be a person, to collect debts due to a deceased creditor, under Act XXVII of 1860, is conclusive in respect of the representative character of such person, and is a full indemnity to all persons paying their debts to him; and a suit for a declaration that he is not the legal representative of the deceased will not lie. GAURI v. GAYADIN, **4 A. 355 = A.W.N. 1882, 66.**

(94)—*Ss.* 4, 8, 9, 21—*Effect of certificate under Act.*—Under Act XXVII of 1860, certificates could only be granted to persons claiming to be the representatives of deceased persons to enable them to recover the debts due to the estate of such deceased persons and receive interest or dividends. A certificate so granted was conclusive of the representative title, only against the debtors of the estate. The procedure given by the Act was not intended to apply to the decision of any claim of right to succeed

Succession Certificate Act (XXVII of 1860 —*continued.*

to the estate of a deceased person or any part of it. Such claims could be determined only by a regular suit in the ordinary way. *Ex parte* RAU NARASINGA, **2 M.H C. 164.**

(95)—*S.* 5—*Application for certificate — Widow and nephew of deceased—Joint certificate—Validity of.*—Two persons claiming to be the adopted sons of a deceased last male-holder the widow and a nephew of the deceased, applied for certificates under Act XL. The Court granted a joint certificate to the widow and the nephew as the adoptions were not established: *Held* that under the circumstances of the case, a certificate should have been given to the widow alone, and not jointly with the nephew whose right to the property would arise only after the widow's death. The Court may take security from the widow under s. 5, Act XXVII of 1860. MUSSUMAT ROOKMINEE v. CHOONNEE LALL, **1 Agra Mis. App. 6.**

(96)—*S.* 5—*Suit by heir of deceased on security bond—Assignment necessary.*—A certificate under Act XXVII of 1860 was issued to the first defendant, and the second defendant executed to the Court a security bond. The plaintiff, having established his right to the monies collected under the certificate, sued on the security bond, without getting an assignment of the same, for the recovery of such monies. *Held* that the suit as against the surety was not maintainable. MAYAN v. CHATHAPPAN, **14 M. 473.**

(97)—S. 5—*See* APPEAL — CASES WHERE APPEAL LIES OR NOT, 38 P.R. 1888.

(98)—*Ss.* 5 *and* 6—*Certificate for collection of debts—Order requiring security—Appeal* — No appeal lies to the High Court against the order of a District Judge, requiring security from the person to whom he has granted a certificate to collect debts, under Act XXVII of 1860. There is nothing to prevent the Judge, however, where the security demanded is excessive, from reconsidering his own order. *In the matter of the petition of* SRIMATI PADDO SUNDARI DASI, **3 A. 304.** (N.W.P. 1870, p. 146, 1 C. 127 = 24 W.R. 362, 1 A. 287, *F.*)

(99)—*Ss.* 5 *and* 6—*Certificate for collection of debts—Security— Appeal.*—No appeal lies to the High Court against the order of the District Judge, requiring security from the person to whom he has granted a certificate to collect debts under Act XXVII of 1860. (H.C R., N. W.P., 1870, p. 146, 1 C. 127 = 24 W.R. 362, *Fol.*) *Semble.* A review of the order may be admissible. *In re* RUKMIN, **1 A. 287.** [*F.*, 3 A. 304.]

(100)—*S.* 6—*Order refusing succession certificate—Appeal.*—An order refusing a certificate under s. 6, Act XXVII of 1860, is not appealable. BAIJNATH v. MAICHAL, **A.W.N. 1881, 22.**

Succession Certificate Act (XXVII of 1860) —*continued.*

(101)—*S.* 6—*Certificate for collection of debts —No appeal.*—No appeal lies from an order refusing to grant a certificate for the collection of debts under s. 6 of Act XXVII of 1860. GULRAJ v. DHARAP NATH, **A.W.N. 1883, 248.**

(102)—*S.* 6—*Prayer for fresh certificate, whether could be made by way of appeal to High Court.*—On an appeal to the High Court with a prayer for a fresh certificate under Act XXVII of 1860, on the ground that the District Judge should not have made his grant of certificate to the appellant, conditional upon her giving security to her opponent, the preliminary objection, taken on behalf of the respondent, that no appeal lay, in the case, under s. 6 of the Act, was allowed. The fresh certificate contemplated by the above s. 6 means a certificate granted to a person other than the one to whom the first certificate was granted. NAURANGI KUNWAR v. RAGHUBANSI KUNWAR, **9 A. 231 =A.W.N. 1887, 20.**

(103)—*S.* 6—*Person objecting to grant of certificate before District Court, petition to High Court maintainable by, for fresh certificate in supersession.*—The person who has originally opposed the granting of a certificate under Act XXVII of 1860 is not restricted, by s. 6 of the Act, to his remedy by way of appeal, from the order of the District Judge, to be brought prior to the actual issue of the certificate. Two different proceedings are contemplated by the section. It contemplates an appeal which is to have the effect of suspending the granting (meaning, the issuing) of the certificate by the District Court, pending the order of the High Court. There is also the further provision, in the latter portion of the above s. 6, for the filing of a petition after the certificate is granted, with a view of the High Court granting a certificate in supersession of that granted by the District Court. There is nothing in the said latter portion of s. 6 to show that such a fresh certificate cannot be applied for by, or is not to be granted to, the person who was dissatisfied with and opposed the granting of the original certificate. No restriction has been placed by the section on the powers of the High Court to grant such a fresh certificate to any petitioner who may show himself to be entitled thereto. GANGIA v. RANGI SINGH, **9 A. 173=A.W.N. 1887, 9.**

(104)—S. 6.—*See* Nos. 89, 90, 98, 99, *supra.*

(105) *S.* 8—*Act* XXVII *of* 1860, *application by daughter-in-law for a certificate under—Immediate rejection —Civil Court granting a certificate—Third person's right to cancel grant, grounds of.*—An application by a daughter-in-law for a certificate as heiress under Act XXVII of 1860 can at once be rejected very properly on the sole ground that she is not the heiress. If a Civil Court, under s. 8 of Act XXVII of 1860, is proceeding to grant, or has granted, a certificate authorising a person to deal with

Succession Certificate Act (XXVII of 1860) —*concluded.*

Government securities which are claimed by a third party as his property, that is a good ground on which such third party may come into Court to oppose the grant of a certificate or to seek its cancelment, BANDAM SETTAH v. BANDAM MAHALAKSHMY, **4 M.H.C. 180.**

(106)—S.8—*See.* No 94, *supra.*

(107)—S. 9—*See* No. 94, *supra.*

(108)—S. 18—Will of Parsi executed prior to 1st January 1866—Applicability of—*See* PROBATE—EFFECT OF PROBATE, 8 B. 474.

(109)—S. 21—*See* No. 94, *supra.*

(110)—S. 24—*See* No. 91, *supra.*

Succession Certificate Act (VII of 1889).

S. 1 (3) REP. IN PT. (AS TO BURMA), ACT XIII OF 1898, S. 18. S. 1 (4) RESTRICTED, ACT VII OF 1901, S. 5. DECLARED IN FORCE —IN THE SONTHAL PARGANAS, REG. III OF 1872, S. 3, AS AMENDED BY REG. III OF 1899, S. 3; IN THE ANGUL DISTRICT, REG. I OF 1894, S. 3; IN BRITISH BALUCHISTAN, REG. I OF 1890, s. 3, IN UPPER BURMA (EXCEPT THE SHAN STATES), ACT XIII OF 1898, S. 4.

(1)—*Object of the Act.*—The appointment of a person to give a legal discharge to debtors to the estates of deceased persons for the debts due, and not the determination of nice and intricate questions of title to such estates, is the object of the Succession Certificate Act. GUNINDRA PROSAD v. JUGMALA BIBI, **30 C. 581.**

(2)—*Object of the Act—Debts due to impartible estates— Necessity of succession certificates —Nature of succession to impartible estates.*—The Succession Certificate Act was passed principally for the protection of honest debtors. The debtor is entitled, before payment, to ask that the person demanding the payment should satisfy him either that he is, as the heir of the person who lent the money, entitled to receive payment, or that he is so entitled as having been an owner of the money, but before the death of the lender. In the former case, the succession certificate is the proper evidence. A person succeeding to an impartible estate succeeds not as joint owner of the estate before his predecessor's death, but merely to the "effects" of his deceased predecessor. He is therefore bound to produce a succession certificate, before he can enforce the payment of debts due to his predecessor. *Semble.*—An impartible zemindari devolving on the zemindar's decease upon one of the members of the family is assets in the hands of the latter, and the succession thereto is not by survivorship. **RAJA OF KALAHASTI v. ACHIGADU, 17 M.L.J. 367 =30 M. 454.** (29 M. 453, *Disc.*; 6 C.W.N. 879, 31 C. 224, 18 C. 151, 10 A. 272, 22 M. 283, *R.*) [*Appr.*, 30 M. 429=19 M.L.J. 401=2 Ind. Cas. 18.]

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Succession Certificate Act (VII of 1889) —continued.

(3)—*Hindu law—Survivorship.*—A founded a shop which he called by his own name. At his death his sons continued the old shop in its old names. The defendant, who had dealings with the sons, passed a bond to them in the name of A, on the 27th May 1895. In a suit brought by the sons on the bond the Court of first instance held that the sons could not sue without taking out a certificate under the Succession Certificate Act. *Held*, that it was not necessary for the sons to take out a certificate under the Act, because when their father died, they succeeded to his estate by survivorship, and that all dealings after that would be the dealings of the new firm then formed and the members of it could sue and be used in respect of them. VITHAL v. GOTYA, **1 Bom. L.R. 197.**

(4)—*Hindu joint family—Debt due to family —Death of one co-parcener—Certificate not necessary.*—Certain bonds stood in the name of a co-parcener in a joint Hindu family. That co-parcener having died, the managing member of the family sued the defendant to recover the sums due on them on the ground that the debts were due to the family. After suit, the parties referred the matter to arbitrators who passed an award. The parties then applied to have the arbitrators' award filed. The Court doubted if it could be filed without a certificate. The High Court held that there was nothing in Act VII, 1889, to prevent the award being filed without a succession certificate. RAMCHANDRA HARI v. BAPU, **16 B. 240.**

(5)—*Joint Hindu family--Mitakshara—Death of managing member after institution of suit—Application for revival by sons.*—On the death of the managing member of a joint Hindu family governed by the Mitakshara Law, it is not necessary that either letters of administration, or a certificate under Act VII of 1889, should be obtained in order to entitle his sons to ask that they may be permitted to proceed with the suit instituted by him. BEEJRAJ v. BHYRO PERSAUD, **23 C. 912.** (16 B. 349, *F.*) [*R.*, 12 C.W.N. 145=7 C.L.J. 658.]

(6)—*Succession Certificate Act* XXVII *of* 1860 *--Heirship, Certificate of--Manager of endowment.* —A trustee of a religious endowment succeeding another trustee need not take out a certificate to enable him to sue for a debt due to the institution. SRIMANT RAJA YARLAGADDA MALLIKARJUNA PRASADA NAYADU BAHADUR ZAMINDAR GARU v. MAKERLA SRIDEVAMMA, **1 C.W.N. 497, P.C.=20 M. 162=24 I.A. 73=7 Sar. 205.** [*R.*, 28 B. 215=5 Bom. L.R. 938.]

(7)—*Suit by son on pro-note standing in name of father.*—Act VII of 1889 clearly contemplates only cases of succession; but a suit by a son on a pro-note executed to his deceased father should be dismissed if no certificate has been produced, where it appears that the promissory note stands in the name of the father and there is nothing on the record to show that the debt sued for was a joint family debt. PERA REDDI v. MOHAMED ABDUL HUSSAIN, **1 M.L.J. 679.**

Succession Certificate Act (VII of 1889) —continued.

(8)—*Court—Inquiry—Certificate, grant of.*—There is no law or authority which requires a Court to find whether the debts alleged to be due to the estate of a deceased person are really due or not as a preliminary condition of the grant of a certificate under the Succession Certificate Act, 1889. The Succession Certificate Act, 1889, is intended for the protection of debtors, which means that where a debtor of a deceased person either voluntarily pays his debt to a person holding a certificate under the Act, or is compelled by the decree of the Court to pay it to that person, he is lawfully discharged. There is nothing in the Act which either expressly or by necessary implication requires the Court granting a certificate to hold an enquiry into the existence of any debt alleged by the person applying to be due as a preliminary condition of the grant. All that a Court has to do under the Act is to ascertain the right of a person to a certificate apart from the question of the existence or non-existence of the debts in respect of which he applies. The mere fact that a debtor produces money in Court is not sufficient by itself to extinguish the debt. KASHI v. PARBHU, **5 Bom. L.R. 721=28 B. 119.**

(9)—*Application by minor through next friend for a Succession Certificate—Non-maintainability—Proper course.*—A minor cannot apply for a Succession Certificate under Act VII of 1889, through a next friend (20 A. 354, *D.*) The legal guardian of a minor has a right of management of the minor's estate and has, in consequence, an interest in a debt due to the minor and a right to collect it. (28 B. 344, *Rel.*) Where therefore a Succession Certificate is required to collect a debt due to the estate of a deceased person and the representative is a minor, the requirements of the Act are sufficiently complied with if the application is made by the legal guardian of the minor. *In the matter of an application under Act* VII *of* 1889 *by* DANBAI, **4 S.L.R. 266.**

(10)—*Summary proceeding — Certificate — Guardian of a minor—Security.*—It is contemplated by the Succession Certificate Act, 1889, that questions arising under it are to be determined by a summary proceeding, which means, a short enquiry, leading up to and resulting in a rapid decision, in contrast with the lengthy investigation which may be required for the more tardy determination of a regular suit; the nature of the inquiry depending on the circumstances of each case. The Act does not permit the issue of a certificate to the guardian of a minor without requiring any security. GULABCHAND v. MOTI, **3 Bom. L.R. 795=25 B. 523.**

Succession Certificate Act (VII of 1889) —*continued.*

(11)—*Application by widow—Objection on the ground of non-division—Summary enquiry—Refusal to make any enquiry.*—On an application for a Succession Certificate made by a widow in respect of the estate of her deceased husband, an objection was put forward by the nephew of the deceased to the effect that he and the deceased were members of an undivided Hindu family and that, consequently, no certificate could be granted to the widow. The District Judge granted the certificate to the widow, refusing to go into the question of non-division. *Held*, though the proceedings under the Act are summary, the District Judge ought to make some investigation (however brief it might be) towards ascertaining who had the *prima facie* title to the grant of the certificate. He ought not have refused to make any enquiry. BALMAKUND v. KUNDAN KUNWAR, **2 A.L.J. 144=A.W.N. 1905, 44=27 A. 452.**

(12)—*Hindu widow—Condition precedent to the grant of certificate—Security—Apprehension of waste—Deposit in bank.*—A District Judge, in granting a Succession Certificate to a Hindu widow, ordered that the money should be deposited in a bank and interest thereof paid to the widow: *Held*, that the order was *ultra vires*. All that the Court could do was to require, as a condition precedent to the grant of the certificate, that the widow should give a bond to the District Judge with one or more sureties that she would render proper accounts. Even such an order should not be passed, unless it is proved to the satisfaction of the Court that there is reasonable apprehension of waste or other danger on the part of the applicant. MUSAMAT SHIB DEI v. MUNSHI AJUDHYA PERSHAD, **9 Ind. Cas. 571.**

(13)—*Woman's property—Right of husband's brother and sister's son to certificate—Presumption as to marriage in Hindu Law.*—The husband's brother of a deceased woman has a better right to the Succession Certificate for her assets, than the sister's son. If the property in question was her husband's property, it passes to the husband's heirs. If it was her *stridhanam*, and if she left no issue, it passes to the husband's heirs, if the marriage was in one of the approved forms. (19 M. 35, 11 M.I.A. 139, *R.*) In the absence of evidence to the contrary, there is a presumption that a marriage was in one of the approved forms. MUTHAN CHETTY v. RAMASWAMY CHETTY, **16 M.L.J. 550.**

(14)—*Joint certificate cannot be granted.*—Under the provisions of the Succession Certificate Act, a joint certificate to recover debts cannot be granted, as it would be to frustrate the object of the Act. LONACHAND GANGARAM MARWADI v. UTTAMCHAND GANGARAM MARWADI, **15 B. 684.** (5 A. 195, 11 B. 179, *R.*) [*R.*, 6 M.L.J. 90=19 M. 497, U.B.R. 1897—1901, Vol. II, 563.]

(15)—*Mortgage — Lease by mortgagee, to mortgagor—Death of some of the mortgagees—*

Succession Certificate Act (VII of 1889) —*continued.*

Suit for rent—Certificate, necessity for.—The defendant mortgaged with possession certain immoveable property to two persons C and F, the proprietors of two firms which traded together jointly. On the day the mortgage was made the mortgagees leased out the mortgaged property to the defendant. Subsequently C and F died. Thereupon the plaintiffs (the partners of the mortgagee firms and the sons of the deceased partners) brought the present suit for recovering rent which had accrued due after the deaths of C and F. The lower Court passed an order directing the plaintiffs to produce a Succession Certificate, on the ground that their partnership was a partnership by contract and not a family partnership. The plaintiffs applied to the High Court under s. 622, Civ. Pro. Code, 1882. *Held* that, as the rent sued for became due after the death of C and F, it formed no part of their estates at the time of their deaths, and that, therefore, no certificate was necessary under Act VII of 1889. RANCHORDAS NATHUBHAI v. BHAGUBHAI PARMANANDAS, **18 B. 394.** [*R.*, 36 C. 936=13 C.W.N. 966=16 C.L.J. 180.]

(16)—*Decree for foreclosure, certificate under the Act not necessary for.*—A decree for foreclosure of a mortgage is not one for the payment of a debt so as to fall within the provisions of Act VII of 1889. The direction to pay within the period fixed in the decree is given not to fix a personal liability for the debt, but to enable the defendants to save their right of redemption and to prevent its extinction by foreclosure. Also the provisions of the Act cannot effect suits instituted before it came into force. In such a case, the vested right in the plaintiff to a decision in the suit already instituted by him in accordance with the law as it existed when the suit was instituted, would certainly be curtailed, if the Act subsequently passed were applied to it. AMMANNA v. GURUMURTHI, **16 M. 64=2 M.L.J. 155.** [*R.*, 16 A. 259, 29 M. 77.]

(17)—*Madras Village Courts Act* (I *of* 1889), *application of this Act to suits in Courts under.*—The provisions of the Succession Certificate Act (VII of 1889) apply to suits in Village Munsifs' Courts under the Madras Village Courts Act (I of 1889). RASIBI AMMAL v. OLAGA PADAYACHI, **21 M. 115.**

(18)—*See* BOM. ACT XIV OF 1869, s. 16, **16 B. 277.**

(19)—*See* APPLICATION, **20 C. 755.**

(20)—Right of sister's daughter and sister's daughter's son to claim certificate under Act—*See* HINDU LAW—INHERITANCE, **12 C.W.N. 453=7 C.L.J. 555=35 C. 631.**

(21)—*See* JOINT-CREDITORS, **13 C.W.N. 509=9 C.L.J. 331=2 Ind. Cas. 254.**

(22)—*See* PROBATE AND ADMINISTRATION ACT, 1889, s. 18, **19 B. 123.**

Succession Certificate Act (VII of 1889) —*continued*.

(23)—*See* PROBATE AND ADMINISTRATION ACT, V OF 1881, s. 98, 2 L.B R. 161.

(24)—*S.* 1, *cl.* 4—*Will of a Hindu testator—Right of devisee to apply for certificate—No Probate or Letters of Administration obtained.*—The devisee under the will of a Hindu testator, residing in the United Provinces, may apply for a succession certificate entitling him to collect the debts due to the deceased testator's estate, notwithstanding the fact that he obtained no Probate or Letters of Administration. JAMNA KUAR v. DOULAT RAI, 2 A.L.J. 126.

(25)—*S.* 1 (4)—*Application by executor for succession certificate—Will disputed—Jurisdiction to decide genuineness of will—Remand—Duty of Judge—Executor whether bound to take out probate.*—The executors under a certain Will applied to the District Court for a certificate of administration under s. 6 of Act VII of 1889 to enable them to collect the debts due to the testator. The genuineness of the Will was disputed by a lady who applied for a certificate on the ground that she was the heir of the deceased. The District Judge rejected the applications on the ground that the validity of the Will could not be settled in a summary proceeding. *Held*, remanding the matter for re-hearing, that the Judge had jurisdiction to decide upon the genuineness of the Will. At the re-hearing, the heir of the deceased withdrew her application and the Judge held that, as the certificate was claimed by the executors as such, probate of the Will should be taken out and he therefore refused the application. *Held*, on appeal, that the duty of the Judge in carrying out the remand order of the High Court was confined exclusively to determining whether the applicant or the heir was entitled to the certificate, and that he could not refuse the certificate simply because the applicants might have asked for probate, as the case did not fall under s. 1, cl. 1 (4) of the Succession Certificate Act. KALIDAS FAKIRCHAND v. BAIHAMALI, 16 B. 712. [*F.*, 18 B. 608; *R.*, 19 B. 821, 22 M. 9.]

(26)—*Ss.* 1 (4), 6 (*d*) *and* 7 (1)—*Will—Application for certificate under—Hindu Wills Act* (XXI *of* 1870)—*Succession.*—Where a will, in respect of which a certificate is applied for under the Succession Certificate Act (VII of 1889), is proved to be genuine after a contest between the parties and there is no suggestion that the Will is one to which the Hindu Wills Act applies, the Court must grant the certificate to the applicant under s. 1 (4) of Act VII of 1889. DAVE LILADHAR KASHIRAM v. BAI PARVATI, 18 B. 608.

(27) *Ss.* 1, *cl* (14), 7, *cl.* (3)—*Grant of the certificate where oral Will set up—Practice—Procedure to be adopted when Will upset—Hindu Law—Circumstances establishing Will.*—When, in answer to an application under the Succession Certificate Act (VII of 1889) a Will

Succession Certificate Act (VII of 1889) —*continued*.

is set up as having been made by the person with respect to whose estate the application is made, the Court trying that application has jurisdiction to try the question whether or not there was a Will, though ordinarily questions regarding a Will should not be decided on a summary application for a certificate. According to the Hindu law, it is not necessary that a Will should be executed by the testator. When the evidence showed, (1) that a deceased pereon had dictated his wishes with regard to his property when he was possessed of a disposing mind, (2) that the draft had been explained to him, and (3) that he gave the draft to a third person, telling him that he had been appointed a trustee under it, and asking him to take it to have it copied out fair for his signature, and that the deceased died a few days after, (4) without having executed the Will, and (5) there was nothing to show that he changed his mind before his death, *held*, that the deceased could not be said to have died intestate. JANKI v. KALLU MAL, 6 A.L.J. 171 =31 A. 236=2 Ind. Cas 213.

(28)—*Ss.* 2, 4—*Certificate not to be given for collection of part only of a debt—Debt in part irrecoverable—Mahomedan Law—Dower-debt.*—The plain meaning of the phrase "his debt" in s. 4 of the Act is the whole of the debt due by the debtor to the deceased, and not a portion of that debt. Such a meaning of the term (1) is against the canons of interpretation, for the natural meaning of the term "debt" is not a share of some one in that debt; (2) is opposed to the scheme of the Act, which has been enacted to afford protection to debtors, and has nothing to do with the convenience of the applicant or his right to or share in the debt; (3) will cause the splitting of an indivisible liability; and (4) will lead to the harassing of a debtor more than once on one cause of action and to multiplication of suits thereon. Hence, no succession certificate can be granted for the collection of a part only of a debt. *Muhammad Ali Khan* v. *Puttan Bibi* (19 A. 129, *fol.*), the remarks therein favouring the grant of a certificate for a portion of debt being held to be *obiter dicta*. The observation to the like effect of *Chamier, J.*, in *Akbar Khan* v. *Bilkisara Begam* (A W.N. 1901, 125, *not F.*) The dower of a Mahomedan wife, whether prompt or deferred, is a debt within the meaning of s. 2 of the Succession Certificate Act. Proceedings under the Act are in no way intended to *determine the share* of the applicant in the debt, or to adjudicate upon the relative rights of the applicant and others therein. GHOFUR KHAN v. KALANDARI BEGAM, 8 A.L.J. 79=9 Ind. Cas. 127.

(29)—*Ss.* 3 (2), 8 *and* 9—*Grant of certificate—Order to file security—Practice.*—Where a Judge, acting under s. 9 of the Succession Certificate Act, requires security to be furnished by a person, to whom a certificate of succession is granted, the amount of the security should

Succession Certificate Act (VII of 1889) —*continued.*

be specified in the order and a time should be prescribed within which the security must be furnished. *Semble*—that s. 8 of the Act cannot be applied to the case of a fixed deposit in a bank, such a deposit not being a "security" within the meaning of s. 3 (2). GULRAJI KUNWAR v. JAGDEO PRASAD, **A W.N. 1906, 94=28 A. 477.**

(30)—*Ss. 3 and 19—Agent to the Governor at Vizagapatam—General Clauses Act*, 1868, *s.* 2 (12)—*Appeal from his order as from an order of District Court—Madras Act* XXIV *of* 1839.—Under s. 3 of Act XXIV of 1839 and Rule X, cl. 4, of the Rules framed pursuant to that Act, the Agent to the Governor at Vizagapatam is the Judge of the Principal Civil Court of Original Jurisdiction in the Agency of Vizagapatam. In s. 2 (12) of the General Clauses Act, 1868, which was in force when the Succession Certificate Act was passed, "District Judge" is defined as the Judge of the Principal Civil Court of Original Jurisdiction. The Succession Certificate Act, in s. 3, defines the District Court as a Court presided over by a District Judge. The Agent's Court is, therefore, a District Court, and an appeal lies, therefore, under s. 19, Succession Certificate Act, from his order as from an order of District Court. GURUVARAJU v. GOPINATHA TRIPATHI, **18 M.L.J. 252=3 M.L.T. 264=31 M. 362.** (18 M. 227, *D.*)

(31)—*S. 4—Debt due to undivided Hindu family—Necessity for production of certificate of heirship.*—The production of a succession certificate is not necessary in the case of a debt due to an undivided Hindu family and claimed by a person entitled to it by right of survivorship and not by way of inheritance. RAO BAHADUR MUKUND BALKRISHNA BUTI v. PURNIA AND OTHERS, **9 C.P.L.R. 65.** (16 B. 349, 19 B. 338, *F.*)

(32)—*S. 4—Execution of bond in name of Hindu father—Suit by son to recover money due on said bond—Necessity for succession certificate.*—Where a Hindu sued upon a bond executed to his father, in the absence of any admission or evidence to the contrary, the presumption was that the debt was one due to the family, and no certificate of heirship was necessary to enable the plaintiff to recover the debt. PALANIAPPA v. AVATHARAMAN, **7 M.L.J. 195.**

(33)—*S. 4—Res judicata.*—The principle of *res judicata* has no effect upon the provisions of s. 4 of Act VII or 1889. It imposes a duty on the Court which the Court is bound to perform, no matter what the proceedings between the parties or any agreement between the parties may be. But the Court, instead of dismissing an application for execution, should give reasonable time to the applicants to perfect their title by the production of one or other of the documents specified in s. 4 of the Act. BEHARI

Succession Certificate Act (VII of 1889) —*continued.*

LAL v. MAJID ALI, **24 A. 138=A.W.N. 1897, 29.**

(34)—*S. 4—'Debt'—Suit on a mortgage—Decree against the mortgaged property - Decree against person.*— No succession certificate need be taken when the suit is one by a mortgagee to recover the mortgage-money by sale of the mortgaged property, the decree in such a suit not being a 'debt' within the meaning of s. 4 of the Act; but a certificate is necessary as a condition precedent to the passing of a decree, if the suit is one to enforce the personal obligation of the mortgagor. PALANIYANDI PILLAY v. VEERAMMAL, **29 M. 77.** (:6. A. 259, *Not F.*) [*R.*, 12 C.W.N. 145=7 C.L.J. 658.]

(35)—*S. 4—Deferred dower, suit by one of several heirs for a portion of her share—Certificate for the portion if may be granted—Heirs' claims if joint or several—Severance of debt.*—Where one of several heirs of a deceased Mahomedan lady sued her husband for a portion of the share of the deferred dower due by the defendant to the deceased, relinquishing the balance. *Held* that an application by the plaintiff for succession certificate in respect of the amount claimed by her in the suit was properly granted. S. 4 of the Succession Certificate Act does not require that the certificate should cover the whole of the debt, if the heirs do not seek to realise the whole. (33 A. 327, *Diss.*) In respect of deferred dower, each of the heirs of the deceased has a distinct right enforceable by himself, though all may jointly sue, and it is open to each to relinquish a portion of the claim. The Defendant husband being moreover one of the heirs, the debt, assuming it to be joint, is severed, and a certificate cannot in consequence be granted for the whole debt. MOHAMED ABDUL HUSAIN v. SARIFAN, **16 C.W.N. 231=15 C.L.J. 384=12 Ind. Cas. 593.**

(36)—*S. 4—Reversionary heirs, if may apply for succession certificate on Hindu widow's death—Debts accrued due during widow's lifetime—Government promissory notes of which certificate had been taken out by the widow—Certificate, if necessary—Money awarded under Land Acquisition Act—Arrears of rent for non-agricultural land—Whether "debts."*—The right of the reversionary heirs of a deceased Hindu to take out succession certificate in respect of debts due to the estate of the deceased is not affected by the interposition of the estate of the widow, and the Court cannot reject an application for succession certificate by such heirs merely on the ground of the deceased having died long ago. A sum of money awarded in a case under the Land Acquisition Act after the death of the owner and kept in deposit under s. 32 of the Act, arrears of rent for non-agricultural lands belonging to the estate, and a Government promissory note standing in the name of the widow as the certificate holder of her husband's estate, were all debts for which it was necessary for the

Succession Certificate Act (VII of 1889) —*continued.*

reversionary heirs to take out succession certificate. ABINAS CHANDRA PAUL v. PROBODH CHANDRA PAUL, **15 C.W.N. 1018**. (13 C.W.N. 966=36 C. 936, *D.*)

(37)—*S.* 4—*Debt, meaning of—Debt falling due after the death of the creditor—High Court interfering in revision in public interest.*—A debt that falls due after the death of the creditor comes within the terms of s. 4, sub-s. (1), cl.(*a*) of Act VII of 1889. In the case of a debt existing in the life of the creditor, which did not become payable in the circumstances until after his death, his heirs cannot obtain a decree without the production of a certificate under the Succession Certificate Act (VII of 1889). (2 C.W.N. 591, *overruled*). A debt is a sum of money, which is now payable or will become payable in future by reason of a present obligation. BANCHARAM MAJUMDAR v. ADYA NATH BHATTACHARJA, **13 C.W.N. 966, F.B.= 10 C L.J. 180=36 C. 936=3 Ind. Cas. 492.**

(38)—*S.* 4—*Application by heir of mortgagee for supplementary decree—Succession Certificate, if necessary—"Debt"—Transfer of Property Act* (IV *of* 1882), *s.* 90.—Where after a preliminary decree had been made in a mortgage suit, the mortgagee died, and his sons got themselves substituted on the record, and an order absolute was made in their favour, but the proceeds of the sale of the mortgaged property proving insufficient, they applied for a personal decree for the balance under s. 90, Transfer of Property Act. *Held* (on a review of the authorities), that, until the applicants obtained certificate under the Succession Certificate Act, no such decree could be made in their favour. SAHADAV SUKUL v SHIKH SAKHAWAT HOSSEIN, **12 C.W.N. 145=7 C.L.J. 658.**

(39)—*S.* 4—*Succession Certificate—Execution of decree—Jurisdiction of execution Court to question validity of decree.*—Where the Court refused execution of a decree, on the ground that it should not have been passed, since plaintiff had not obtained Succession Certificate before passing of the decree. *Held*, that, as the Court executing a decree is not competent to question the validity of a decree passed by a Court of competent jurisdiction, the execution Court had acted with material irregularity in refusing execution of the decree. TIKA BAI v. GODHA RAM, **145 P.L.R. 1906.**

(40)—*S.* 4—*Joint decree-holders, right to execute a decree passed in favour of—Execution of decree by a survivor of two joint decree-holders—Heir of a decree-holder, right of, to execute a decree.* — Two decree-holders were awarded certain sum under a decree jointly and certain other sum severally. One of the decree holders died and the other claimed to execute the whole decree because she was the survivor of the joint decree-holders and because she was the heir of the other decree-holder, and that she could do so without producing succession certificate. *Held*, that, so far as the sums awarded jointly were concerned, the surviving

Succession Certificate Act (VII of 1889) —*continued.*

decree-holder could execute the decree, but she could not be allowed to execute it with respect to the sums awarded severally without the production of a Succession Certificate. RAI JAGATPAL SINGH v. THAKURAIN BILAS KUNWAR, **10 O.C. 378**. (26 C. 839, 16 A. 259, *R.*)

(41)—*S.* 4—*Suit for account—Suit by heir against agent of the deceased — Necessity for certificate under — "Debt" defined.*—A lady died leaving the plaintiff and defendant No. 2 as heirs. Defendant No. 1 was her agent. The plaintiff brought the present suit against defendant No. 1 for an account of his dealings with the deceased lady's property. Defendant No. 1 contended that the plaintiff, who took out a certificate under the Succession Certificate Act, was not authorized, under that certificate, to claim any debt due from him. Under the circumstances, *held*, an action claiming an account is not an action for recovery of a debt. An heir is entitled to bring an action of account as distinguished from an action of debt without taking out Letters of Administration. Therefore, a Succession Certificate was unnecessary for the maintenance of plaintiff's action and the plaintiff's suit was rightly instituted. *Per Mookerjee, J.*—The word "debt" means all money which the deceased was entitled to receive as certain liability on bonds and other contracts. BISSESWAR ROY v. DURGADAS MEHARA, **32 C. 418** (22 M. 139, *Appr.*; 22 M. 144, Note, *R.*) [*D.*, 12 C. W. N. 145=7 C. L.J. 658.]

(42) *S.* 4—*Necessity of certificate by a member of joint Hindu family.*—A certificate under s. 4, Act VII of 1880, is not necessary in the case of the plaintiff suing in respect of debts to which he had become entitled, as a member of a joint Hindu family, by right of survivorship. When a certificate of succession is not produced with the plaint, proceedings may be stayed and the plaintiff directed to take measures to procure it. NAYA RAMA v. SHIB DAS, **84 P.L.R. 1901=20. P. R. 1901.** (13 P. R. 1883, *F.*; 102 P. R. 1889, *Expl.*)

(43 & 44)—*S.* 4—*Separate Hindu family—Certificate necessary — Revision—Irregularity.* —It is a serious irregularity not to require the plaintiff to produce the certificate required by s. 4 of the Succession Certificate Act in the case of a separate Hindu family. GHISU v. RAM BALLABH, **13 Ind. Cas. 363.**

(45)— *S.* 4, *applicability of—Suit for sale on mortgage.*—S. 4 of the Succession Certificate Act applies to suits for sale under s. 88 of the Transfer of Property Act. RAM SARUP v. KALLA, **14 Ind. Cas. 570.** (16 A. 259, *F.*)

(46)—*S.* 4—*Suit on mortgage—No personal decree.*—No certificate under s. 4 of the Succession Certificate Act is necessary before a decree can be passed directing the sale of mortgage

Succession Certificate Act (VII of 1889) —*continued.*

properties in a suit by the heirs of a mortgagee for the recovery of the debt by the sale of the property mortgaged, where no personal decree is asked for against the defendant. KAMBALI NAIDU v. SANKER AMMAL, **12 M.L.T. 202 = 16 Ind. Cas. 224.** (29 M. 77, 32 C. 418, 28 B. 630, *F.*)

(47)—*S.* 4—*Equity of redemption not a security—Letters of administration not to be granted when proper remedy of petitioner is to file regular suit to recover property.*—The respondents applied for Letters of Administration to the estate of a deceased person claiming to administer the estate as his daughters. The appellants denied the legitimacy of the respondents and claimed to be in possession for 30 years as the deceased's nieces. The property was alleged to be under a mortgage to another person. *Held*, (1) that the equity of redemption was not a security or debt within the meaning of s. 4 of the Succession Certificate Act and the respondent could file a suit for redemption without such a certificate or Letters of Administration (4 L.B.R. 287, 14 Bur L. R. 280, *D.*); (2), that the application for Letters of Administration was an attempt to obtain adjudication as to the status of the respondents and to obtain possession without filing a regular suit, and should be rejected ; (3) that the proper remedy of the respondent was to bring a regular suit against the parties in possession of the property. MA THEIN MAY v. MA THAN MYA, **5 Ind. Cas. 425.**

(48)—*S.* 4—*Civ. Pro. Code* (*Act* V *of* 1908), *s.* 113, *O.* XLVI, *r.* 1—*Hindu Law—Mitakshara family—Bond in name of deceased father—Impartible* Raj—*Whether succession certificate necessary to be taken out by son—"Effects of deceased"—Succession by survivorship.*—A Succession certificate is confined to the case in which the claim is to the effects of the deceased, and not to family property when the claim is by right of survivorship. (19 B. 338, 23 C. 912, 1 C.W.N. 32, 11 I.A. 149, 7 A. 1, 5 I. A. 149, 4 C. 190, *F.*) Succession to impartiable estates has always been determined by the rule of survivorship. Therefore, a successor to an impartible *Raj* does not succeed as an heir to the effects of the deceased holder of the *Raj*, but he succeeds by right of survivorship. And consequently, when a bond stands in the name of the last holder of an impartible *Raj*, his successor is not bound to produce a succession certificate before he can obtain a decree on the bond. GUR PERSHAD SINGH v. DHORI RAI, **7 Ind. Cas. 806.**

(49)—*S.* 4—*Receiver appointed to take possession whether "person claiming to be entitled to the effects of the deceased"—Whether receiver bound to take out succession certificate.*—A receiver by his appointment does not become the representative of the parties, but is an officer and representative of the Court. (34 C. 305, 5 C. L.J. 270, *R.*) Therefore, where, in a suit for partition amongst the sons of a deceased person, one of the sons is appointed receiver and he

Succession Certificate Act (VII of 1889) —*continued.*

seeks to take possession of the Government promissory notes and the cash in deposit in a bank belonging to the estate of the deceased, he cannot be said to "claim to be entitled to the effects of the deceased person" within the meaning of s. 4 of the Succession Certificate Act, and is competent to take possession of the securities and monies in the hands of the bank without a certificate under the said section. HARIHAR MUKHERJEE v. HARENDRA NATH MUKHERJEE, **6 Ind. Cas. 416 = 12 C.L J. 252 = 37 C. 754.**

(50)—*S.* 4—*Certificate—Personal decree—Sale on mortgage.*—S. 4 of the Succession Certificate Act, 1889, limits the necessity of a certificate under the Act to those suits where the Court is called upon to pass a personal decree against the debtor of a deceased person for the payment of his debt ; the section does not apply to a suit for a sale on a mortgage. NANCHAND v. YENAWA, **6 Bom. L.R. 582 = 28 B. 630.**

(51)—*S.* 4—*Suit by heir for refund of purchase money—Necessity for production of succession certificate.*—The heir of a vendee sued for the refund of the price alleged to have been paid for goods sold but not delivered. *Held*, that as the suit was for recovery of a debt within the meaning of s. 4, of the Succession Certificate Act, the plaintiff was bound to produce a succession certificate. PENTA REDDI v. ANKI REDDI, **2 M.L.J. 34.**

(52)—*S.* 4—*Usufructuary mortgage—Suit on mortgage by adopted son of mortgagee—Succession certificate whether necessary.* — Plaintiff sued to recover the amount due under a usufructuary mortgage executed in favour of his adoptive father or for possession of the property comprised under the mortgage. He did not produce a certificate of heirship. *Held*, that the plaintiff was entitled to a decree for the mortgage amount without the production of a certificate of heirship. The decree was not for money due under a contract, but was in reality the assessment in money of the value of the plaintiff's mortgage interest. In strictness, the plaintiff was entitled to a decree for the land itself. The amount could not be treated as a debt within the meaning of the Succession Certificate Act. ARUMUGAM PILLAI v. VALURA KOUNDAN, **24 M. 22.**

(53)—*S.* 4—*Suit for mortgage money, the security becoming impaired—Objection re want of succession certificate.*—When the representatives of a usufructuary mortgagee sue to recover the mortgage-money from the mortgagor personally, by reason of the mortgage security being impaired by subsequent events, no succession certificate need be produced. Objection *re* want of succession certificate, ought not to be allowed to be taken for the first time in appeal. UMESH CHANDRA PARAMANICK v. MATHURA MOHAN HALDAR, **28 C. 246 = 5 C.W.N. 607.**

Succession Certificate Act (VII of 1889) —*continued.*

(54)—*S.* 4—*Certificate not to be given for a collection of part only of a debt—Debt in part irrecoverable.*—A certificate for collection of debts under Act No. VII of 1889 may not be given for collection of part only of a debt. Where such a certificate is applied for, the applicant must pay succession duty on the whole, or the whole of the unpaid portion of the debt, irrespective of the amount which is likely to come into the applicant's hands. AKBAR KHAN v. BILKISARA BEGAM, **A.W.N. 1901, 125.** (19 A. 129, *F.*)

(55)—*S.* 4—*Certificate to collect debts—Suit for foreclosure of a mortgage.*—S. 4 of Act VII of 1889 does not apply to a suit for foreclosure of a mortgage. HANWANT SINGH v. MITHANA KOER, **A.W.N. 1900, 94.** (16 A. 259, *R.*)

(56)—*S.* 4—*Claim to recover arrears of annuity by representative of deceased annuitant —Certificate of succession necessary.*—A plaintiff sued as an annuitant under a will to recover arrears of the annuity. During the pendency of the suit the plaintiff died, and his son was brought upon the record in his place. *Held*, that before a decree could be pronounced in favour of the son, it was necessary for him to produce a certificate of succession according to the provisions of Act No. VII of 1889. For this purpose the lower appellate Court ought to have granted reasonable time to the plaintiff to produce the certificate, and not to have dismissed the suit. JAGAN NATH PRASAD v. BAGESHWAR KUNWAR, **A.W.N. 1899, 217.** (A.W.N. 1897, 29, *R.*)

(57)—*S.* 4—*Certificate under, when necessary.* —S. 4 of Act VII of 1889 (Succession Certificate Act) forbids any Court from passing a decree against a debtor of a deceased person for payment of his debt, except on production, by the person claiming, of a probate or letters of administration. A decree would be "against the debtor," when passed, although he consented to it. The plaintiffs sued to recover a certain amount due on a mortgage-bond executed by the defendant to their deceased father. But they did not produce a certificate as required under the Succession Certificate Act (VII of 1889). The claim was compromised by the parties and they prayed that a decree might be passed in terms of the compromise. *Held* that the plaintiffs must produce a certificate under s. 4 of Act VII of 1889 before they could get a decree as prayed for. SANTAJI KHANDERAO v. RAVJI, **15 B. 105.** [*R.*, 12 C.W.N. 145=7 C.L.J. 658; *D.*, 28 B. 630.]

(58)—*S.* 4—*Civ.Pro.Code*, 1882, *s.* 50—*Death of plaintiff—Representation—Practice.*—S.50 of the Code contains the only provision which prevents a legal representative from continuing a suit until administration is taken out. That applies to the institution of a suit. Illustration (*a*), which requires probate to be taken out before suit filed, is an advance on the English law. Whether the principle involved in that illustration should have been extended by analogy when it was sought to revive a suit under s. 365, may be doubted. Since the passing of Act VII of 1889, however, it has become unnecessary to enquire as to the effect of s. 50 where it is sought to revive a suit under s. 365 of the Code, for that Act shows that all that can be insisted upon is that the representation should be complete before decree. D. D. TORREGROSA VASQEZ v. PRAGJI HURJI, **16 B. 519.** [*R.*, 12 C.W.N. 145=7 C.L.J. 658; *D.*, 6 C.P.L.R. 157.]

Succession Certificate Act (VII of 1889) —*continued.*

(59)—*S.* 4—*Decree obtained by one of two undivided brothers—Right of surviving brother to execute—Nature of debt.*—A decree obtained by one of two undivided brothers can, after his death, be executed by the surviving brother without a certificate of heirship under s. 4 of Act VII of 1889, if the debt is in its nature a family debt; because the right to execute the decree would devolve on him by survivorship and not as the heir of his deceased brother. But if, on the contrary, the debt is part of the separate property of the deceased, the applicant can only execute the decree as heir, and must, in that case, obtain a certificate of heirship to enable him to proceed. RAGHAVENDRA MADHAV v. BHIMA, **16 B. 349.** [*F.*, 19 B. 338, 9 C.P.L.R. 65, 23 C. 912; *R*, 17 B. 6; L.B.R. 1872—1892, 651; *D.*, U.B.R. 1892—1896, Vol. II, 204.]

(60)—*S.* 4—*Sale of* Deshmuki hak—*Suit for damages by deceased vendee's heirs for wrongful receipt of* hak *by vendor — Certificate unnecessary.*—S. 4 of the Succession Certificate Act, VII of 1889, prevents a Civil Court from passing a decree only as against a *debtor* of a deceased person for payment of his *debt*, except on production of one or other of the documents there mentioned. In the present case, the defendants sold on 30th March, 1873, to the deceased M, the amount due on account of the *deshmuki hak* which the Sarker might please to order to be debited. The defendants, notwithstanding the aforesaid sale, received the *hak* from the revenue authorities in 1886, some two years after the death of M. The heirs of M brought the present suit against the defendants for recovery of damages or for money had and received by the defendants for their use. The defendants contended that the suit was not maintainable without obtaining a succession certificate. *Held* that the property in the amount of the *hak* sold to M, became vested in him at the time of the sale, *i.e.*, in 1873, that the defendants never became his debtors at any time, as the amount so assigned was not received by the defendants from the revenue authorities until after M's death in 1884; and that, therefore, no succession certificate was necessary for the plaintiffs to maintain their suit. NARAYAN BHAU BARTAKE v. TATIA GANPATRAO DESHMUKH, **15 B. 580.** [*Disappr.*, 21 M. 139; *R.*, 18 M. 457=5 M.L.J. 61.]

Succession Certificate Act (VII of 1889) —*continued.*

(61)—*S.* 4—*Bar to decree not to suit.*—S. 4 of the Succession Certificate Act prohibits a Court from passing a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person except on the production by the person so claiming of—among other things—either letters of administration or a certificate granted under the Act with the debt specified therein. The section does not bar the suit as the Courts below have imagined. The Court of first instance should therefore allow plaintiff a reasonable time to obtain the necessary qualification by means of letters of administration or a succession certificate. MAUNG PO KYI v. MA NYEIN, **U.B.R. 1892–1896, Vol. II, 638.**

(62)—*S.* 4—*Joint Hindu family—Family debt, suit for—Certificate, if necessary—Hindu Law—Evidence—Presumption as to nature of debt.*—Under the Succession Certificate Act VII of 1889, a plaintiff does not require a certificate where his claim is for family property by right of survivorship. Where the plaintiff's family is admitted or proved to be a joint Hindu family, but there is no direct evidence as to the nature of the debt claimed by him, the presumption is that it is a family debt. JAGMOHANDAS KILABHAI v. ALLU MARIA DUSKAL, **19 B. 338.** [*F.*, 17 A. 578, 15=C.W.N. 49=7 Ind. Cas. 806=38 C. 182; *R.*, U.B.R. 1892—1896, Vol. II, 204, 21 B. 53, 9 C.P.L R. 65, 4 L.B.R. 99.]

(63)—*S.* 4—*Succession—Provisional decree.*—A Court cannot pass a decree, provisional or otherwise, against a debtor of a deceased person for payment of the debt to any person who does not hold probate or letters of administration or a certificate of succession. MA SEIN NYO v. MA MAI TU, **2 L.B.R. 164.** (P.J.L.B. 334, *Diss.*)

(64)—*S.* 4—*Execution of decree—Application for execution by legal representative of decree-holder—Necessity for certificate — Limitation Act* (1877), *art.* 179 (4).—An application for execution of a decree made by the legal representative of a deceased decree-holder, without the production of the certificate under the Succession Certificate Act, is nevertheless one made "in accordance with law" within the meaning of art. 179, cl. (4), of the Limitation Act. BALKISHAN SHIWA BAKAS v. WAGARSING, **20 B. 76.** (19 C. 482, 20 C. 755, 16 A. 26, 8 C. 422, 6 M. 181, 12 B. 625, 5 M.H.C. 453, *R.*; 6 B. 31, *D.*) [*R.*, 31 M. 77=17 M.L.J. 566, 9 C.L.J. 443=13 C.W.N. 533, 13 Bom. L.R. 22=9 Ind. Cas. 349.]

(65)—*S.* 4 — *Execution of decree—Sale of debt due to deceased judgment debtor—Rights of purchaser—Representative of creditor—Certificate.*—A obtained a decree against B, who subsequently died. In execution of the decree, A brought to sale a debt due to B by a firm, purchased it himself, and thereupon applied to the District Judge for a certificate under

Succession Certificate Act (VII of 1889) —*continued.*

the Succession Certificate Act (VII of 1889) to enable him to recover the debt. The District Judge rejected the application holding that A was not a representative of the deceased. A, thereupon, appealed to the High Court. *Held* that, under s. 4 (*a*) of the Succession Certificate Act (VII of 1889), the applicant was entitled to a certificate, he being the purchaser at the Court sale of part of the effects of the deceased creditor B. MANCHARAM PRANJIVAN v. BAI MAHALI, **18 B. 315.**

(66)—*S.* 4—*Transfer of Property Act* (IV of 1882), *s.* 88—*Suit for sale by representatives of mortgagee — Certificate whether necessary.*—Such alteration as was made in the law by s. 4 of Act VII of 1889 having been only an alteration in procedure not affecting any vested right of action, as soon as the Act came into force, its provisions should be taken to have applied even to suits instituted prior to the Act. (6 A. 262, *F.*) A mortgagee who brings his suit for sale is bringing his suit against his debtor, the mortgagor, for payment of his debt, and the decree which he seeks in that suit is a decree for payment of such debt by sale of the mortgaged property. S. 4 of the Act therefore applies to a suit for sale under s. 88 of the Transfer of Property Act, which, in the result, is a suit in which, if the plaintiff succeeds, the decree would be one form of a decree for payment of a debt. FATEH CHAND v. MUHAMMAD BAKHSH, **16 A. 259, F.B.=A.W.N. 1894, 74.** (16 M. 64, *D.* 19 C.336 *Diss.*) [*Diss.*, 26 C. 839 =4 C.W.N. 558; *Not F.*, 28 B. 630, 29 M. 77; *R.*, 16 A. 418, 17 A. 537, 20 M. 232, 20 A.W.N. 95, 10 O.C. 378, 5 M.L.T. 278.]

(67)—*S.* 4—*Suit by survivor for debt due to joint family— No certificate necessary—Bond debt due to joint Hindu family—Nature of debt need not appear from bond.*—Where it is proved that a debt is advanced from the funds of a joint Hindu family and is due to that family, there is no necessity for a certificate under the Succession Certificate Act, in order to enable the survivor of such family to recover such debt. [*R.*, 7 C.L J. 658=12 C.W N. 145.] Where such a debt is a bond-debt, it is not necessary that it should appear in the bond that the funds were those of a joint family. PATESHURI PARTAB NARAIN SINGH v. BHAGWATI PRASAD, **17 A. 578=A.W.N. 1895, 132.** (19 B. 338, *F.*)

(68)—*S.* 4—*Collection of portion of particular debt, when certificate grantable for.*—It would be against public policy that a certificate to collect a portion only of a debt should be granted, where the other portion remains undischarged, because it would possibly tend to multiplication of suits in respect of one liability and the consequent harassment of debtors. There is nothing however to prevent the grant of a certificate for the collection of any one of several distinct debts, or of more than one of such debts; in other words, it is not obligatory on the applicant to pay for a certificate for the

Succession Certificate Act (VII of 1889) —*continued.*

collection of one and all of the debts, due to the deceased, and where a portion of a debt having been already satisfied, the certificate sought to be obtained is to cover only the unsatisfied portion of the debt, the applicant will have to pay duty, under the Act, only in respect of such undischarged balance. MUHAMMAD ALIHAN v. PUTTAN BIBI, **19 A. 129 = A.W.N. 1896, 198.** [*F.*, A.W.N. 1901, 125; *R.*, 70 P. R. 1904.]

(69)—*S.* 4—*Contract Act, ss.* 45, 263—*Suit by a surviving member of a firm—Suit by heir of deceased partner and surviving partner.*—When a debt is owing to joint Hindu family, carrying on business as a partnership, after the death of one of the partners, the surviving partner may sue alone for the recovery of the debt without obtaining a certificate under the Succession Certificate Act, and if the heir of the deceased partner is also joined as a co-plaintiff, a certificate of heirship will be necessary, unless it appears on the face of the document sued on, that the debt was a co-pracenary debt. VAIDYANATHA AYYAR v. CHINNASAWMI NAIK, **17 M. 108.** [*F.*, 10 P.R. 1906; *R.*, 70 P.R. 1904, 17 A. 578, U. B R. 1892—1896, Vol. II, 204, 9 C.P.L.R. 65, 4 L.B.R. 99, 9 C.L.J. 331 = 13 C.W.N. 509.]

(70)—*S.* 4—*Debt bond in favour of one member of joint Hindu family—Debt due to family—Necessity for certificate.*—Suit by sons on mortgage bond in favour of their father. On the face of the bond the debt did not appear to be a joint family debt. *Held*, that inasmuch as the debt was found to be a joint debt, a Succession Certificate was not necessary. SUBRAMANIAN CHETTI v. RAKKU SERVAI, **20 M. 232 = 7 M.L.J. 100.** (14 M. 377, *Expl.*) [*F.*, 22 M. 380; *R.*, 4 L.B.R. 99.]

(71)—*S.* 4—*Application for execution*—S. 4, cl. (*b*), Act VII of 1889, does not apply to applications to execute decrees which were pending at the date of the passing of the Act, but refers to applications made after the Act came into force. RAMA RAO v. CHELLAIAMMA, **14 M. 468 = 1 M.L.J. 602.**

(72)—*S.* 4—*Suit by son for debt due to his father.*—In a suit by a son on a bond executed in favour of his deceased father, the defendant is entitled to insist on the production of a certificate under Act VII of 1889, unless it appears on the face of the bond that the debt claimed was due to the joint family consisting of the father and the son. VENKATARAMANNA v. VENKAYYA, **14 M. 377.** [*F.*, 20 M. 232; *R.*, 17 M. 108, 19 B. 338, 17 A. 578, 9 C.P.L.R. 65, 12 C.W.N. 145 = 7 C.L.J. 658; *D.*, 17 M. 147.]

(73)—*S.* 4—*Civ Pro. Code* (XIV *of* 1882), *s.* 622—*Order wrongly dismissing application to sue* in forma pauperis, *open to revision by High Court.*—Where a Court, having jurisdiction to entertain an application presented to it for leave to sue *in forma pauperis*, declines to do so by reason of its erroneously supposing that a succession certificate, under Act VII of 1889, was necessary before it could be entertained, the case would come within the principle enunciated in 11 M. 220, F.B., as warranting the interference of the High Court under s. 622 of the Code of Civil Procedure. KAMMATHI v. MANGAPPA, **16 M. 454.** [*R.*, 13 C.W.N. 509 = 9 C.L.J. 331; *D.*, 22 M. 68.]

Succession Certificate Act (XII of 1889 —*continued.*

(74)—*S* 4—*Suit for refund of price paid—Liquidated sum of money.*—A suit for the refund of the price paid for goods sold but not delivered, is a suit for a liquidated sum of money and not a claim for damages. A succession certificate is therefore necessary. PENTA REDDI v. ANKI REDDI, **22 M. 44, Note.** (18 I.A. 158, *R.*) [*Appr.*, 32 C. 418; *Expl.*, 22 M. 139.]

(75)—*S.* 4—*Mortgage in favour of managing member of joint Hindu family—Suit on mortgage by person claiming by right of survivorship—Necessity for succession certificate.*—Suit to recover the amount due under a mortgage bond executed in favour of the managing member of the family to which the plaintiff belonged. In a family partition, the mortgage bond fell to the share of the plaintiff. *Held*, seeing that the family was admittledly undivided and that the plaintiff claimed by survivorship, the Succession Certificate Act did not apply, and no certificate was necessary. PALLAM RAJU v. BAPANNA, **22 M. 380.** [*R.*, 12 C.W.N. 145 = 7 C.L.J. 658.]

(76)—*S.* 4—*Mitakshara Law—Survivorship—Succession.*—In the case of a family governed by the Mitakshara Law, the son is a joint owner with his father from the moment of his birth, and takes by survivorship. S. 4 of the Succession Certificate Act has no application to a suit by the father revived, after his death, in the name of his son. BISSEN CHAND DHUDHURIA BAHADUR v. CHATRAPAT SINGH, **1 C.W.N. 32.** [*R.*, 7 C.L.J. 658 = 12 C.W.N. 145.]

(77)—*S.* 4—"*Debt*," *meaning of.*—The Succession Certificate Act refers only to such debts as the deceased could sue upon. For the realisation of a debt that has fallen due since the death of the deceased, no certificate is necessary. NEMDHARI ROY v. MUSSUMAT BISSESSARI KUMARI, **2 C.W.N. 591.** [*Overruled*, 13 C.W.N. 966, F.B. = 10 C.L.J. 180; *Diss.*, 30 A. 315 = 5 A.L.J. 598 = A.W.N. 1908, 113; *D.*, 12 C.W.N. 145 = 7 C.L.J. 658.]

(78)—*Ss.* 4, 78—*Ben. Act* VII *of* 1876—*Suit for rent by unregistered proprietor*—"*Debt.*"—Where arrears of rent fell due during the life-time of a registered proprietor, a rent suit, for such rent, by his son, is maintainable, though his name is not registered. (2 C.W.N. 493, *R.*) [*F.*, 27 C. 535.] Rent is not a debt. Therefore, no succession certificate is necessary, to recover the same. NAGENDRA NATH BASU v. SATADAL BASINI BASU, **26 C. 536 = 3 C.W.N. 294.**

(79)—*S.* 4—*Assignee of property mortgaged, not a debtor—Suit for sale of mortgaged property, not as against mortgagor personally—Certificate*

Succession Certificate Act (VII of 1889) —*continued*.

to collect debts not necessary—Suit to enforce charge— Nature of.— The assignees of a certain mortgaged premises are not debtors within the meaning of s. 4, Act VII of 1889. (15 C. 54, *Appl.*; 13 C. 47, *D.*) The heirs of a mortgagee, seeking relief against the mortgaged property alone need not take out a certificate under the Act. S. 4, Act VII of 1889, does not apply to a suit for sale on a mortgage. (13 C. 47, *D.*; 15 C. 54, *App'.*) [*F.*, 26 C. 839=4 C.W.N. 558, 28 B. 630; *Appr.*, 22 C. 143; *R.*, 12 C.W.N. 145=7 C.L.J. 658; *Diss*, 16 A. 259=14 A.W.N. 1894, 74.] The wording of s. 2 of Act XXVII of 1860 is very similar to that of s. 4 of the Succession Certificate Act, so far as the matter referred to in this case is concerned. [*Appr.*, 22 C. 143]. A suit to enforce a charge against immoveable property is one to recover an interest in the immoveable property. KANCHAN MODI v. BRIJNATH SINGH, **19 C. 336.**

(80)—*S.* 4—*Execution of decrees.*—S. 4 of Act VII of 1889 merely provides that the Court shall not proceed upon an application of a person claiming to be entitled to execute a decree, except on the production of a certificate or other authority of the like nature. But it does not follow from that section that an application might not be made without the production of the certificate, the certificate being supplied during the pendency of the proceedings. BROJO NATH SURMA v. ISWAR CHANDRA DUTT, **19 C. 482.** (13 C. 47, *F.*) [*F.*, 16 A. 26= A.W.N. 1893, 197, 20 B. 76; *R.*, 18 A. 34=15 A.W.N. 148, 13 C.W.N. 533=9 C.L.J. 443.]

(81)—*S.* 4—*Decree made in favour of a deceased mohunt—Right of successor and representative to apply for execution of decree made in favour of the deceased for costs incurred on behalf of the* muth.—The successor and representative of a deceased mohunt need not take out probate, certificate, or letters of administration to enable him to apply for execution of a decree made in favour of a deceased mohunt for costs incurred in proceedings carried on by him on behalf of the *muth*. JOGENDRANATH BHARATI v. RAM CHUNDER BHARATI, **20 C. 103.**

(82)—S. 4—*See* PUNJAB ACT XVIII OF 1884, s. 70 (*b*), 70 P.R. 1904.

(83)—S. 4—*See* APPEAL TO PRIVY COUNCIL—CASES WHERE APPEALS LIE OR NOT, 20 A. 118=A.W.N. 1897, 220.

(84)—S. 4—*See* BUDDHIST LAW—INHERITANCE, L.B.R. 1893—1900. 334.

(85)—S. 4— *See* CIV. PRO. CODE, 1908, s. 48, 27 P.R. 1894.

(86)—S. 4—*See* CIV. PRO. CODE, 1908, O. 21, s. 16, 37 P.R. 1893.

(87)—S. 4—*See* EXECUTION OF DECREE — APPLICATION FOR EXECUTION AND POWERS OF COURT, 54 P.R. 1893.

Succession Certificate Act (VII of 1889) —*continued*.

(88)—S. 4—*See* LIMITATION ACT, 1908, s.22, 21 B. 580.

(89) — S. 4—*See* MAHOMEDAN LAW—DOWER, 88 P. R. 1891.

(90)—S. 4—Suit for recovery of dower by heirs of deceased wife against husband—Whether plaintiff entitled to decree without certificate required by Act— *See* MAHOMEDAN LAW— DOWER, A.W.N. 1908, 113=30 A. 315=5 A.L.J. 598.

(91)—S. 4—*See* MAINTENANCE, 13 Ind. Cas. 148.

(92)—S. 4—*See* PARTIES TO SUIT—GENERAL, 18 C. 86.

(93)—S. 4—Parties not having certificate, etc., under—Receiver in suit between them—Effect—*See* RECEIVER, 3 S.L.R. 118=4 Ind. Cas. 605.

(94)— S. 4—Certificate not granted to mortgagee's representative—Court cannot pass any decree under s. 90, Transfer of Property Act, in favour of mortgagee's representative, in suit to enforce mortgage—Subsequent grant of certificate not sufficient— *See* TRANSFER OF PROPERTY ACT, 1882, s. 90, 35 C. 767.

(95)—S. 4—*See* NO. 28, *supra*.

(96)—S. 4, *sub-s.* 1, *cl. (a)—Necessity for representation being complete before decree* —The words "no Court shall pass a decree without the production of a succession certificate in cl. (*a*) sub-s. (1) of s. 4 of the Act do not mean any more than that the representation shall be complete before decree and do not render the obtaining of a certificate a step necessary to enable a plaintiff suing in a representative capacity to institute a suit. YADO v ANANDRAO, **6 C.P.L.R. 157.** (16 B. 519, *R.*)

(97)—*S.* 4 (*b*)—*Application for execution of decree—Certificate.*—The words of cl. (*b*) of s. 4 of Act VII of 1889 prohibit an execution Court from proceeding to execute the decree unless, in cases where a succession certificate under the Act is required, such a certificate has been produced. This means that only upon the production of such certificate, is it competent to the Court to direct that execution should issue and proceed on the decree. It is not, however, necessary that the certificate should be produced along with the application for execution; it is sufficient if it be produced and tendered in Court at any time before the Court proceeds to pass any order for the execution of the decree. KALIAN SINGH v. RAM CHARAN, **18 A. 34=A.W.N. 1895, 148.** (19 C. 482, A.W.N. 1893, 197, *R.*)

(98)—*S* 4 (I)—*Debt does not include rent—Court's jurisdiction to inquire whether debt is due.*—The word "debt" in s. 4 (1) includes any debt except rent. A Court granting the succession certificate is not competent to inquire whether a debt alleged by the petitioner is really

Succession Certificate Act (VII of 1889) —*continued.*

due to the estate of the deceased, before granting the certificate. ANDALAMMAL v. VENKATACHARLU, **17 M.L.J. 257.** (28 B. 119, *R.*)

(99)—*S.* 4, (1)(*a*)--*Suit for account of partnership —Suit by son of Muhammadan partner.*—Suit by a Muhammadan for an account of the capital and profits of a partnership and for payment of the share of his father, the deceased partner of the firm. The plaintiff had not obtained letters of administration or a Succession Certificate. *Held*, that the claim was not a debt within the meaning of s. 4 of the Succession Certificate Act, as there was, at the time of the death of the plaintiff's father, no present obligation to pay a liquidated sum of money to him. A Succession Certificate was therefore not necessary. SABJU SAHIB v. NOORDIN SAHIB, **22 M. 139.** [*R.*, 32 C. 418, 7 C.L.J. 658=12 C.W.N. 145, 13 C.W.N. 966=10 C.L.J. 180, F.B.=36 C. 936, F.B.]

(100)—*S.* 4, *sub-s.* 1, *cl.* (*b*), *scope of.*—S. 4, sub-s. 1, cl. (*b*) of Act VII of 1889, is not confined to the execution of decrees passed subsequently to the time when the Act came into operation. Where the legal representative of a decree-holder applies for the execution of the decree after Act VII of 1889, came into operation, the decree having been passed prior to the passing of the Act, a certificate under s. 4 of the Act must be produced by him. CHINNIRAM UMAJI v. HANMANA, **15 B. 265.**

(101)—*S.* 4, *sub-s.* 1, *cl.* (*b*), *Succession Certificate Act*, 1889, *construction of—Original mortgagee applying for execution, death of—Subsequent proceedings by his heirs—Necessity of Succession Certificate.*—S. 4, sub-s. 1, cl. (*b*) is inapplicable to a case where the Court has commenced proceedings on the application of the mortgagee-decree-holder himself, but is applicable, if, during the pendency of the execution-proceedings, the decree-holder dies and his legal representatives are brought on the record. (22 C. 143, *R.*) Where a mortgagee decree-holder dies after applying for execution, his legal representatives applying for leave to continue the execution-proceedings, may do so, without producing a certificate. MAHOMED YUSUF v. ABDUR RAHIM BEPARI, **26 C. 839=4 C.W.N. 558.** (15 C. 54, 19 C. 336, 22 C. 143. *F.*; 16 A. 259, *D.*) [*F.*, 28 B. 630=6 Bom. L.R. 582; *R.*, 29 M. 77, 5 M.L.T. 278, 12 C.W.N. 145 =7 C.L.J. 658; *Diss.*, 10 O.C. 378, B.]

(102)—*S.* 4 (1), (*b*)—*Application for execution presented without certificate.*—S 4, sub-s. 1 cl. (*b*) of Act VII of 1889, provides that the Court shall not proceed to execution except upon the production of one or other of the certificates set forth in that section. But the application for execution need not, at its presentation, be accompanied by such a certificate, and, therefore, such an application, though presented unaccompanied by the certific te, will constitute a good application "in accordance with law" for the purposes of art. 179 of the Limitation Act, 1877. MANGAL KHAN v. SALIM-ULLAH KHAN, **6 A. 26=A.W.N. 1893, 197.** (19 C. 482, *F.*) [*F.*, 20 B. 76, 18 A. 34, 13 C.W.N. 533=9 C.L.J. 443; *R.*, 31 M. 77=17 M.L.J. 566.]

Succession Certificate Act (VII of 1889) —*continued.*

(103)—*S.* 4—*sub-s.* 1, *cl.* (*b*)—*Proceedings in execution of decree taken before passing of Succession Certificate Act* (VII *of* 1889)—*Applicability of s.* 4, *sub-s.* 1, *cl.* (*b*) *of Act to such proceedings.*—Cl. (*b*) of sub-s. 1 of s. 4 of the Succession Certificate Act (VII of 1889) does not apply to applications or proceedings in execution of a decree pending at the time at which the Act came into force. The application therein mentioned must mean one made after the Act came into force, and the proceeding of the Court in execution must be an initial one under that application, and not one in continuation of proceedings taken on applications made before the Act came into force. BALUBHAI DAYABHAI v. NASAR *bin* ABDUL HABIB FAZLY, **15 B. 79.** [*F.*, 14 M. 458; *R.*, 15 B. 265.]

(104)—*S.* 4, *sub-s.* 2.—*Suit by zamindar on bond executed to his father, the late zamindar for arrears of rent — No suit for rent.*—A suit by a zemindar on a bond executed to his father, the late zamindar, for arrears of rent, is not a suit for rent within the meaning of s. 4, sub-s. 2, of the Succession Certificate Act. The debt is now due upon the bond and is not rent. The character must be determined by the promise contained in the document and not by the consideration recited for the promise. ZAMINDAR OF KALAHASTI v. VENKATAPA, **1 M.L.J. 680.**

(105)—*S.* 4, *sub s.* 2—*Certificate to collect debts—Debt—Profits of zamindari property.*—A suit to recover as heir to a deceased co-sharer profits of zamindari property from the lambardar is not a suit to recover a "debt" as that term is defined in s. 4, sub-s. (2), of Act VII of 1889. The plaintiff therefore in such a suit is not bound to provide himself with a Certificate of Succession. AULAD HUSAIN v. TAJAMMAL HUSAIN, **A.W.N. 1900, 96.**

(106)—*S.* 4, *sub-s.* 2—*Claim for unliquidated damages.*—A Hindu died leaving some sheep with X, who did not return them. His widow applied for a Succession Certificate to enable her to sue X for damages for wrongful detention. It was held that the word "debt" in s. 4, sub-s. 2 of Act VII of 1889, does not include a claim of this nature, and that, though it was not necessary that there should be a loan, there should be a certain sum of money due by the debtor to the deceased. A certificate could not therefore be granted under the Act. SUBBANNA v. MUNEKKA, **18 M. 457 =5 M.L.J. 61.** [*R.*, 7 C.L.J. 658=12 C.W.N. 145.]

(107)—*Ss.* 4, 6—*Suit by assignee of debt due to deceased creditor.*—If a person, claiming to be the heir to a deceased creditor, is bound to

Succession Certificate Act (VII of 1889) —*continued.*

produce a Succession Certificate before he can sue to recover the debt, no less is the assignee from such heir bound to take a certificate for the collection of the assigned debt. KARUPPASAMI v. PICHU, **15 M. 419=2 M.L.J. 116.**

(108)—*Ss.* 4, 7—*Debt—No certificate for part of a debt.*—A Mahomedan lady died leaving several heirs and her dower unpaid. One of the heirs was entitled to Rs. 17,000 out of the dower debt. She relinquished her claim to all but Rs. 800, and applied for a Succession Certificate for Rs. 800 only and offered to pay duty for the same. *Held*, that no certificate could be granted for a part of the debt. BISMILLA BEGAM v. TAWASSUL HUSAIN, **7 A.L.J. 255 =5 Ind. Cas. 424=32 A. 335.** (19 A. 129, *F.*; A.W.N. 1901, 125, *R.*)

(109)—*Ss.* 4, 9—*Minor—Applying through natural guardian—Issue of certificate.*—A Succession Certificate may be granted to a minor on application made by him though his natural guardian. Otherwise, s. 4 of the Succession Certificate Act would stand in the way of the minor suing for the effects of the deceased father, and no such suit could be filed during his minority. (28 B. 344, 6 Bom. L.R. 281, 25 B. 523, 3 Bom. L.R. 795, *Considered*; 5 C.L.R. 517, 20 A. 352, *F.*) The provisions of s. 9 of the Act can be satisfied by the guardian depositing the necessary security on behalf of the minor. SINGANAMALA KRISHNAMACHARLU v. SINGANAMALA VENKATAMMA, **15 Ind. Cas. 408=M.W.N. 1912, 411=36 M. 214.**

(110)—*Ss.* 4 *and* 16—*Assignment of the debt by the holder of Succession Certificate—Right of the assignee to sue for the debt--Practice--Assignee not allowed time to produce a fresh certificate.*—B. A. who was the mortgagee of the property in suit, died leaving behind him F.A. and others as his heirs. F. A. got a Succession Certificate with regard to the mortgage in suit and assigned the mortgage to the plaintiff, together with his right to sue as a holder of the Succession Certificate. *Held*, that the plaintiff had no right to maintain the suit, as he did not hold a Succession Certificate. *Held*, further, that he could not be allowed to convert the suit brought by him as an assignee of the debt into one by a certificate holder by allowing him an opportunity to produce a Succession Certificate. ALLAH DAD KHAN v. SANT RAM, **10 A.L.J. 506=35 A. 74=17 Ind. Cas. 486**

(111)—*Ss* 4, 17—*Probate issued from Native Court—Suit in British India.*—The executors of the will of a subject of a Native State cannot maintain a suit in a British Court on the strength of a probate issued by a Native Court, but must take out probate or letters of administration in British India under Act V of 1881, or a Certificate under Act VII of 1889. MANASINGH v. AHMED KUNHI, **17 M. 14.**

(112)—*S.* 5—*Granting of certificate by competent Court—Right of other Courts to question the certificate.*—Where a competent Court grants a Certificate of Succession to a certain person,

Succession Certificate Act (VII of 1889) —*continued.*

under the Act, it is not open to a Court, before which such Succession Certificate is produced as authority to collect the debts entered therein, to question the right of the Court which granted the certificate; to hold otherwise would be to open the door to confusion and give opportunity for fraud. DURGA DAS v. GULLU, **27 A. 87=A.W.N. 1904, 172.** [*F.*, 17 M.L.J. 37.]

(113)—*S.* 6—*Certificate to collect some only of the debts due to the deceased, legality of.*—Where a person applies for a certificate under s. 6 of the Succession Certificate Act, in order to enable him to comply with the requirements of s. 4 of the Act, such person cannot be compelled to ask for a certificate in respect of more debts than he wishes to collect for the time being. There is nothing in the law to prevent the Court from entertaining an application and granting a certificate in respect of some only of the several debts due to a deceased person. *In the matter of the petition of* INDARMAN, **18 A. 45=A.W.N. 1865, 152.**

(114)—*S.* 6 (*d*)—*Certificate, grant of—Guardian—Minor.*—A certificate under the Succession Certificate Act, 1889, can be issued to the guardian of a minor. *In re* MAHADEV, **6 Bom. L.R. 281=28 B. 344.**

(115)—S. 6—*See* Nos. 26, 107, *supra.*

(116)—*Ss.* 6, 7—*Grant of Succession Certificate to minor through next friend.*—A certificate may be granted to a minor through his next friend to collect debts alleged to be due to the minor's adoptive father, then deceased. RAMKUAR v. SARDAR SINGH, **20 A. 352=A.W.N. 1898, 64.** (5 C.L.R. 517, *R.*) [*R.*, 28 B. 344.]

(117)—*Ss.* 6, 19—*Appeal.*—When a Succession Certificate is granted to the petitioner and he is ordered to furnish security, no appeal lies against so much of the order as requires security to be furnished. RAMA REDDI v. PAPI REDDI, **19 M. 199.** [*F.*, 5 O.C. 213.]

(118)—*S.* 7—"*Summary enquiry,*" *meaning of—Procedure where questions of law or fact are intricate—Prima facie title to be determined in case of intricacy.*—Under s. 7 of the Succession Certificate Act, when a Court, considering that the pleadings of the parties are contentious and are such as will necessitate a prolonged enquiry into intricate questions of law or fact, decides summarily as to who is *prima facie* entitled to the certificate, the Court need not frame issues on such questions or record evidence thereon. The "summary enquiry" contemplated by the section means a short enquiry leading up to and resulting in a rapid decision, in contrast with the lengthy investigation required for the more tardy determination of a regular suit. The nature of the enquiry must depend on the circumstances of each case. CHUNNI LAL v. GULAB CHAND, **8 Ind. Cas. 730.** (25 B. 523, 3 Bom. L.R. 795, *R.*)

(119)—*S.* 7—*Question too intricate and difficult for decision in summary trial—Previous enquiry not necessary—Person having* prima

Succession Certificate Act (VII of 1889) —*continued.*

facie *right—Right to grant certificate without inquiry—Whether exists*,—Where, in a proceeding for the grant of a succession certificate, the rival claimant is the widow of the person for whose assets the certificate is asked for. *Held* that the widow's *prima facie* right was clear upon the pleadings, and that the Court was justified in granting the certificate to the widow, without an inquiry. (17 M. 477, *Cons.*) The language of s. 7 of the Succession Certificate Act does not support the contention that, in all cases, a Court dealing with an application for a succession certificate must hold some inquiry, before it can hold that it raises questions too intricate and difficult for decision in a summary trial, and it would be going too far to uphold such a contention. ANGAPPA CHETTIAR v. MEENAKSHI AMMAL, **24 M.L.J. 198 = 1913 M.W.N. 175 = 18 Ind. Cas. 733.**

(120)—*S.* 7—*Decision of Court.*—On an application for a succession certificate, the Court is bound to decide, though in a summary manner, the question as to the right to the certificate, especially, when there is conflict between two parties. BASANTA LAL v. PARBATI KOER, **31 C. 133 = 8 C.W.N. 51.** (23 C. 431, *Rel on*; 6 C.W.N. 345, *D.*).

(121)—*S.* 7—*Summary manner—What is meant by—Debts and securities, ss.* 4 (2) *and* 6—*Meaning of "debt"—Is money advanced on usufructuary mortgage included in term?*—The Act was never intended to take the place of a Probate and Administration Act, and s. 21 expressly provides that the grant of probate or letters of administration is to supersede a certificate under the Act. "Debt" must be taken in its ordinary and common acceptation. In Stephen's Commentaries on Blackstone, Book II, Chap. V, it is said : "For in general, whenever a contract is such as to give one of the parties a right to receive a certain and liquidated sum of money from the other as in the case of a bond for the payment of money, or an implied promise to pay for goods supplied so much as they shall be reasonably worth—a debt is then supposed to exist between these parties." The Transfer of Property Act is not in force but among the cases of mortgage of the usual kind prevalent in Upper Burma, which have come before the Court, I do not think that there have been any in which the mortgage-money has been sued for. Probably such mortgage-money is not a debt, but the point would have to be settled in a mortgage suit. If the applicant for the certificate proposes to sue for any mortgage-money, she can of course include the amount in her statement of debts and pay duty on it. But the mortgaged property cannot be entered as the debt itself. MA BE NAUNG v. MA BOK, **U.B.R. 1892—1896, Vol. II, 639.** (8 W.R. 2, 8 C. 858, *R.*) [*R.*, U.B.R. 1892—1896, Vol. II, 428.]

(122)—*S.* 7—*Grant of joint certificate.*—Under the special circumstances of the case the grant of a joint certificate to the contending parties was not interfered with, but the opinion was indicated that there ought to have been a definite determination between the rival claims. MAUNG PON v. MAUNG SAN, **U. B. R. 1897—1901, Vol II. 563.** (15 A. 195. 16 A. 21, 11 B. 179, 15 B. 684, 19 M. 497, *R.*)

(123)—*S.* 7—*Joint certificate.*—Under certain circumstances, it is legal to grant a joint certificate in the name of the rival claimants to collect the debts due to the estate of the deceased under the Succession Certificate Act, 1899. NARAYANASAMI v. KUPPUSAMI, **19 M. 497 = 4 M.L.J. 112.** [*R.*, U.B.R. 1897—1901, Vol. II, 563.]

(123-*a*)—S. 7—*See* NOS. 26, 27, 108, 116, *supra.*

(124)—*S.* 7, *cl.* 1, *application for certificate under—Duty of Court to decide questions at issue touching right to certificate.*—Cl. (3) of s. 7 of Act VII of 1889, enables the Court in cases of difficulty and intricacy, to grant a succession certificate to the person having *prima facie* the best title thereto, but it is also expressly laid down by cl. (1) of the section that "the Court shall proceed to decide in a summary manner the right to the certificate." The District Judge was therefore wrong in having refused jurisdiction on the grounds given by him. Even though the question at issue between the applicant and his opposite party related to the *status* (joint or divided) of the family to which the deceased belonged, it was the duty of the District Judge to have proceeded to decide the matter in a summary manner. DHARMAYA v. SAYANA, **21 B. 53.** [*Expl.*, 5 C.W.N. 494.]

(125)—*S.* 7. *cl.* 3—*Revocation of certificate by District Judge—Functions of Appellate Court — Judicial discretion—Exercise by Appellate Court—Error of law—High Court's power of interference — Revision — S.* 115, *Civ. Pro. Code.*—The functions and powers of a Court of Appeal invested with plenary jurisdiction to decide a question which the Court of First Instance had to decide, is the same as those of the Court of First Instance itself. *Held*, that the District Judge, who, in appeal, was not prepared to hold the will proved on the evidence on record, had power to exercise the discretion by s. 7, cl. (3), Succession Certificate Act, and to revoke the grant of the certificate, on the ground that the question was an intricate one. Even if the District Judge had committed an error either of law or of fact in considering the question to be intricate, the High Court has no power to interfere with his order in revision under s. 115, Civ. Pro. Code, 1908. V. S. RAMAKRISHNA AIYAR v. NAGAMMAL, **10 M. L.T. 164.**

(126)—*S.* 7, (3)—*Inquiry into title set up.*—On an application on behalf of a minor, for a certificate under Succession Certificate Act, the Court ought to make some enquiry into the title set up by the applicant, prior to the disposal of his application. HURRI KRISHNA PANDA v. BALABHADRA PANDA, **23 C. 431.** (6 C. 303, 15 C. 574, 17 M. 477, *R.*; 7 M. 452 *D.*; 5 C. L.R. 517, *Diss.*) [*Rel. on.*, 31 C. 133 = 8; C.W. N. 51; *Appr.*, 25 C. 320; *R.*, 5 C.W.N. 494.]

Succession Certificate Act (VII of 1889) —*continued.*

(127)—*S.* 7 (3)—*Inquiry into*—Prima facie *title.*—The intention of s. 7 (3) of the Succession Certificate Act is not to save the Court the trouble of making any inquiry at all where the applicant is not the heir to the deceased, but it is to allow the *prima faice* title to the certificate to prevail when a question of law or fact arises on inquiry, too difficult to be determined in a summary proceeding. SIVAMMA v. SUBBAMMA, **17 M. 477.** [*Appr.*, 23 C. 431 ; *R.*, 21 B. 53, 5 C.W.N. 494.]

(128)—*Ss.* 7 (3) *and* 9 (1)—*Grant of certificate —Taking security essential—No discretion to Court.*—Where a certificate is issued under s. 7, sub-s. (3) of the Succession Certificate Act, the Court shall require security-bond with one or more sureties to be given as a condition precedent to the granting of the certificate (*Vide* s. 9, cl. 1). The section leaves no discretion to the Court in this matter. RAJAM CHETTY *alias* SUBBARAYA CHETTY v. EDALAPALLI AUTHIAMMAL, **11 M.L.T. 384=M.W.N. 1912, 535=14 Ind. Cas. 303.**

(129)—*S.* 7, *cl.* (4)—*Certificate for collection of debts not grantable to several of the applicants.* —The provisions of cl. (4) of s. 7, Succession Certificate Act, empowers the Court to select one out of several applicants for a certificate on consideration amongst others, of the extent of their interest in the estate. This however does not imply that the Judge is competent to issue certificates to several of the applicants for partial collection, by each of them, of the debts in question. SHITAB DEBI v. DEBI PRASAD, **16 A. 21=A W N. 1893, 191.** [*R.*, 19 M. 497, U.B.R. 1897—1901, Vol. II, 563, 70 P.R. 1904.]

(130)—*Ss.* 7, 9—*Certificate of succession— Power of Judge to grant certificate as to a portion of the debts of a deceased person.*—There is nothing in the Succession Certificate Act, 1889, to preclude a Judge from granting a certificate for partial collections of the debts of a deceased person, security being furnished by the applicant to a proportionate amount. *In the matter of the petition of* GHANSHAM DAS, **A.W.N. 1893, 84.**

(131)—*Ss.* 7 *and* 19—*Orders under ss.* 7 *and* 19—*Appeal.*—No appeal lies against an order under s. 7 of Act VII of 1889 directing security to be given, but an appeal lies against an order passed under s. 19 of the Act. MAYILKOTHIL KUNJUNNI NAIR v. VADAKEVEETIL KONGATHIL ELAYA NAIR, **7 M.L.T. 246=6 Ind. Cas. 599.** (19 M. 199, 20 M. 442, *R.*)

(132)—*Ss.* 7, 25—*Summary enquiry—Effect of decision under the Act.*—There must be an enquiry before a certificate is granted under the Succession Certificate Act, but the enquiry is to be a summary one, and when a Judge has legal evidence before him on which he comes to a proper conclusion, his proceedings cannot be set aside because they seem not to have been of a very protracted nature. (23 C. 431, 17 M. 477, 25 C. 320, 21 B 53, *R.*) No decision under the Succession Certificate Act bars in any way the rights of the parties, or establishes the right of the party to the debt to collect which the certificate is granted. MUSSTT. JIGIRI BEGAM v. SYED ALI NAWAB, **5 C.W. N. 494.**

(133)—*S.* 8—*Petition for succession certificate, contents of.*—A Court has no power to grant a succession certificate except upon a petition complying with the provisions of the Act. Amongst other things, it must specify each debt and security in respect of which the certificate is asked, and the certificate, when granted, must specify each debt and security covered by it. MAUNG THA MAUNG v. MAUNG HLAW, **8 Ind. Cas. 996.**

(134)—S. 8—Widow's application for succession certificate—Objection by reversioner—Suit by widow for declaration of abstract right —Maintainability—*See* SPECIFIC RELIEF ACT, 1877, s. 42, 7 A. L. J. 311=5 Ind. Cas. 593=32 A. 316.

(134-*a*)—S. 8—*See* NO. 29, *supra.*

(135)—*S.* 9—*Cancellation of security-bond.* —*Held*, that a person who has given security and executed a bond under the provisions of s. 9 of the Succession Certificate Act, VII of 1889, cannot be relieved of his liability so long as the certificate of succession granted by Court holds good. KAMAL DIN v. MUSSAMAT HAJRAN, **5 P.L.R. 1901.**

(136)—*S.* 9—*Suit for a share in inheritance against administrator—Civ Pro. Code, s.* 43—*Cause of action—Administrator's refusal to pay interest to plaintiff, on denial of plaintiff's title.* —In August 1893, Z a lunatic, died, leaving the plaintiff and the defendants as his heirs. J.A., one of the defendants, obtained a succession certificate under Act VII of 1889, limited to the collection of the interest of certain promissory notes which formed the greater part of the estate. In September 1894, the plaintiff sued J.A., for recovery of a certain sum on the allegation that the plaintiff was one of the heirs of Z; that J.A., had, under the succession certificate, received a certain sum as interest, but had declined on demand made, to pay to the plaintiff his share thereof which amounted to the sum claimed. J.A., did not deny plaintiff's title to a share in the Estate. He refused to pay on the ground that he was entitled to set off against the claim certain sums expended by him on behalf of the Estate. That suit was dismissed on the ground that as some other person had filed a suit against the parties to that suit, an element of uncertainty had been created in the right of the plaintiff. In August 1896, the plaintiff instituted another suit for recovery of his share in the entire property of Z the deceased lunatic; the plaintiff's allegations were that he was one of the heirs of Z that in September 1895, he had applied to the Court that security should be taken from J.A., under s. 9, Act VII of 1889; that the latter in the

Succession Certificate Act (VII of 1889) —*continued.*

course of those proceedings alleged that he had become the owner of the plaintiff's share, thereby setting up for the first time, a title adverse to the plaintiff. J.A., the defendant, pleaded that the suit was barred by s. 43, Act XIV of 1882. *Held*, that the refusal of J.A. to pay interest in 1894 was not, and did not involve, a denial of the plaintiff's title; and it was only a denial of the plaintiff's title that could force the plaintiff into Court with a claim for possession of his share by administration and partition. *Held*, that the cause of action in the second suit was not complete when the first suit was brought; and that the second suit was, therefore, not barred by s. 43, Act XIV of 1882. The cause of action, which arises against an administrator who, being bound to administer the estate and to render accounts thereof as administered by him, fails to do so, differs from the cause of action which arises against the trespasser or a person who wrongfully withholds possession of property to which the plaintiff is entitled. SYED MOHAMMAD ZAKI ALI KHAN v. SYED MOHAMMAD JAFAR ALI KHAN, **2 O.C. 17.**

(137)—*S.* 9—*Certificate to realise interest only*-Ultra vires—*Security.*—On an application by a widow for a succession certificate for the debts of her deceased husband, the Court ordered that she was entitled to draw interest only without disturbing the principal. *Held*, that the order was *ultra vires* and all that the Court could do under s. 9 of the Succession Certificate Act was to take, if necessary, security for rendering an account of the debts and securities received by her, and the certificate when granted should be both for the principal debt and the interest. JAI DEI v. BANWARI LAL, **11 A.L.J. 248=35 A. 249=19 Ind. Cas. 447.**

(138)—*S.* 9—*Disputed question of title—Duty of the Court.*—S. 7 of the Succession Certificate Act makes it incumbent on the Court to pass a definite order giving the certificate to one applicant or another with all convenient speed. If the question of title is in doubt, the Court should decide it on *prima facie* grounds to the best of its ability, give a certificate accordingly and take security. It should not refuse to adjudicate, because difficult questions arise or because the matter is in issue in a regular suit. RUKMAN DEVI v. SAIN DAS, **137 P.R. 1907.**

(139)—*S.* 9—*Security—Reversionary heirs—Contingent interests.*—The security taken under s. 9 of the Succession Certificate Act, 1889, does not protect the contingent interests of reversionary heirs, when the certificate granted in the same proceeding is given to the real heir. BAI PARSON v. SOMNATH, **5 Bom. L. R. 929.**

(140)—*S.* 9—*Grant of succession certificate to Hindu widow in preference to next reversioner*

Succession Certificate Act (VII of 1889) —*continued.*

—Necessity for taking security—Right of applicant to extend debts--Order as to furnishing security and form thereof--Appeal--Right of respondent to file memorandum of objections—Nature of enquiry under Act—Necessity for enquiry as to reunion.—Where the Court granted succession certificate to a Hindu widow in preference to the next reversioner, it was bound to require security from her under s. 9 of the Act. Even if the demand of security were discretionary, an appellate Court would not meddle with the exercise of such discretionary power. An applicant for the grant of a succession certificate is not bound to mention all the debts in his application. Under s. 10 of the Act he is at liberty to have the certificate extended to debts not originally mentioned. No appeal lies from an order directing an applicant to furnish security or as to the form of security. There is no provision in the Act for a respondent to file a memorandum of objections. In the course of the summary proceedings under the Act, the Court is not bound to enquire into such intricate questions as re-union between the members of a divided family. SUNDARAMMAL v. KULLAPPA CHETTY, **5 M.L.J. 36.**

(141)—S. 9—*See* Nos. 29, 109, 128, 130, *supra* and No. 164, *infra.*

(142)—*Ss.* 9, 10—*Appeal.*—An appeal lies from an order of the District Court granting succession certificate to an applicant conditional on his furnishing security, when the right of the applicant is contested by the appellant. The order is not merely an interlocutory order. ARIYA PILLAI v. THANGAMMAL, **20 M. 442.** [*F.*, 139 P.R. 1908; *Com.*, 26 A. 173=A.W.N. 1903, 225; *R.*, 5 O.C. 213.]

(143)—*Ss.* 9, 19—*Order granting certificate conditionally on furnishing security—If appealable.*—An order passed on an application for a succession certificate, granting a certificate, conditionally on the applicant furnishing security is not an order of the kind described in s. 19 of the Act and no appeal lies therefrom. NANNHU LAL v. GULABO, **26 A. 173=A.W.N. 1903, 225.** (13 A. 214, 19 B. 790, *F.*; 20 M. 442, 5 M.L.J. 28, 25 C. 320, *R.*) [*Diss.*, 139 P.R. 1908=4 P.L.R. 1909; *F.*, 2 A.L.J. 606.]

(144)—*Ss.* 9, 19—*Certificate granted on applicant furnishing security—Appeal from order—Civ. Pro. Code*, 1882, *s.* 622 (=*s.* 115, *New Code*).—The widow of a deceased person applied for a certificate of succession under Act VII of 1889, and the Judge ordered a certificate to issue on the petitioner furnishing security under s. 9 of the Act. *Held* that such order was not an order "granting, refusing or revoking a certificate" within the meaning of s. 19 of the Act, and was, therefore, not appealable. BAI DEVKORE v. LALCHAND JIVANDAS, **19 B. 790.** [*Not. F.*, 139 P.R. 1908=4 P.L.R. 1909=156 P.W.R. 1908; *F.*, 26 A. 173=23 A.W.N. 225.]

(145)—*S.* 10—*Extension of certificate, application for—If can be made by any other than the certificate holder.*—Where S obtained a

Succession Certificate Act (VII of 1889) —*continued.*

succession certificate as heir of B and assigned a pro-note not included in the schedule, to the petitioner, and he (assignee) applied for an extension of the certificate, *held* that the District Court had no jurisdiction to grant extension of the certificate to any other than the holder of the certificate. RAJAH OF KALAHASTI v. RAMA RAYANIMGAR, **6 M.L.T. 161=3 Ind. Cas. 84=19 M.L.J. 456.**

(146)—*S.* 10—*Application by next friend of minor, whether sustainable.*—An application can be made by a next friend on behalf of a minor for a succession certificate. GODAVARTI PERIAH v. GODAVARTI LAKSHMIDEVI AMMAL, **16 Ind. Cas. 797.** (25 B. 523=3 Bom. L.R. 795, 28 B. 344=6 Bom. L.R. 281, *Diss.*; 20 A. 352=A.W.N. 1898, 64, *Appr.*)

(147)—*S.* 10—*Extension of certificate—No grant of certificate—No appeal under s.* 19.—The extension of a certificate under s. 10, Act VII of 1889 to additional debts is not the grant of a certificate so as to give a right of appeal under s. 19 of the act against extension. VENKATESWARALU v. BRAHMARABUTU RAJA KRISHNAJI, **25 M. 634.**

(148)—S. 10—*See* No. 142, *supra.*

(149)—*S.* 14, *money deposited under, when refundable to applicant.*—Whenever an application for a succession certificate is allowed, *i.e.*, the Court has passed its order for the issue of the certificate to the petitioner, the amount of the deposit paid by him into Court becomes at once legally appropriated as duty to the extent of the debt covered by the order, and cannot be refunded. In other cases, a refund can be made to the person who has deposited the amount. SANKARA AYYAR v. NAINAR MOOPPANAR, **21 M. 241.**

(150)—*S.* 16—*Joinder of parties—Certificate holder entitled to half sum due on bond—The others not joining—Effect.*—The holders of a succession certificate entitled to half the sum due on a bond can sue under this section to collect that part of the debt due to them (and if the persons entitled to the other half refuse to join as plaintiffs) by impleading them as defendants. SHIB RAM v. MUHAMMAD SHAH, **29 P.R. 1899.**

(151)—S. 16—*See* No. 110, *supra.*

(152)—S. 17—*See* No. 111, *supra.*

(153)—*Ss.* 17, 20—*Certificate of heirship, grant of—Hindu family — Notice to other members—Political Agent, grant of certificate by—Irregularity—Stamp of certificate—Court fees Act* VII *of* 1870, *s.* 26—*Notification of Governor-General — Certificate of heirship granted by Political Agent — Recognition in British India.*—Where a District Judge confirmed the grant of a certificate by the Subordinate Judge, on the ground that the certificate granted by the Political Agent was invalid, because the applicant had not given the Political Agent the requisite information as to the other relatives of the family, and no notice had been issued to

Succession Certificate Act (VII of 1889) —*continued.*

them it was *held* that these irregularities might be reasons for the opponent asking the Political Agent to cancel the grant, but that they did not enable the District Court to treat it as a nullity. A certificate having been granted on an ordinary stamp of the requisite value, it was contended that it was not properly stamped in accordance with the Court Fees Act of 1870, as required by s. 17 of Act VII of 1889, because it did not bear upon it the words "Court Fees" as directed in the Notification of the Governor-General, No. 361, dated 18th April, 1883. *Held* that the direction in s. 26 of Act VII of 1889, that the stamp should bear the words "Court Fees" is not a matter on which, by the terms of that section, the Governor-General in Council had authority to give any direction, and it can, therefore, only be regarded as a departmental order, the non-performance of which cannot invalidate the stamp for the purpose of the Act. A certificate of heirship stamped with the proper stamp, and granted by the Political Agent of a Native State, must be recognized by the Civil Courts in British India "as having the same effect in British India as a certificate granted under this Act" as provided by s. 17 of Act VII of 1889, and, under s. 20, precludes the granting of a certificate by a Civil Court. ANNAPURNA BAI v. LAKSHMAN BHIKAJI VAKHARKAR, **19 B. 145.**

(154)—*S.* 18 (*b and c*)—*Revocation of certificate*—Res judicata—*Estoppel—Judgment obtained by fraud, not conclusive* inter partes.—One P died in 1889 leaving behind him his daughter M as his heir. It was alleged that he made a Will appointing K and L as his executors. These executors applied for a certificate under Act VII of 1889 to recover a debt due from one N to P's estate. M opposed this application, and claimed the certificate for herself in a separate application. The District Judge granted the executors' application and rejected that of M on 14th September 1892. In the meantime, one R, claiming to be auction-purchaser of the right, title, and interest of P in the debt due from N, applied on 12th September, 1892, in his own name, for a certificate under Act VII of 1889. The District Judge rejected this application. R appealed to the High Court. To this appeal, the executors were made parties at their own request. The High Court reversed the District Judge's order and remanded the case for disposal on the merits. Upon the remand, the executors did not appear before the District Judge to contest R's application, and the District Judge granted him a certificate. Thereupon, he applied for revocation of the certificate previously granted to the executors; and the executors in their turn applied for a revocation of the certificate granted to him. The District Judge revoked R's certificate on the ground that he had fraudulently concealed from the Court the previous grant of a certificate to the executors. Against this order R appealed to the High Court, contending (*inter alia*) that the executors

Succession Certificate Act (VII of 1889) —*continued.*

not having resisted his application for a certificate after the case had been remanded by the High Court, were estopped, on the principle of *res judicata*, from applying for a revocation of the certificate granted to him. (*a*) *Held* that the executors were not estopped. The executors having applied to be made parties to the appeal proceedings were bound to appear in the Court below, and their failure to do so disabled them from pleading objections, such as the collusive character of the decree and M's want of title, but it did not operate as *res judicata*, especially when there was reason to suspect fraud on the part of R. The order obtained by him could not have the effect of *res judicata*, unless the executors being called on to dispute it, had failed to do so. (*b*) A party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud. (*c*) *Held*, also, that the District Judge had the power, under s. 18 (*b* or *c*) of Act VII of 1889, to revoke the certificate he had granted under a mistake of fact to R. MANCHHARAM v. KALIDAS, **19 B. 821.** [*Appr*, 3 C.W.N. 660=27 C. 11; *Appl.*, 27 C. 11.]

(155) —S. 19, cl. *(c)*—Suit for declaration of plaintiff's right to collect debts due to a deceased person's estate—Previous grant of a succession certificate to the defendant—Maintainability of suit—*See* RIGHT OF SUIT—MISCELLANEOUS, 15 M.L.J. 399.

(156)—*S.* 19—*Appeal—Costs.*—In cases under the Succession Certificate Act, where an appeal is prohibited by s. 19, no appeal will lie as to costs alone. RAM GHULAM v. SHIP DIN, **A.W.N. 1892, 35.**

(157)—*S.* 19—*Conditional order for grant of succession certificate, whether appealable.*—An order granting a succession certificate, though coupled with a condition that the applicant must give security, is an order granting a certificate and is appealable under s. 19 of the Act. BIRI v. BARKHURDAR, **139 P.R. 1908=4 P.L.R. 1909=156 P.W.R. 1908=4 Ind. Cas. 639.** (25 C. 320, *F.*; 5 M.L.J. 28, 20 M. 442, 2 A.L.J. 606, *R.*; 13 A. 214, 26 A. 173, 19 B. 790, *D.*)

(158)—*S.* 19—*Order granting certificate conditional on furnishing security, not appealable.*—Where a certificate is granted conditional on the applicant's furnishing security, no appeal lies, under s. 19, from such order—(13 A. 214, 26 A. 173, *F.*)—*Per* Richards, J.—(*dubitante*) Where the order of the District Court grants the applicant a right to obtain a certificate on the furnishing of security, but no time is fixed within which it should be furnished, nor are the consequences that should follow upon failure to do so set forth, the order falls within s. 19 of the Act. The order which a Legislature intended to be appealable was the decision of the Court as to who was or was not the proper person to be granted a certificate, and not the question whether or not that person should within a definite or indefinite period, furnish security. GAURI DUTT v. MUSAMMAT MAIKIA, **2 A.L.J. 606.** [*R.*, 4 P.L.R. 1909=139 P.R. 1908=156 P.W.R. 1908.]

(159)—*S.* 19—*Agent to the Governor at Vizagapatam—Appeal—District Court.*—Under s. 19 of the Succession Certificate Act, an appeal lies from the order of the Court of the Agent to the Governor at Vizagapatam as from an order of a District Court, which the Agent's Court is. BABUBALENDRANI GURVARAJU v. BABUBALENDRANI CHANDRASAKARA RAJU, **3 M.L.T. 264=31 M. 362.** (18 M. 227, *Diss.*)

(160)—*S.* 19—*Insurance—Premia paid out of salary of deceased—Sum insured* prima facie *his separate property.*—Application for a certificate under the Act, in respect of moneys due to deceased on policies of insurance, was made by his widow but opposed by his brother, who set up his title by survivorship and prayed for a certificate in his own favour. The District Judge granted the certificate to the brother. On appeal by the widow, *held*, the lower Court ought to have issued the certificate to the widow, acting on the view that the money in question was *prima facie* the separate property of the deceased, the premia having been paid by him out of his salary (13 M.L.J. 75, *R.*) and the brother must have been left to establish his right by suit, chiefly because he had based his claim solely upon the assumption that the education of the deceased was at the expense of the family. RAJAMMA v. RAMAKRISHNAYYA, **29 M. 121.**

(161)—*S.* 19—*Security, certificate granted on condition of giving—Appeal from order requiring security before granting certificate.*—An appeal by a person against that part of an order under the Succession Certificate Act, 1889, directing that a certificate shall issue to him on his giving security, which requires him to give security, is not an appeal against "an order granting a certificate" within the meaning of s. 19, whether the other part of the order is "an order granting a certificate," within the meaning of s. 19 or not, and that therefore such an appeal does not lie. DILAJ KUAR v. JAGDAT SINGH, **5 O.C. 213.**

(162)—*S.* 19—*Order to grant certificate on security being furnished—Appealability of order.*—An order that certificate be granted on security being furnished is an order granting a certificate within the meaning of s. 19 of the Act and as such is appealable. VENKATASAMI v. CHINNA NARAYANA, **5 M.L.J. 28.** [*N.F.*, 26 A. 173=23 A.W.N. 225; *F.*, 139 P.R. 1908=4 P.L.R. 1909=156 P.W.R. 1908.]

(163)—*S.* 19—*Order conditional on giving security—Enquiry as to existence of debts.*—An order granting a succession certificate, though coupled with a condition that the applicant must give security, is nevertheless an order that is appealable within the meaning of s. 19,

Succession Certificate Act (VII of 1889) —*continued.*

Succession Certificate Act. (13 A. 214, *Diss.*) [*F.*, 139 P.R. 1908=4 P.L.R. 1909 ; *Diss.*, 5 O.C. 213, 26 A. 173=23 A.W.N. 225.] Before granting a certificate, the Court ought to take at least some evidence going to show that the debts, in respect of which certificate is applied for, were due to the estate of the deceased. RADHA RANI DASSI v. BRINDABUN CHANDRA BASACK, **25 C. 320=2 C.W.N. 59.** (23 C. 431, *R.*) [*R.*, 5 C.W.N. 494.]

(164)—*Ss.* 19, 9—*Appealable orders—Order requiring security as condition precedent to granting certificate—Appeal.*—S. 19 of the Act is the solitary authority under which any appeal from orders under the enactment can lie. Where, on an application for a certificate under the Act, a Judge acting under s. 9 required security as a condition precedent to his granting it, *held* that it was not an order "granting, refusing or revoking a certificate" within the meaning of s. 19 of the Act, and that, therefore, it was not appealable. BHUGWANI v. MANNI LAL, **13 A. 214=A.W.N. 1891, 45.** [*Diss.*, 5 M.L.J. 28, 20 M. 442, 25 C. 320; *F.*, 19 B. 790, 26 A. 173=23 A.W.N. 225, 2 A.L.J. 606 ; *R.*, 5 O.C. 213, F.B. ; *D.*, 139 P.R. 1908=4 P.L.R. 1909.]

(165)—*Ss.* 19 *and* 20—*Appeal from orders—Punjab practice.*—Under notifications Nos. 570 and 571 (4th November 1889) of the Punjab Government, it is to the Divisional Court and not to the Chief Court that appeals from orders passed by a District Judge or Subordinate Judge under the Succession Certificate Act lay. TIKAYA MAL v. LAUNGA MALIK, **124 P.R. 1890.** [*R.*, 98 P.R. 1908.]

(166)—*Ss.* 19, 26—*Munsif invested with functions of District Court—Appeal from his decision—Jurisdiction.*—An appeal from an order of a Munsif invested under s. 26 with the functions of the District Court lies to the District Judge, and a Subordinate Judge or a Judge of the Court of Small Causes has no jurisdiction to entertain such an appeal. HURAN BIBI v. HINGAN BIBI, **8 A.L.J. 1300.**

(167)—*Ss.* 19, 26—*Appeal from order of District Court under s.* 26.—S. 26 of the Succession Certificate Act confers on the District Court the same appellate jurisdiction over an order of an inferior Court as is conferred by s. 19 on the High Court over the order of a District Court. There is no provision in the Act for a second appeal in any case. SUBBA RAO v. PALANI ANDI PILLAI, **17 M. 167=4 M.L.J. 72.**

(168)—*Ss.* 19, 28—*Reg.* VIII *of* 1827—*Order refusing certificate, if appealable.*—An appeal lies from an order refusing to grant a certificate of heirship under Reg. VIII of 1827, by virtue of s. 19 of the Succession Certificate Act (VII of 1889). RANGUBAI v. ABAJI, **19 B. 399.**

(169)—*S.* 20—*Certificate for part only of a debt.*—Under Act VII of 1899, a separate certificate cannot be applied for and granted to each and every heir to a fractional share in the estate

Succession Certificate Act (VII of 1889) —*concluded.*

of a deceased person so as to qualify him to separately recover his share from the creditor or creditors of the deceased. SHAMSH-UN-NISSA v. WAJID ALI, **A.W.N. 1890, 91.**

(170)—S. 20—*See* Nos. 153, 165, *supra.*

(171)—*S.* 25—*See* No. 132, *supra.*

(172)—*S.* 26—*Bombay Reg.*, VIII *of* 1827, *s.* 2, *Jurisdiction of Court.*—A Subordinate Judge who had been invested by Government under s. 26 of Act VII of 1889 with the functions of a District Court under Act VII of 1889 has jurisdiction to hear and determine an application made under s. 2 of Bombay Reg. VIII of 1827. PITAMBAR MANCHARAM v. ISHVAR JADURAM, **17 B. 1230.** [*F.*, 18 B. 748, 19 B. 399.]

(173)—*S.* 26—*Grant of certificate on the applicants' furnishing security—Appeal.*—An order passed under the Succession Certificate Act, 1889, granting a certificate on the applicant's furnishing security, is an order appealable under s. 26 of the Act. BAI NANDKORE v. MAGAN LAL VARAJ BHUKHANDAS SHAH, **13 Bom. L.R. 1208.** '19 B. 790, *D.*)

(174)—*S.* 26—*Civil Judge—Investment with functions of District Court.*—After the notification which made the Civil Judges not inferior in grade to the District Courts a Civil Judge could not be invested with the functions of a District Court under s. 26 of the Succession Certificate Act. HIRALAL MAYARAM v. KHUSHALIRAM, **15 C.P.L.R. 54.** (9 C.P. L. R. 19, *R.*)

(175)—S. 26—*See* Nos. 166, 167, *supra.*

(176)—*S.* 28—*Certificate of heirship under Reg.* VIII *of* 1827—*Refusal by District Judge—Appeal.*—An appeal lies from the order of a District Judge refusing to grant a certificate of heirship under Reg. VIII of 1827 by virtue of the provisions of s. 28 of the Succession Certificate Act (VII of 1889). JAVERMAL v. THE NAZIR OF THE DISTRICT COURT OF POONA, **18 B. 748.** [*F.*, 19 B. 399.]

(177)—S. 28—*See* No. 168, *supra.*

Succession Law.

Applicable to converts—*See* NATIVE CHRISTIANS, 1 Bom. L.R. 53=23 B. 539.

Sudder Court.

Petition for review heard by four Judges of the Agra—All four Judges equally divided in opinion—The same heard by the Chief Justice of N.W.P.—*See* HIGH COURT, JURISDICTION OF, CALCUTTA, 15 W.R.P.C. 16=6 B.L.R. 283=13 M.I.A. 585.

See ST. 24 AND 25, VIC., C. 104, s. 9, 8 W.R. 470.

Sudder Khajana.

Sudder Khajana — Meaning.— The words 'Sudder Khajana' may imply a rental payable to the zemindar also, not merely to the Government. KALEE TARA DEBIA v. NITTIANUND SHAHA, **12 W.R. 90.**

Sudra Ascetic.

Sudra ascetic—Devolution of property—*See* HINDU LAW—INHERITANCE, 22 M. 302.

Sudras.

(1)—*Adoption by Sudra—Religious ceremony—Pollution.*—An adoption by a sudra under pollution is valid as in his case no religious ceremonies are essential. THANGATHANNI v. RAMU, **5 M. 358.**

(2)—*Adoption by sudra after marriage.—Quære.*—Whether a sudra can be validly adopted after marriage. VYTHILINGA v. VIJAYATHAMMAL, **6 M. 43.**

(3)—*Illegitimate daughter — Succession.*—Under Hindu Law, the illegitimate daughter of a Sudra is not entitled to inherit in preference to the son of a divided brother. BHIKYA v. BABU, **10 Bom. L.R. 736=32 B. 562.**

(4)—*Offspring of illegitimate son of sudra—Rights of inheritance.*—Offsprings of the illegitimate son of Sudra are entitled to a share of his property along with the offspring of his legitimate son. FAKIRAPPA v. FAKIRAPPA, **4 Bom.LR. 809.**

Khatris—Rajpoots—*See* CASTE, 4 W.R. P. C. 132=7 M I.A. 18.

Adoption—Mother's sister's son—*See* HINDU LAW—ADOPTION, 1 M. 62.

Adoption among—*See* HINDU LAW—ADOPTION, 6 C. 381=7 I.A. 250=7 C.L.R. 313, P. C.

Hindu Law—Widow not competent to give only son in adoption—*See* HINDU LAW—ADOPTION, 6 B. 524.

Adoption of Sudra—Ceremonies, if necessary—*See* HINDU LAW—ADOPTION, 4 B.L.R.A. C. 162=13 W.R. 168.

Adoption by a—Leper in Bengal—Religious ceremonies—*See* HINDU LAW—ADOPTION, 28 C. 168.

See HINDU LAW—ADOPTION, 7 B.L.R. 1=15 W.R. 300, 12 B.H.C. 364.

Right of illegitimate son of—Not born of female slave, when putative father dispossessed of his property during his life—*See* HINDU LAW—INHERITANCE, 28 C. 194.

Legitimate son of illegitimate son of sudra preferential heir to divided brother—*See* HINDU LAW—INHERITANCE, 25 M. 519=11 M.L.J. 399.

Illegitimate son, inheritance of—*See* HINDU LAW—INHERITANCE, 4 B. 37.

Ahirs, illegitimate sons among, not entitled to inherit to father's property—*See* HINDU LAW—INHERITANCE, 8 A. 387=A.W.N. 1886, 186.

Hindu Law—Impartible property — Mitakshara—Sudras—Illegitimate son, right of—Ordinary rule of survivorship applies — *See* HINDU LAW—INHERITANCE, 18 C. 151, P.C. =17 I.A. 128.

Sudras—*concluded.*

Hindu Law—Inheritance —Illegitimate son of Sudra, whether entitled to succeed to whole estate — Widow restricting illegitimate son's right, to his one half share. *See* HINDU LAW—INHERITANCE, 14 B. 282.

Son of a Khatri by a—woman—*See* HINDU LAW—INHERITANCE, 4 W.R.P.C. 132=7 M. I.A. 18.

See HINDU LAW — INHERITANCE, 23 B. 257. 3 B.L.R.P.C. 1=13 M. I. A. 141=12 W. R.P.C. 41.

Right of illegitimate son to maintenance—Maintenance, a charge on the Zemindary—*See* HINDU LAW—MAINTENANCE, 11 W.R. P.C. 6=2 B.L.R. 15, P.C.=12 M.I.A. 203.

Zemindar of—Caste—Illegitimate son, right to maintenance—*See* HINDU LAW — MAINTENANCE, 5 M.H.C. 405.

See HINDU LAW—MAINTENANCE, 1 M.306, 8 M. 325, 8 M.557, 3 B.L.R. P.C. 1=13 M.I.A. 141=12 W.R.P.C. 41, 8 M.L.J. 105, 7 M. L. T. 17=20 M.L.J. 49=5 Ind. Cas. 42=33 M. 342.

Marriage between different sub-divisions of Sudra caste—*See* HINDU LAW—MARRIAGE, 1 C. 1=23 W. R. 334, 15 C. 708.

Hindu Law—Sudras—Adopted son, share of—Subsequent birth of legitimate son — *See* HINDU LAW—PARTITION, 7 M. 253.

See HINDU LAW—PARTITION, 12 M. 401.

Suds.

Adoption of wife's brother—Custom among Suds — Hindu Law.— In the absence of a custom prohibiting such adoption, amongst the Suds (of Ludhiana claiming to belong to one of the twice-born classes), the adoption of a wife's brother is not invalid. NUND LAL v. LAKHA, **125 P.R. 1880.**

Sufficient Cause.

For recalling certificates granted, what does not amount to—*See* ACT XL OF 1858, ss. 7, 21, A.W.N. 1881, 4.

Non-appearance of guardian of minor—*See* CIV. PRO. CODE, 1908, O. IX, r. 13, 5. C.W.N. 58.

Review of order of dismissal for default—Advocate engaged in a case elsewhere—*See* CIV. PRO. CODE, 1908, O. XLVII, rr. 7, 9, 2 L.B. R. 279.

Where cross-objections turned into a memo of appeal—*See* LIMITATION ACT, 1908, ss. 4 and 5, 1 Bom. L.R. 768=23 B. 692.

See LIMITATION ACT, 1908, ss. 4, 5, 21 B. 552.

Sufficient cause, time required in obtaining copy of the judgment appealed from is not—*See* LIMITATION ACT, 1908, s. 12, 1 Bom. L. R. 112.

Suggestion by Court.

(1)—*Erroneous suggestion by Court—Party acting upon it*—Res judicata—Where the defendant raised certain contentions, and the Court, instead of trying and adjudicating on them, referred him to a fresh suit, his acquiescence in such suggestion, instead of preferring an appeal, is reasonable submission to the Court and, in such circumstances, the rule of *res judicata* cannot be applied with justice. BABU LAL v. ISHRI PRASAD NARAIN SINGH, **2 A. 582, F.B** [*R.*, 14 B. 31.]

(2)—*Judge suggesting to a pleader about the sufficiency of evidence, how far bound down by that suggestion.*—When a Judge suggests to a pleader that it is needless for him to call further witnesses' evidence on a particular point and suggests that they should be merely tendered for cross-examination, that is an intimation to the pleader that the Judge is satisfied with the evidence so far as it has gone and that the cross-examination of the witnesses that have been called has not impressed him, and when the Judge has made such a suggestion and it has been acted on by the pleader, he and his client have a just cause of complaint if the Judge afterwards turns round and says "I decided against you on the point." HASAJI v. DHONDI RAM, **6 Bom L.R. 636.**

Suits.

See RIGHT OF SUIT.

(1)—*Definition of 'Suit.'*—The word 'suit' in Act IX of 1871 does not include an application. DHONESSUR KOOER v. ROY GOODER SAHOY, **2 C. 336, F. B.**

(2)—*Suit defined.*—The word "suit" ought to be confined to such proceedings as, under that description, are directly dealt with in the Code of Civil Procedure, or such as by the operation of the particular Act which regulates them are treated as suits. WATKINS v. FOX, **22 C. 943.** [*R.*, 17 C. P. L. R. 178.]

(3)—*'Suit' meaning of.*—The word "suit" does not include an appeal. BHARASI LALCHOWDHRY v. SARAT CUNDER DASS, **23 C. 415.**

(4)—*"Suit," meaning of.*—The word "suit" in Act VIII (B.C.) of 1869, s. 102, covers all proceedings whether prior or subsequent to decree. KEDARNATH BISWAS v. HURO PERSHAD ROY CHOWDHRY, 23 **W. R. 207.**

(5)—*Broach and Kaira Encumbered Estates Act (XIV of 1877), s. 19—"Suit" includes application for execution.*—The word 'suits' in the last paragraph of s. 19 of Act XIV of 1877, includes applications for execution of decrees. BHULJIBECHAR v. BAWAJI DAJI, **5 B. 448.**

(6)—*Suit—Appeal—Application.*—The word "suit" does not include an appeal or application. BANESS v. TURTON, **23 P.R. 1883.** [*Cited*, 22 P. R. 1905=57 P. L. R. 1905.]

(7)—*Suits, applications and appeals, distinction between—Limitation—Jurisdiction.*—The distinction taken for the purposes of *limitation* between suits, appeals and applications by the

Suits—*continued.*

Limitation Acts, has no bearing upon a question of *jurisdiction*. BALAJI v. RANCHODDAS, **5 B. 680.**

(8)—"*Suit*"—"*Appeal.*"—S. 647 makes s. 373 of the Code applicable to proceedings in execution. The words "suit" and "appeal" in s. 647 apply to those proceedings generally known as a suit and an appeal, *i.e.*, to suits and appeals in the strict acceptation of the terms, and they were not intended to cover proceedings for the enforcement of rights decreed in a suit or appeal. RADHA CHARAN v. MAN SINGH, **12 A. 392, F.B.=A.W.N. 1890, 119.** [*Diss.*, 18 C. 462, 18 C. 515, 37 P.R. 1892; *Not F.*, 15 M. 240, 18 C. 635; *R.*, 26 B. 76=3 Bom. L.R. 431.]

(9)—*Civ. Pro. Code*, 1882, *s.* 647—*Applicability to suits and appeals.*—The section was intended to apply to miscellaneous matters other than suits and appeals. AMIR HASSAN v. AHMAD ALI, **9 A. 36.**

(10)—*Order under s. 28 of Act X of 1859 is 'suit'—Appeal.*—The proceedings under s. 28 of Act X of 1859 is a suit and is subject to the provisions regarding appeals. CHOWDREE JEYCHUND v. KADHOREE, **2 N.W.P. 244.**

(11)—*When a suit terminates.*—A suit can ordinarily be said to terminate when there is nothing more to be done in it except execution. The fact that the attorney may have to appear in the execution proceedings cannot postpone his right of suit. ADMINISTRATOR GENERAL OF BENGAL v. CHUNDER CANT MOOKERJEE, **22 C. 952, Note.**

(12)—*Application under the Administrator-General's Act—Suit*—Res judicata.—An application by petition under s. 63 of Act II of 1874 is a suit within the meaning of s. 13 of the Civ. Pro. Code (X of 1877) and is barred by the disposal of a similar former application in the same matter, though the order passed is capable of being reviewed. ELIZA SMITH v. THE SECRETARY OF STATE, **3 C. 340.**

(13)—*Suit—Act* LIII *of* 1860—*Civ. Pro. Code*, 1859, *s.* 378.—S. 2, Act LIII of 1860, refers to appeals *and* to suits; and as the suit of the special appellant, which had been decreed in the Court of first instance, was dismissed by the lower appellate Court, the special appellant was held entitled to a revival of his suit. S. 378, Civ. Pro. Code, 1859 refers to applications for review of judgment, but this was an application for revival of suit under s. 2, Act LIII of 1860. BUNGSHEODHUR MONDUL v. PUDDOHOGHUN ROY, **W.R. F.B. 11=Marsh 38=1 Ind. Jur. O.S. 5=1 Hay, 90.**

(14)—*Mistake in framing of—Procedure.*—The plaintiff framed his suit for injunction, when he ought in reality to have sued for declaration of title and possession. The lower Court, thereupon, dismissed his suit on the ground that the suit was manifestly brought in defeat of the stamp laws. *Held* that the lower Court ought not to have dismissed the suit

Suits—*continued.*

and that the procedure to be followed in cases like the present was to order the plaintiff to add the proper prayer and to pay the additional Court-fees within a reasonable time. BALARAM v. MAHADU, **1 Bom. L.R. 40.**

(15)—*Defective suit.*—A suit to set aside the sale of certain lands attached and sold by a decree-holder is not defective, because the auction-purchaser is omitted from the list of defendants. SREEKISHEN CHOWDHRY v. RAM KRISTO BHUTTACHARJEE, **19 W.R. 317.**

(16)—*Application for assistance to eject a ryot—S. 25, Act X of 1859—Stamp Act XXVI of 1867— Stamp of eight annas.*—An application under s. 25, Act X of 1859 for the assistance of the Collector in ejecting a ryot is not a suit, and ought to be received by the Revenue Courts on a stamp of 8 annas. PEARY MOHUN MOOKERJEE v. KENA BEWAH, **11 W.R. 90.** (W.R. F.B. 118, *F.*)

(17)—*Suit, restoration of—Decree set aside for fraud—Order of Court of concurrent jurisdiction if effective to restore suit.*—Where a decree obtained in a Court of equal jurisdiction was set aside by another Court, which went on to add that the result of the decree being declared fraudulent would be that the original suit would be restored. *Held*, that this order of a Court of equal jurisdiction could not operate as a direction to the first Court to restore the suit, and that, in refusing to restore the suit, the Court had committed no error. KHETRA MOHAN BARIK v. MANGOBINDA PAL, **14 C.W.N. 558 =6 Ind. Cas. 13.**

(18)—*Allegation of suit being instituted without knowledge and consent of plaintiff—Procedure to be adopted.*—In this case after the plaint had been duly admitted, an objection was raised that the suit was instituted without the knowledge and consent of the plaintiff. *Held* that the Court should raise a preliminary issue whether the plaint had been duly signed and presented, and should decide the same after recording the evidence of both the parties thereon. Where an order was passed rejecting the plaint without holding such formal enquiry. *Held*, such an order was bad. MUSSAMAT BIBI SADHU v. SAYED GHULAM HYDER SHAH, **4 S L.R. 35=7 Ind. Cas. 600.**

(19)—*Act X of 1859, s. 23, cl. 5 and s. 78—Suit for ejectment—Allegation of contract providing for forfeiture and lessor's entry on non-payment—Application to set aside ex parte decree by Collector—Competency of Collector's successor to rescind decree and revive suit.*—Plaintiff sued the defendants under cl. 5. s. 23 of Act X of 1859, for *khas* possession of a farm for which the latter had paid a bonus. He stated in the plaint that the contract between them was that on default in payment of the farming rent as per *kistobundee*, a suit was to be instituted, and a decree obtained for the arrears in execution of which decree the lease was to be forfeited and the plaintiff, the lessor, entitled to enter upon *khas* possession of the leased properties, unless

Suits—*continued.*

the amount due was paid within 15 days. The defendants having failed to pay rent within 15 days from the date of the execution of the decree for rent obtained by the plaintiff, he alleged that they had violated the terms of the lease and were liable to be ejected. *Held*, that the terms were in strict accordance with the provisions of s. 78 of Act X of 1859, and that the plaintiff ought to have brought his suit under that section, under which it would be the duty of the Court, to specify the amount of arrear in its decree, so that, if such amount be paid into Court within 15 days from the date of the decree, the lessees or tenants could not be ejected. The plaintiff in such a case must show an arrear and must obtain a decree under s. 78 for the ejectment of his lessees, and the lessees, from the date of decree, specifying the amount of arrear, if any due, will have 15 days from the date of such decree within which to pay in the amount found to be due. Where defendants, against whom the Collector had passed an *ex-parte* decree, applied, under the provisions of s. 58 of Act X, for a revival of the suit and showed good and sufficient cause for their non-appearance, and the successor of the Collector to whom the application had been made was satisfied with the cause shown and further found that there had been a failure of justice, it was held to be competent to him to alter or rescind the decree passed by his predecessor, according as the justice of the case might require. RUGHOO MOHINEE DOSSEE v. KASHEENATH ROY CHOWDHRY, **10 W. R. 156.**

(20)—*Possession, suit for, by mortgagee, on default of payment of interest - Suit for specific performance of contract—Contract to transfer immoveable property—Specific Relief Act, ss. 12 and 21 (a)—Suit for recovery of property based on title acquired under the mortgage-deed, not a suit for specific performance—Money compensation not an adequate relief.*—A mortgage-deed contained a stipulation that the interest was to be paid half-yearly and it was provided, that in case of default the mortgagee would be entitled to take possession of the property and hold it for 15 years. Default in the payment of interest having occurred, the mortgagee sued for possession. It was contended by the mortgagor that the suit for possession should be regarded as a suit for specific performance of a "contract for non-performance of which compensation in money is an adequate relief" within the meaning of s. 21 (*a*) of the Specific Relief Act.—*Held*, that a suit like this was not a suit for specific performance of a contract. (5 O.C. 148, 6 O.C. 167 *R.*) *Held*, further, that the suit could not be regarded as a suit to enforce a contract to transfer immoveable property within the meaning of s. 12 of the Specific Relief Act, but that it was a suit for recovery of immoveable property, based on a title acquired by the mortgagee under the terms of the mortgage-deed. KALKA SINGH v. HIMAYAT ALLY; **10 O.C. 218.** (2 O.C. 24, *Diss.*; 13 B.L.R. 312, 6 A. 231, 11 A. 27, 26 A. 497, 2 A. 718, 23 M. 593, 23 A. 285, *R.*)

Suits—*concluded.*

Complaint, whether a—Appeal—*See* BEN. ACT X OF 1859, s. 23, cl. 7, ss. 145 and 160, 6 B.L.R. 569=15 W.R. 136.

Allegation of wrong cause of action—Legality of dismissal of suit—*See* CAUSE OF ACTION, 14 C.P.L.R. 151.

Suit by temple committee against temple servants for declaration as to their right to have the services performed by others—Jurisdiction—*See* CIV. PRO. CODE, 1908, s. 9, 11 Bom. L.R. 389=33 B. 387=2 Ind. Cas. 419.

See CIV. PRO. CODE, 1908, ss. 10, 26, O. IV, r. 1, s. 47, 22 M. 256.

Meaning of word "suit" occurring in s. 11, Civ. Pro. Code, 1908.—*See* CIV. PRO. CODE, 1908, s. 11. 12 C.P.L R. 91.

Time for objecting to the maintainability of. —*See* CIV. PRO. CODE, 1908, s. 47, 32 M. 425 =4 Ind. Cas, 723.

Applicability to—and appeals—*See* CIV. PRO. CODE, 1908, s. 141, 9 A. 36.

Mesne profits—*See* CIV. PRO. CODE, 1908, O. II, rr. 1, 2, U.B.R. 1904, 1st Qr., C.P. C. 1.

Multifariousness of—*See* CIV. PRO. CODE, 1908, O. II, r. 2, 3 Bom. L.R. 799.

To set aside incumbrance, form of — *See* CIV. PRO. CODE, 1908, O. XXI, rr. 66 and 70, 1 Bom. L.R. 220=23 B. 759.

To set aside a sale—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 90 and 92, 3 Bom. L.R. 463 =26 B. 40.

Evidence let in one suit, may by consent of the parties be used in another—*See* CONSENT, 2 Bom. L.R. 386=24 B. 591.

See COURT-FEES ACT, 1870, s. 11. 24 C. 173 =1 C.W.N. 43.

Dismissal for default—*See* DISMISSAL OF SUITS, 2 Bom. L.R. 206.

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 18 C. 635.

See LIMITATION ACT, 1908, s. 14, 1 A. 97.

Restoration of—Application without affidavit not bad—*See* PRACTICE AND PROCEDURE, 3 Bom. L.R. 130.

Meaning of—*See* RES JUDICATA—RES-JUDICATA IN EXECUTION PROCEEDINGS, 6 B. 54.

Suits and Appeals, Bengal and Madras, Dismissal of.

See ACT XXIX OF 1841.

Suits, Bombay.

See BOM. ACT XVI OF 1838.

Suits Legal Representatives.

See ACT XII OF 1855.

Suit of Civil Nature.

See CIV. PRO. CODE, 1908, s. 9.

See RIGHT OF SUIT.

Proceeding for revocation of probate, if—*See* PROBATE—GENERAL, 12 C.L.J. 91=6 Ind. Cas. 912.

Suit for declaration of right to recite Stotrams—*See* RIGHT OF SUIT — OFFICE OR EMOLUMENT, SUITS RELATING TO, 20 M. L. J. 530=8 M. L. T. 137=7 Ind. Cas. 148.

Right to perform Ram Lila—Not connected with shrine or temple—Right of suit—*See* RIGHT OF SUIT—OFFICE OR EMOLUMENT, SUITS RELATING TO, 7 A.L.J. 529= 6 Ind. Cas. 223 =32 A. 527.

Suits Valuation Act (VII of 1887).

[REP. IN PT., ACT XII OF 1891. DECLARED IN FORCE—IN BRITISH BALUCHISTAN, REG. I OF 1890, S. 3; IN UPPER BURMA, (EXCEPT THE SHAN STATES), ACT XIII OF 1898, S. 4].

(1)—*See* PUN. ACT XVIII OF 1884, s. 40, 145 P.R. 1892.

(1-*a*)—Appeal to Privy Council—Value of the subject-matter of suit—*See* CIV. PRO. CODE, 1908, s. 110, 60 P.R. 1905=150 P.L.R. 1905.

(1-*b*)— *See* CUSTODY OF WIFE, 53 P.R. 1891.

(1-*c*)—*S.* 3—*Suit for pre-emption of reversionary rights—Value of suit—Rules framed by Local Government.*—Where the suit is for the acquisition of a contingent interest in land and not for possession or for a present interest, the rules of the Local Government framed under s. 3 will not apply and the value for purposes of jurisdiction will be that set forth in the plaint. HAIDAR KHAN v. ALI AKBAR KHAN, **18 P.R. 1897.** [*F.*, 32 P.R. 1901=88 P.L.R. 1901.]

(1-*d*)—S. 3—*See* COURT-FEES ACT, 1870, s. 7, cl. V, 20 P.R. 1893.

(1-*e*)—Ss. 3 and 4—*See* JURISDICTION OF CIVIL COURTS, 16 P.W.R. 1907.

(1-*f*)—Ss. 3,7, 8, 11 = *See* COURT FEES ACT, 1870, s. 7, cl. 4, sch. II, art. 17, cl. 1, 8 Bom. L.R. 885=31 B. 73.

(1-*g*)—S. 4— *See* PUN. ACT XVIII OF 1884, s. 40 (*a*), 132 P.R. 1893.

(1-*h*)—S. 4—*See* No. 1-*e*, *supra*.

(1-*i*)—S. 7—*See* No. 1-*f*, *supra*.

(1-*j*)—Ss. 7, 8, 11 — *See* ACT XII OF 1887, s. 21, 17 C. 680.

(2)—*S.* 8—*Suit for partition, valuation of purposes of Court-fees and jurisdiction.*—The point for decision in this case was whether the suit for partition was properly brought in the Court of the First Class Subordinate Judge. The value of the whole land to be partitioned was

Suits Valuation Act (VII of 1887)—*continued.*

over Rs. 5,000. Plaintiffs valued the share claimed by them at Rs. 250. *Held*, the Suits Valuation Act, 1887, s. 8, providing that for such a suit the value for the computation of Court-fees and that for purposes of jurisdiction should be the same, the value of the subject-matter of the present suit cannot be held to be more than Rs. 250, so that the suit ought to have been filed in the Court of a Second Class Subordinate Judge. MOTIBHAI v. HARIDAS, **22 B. 315.** [*Cons.*, 33 B. 658=11 Bom. L.R. 1074; *R.*, 15 C.P.L.R. 81, 120=21 M.L.J. 21=9 M.L.T. 3=8 Ind. Cas. 512.]

(3)—*S.* 8—"*Determinable*," *meaning of.*—The word "determinable" in s. 8 of the Suits Valuation Act applies as much to the final and exact and judicial determination made under s. 11 of the Court Fees Act as it does to the inexact and *ex parte* valuation in the plaint. IBRAHIMJI ISSAJI v. BENJANJI JAMSEDJI, **20 B. 265.**

(4)—*S.* 8—*Civil Courts Act, s.* 12—*Suit for share of undivided property.*—When a suit for partition relates to co-parcenary property, unless it is one for general partition among all the share-holders, the specific and definite share claimed must be held to be the subject-matter of the suit as stated in the Suits Valuation Act and the Civil Courts Act, and the value of the same should determine the Court's jurisdiction, and not that set on the whole property which will, of course, be the value of a suit in which a general partition of all the shares may be prayed for. CHAKRAPANI ASARI v. NARASINGA RAU, **19 M. 56.** [*R.*, 20 M. 289.]

(5)—*S.* 8—*Partition suit, computation of Court-fees in.*—In the case of a suit for partition, whether it falls under s. 8 of the Suits Valuation Act, or under s. 14 of Act III of 1873, the value for the computation of Court-fees and that for the purposes of jurisdiction are the same, *viz.*, the value of the share claimed by the plaintiff. Where the value of such share happens to be within the pecuniary limits of the jurisdiction of the Court in which the suit is instituted, it is immaterial that the value of the entire property sought to be partitioned goes beyond such jurisdiction. CHINNASAMI PILLAI v. KARUPPA UDAYAN, **21 M. 234.** [*R.*, 15 C.P.L.R. 120.]

(6)—*S.* 8—*Claim for partition—Property in joint possession of plaintiff and defendant—Value of relief—Plaintiff's discretion—Rules in s* 7, *cl.* 5, *Act* VII *of* 1870 (*Court Fees*)—*Non-applicability of—Interlocutory order—High Court's power to set aside.*—In a suit for partition, a plaintiff, who alleges that he is in joint possession with the defendant of the properties belonging to both in common, is entitled to value the relief according to his own discretion. S. 8 of the Suits Valuation Act, applies to suits for partition which are not also suits for possession. (21 M.L.J. 21, 19 M. 56, 21 M. 234, 20 M. 289, 13 M. 56, 31 M. 89, *R.*) The rules

Suits Valuation Act (VII of 1887)—*continued.*

contained in s. 7, cl. 5, Court Fees Act, do not apply to such suits. The High Court has power to set aside in revision an interlocutory order passed by a subordinate Court. CHALASAWMY RAMIAH v. CHALASAMY RAMASAMY, **11 M.L.T. 155=M.W.N. 1912, 199=13 Ind. Cas. 903.**

(7)—*S.* 8—*Suit for accounts.*—Valuation of a suit, after dissolution of a partnership, for a specific sum alleged to be found due on an adjustment of partnership accounts, or, in the alternative, for accounts, is according to value set by plaintiff on the relief sought. DHANI RAM SHAH v. BHAGIRATH SHAHA, **22 C. 692.**

(8)—*S.* 8—*Suit for accounts—Valuation for Court fees and jurisdictional purposes—Appeal.*—Under s. 8 of the Court Fees Act (VII of 1887), in a suit for account, the valuation entered in the plaint for purposes of Court-fee determines the question of jurisdiction, the value for both purposes being the same, So, where, after the rejection by the Subordinate Judge of the First Class of the claim of the plaintiff in a suit for an account (valued by the plaintiff at Rs. 130), the plaintiff preferred an appeal to the High Court, valuing his claim in appeal at Rs. 10,505, *held*, that the appeal did not lie to the High Court, but only to the District Court. BHAGVANTRAI MUNSHI v. MEHTA BAJURAO, **18 B. 40.** [*R.*, 18 B. 100, 20 B. 265.]

(9)—*S.* 8—*Amount of claim as fixed by plaintiff—Items incidental to principal relief—Appeal—Suit to take accounts—Court-fee—Jurisdiction.*—In a suit for taking account, the plaint having contained several items which were all incidental to the chief item of relief, the plaint was held to be substantially one to have the minor plaintiff's estate administered, that is, to have accounts taken and the accounting party ordered to pay what (if any) should be found due from him on the balance of such account. The valuation of the suit put by the plaintiff being Rs. 130, it was held that the High Court had no jurisdiction to hear the appeal which ought to be to the District Court. The appeal was therefore returned for presentation in the proper Court. According to s. 8 of the Suits Valuation Act (VII of 1877), in suits for taking account, the Court fee stamp and jurisdiction are both determined by the amount of claim as fixed by the plaintiff. BAI AMBA v. PRANJIVANDAS DHULLABHRAM, **19 B. 198.** [*R.*, 9 Bom. L.R. 316.]

(10)—*S.* 8—*Value of a suit for redemption—Market value—Principal amount—Appeal from an order of Subordinate Judge.*—The value of the subject-matter of the suit in a redemption suit is not the market-value of the property but the amount of the mortgage money. In a suit for redemption where the principal amount of a mortgage was Rs. 1,000, *held*, that the suit was cognizable by a Munsif and an appeal lay to the District Judge from an order of the Subordinate Judge returning a plaint for presentation to the proper Court. S. 8 of the Suits Valuation Act does not affect the law laid down

Suits Valuation Act (VII of 1887)—*continued.*

in. KEDAR SINGH v. MATABADAL SINGH, **3 A.L.J. 713=A.W.N. 1908, 296=31 A. 44=1 Ind. Cas. 703.** (5 A. 332, 8 A. 438, *R.*)

(11)—*S.* 8—*Jurisdiction—Valuation of suit—Suit for the cancellation of an auction sale of a house sold in execution of a money decree not exceeding Rs.* 100—*Punjab Courts Act*, 1884, *s.* 3.—The value, for purposes of jurisdiction, of a suit for the cancellation of an auction sale of a house sold in execution of a money decree is the value of the judgment-debtor's interest in the house in suit assessed by the auction sale, and not the value the plaintiff chose to assess it at. RADHA RAM v. HIRA, **42 P.R. 1901.** (15 A. 378, 50 P.R. 1890, 1 P. R. 1887, F.B., 15 C. 104, 50 P.R. 1896, *F.*)

(12)—*S.* 8—*Valuation of suit—Suit for lease, annual rent being Rs.* 71—*Suit to be valued at Rs.* 71—*Jurisdiction of Munsif—Court Fees Act, s.* 7 *cl.* X, *sub-cl.* (*c*) — *Civ. Pro. Code*, (1908), *s.* 115—*Decision on facts—Failure of Court below to grasp real point—Judicial decision—Interference by High Court—Prejudice to neither party—Question of prejudice, if arises.*—In a suit in a Sub-Judge's Court, the plaintiff prayed that his *mourasi mokarari* right in certain lands be declared and a decree passed against the defendants for directing them to grant him lease, the yearly rent payable on which was Rs. 71. The plaintiff valued the suit for the purposes of jurisdiction at Rs. 1,100 but gave no materials or *data* to support the valuation : *Held* that, under the provisions of s. 7, cl. (*x*), sub-cl. (*c*), of the Court Fees Act and s. 8 of the Suits Valuation Act, the suit should have been valued at Rs. 71 for purposes of Court-fee and jurisdiction, and it ought to be filed in the Munsif's Court. Where the decision of a Subordinate Court is arrived at, though wrongly, either on the facts or on a proper judicial consideration of the matters placed before it, the High Court will not interfere under s. 115 of the Civ. Pro. Code. But where the Court below failed to grasp the point which really had to be determined, namely, whether, under the provisions of the Court Fees Act and the Suits Valuation Act, the valuation of the suit given by the plaintiff was correct or not, and the Court simply accepted the valuation given by the plaintiff without attempting to ascertain the materials on which the valuation was based, in fact without arriving at a judicial decision at all : *Held*, that, the High Court should interfere, if satisfied that the decision of the Court below was wrong. (11 C. 6, 11 I.A. 237, 1 C.W.N. 626, *R.*) In such a case, the High Court will interfere even if neither party is prejudiced, because the law requires that suits of certain values should be tried in certain Courts and the question of prejudice does not arise. PORT CANNING AND LAND IMPROVEMENT CO., LD. v. ROSON ALI, **15 Ind. Cas. 46=17 C.W.N. 160.** (32 C. 734, 9 C.W.N. 690, *D.*)

(13)—*S.* 8—*Amendment of valuation of suit in appeal—Court-fee—Jurisdiction.*—In a suit brought for an account, for the return of certain property, and for the cancellation of a power-of-attorney, the plaintiff valued the suit at Rs. 600. From the decree in this suit, the plaintiff appealed to the Chief Court valuing the appeal for the purposes of the Court-Fees Act at Rs. 600, and for the purposes of jurisdiction at Rs. 13,800. It was held, that, as the value given for the purposes of Court fees both in the plaint and in the memorandum of appeal was only Rs. 600, the value for the purposes of jurisdiction, must, under s. 8 of the Suits Valuation Act, be taken at that figure, and that the plaintiff could not be allowed to amend the valuation so as to bring the appeal within the jurisdiction of the Chief Court. THEIN YIN v. FOUCAR BROTHERS & CO., LTD., **4 L.B.R. 120.**

(14)—*S.* 8—*Court Fees Act, s.* 7 (*iv*) (*d*) (*e*)—*Jurisdiction—Further appeal.*—A suit in which an *ad valorem* Court-fee was payable under s. 7 (iv) (*d*) (*e*) of the Court Fees Act was valued at Rs. 1,005 for the purposes of jurisdiction and at Rs. 130 for the purposes of Court-fees ; it was dismissed by the Courts below. On appeal to the Chief Court, *held* that no appeal lay, as, under s 8 of the Suits Valuation Act, the value of a suit of this nature for purposes of Court-fees and for purposes of jurisdiction was the same, the amount of Court-fees being computable according to the value of relief sought. SOHAN LAL v. GULAB MAL, **50 P.R. 1896.** (18 B. 207, *F.*) [*R.*, 6 P.R. 1904 ; *F.*, 42 P.R. 1901, 27 P.R. 1910 ; *Cited*, 63 P.R. 1902.]

(15)—*S.* 8—*Jurisdiction, value for purposes of—Further appeal—Punjab Courts Act* (XVIII *of* 1884), s. 70 (1) (*b*).—The plaintiffs filed an application under s. 70 (1) (*a*) and (*b*) of Act XVIII of 1884 as amended by XXV of 1899 in a suit for a perpetual injunction to the effect that the defendants should not restrain the plaintiffs from saying prayers in a certain mosque and from setting up their own *imam* to lead the prayers of their congregation and from performing other ritual connected with the Divine service. *Held*, that the application did not lie, under s. 70 (1) (*b*), as the value for Court-fees was the value for purposes of jurisdiction and that value was assessed in the Court of first instance and in the Chief Court at Rs. 100 only, being less than Rs. 200. UMAR DIN v. ABDULLA, **43 P.L.R. 1903.** (50 P. R. 1896, *F.*)

(15-*a*)—S. 8—*See* BOM. ACT II OF 1864, ss. 8, 15, 12 Bom. L.R. 149=34 B. 267.

(15-*b*)—S. 8—*See* APPEAL—FORUM OF APPEAL, 86 P. R. 1892.

(15-*c*)—S. 8—Jurisdictional value for suit for settlement of accounts—*See* COURT FEES ACT, 1870, ss. 7 (v) (*f*), 11, 46 P. R. 1906=94 P. L. R. 1906.

(15-*d*)—S. 8—*See* MESNE PROFITS—SUITS FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 7 Ind. Cas. 778.

(15-*e*)—S. 8—Redemption suit—Valuation of subject-matter—*See* MORTGAGE—REDEMPTION, 5 L.B.R. 208, F.B.=8 Ind. Cas. 973.

Suits Valuation Act (VII of 1887)—*continued.*

(15-*f*)—S. 8—*See* Nos. 1-*f*, 1-*j*, *supra*.

(16)—*Ss.* 8, 9—*Valuation by plaintiff—Found arbitrary—Power of Court.*—The valuation made by a plaintiff of the relief sought by him, in a suit for partition of properties which he claims to be in joint possession of along with his co-parceners, cannot be rejected by the Court, even if it is proved not to be a *bona fide* but an arbitrary valuation. The powers conferred by s. 9 of the Act, if exercised, are sufficient to meet cases, where difficulties arise as to the valuation of any class of suits. CHELASANI RAMIAH v. CHELASANI RAMASAMI, **13 M.L.T. 128=M.W.N. 1913, 105=24 M.L.J. 233, F.B. =15 Ind. Cas. 363.**

(16-*a*)—Ss. 8, 9—Valuation of suit for purposes of jurisdiction and Court-fee—*See* COURT FEES ACT, 1870, s. 7 (iv), (*d*), 63 P. R. 1902.

(16-*b*)—Ss. 8 & 9—Suit to direct registration of will—Method of valuation for purposes of jurisdiction—*See* JURISDICTION OF MUNSIFFS' COURTS, 17 M.L.J. 573, F.B.=3 M.L.T. 73= 31 M. 89.

(17)—*Ss.* 8, 9, 12—*Bengal, N. W. P. and Assam Civil Courts Act* (XII *of* 1887), *ss.* 18, 19—*General Clauses Act* (I *of* 1887), *s.* 3 (13)—"*Value*"—*Jurisdiction—Suit for restitution of conjugal rights—Capability of valuation—Long practice.*—The practice, which has prevailed for upwards of half a century, of allowing the plaintiff, in a suit for restitution of conjugal rights, to put a value on the relief, which he asks for, and thus determine the jurisdiction, is not illegal and should not be departed from. The word "value" in s. 19 of Act No. XII of 1887 may be interpreted to mean the valuation put by the plaintiff on the relief sought by him. A suit for restitution of conjugal rights does not admit of being satisfactorily valued, but the plaintiff can put his own valuation, subject to the power of the Court to refuse to accept the valuation if it is not *bona fide*. A money value, however arbitrary, can be placed on all suits. A Munsiff can, therefore, try a suit for restitution of conjugal rights, the value of which as fixed by the plaintiff, is within his pecuniary jurisdiction. ZAER HUSAIN KHAN v. KURSHED JAN, **3 A.L.J. 266; F.B.=A. W. N. 1906, 99=28 A. 545, F. B.** (31 C. 849; *Diss.*) [*R.*, 34 C. 352=5 C.L.J. 400=11 C.W.N. 458, 17 M.L J. 573, F.B.=31 M. 89=3 M.L.T. 73.]

(17-*a*)—Ss. 8, 11—Value of suit—Suit for dissolution of partnership and for accounts—Course of appeal— Punjab Courts Act, 1884, s. 39—*See* APPEAL—FORUM OF APPEAL, 58 P.R. 1902.

(18)—*S.* 9—*Rules under—Retrospective effect—Jurisdiction—Procedure—Rule of interpretation regarding—Applicability to Indian Legislature—Suit for custody of wife—Valuation.*—*Held*, that the rules framed under s. 9, Part II, Suits Valuation Act, 1887, were not intended to have retrospective effect, so as to affect jurisdiction with respect to an appeal in a suit instituted before the rules came into force. *Held*, that, although, speaking generally, an enactment relating to matters of mere procedure is held to have a retrospective effect, and to apply to suits or action already instituted, yet, this principle is not recognized by the Indian Legislature. DHIRTA v. KESRI, **31 P.R. 1909=49 P.L.R. 1909=3 Ind. Cas. 404=36 P.W.R. 1909.** (12 P.R. 1900, F.B., *F.*)

(18-*a*)—S. 9—*See* COURT FEES ACT, 1870, s. 7 (iv) (*d*), 118 P.L.R. 1904.

(19)—S. 9—*See* Nos. 16, 16-*a*, 16-*b*, 17, *supra*.

(19-*a*)—S. 9, r. 4—Rule IV framed under s. 9 of the Act—*See* MORTGAGE—GENERAL, P.L.R. 1900, p. 135.

(20)—*S.* 11—*Applicability—Designed exaggeration of claim.*—Where a suit which has been designedly over or undervalued has been tried on the merits by the first Court, and the over-valuation or under-valuation has not prejudicially affected its disposal on the merits, the defect of jurisdiction is cured. An objection as to valuation in appeal for the first time, cannot be given effect to. S. 11 of the Act applies to cases where the effect of improper valuation has been to oust the jurisdiction of a Court of exclusive jurisdiction, and to those where the plaintiff has designedly undervalued or over-valued his claim for getting a trial in a Court different from the one intended by the Legislature. HAMIDUNNISSA BIBI v. GOPAL CHANDRA MALAKAR, **24 C. 661=1 C.W.N. 556.** [*R.*, 31 C. 849=8 C.W.N. 705, 2 O.C. 103.]

(21)—*S.* 11—*Partition, Suit for—Valuation.*—The value of a suit for partition for purposes of jurisdiction, is the value of the entire estate sought to be partitioned (3 C.L.J. 197, *F.*) and not that of the share claimed by the plaintiff. Where, however, the suit had been erroneously valued in the Court of first instance according to the share of the plaintiff: *Held*, that s. 11 of the Act was applicable and the appellate Court would not interfere, unless it was proved that the undervaluation had affected prejudicially the disposal of the suit. EDWARD DALGLISH v. RAMDHARI SAHU, **4 C.L.J. 509.** (1 C.W. N. 136, *Appl.*)

(22)—*S.* 11—*Value of the plaintiff's share in a partition suit, within Munsif's Jurisdiction—Decision by Sub-Court—Civil Courts Act Madras* (III *of* 1873), *s.* 12—*Valuation for jurisdiction.*—The vendee of a portion of an estate from its purchaser at a Court-sale sued in the Sub-Court for partition. The value of his share was much below Rs. 2,500, while the whole property was worth more than that amount. The Sub-Judge decided the suit. *Held*, the suit ought to have been instituted in the Court of the District Munsif; but since the over-valuation has not prejudicially affected the case, the provisions in s. 11 of the Suits Valuation Act apply, so that the decree of the Sub-Judge might be confirmed as if there had been no defect of jurisdiction. *Quære*:—Whether in suits of less than

concurrent jurisdiction with a District Munsif. KRISHNASAMI v. KANAKASABAI, **14 M. 183 = 1 M.L.J. 234**. [*F.*, 15 M. 69, 23 M. 367 = 9 M.L.J. 263 ; *R.*, 20 M. 289, 19 M. 56, 35 P.R. 1901 = 47 P.L.R. 1901, 8 Bom. L.R. 516.]

(23)—*S.* 11—*Valuation of suit — Appeal — Mortgage—Redemption suit — Jurisdiction of Court—Objection not taken by defendant—Objection on appeal.*—The words "over-valuation" and "under-valuation" in s. 11 of the Suits Valuation Act, 1887, refer to those cases only in which the valuation is discretionary. When plaintiff cannot at his discretion fix a value for the suit, the section has no application. A suit by a mortgagor for redemption of a house sold in execution of an *ex parte* decree obtained by a third person without the knowledge of the mortgagor, against the mortgagee, the decree-holder and the purchaser, must be valued at the amount which the decree-holder would recover if successful. MALI v. TULSI RAM, **214 P.L.R. 1910**.

(24)—*S.* 11, *Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 578—*Jurisdiction of Civil Court—Suit for removal of trustee for breach of trust*—Forum—*Effect of under valuation or over valuation of suit.*—In a suit for removal of a trustee for breach of trust, the value of the trust property is the guide to the determination of the question of jurisdiction.—The effect of s. 11 of the Suits Valuation Act is simply to place over-valuation or under-valuation of suits on the same footing with other irregularities contemplated by s. 578, Civ. Pro. Code, 1882, except that the objection must be taken either in the Court of first instance or in the lower appellate Court. The mere change of *forum* consequent on an under-valuation cannot of itself be treated as prejudicially affecting the disposal of the suit on the merits within the meaning of s. 11 of the Act, for, that is the very case premised and provided for by the sections. RAGHAVA CHARIAR v. RAGHAVA CHARIAR, **20 M.L.J. 726 = 8 M.L.T. 404 = 8 Ind. Cas. 545**.

(25)—*S.* 11—*Pre-emption, Suit for—Jurisdiction—U.P. Act* XVIII *of* 1876, *s.* 10, *notice by mortgagee under — Notice amount to be entered in—Interest, when mortgagee entitled to—Costs, mortgagee entitled to include in decree for foreclosure—T. P. Act, s. 86.*—In June 1886, M. A, mortgaged his zemindari share to M. K. for Rs. 3,600 by executing a deed of conditional sale. The defendants (representatives of the mortgagee) obtained against the mortgagor a decree for foreclosure in default of payment of Rs. 5,022 in March 1896 ; no interest being decreed subsequent to the institution of the suit. In April 1896, an order absolute was passed and in July 1896 the defendants obtained possession. In March 1897, the plaintiff sued the defendant and the mortgagor for pre-emption, alleging that Rs. 3,600 only were due on the mortgage at the time of foreclosure, which sum he was willing to pay. The Court of first instance dismissed the claim ; on appeal, the District Judge decreed it on payment of Rs. 5,022. The

defendants in second appeal objected to the jurisdiction of the District Judge to hear the appeal, and claimed a further sum due on the mortgage for interest from the date of institution of the suit to date of obtaining possession. The plaintiff, under s. 551 of the Code of Civil Procedure, objected to his liability for costs included in the sum of Rs. 5,022. *Held*, that s. 11 of Act VII of 1887 did not apply. What *prima facie* determines the jurisdiction of a Court is the claim or subject-matter of the claim as estimated by the plaintiff and the determination having given the jurisdiction, the jurisdiction itself continues, whatever the event of the suit ; and this is so notwithstanding a *bona fide* error in the estimate made by the plaintiff, if the wrong valuation has not prejudicially affected the disposal of the suit or appeal on the merits. SAKINA BIBI v. ABDUL HAFIZ KHAN, **2 O C. 103**. [*R.*, 3 O.C. 184 ; 6 O.C. 255.]

(26)—*S.* 11—*Jurisdiction—Pre-emption suit —Appeal—Court-fee—Payment of deficiency after limitation period.*—The District Judge declined to hear an appeal in a pre-emption suit valued, for purposes of jurisdiction, at less than Rs. 100, decided by a *Munsif* of the Third Class, on the ground that the suit was undervalued, and the true value for purposes of jurisdiction, was over Rs. 100. The District Judge also held that the plaintiff could not be allowed to make up the deficiency in the payment of Court-fee after the period of limitation prescribed for such suits had expired. *Held*, (1) that the District Judge had overlooked the provisions of s. 11 of Act VII of 1887 (Suits Valuation Act), and that he should have acted in accordance with them ; (2) that as the case fell within those provisions, the proceedings of the *Munsif* were not void for want of jurisdiction ; (3) that the deficiency in the Court-fee could be levied after the period of limitation had expired. The Chief Court remanded the appeal to be determined by the Divisional Judge having jurisdiction to try the case. RAM v. TAJA, **173 P.L R. 1903 = 74 P.R. 1903, Note** (15 A. 65, 20 A. 11, 23 A. 423, 24 A. 218. *Not F.*; 3 P.R 1893, C.A. No. 635 of 1902, 19 C.780, 20 C. 44, *F.*) [*R.*, 74 P.R. 1903.]

(27)—*S.* 11—*Suit for specific performance of contract—Under-valuation—Objection not taken in Court of first instance—No prejudice on merits proved—Decree reversed in appeal—Impropriety.*—Where the plaintiff sued for specific performance of a contract to sell an oil well and valued his suit at Rs. 2,000 and the terms of the contract were that the defendant agreed to sell the well for a total consideration of Rs. 4,600 out of which he received a sum of Rs. 600 and the plaintiff had to discharge a prior mortgage of Rs. 2,000, and where the plaintiff, without any objection being taken as to valuation by the defendant, obtained a decree in his favour, and where, on appeal, on objection taken by the defendant, the decree was set aside on the ground that the suit was Rs. 2,500 in value a Subordinate Judge has no

Suits Valuation Act (VII of 1887)—*continued.*

undervalued and the plaint was returned for presentation to the proper Court. *Held*, that s. 11 of the Suits Valuation Act applied, and that the decree ought not to have been set aside, because no objection was taken in the Court of first instance and there was no allegation that the under-valuation prejudicially affected the disposal of the suit on the merits. BAIJNATH SINGH v. MI CAUK AND MI TA, **U.B.R. 1911, 1st Quarter, 82.** (1 L.B.R. 85, *Diss.*; U.B.R. 1897—1901, Vol. II, 443. 14 M. 183, 10 M. 326, 23 M. 367, *R.*)

(28)—*S.* 11—*Objection as to jurisdiction—No prejudice.*—Where an objection was taken that the Madras City Civil Court had no jurisdiction to entertain a suit, as the subject-matter, a house, was worth Rs. 3,275, (according to the valuation put upon it by a Commissioner appointed for the purpose) and the Judge decided that, under s. 7, cl. (4), sub-ss. C and D of the Court Fees Act, and s. 8 of the Suits Valuation Act, plaintiff can put any value for purposes of jurisdiction, and decided the suit on the merits. *Held*, that the case fell within the terms of s. 11 of the Suits Valuation Act, and the High Court could not interfere, as the disposal of the suit had not been prejudicially affected. KUPPUSAMI NAIDU v. ANDALAMMAL, **6 M.L.T. 241=3 Ind. Cas. 440.**

(29)—*S.* 11—*Objection as to jurisdiction of appellate Court—Improper valuation of suit—Objection not taken in first Court—Objection cannot be permitted in appellate Court.*—An appellate Court cannot entertain an objection which has not been raised in the first Court to the effect that the suit has not been properly valued and if properly valued the appellate Court had no jurisdiction to hear the appeal. HIRA LAL v. MT. JANI BAI, **2 C.P.L.R. 18.** (5 W.R. P.C. 69, *F.*: 12 M.I.A. 440, 12 W.R. P.C. 1, *R.*) [*F.*, 11 C.P.L.R. 49.]

(30)—*S.* 11—*Objection as to under-valuation of suit—Under-valuation not prejudicially affecting disposal of suit—Second appeal—Admissibility of objection.*—In a suit for the removal of a karnavan and for the appointment of another in his stead, an objection was taken on behalf of a defendant that the suit was undervalued, and that the suit if valued correctly, was beyond the jurisdiction of the Court in which it was instituted. The objection was, however, overruled. *Held* that the objection could be raised even in second appeal. *Held* also that, as the disposal of the suit was not prejudicially affected by the under-valuation, the objection was not one which the High Court could entertain, having regard to s. 11 of the Suits Valuation Act. GOVINDA MENON v. KARUNAKARA MENON, **24 M. 43.** [*D.*, 3 C.L.J. 266.]

(31)—*S.* 11—*Civ. Pro. Code, s.* 578—*Want of jurisdiction in original Court to try a suit—Objection not raised—Value of suit—Jurisdiction.*—If the value of the subject-matter is not set out in definite terms in the plaint, s. 11 of

Suits Valuation Act (VII of 1887)—*continued.*

the Suits Valuation Act, 1887, would not apply. It was to be inferred in this case, however, that the value of the subject-matter was in excess of the jurisdiction of the Court which tried the suit. When there is inherent incompetency in the Court of the Myook invested with powers for the adjudication of suits of value not exceeding Rs. 3,000 to try the suit, and notwithstanding that no objection to the jurisdiction was raised in the original Court, the appellate Court is bound to decide the question. The error in exercising jurisdiction where none existed cannot be cured under s. 578, Civ. Pro Code, 1882. MAUNG MYAING v. MAUNG SHWE YON, **1 L.B.R. 85.** [*F.* & *R.*, 1 L.B.R. 186.]

(32) *S.* 11—*Jurisdiction—Suit for a declaratory decree that land is* shamilat-i-deh *and liable to partition—Objection in appeal—Powers of a Subordinate Judge appointed as Additional District Judge.*—*Held*, that a question of jurisdiction may be raised for the first time at the hearing of a further appeal, if it is patent on the record. *Held*, also, that a suit for a declaratory decree that certain land is *shamilat deh* and liable to partition must be valued for purpose of jurisdiction at thirty times the jama of the whole land and not of the plaintiff's share in it according to the rules framed by the Local Government under the Suits Valuation Act, 1887. A suit for partition has no analogy with such a suit. (110 P.R. 1888, *R.*) *Held*, also, that s. 11, Suits Valuation Act, 1887, applies only where questions of over-valuation or under-valuation arise and is limited to cases in which the valuation depends on the parties or the Court, and is not applicable where the valuation is fixed by rules having the force of law. (133 P.R 1894, *F.*) When the presiding officer of the Court was appointed by Government notification as an Additional District Judge in a district and the Government ordered that the ordinary civil powers to be exercised by him were to be limited to those of a Sub-Judge of the second class, he was competent to try civil suits up to the value of Rs. 5.000 only. KHUDA YAR v. WAHAB DIN, **47 P.L.R. 1901=35 P.R. 1901.** (46 P.R. 1899, *R.*) [*Cited*, 58 P.R. 1902.]

(33)—*S.* 11—*Lower appellate Court's decision under—No appeal lies from—Objection as to under-valuation by plaintiff in second appeal—Not tenable.*—Objection taken by the first defendant, in this case, as to plaintiff's under-valuation of the suit in the Court of first instance was disallowed by that Court, which gave a decree for plaintiff. The same contention was, again, raised by the first defendant, on appeal, and was allowed by the Dt. Judge, who, however, on the ground that he was not satisfied that the under-valuation had prejudicially affected the disposal of the suit on its merits, proceeded to dispose of the appeal in exercise of his powers under s. 11 of the Act. On second appeal, the contention was sought to be raised on behalf of the plaintiff that the lower

Suits Valuation Act (VII of 1887)—*continued.*

appellate Court ought to have held that the under-valuation affected the case on the merits and it was held that a plaintiff cannot be heard to say that the under-valuation of his suit prejudicially affected its disposal on the merits, where he himself instituted the suit in a Court, which had not jurisdiction to try it and the decision in the suit in the Court of first instance was in his favour. Further, no appeal lies against the decision of an appellate Court to exercise the powers conferred by s. 11 of the Act and dispose of the appeal. RAMASAWMY AIYANGAR v. OBAI GOUNDEN, **15 M.L.J. 487.**

(34)—*S.* 11—*Questions to be considered in appeal.*—Where a Court of first instance has entertained and decided a suit on the merits, and an objection is raised in appeal that such Court was not competent to try it, the suit having been under-valued, it is the duty of the appellate Court to find whether the under-valuation had prejudicially affected the disposal of the suit on the merits. If it finds that it has affected, the decree of the lower Court may be discharged; if not, the appellate Court should decide the appeal on the merits. WAHID-ULLAH v. KANHAYA LAL, **25 A. 174. F.B.=A.W.N. 1902, 222.**

(35)—*S.* 11—*Suit not properly valued to evade jurisdiction—Remand by appellate Court for findings—No final disposal by appellate Court—Validity of remand order.*—Plaintiff sued for possession of certain immoveable property. Defendant contended that the suit was under-valued to evade jurisdiction. The suit was, however, dismissed on the ground of limitation. On appeal, the District Judge remanded the suit for a finding on the issue as to title. When the findings were returned, he held that the value of the suit was above Rs. 5,000, and returned the appeal memo for presentation to the proper Court. On its being presented in the High Court, the respondent objected that the order of remand for a finding on the issue as to title was made without jurisdiction, and that anything done in pursuance of that order was a nullity. The objection was based on under-valuation. *Held* that in a case like this, the effect of s. 11 of the Suits Valuation Act was to cure the want of jurisdiction, unless the appellate Court was satisfied that the under-valuation prejudicially affected the cause on the merits. As the lower appellate Court did not finally dispose of the appeal on the merits, it was open to the High Court to deal with the findings and go into the question of their correctness. S. 11 of the Suits Valuation Act did not apply, only when there was a final disposal on the merits. RAMAN v. SECRETARY OF STATE FOR INDIA IN COUNCIL, **24 M. 427=11 M.L.J. 315.**

(36)—*S.* 11, *cl.* (1)—*Scope*—"*Over-valuation or under-valuation.*"—By the phrase "over-valuation or under-valuation," the Legislature intended to include all cases of erroneous valuation. The language of s. 11, Act VII of 1887, is comprehensive enough to cover a case

Suits Valuation Act (VII of 1887)—*concluded.*

wherein a Court has exercised jurisdiction by reason of an arbitrary valuation, when no valuation ought to have been made, because the suit was incapable of valuation. Where a Court of first instance tries a suit on account of the arbitrary valuation thereof by plaintiff, no objection being taken to jurisdiction by the defendant, the appellate Court ought not to dismiss the suit. AKLEMANNESSA BIBI v. MAHOMED HATEM, **31 C 849=8 C.W.N. 705.** [*D.*, 34 C. 352=5 C.L.J. 400=11 C.W.N. 458; *Diss.*, 28 A. 545, F.B.=3 A.L.J. 266=A.W.N. 1906, 99; *R.*, 31 M. 89, F.B.=17 M.L.J. 573 =3 M.L.T. 73.]

(36-*a*)—S. 11—*See* ACT XII OF 1887, s. 21, sub-s. (2), 31 C. 344.

(36-*b*)—S. 11—*See* U.P. ACT XIX OF 1873, ch. IV, A.W.N. 1889, 169.

(36-*c*)—S. 11—*See* APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 18 M. 418.

(36-*d*)—S. 11—*See* JURISDICTION—GENERAL, 71 P.L.R. 1906=55 P.R. 1906.

(36-*e*)—S. 11—*See* Nos. 1-*f*, 1-*j*, 17-*a*, *supra*.

(37)—*Ss.* 11, 21—*Bombay Civil Courts Act* (XIV *of* 1869), *s.* 24—*Valuation of suit—Jurisdiction of Court—Restitution of conjugal rights.*—Where the claim in a suit for restitution of conjugal rights is valued by the plaintiff, that valuation must be accepted for the purpose of jurisdiction, unless it is shown to have been made either from any improper motive, or deliberately for the purpose of giving the Court a jurisdiction which it has not. JASODA CHHOTU v. CHHOTU MANNU, **11 Bom. L.R. 1352=4 Ind. Cas. 836.** (34 C. 352, *F.*).

(37)—S. 12—*See* No. 17, *supra*.

(38)—S. 21—*See* No. 37, *supra*.

Sukavasi Tenants.

(1)—'*Sukavasis*'—*Ulkudi tenants—Rights of—Compulsory sale—Right on—Value of land acquired—How apportioned.*—The class of tenants known as "Ulkudi tenants," also called 'Sukavasis,' have a qualified interest in the soil. Generally it would seem Ulkudis cannot sell their holdings without the Mirasidar's consent, but when a statutory transfer is forced on them they are clearly entitled to compensation for the loss of their interest. The value of the land appropriated having been ascertained, it must be assigned to the Mirasidar and the Ulkudis proportionately to the value of their respective interests. APPASAMI v. RANGAPPA, **4 M. 367.**

Suit against—of cultivated land—Limitation—*See* LANDLORD AND TENANT—MIRASIDARS, 3 M.H.C. 381.

Sukhadi.

Sukhadi, the hak of, is not affected by Act XX of 1839—*See* BOM. ACT XX OF 1839, 7 Bom. L.R. 798.

Summary Decision.

(1)—*Summary decision — Registration Act* (1866), *s.* 53, *decree under.*—A summary decision is one arrived at by a summary proceeding; and a decree under s. 53 of the old Registration Act of 1866 is a summary decision. MINA KONWARI v. JUGGAT SEHANI, **10 C. 196=13 C.L.R. 385, P.C.=4 Sar. 454=10 I.A. 119, P.C.**

Summary Dismissal of Suit.

See RES JUDICATA—ADJUDICATIONS.

(1)—*Civ. Pro. Code, Act* X *of* 1877, *s.* 13—*Summary dismissal of former suit—Institution of fresh suit not barred.*—In order to support a plea of *res judicata* under the provisions of s. 13 of Act X of 1877, there must have been a determination of the merits of the claim in the suit, and a final adjudication of issues raised by one party and denied by the other. Where a decision, in a former suit in which no issues had been raised or determined, is not based on the merits, it cannot afford a bar to a subsequent suit with reference to s. 13 of the Civ. Pro. Code. SHAM SINGH v. KHARAK SINGH, **107 P. R. 1880** [*F.*, 104 P.R. 1883.]

Summary Execution of Decree.

(1)—*Decree against father—Engagements by sons of judgment-debtor to liquidate decree—Decree whether executable summarily against sons.*—An engagement entered into by the sons of a judgment-debtor with the decree-holder to liquidate the decree against their father is not one which the Court executing the decree is competent to enforce summarily by process of execution, as they, being entire strangers to the suit in which the decree was made, are not bound by it; consent of parties cannot give the Court jurisdiction to permit the summary procedure provided for decrees made in regular suits to be substituted for a regular suit between the parties to the agreement. RAI BHAG SINGH v. HARDIT SINGH, **59 P.R. 1880.**

Summary Jurisdiction.

(1)—*Summary jurisdiction of High Court.*—Summary jurisdiction of High Court to enforce soliciter's lien. CULLIANJEE v. RAGHAWJI, **6 Bom. L.R. 879=30 B. 27.**

(2)—Summary jurisdiction is discretionary. *In re* TYABJI & CO., **7 Bom. L.R. 547.**

Summary Order.

(1)—*Act* VIII *of* 1859, *s.* 246—*Suit to set aside summary order—Onus.*—In a suit to set aside a summary order under the provisions of s. 246, Act VIII of 1859, on the allegation that the order was illegal, it is for plaintiff to prove its illegality. MAHIMA CHANDRA KUNDU v. MOULVI NURUDDIN, **3 B.L.R. A.C. 70=11 W.R. 422.**

For distribution of assets—*See* CIV. PRO. CODE, 1882, ss. 350, 351, 352, 355, 356, 1 L.B. R. 229.

Costs—Payment of costs of—Act VIII of 1859, s. 269—Act XXIII of 1861, s. 11—*See* DECREE—DECREE, CONSTRUCTION OF. 2 C.L.R. 504.

Summary Petition.

(1)—*Instalment bond—Stipulation for payment of entire amount on failure to pay one instalment—Summary petition not entertainable under* s. 53, *Act* XX *of* 1866 *for enforcing stipulation.*—In respect of a bond payable by instalments and containing a stipulation that, in case of default in payment of any one of the instalments, the whole amount secured by the bond should at once become due, a petition, in a summary way could not be presented under s.53 of Act XX of 1866 for the purpose of enforcing the stipulation, JAIKISHEN v. ELAHIA; AROORA v. BUKSH, **85 P.R. 1869.**

Summary Procedure.

(1)—*Act* XX *of* 1866, *s.* 53—*Summary application.*—A summary application under s. 53 of Act XX of 1866 cannot be entertained at the suit of the assignee of the obligee. GOUR MOHUN DASS v. RAM ROOP MOZOOMDAR, **10 W.R. 84=1 B.L.R. A.C. 42.**

(2)—Against surety—Execution of decree—*See* SURETY, LIABILITY OF SURETY, 3 C.L.R. 505.

Summary Remedy.

Summary enforcement of contract made by Court while managing estate—*See* COURT, 15 C. 253.

Summary Settlement.

See CUSTOMS—PUNJAB—MISCELLANEOUS, 121 P.L.R. 1902=97 P.R. 1902.

Summary Suit.

(1)—*Summary suit—Ben. Reg.* VII *of* 1825 *Effect of.*—Summary suit under Bengal Regulation VII of 1825, s. 5, to set aside a sale by a judgment-creditor, for inadequacy of price. LAMB v. BEJOY KISHEN DASS, **8 M.I.A. 427.**

See MAD. ACT VIII OF 1865, s. 69, 26 M. 518.

Ex parte decree in summary suit—Appeal—*See* APPEAL—EX PARTE DECREES, 2 B. 644.

See CIV. PRO. CODE, 1908, s. 95, O. XXXVII, rr, 2, 3, 18 B. 717.

See CIV. PRO. CODE, 1908, s. 104, O. XLIII, r. 1, 26 M. 518.

Failure to bring summary suit—No bar to—*See* EJECTMENT, SUIT FOR, 12 C.P.L.R. 59.

Summary suit on promissory note—Power to extend time for defendant to apply for leave to defend—*See* PRACTICE AND PROCEDURE, 3 C. 539.

Summary Trial.

(1)—*Criminal Procedure Code, ch.* XXII—*Summary trial — Summary jurisdiction not affected by length of proceedings.*—Where a Magistrate is empowered by law to try a case summarily the fact that the trial is a protracted one in no way affects his jurisdiction. MANSA, *In the matter of the petition*, **A.W.N. 1892, 30. (A.W.N. 1891, 183, *Diss.*)**

Summons.

See CIV. PRO. CODE, 1908, O. V, rr. 10 to 25.

See CIV. PRO. CODE, 1908, O. XVI, rr, 1 —21.

(1)—*No evidence adduced by defendant—Summons to plaintiff—Practice.*—It is competent to a Court to refuse to summon the plaintiff in a case in which the defendant has not adduced any evidence in support of his case. CHYSTUNNO CHUNDER ROY v. KEDARNATH ROY, **14 W.R. 99.**

(2)—*Omission to serve summons—Appearance of defendant.*—Where a summons has not been issued to a defendant, the defect is cured by his appearance. KHALUT CHUNDER GHOSE v. SARODA SOONDERY DOSSEE, **Bourke, O.C. 244.**

(3)—*Party summoned but not appearing—Bound by decision.*—A party who has been summoned before the Judge and has not appeared, is bound by such decision. *Per Pontifex, J.* NOBODEEP CHUNDER CHOWDHRY v. BROJENDRO LALL ROY, **7 C. 406 = 9 C.L.R. 117.** [*Doubted*, 12 C. 33.]

(4)—*Service of summons—Period—Civ. Pro. Code*, 1882, *s.* 99-A. Section 99-A of the Civil Procedure Code, 1882, is not very happily expressed, but it means that when a plaintiff fails for a period of one year from the return of the summons unserved, to apply for the issue of a fresh summons and on that application to satisfy the Court that he has used his best endeavours to discover the residence of the defendant who has not been served, or that such defendant is avoiding service of process then, and only then, the Court may dismiss the suit as against such defendant under the section. The section refers to the lapse of a year, not from the filing of the plaint, but from the return of the summons unserved. JUGALPRASAD v. BISESAR, **7 Bom. L.R. 928.**

(5)—*Civ. Pro. Code, Act* VIII *of* 1859, *ss*, 55, 113—*Service of summons not in sufficient time—Ex parte decree—Application to set aside decree.*—Where summons was not served on the defendant in sufficient time to enable him to appear and answer, an *ex parte* decree passed against the defendant was set aside on his application, and the suit was ordered to be re-heard. *Quære*:—Whether there was proper service under s. 55, Act VIII of 1859, when a copy of the summons was affixed on the door of the house in which the defendant was living? CHANBASAPPA *bin* SANGAPPA v. MAINABA *bin* MAHADSHET, **7 B.H.C. A.C. 138.**

(6)—*Court's power, if service cannot be effected in time—Summonses, application for—Nazir's duty.*—*Held*, that if a party applies for summonses so late that service cannot be effected in time, the Court may refuse to adjourn the hearing; but neither the Court nor the Nazir should refuse to issue summonses simply because it is supposed that they cannot be served in time. ABDUL HAFIZ KHAN v. AJUDHIA, **2 O.C. 34.**

Summons—*continued.*

(7)—*Civ. Pro. Code (Act X of 1877), s. 37 (a)—'Non-resident' meaning of.*—The word 'resident' in legislative enactments must be construed according to what may be supposed to have been the intention of the Legislature in using the term. In s. 37 of the Civ. Pro. Code (Act X of 1877), cl. (*a*) has been intended to enable persons who are not resident within the local limits of a Court to appear by a person holding a general power of attorney, and the term 'non-resident' in the section should be construed broadly, so as not to prevant a creditor from enforcing his claims against his debtor. The above term cannot be allowed to cover every absence from home, whatever its nature or duration; but it will include every absence which may reasonably be supposed to have been within the contemplation of the Legislature when enacting, the above clause for enabling non-resident persons to appear by general agent. So, a person who, having resided for a number of years at his place of business, was absent for an interval of several months at his distant native country, was held, during such interval, to be non-resident within the jurisdiction of the Court, in his place of buisness, for the purposes of s. 37. RAMCHANDRA SAKHARAM v. KESHAV DURGAJI, **6 B. 100.** [*F.*, 28 A. 135 = 2 A.L.J. 626 = A.W.N. 1905, 221; *Appr.*, 14 M.L.J. 223; *R.*, 14 B. 541.]

(8)—*Affixing summons to door—Temporary absence, no ground.*—Mere temporary absence of the person to be served does not justify the process server affixing the summons to the door. (21 B. 223, *R.*) It is the duty of the peon to take some pains to find out the person to be served, so that, if possible, personal service may be effected. SUBRAMANIA PILLAI v. MUTHUKUTTI, **8 M.L.J. 84.**

(9)—*Service on Railway Company.*—For the purposes of summons, a Railway Company must be deemed to dwell at its principal office. HANLON v. INDIA BRANCH RIALWAY COMPANY, **1 Hyde 197.**

(10)—*Civ. Pro. Code*, 1882, *s.* 82—*Service of summons, mode of—Duty of Court—Summons transmitted to another Court for service—Power of transmitting Court to question validity of service—Cases where transmitting Court can question sufficiency of service by another Court.*—Where the service of summons is effected by affixing a copy of it to the door of the defendant's dwelling house, it is expressly provided by s. 82 of the Civ. Pro. Code, 1882, that the Court should decide whether the summons has been duly served by such affixing or not, and must be satisfied that the defendant is keeping out of the way for the purpose of avoiding service; and if it is not so satisfied and consequently decided in the negative, then, a new summons must be issued, or substituted service directed. There must be personal service, if practicable, and substituted service of any kind whatsoever is only allowed on proof that reasonable efforts have been made to serve the defendant personally, and that he is wilfully evading service. As to the mode of substituted service, it is to be

Summons—*continued.*

settled according to the circumstances of each case. [*R.*, 16 B. 117, 18 A. 241, 7 Bom. L.R. 159, 18 M.L.J. 96.] Where, however, service of summons has been effected through another Court, the original Court is not bound, in every case, to satisfy itself that the law as to service has been strictly followed. The Court serving the summons alone can judge whether service has been properly effected, and the transmitting Court cannot act as a revising Court as regards the service. There is a presumption in favour of the proceedings of Courts of justice that everything has been duly performed, and if the return states that the service has been duly effected, that presumption would prevail, unless the return discloses some patent irregularity or clear divergence from the law. [*Cons.*, 22 C. 889.] Although, on a return from a competent Court that *service has been duly effected*, the transmitting Court should presume that either personal service has been effected, or substituted service under ss. 80, 82 of the Civ. Pro. Code, 1882, still, the presumption in favour of the due execution of acts of judicial nature only obtains *donee probetur in contrarium*, and there may now and then occur cases where there is something in the return distinctly negativing that presumption, and showing illegality in the mode of service. Thus, in the present case, where the return from the serving Court was to the following effect " Read bailiff's endorsement on the back of the process, stating that the summons has been affixed to the defendant's house on the 22nd December, 1884, at 9 A.M.; and proof of the same having been duly taken by me, it is ordered that the summons be returned;" *held*, that there was no sufficient service. The return itself proved the insufficiency, and the case constituted an exception to the general rule that a return of service by a competent Court must be taken as proof of such service. In the first place, there was no statement that service was *duly effected*; nor, in the second place, did it appear that anything was done beyond the affixing of the summons on the defendant's door; nor that the provisions of ss. 80 and 82 of the Civ. Pro. Code, were strictly followed. NUSUR MAHOMED v. KAZBAI, **10 B. 202.**

(11)—*Act* X *of* 1859, *ss.* 47, 56, 58—*Suit for rent—Service of summons on defendant residing outside district—Decree of Revenue Courts—Jurisdiction of Civil Courts.*—The words in s. 56 of Act X of 1859 "upon proof that the summons or proclamation has been duly served according to the provisions of this Act," refer to the mode in which a summons is to be served. Where the defendant in a suit for rent resides in another district and the service of summons is effected by a peon of the Collector's office of the district in which the suit is brought, and not through the Collector of the district in which the defendant resides, as required by s. 47 of the Act such procedure would not amount to such irregularity as to vitiate the proceedings. An irregularity of this kind by which the party is not injured does not vitiate

Summons—*continued.*

the proceeding and render the *ex parte* decree passed against him void. *Quaere*:—Whether the Civil Court, which includes not only the Court of the District Judge and of the Subordinate Judge, but also that of the Munsif, is competent to enquire into the irregularity of decrees obtained in the Revenue Court, and either set them aside, or treat them as mullities, on the ground of greater or less irregularities in the proceedings. MACKINTOSH v. KALLY DOSS MULLICK, **11 B L.R. 1=19 W. R. 234.**

(12)—*Summons to defendant—Service—Procedure—Affixture on house of defendant—Summons not served to be returned to Court for fresh order.*—Every summons not actually served on the party, defendant or respondent, or on his recognised agent, must be stuck up on the house in which such party is actually residing, s. 55 of Act VIII of 1859, which lays down the proper course of proceeding in cases where a defendant or respondent cannot be found, directs that the summons should be returned to the Court and an order obtained from the Court as to the mode of service.—In this case, the High Court expressed strong disapprobation of the impropriety and want of care on the part of the lower Court in passing a decree against the defendants of the second part without any evidence and also actually making them liable for the costs of the defendants of the first part, when, very probably, the former had never been summoned at all nor had any notice of the suit itself. GOPAUL DOSS v. GREEDHAREE DOSS, **6 W.R. 13.**

(13)—*Service of summons—Practice— Civ. Pro. Code*, 1882, *s.*80.—Where there is merely a statement that the respondent cannot be found but it does not appear that any effort was made to find him, the serving officer is not entitled to affix a copy of the summons on the outer door of the house in which the respondent ordinarily resided, as provided by s, 80 of the Civil Procedure Code, 1882. SAKHARAM v. PADMAKAR, **8 Bom. L. R. 757=30 B. 623.**

(14)—*Act* VIII *of* 1859, *s.* 55—*Procedure.*—Under s. 55 there is no proper service unless it be the fact that the defendant is actually dwelling in the house upon which the summons is affixed; and cannot after diligent search, be found in other words, is keeping out of the way to avoid service.—Where a judgment-debtor applies to set aside an *ex parte* judgment on the ground that there was no effectual service of the summons upon him, he should be called upon to give his evidence, or to make out a *prima facie* case. KHUDEERUN LALL v. CHUTTERDHAREE LALL, **21 W.R. 242.**

(15)—*Service of summons—Nature of dwelling necessary for effective service.*—Service of a copy of the summons on the door of the house in which the defendant is dwelling is one of the modes of service provided in lieu of personal service, but it is necessary that the defendant should be residing in the house in such a manner as to make it probable that knowledge of the service of the summons will reach him. There

Summons—*continued.*

may be a dwelling sufficient to give jurisdiction and yet not the kind of dwelling necessary to make a good service. ANANTHA NARAYANA v. PERIYANA KONE, **5 M.H.C. 101.**

(16)—*Ss.* 79, 80, *Civ. Pro. Code*, 1882—*Sufficiency of proof of service of summons—Affidavit of service of summons.*—For the purpose of showing that the defendant cannot be found, the affidavit of service of summons must show that proper efforts to find him were made, and that the copy of the summons was affixed on the door of the house in which the defendants *ordinarily* resided at the time of service. Whether or not these conditions are established to the satisfaction of the Court, must in each case, depend on its own particular circumstances. It seems that in case of defendant's refusal to sign the summons, when tendered, those conditions need not necessarily be established. RAJENDRO NATH SANYAL v. JAN MEAH, **26 C. 101=2 C.W.N. 574.** [*F.*, 5 C.L.J. 555; *R.*, 30 B. 623=8 Bom. L.R. 757.]

(17)—*S.* 80, *Civ. Pro. Code*, 1882—*Affidavit of service.*—S. 80 of the Code is intended for cases in which the writ of summons should be affixed in the way required by that section after a proper attempt has been made to find the defendant. A process server may go to a man's house and not find him, but that is not attempting to find him. The process server should go to his house, make enquiries, and if necessary follow him. He should make enquiries to find out when he is likely to be at home, and go to the house at a time when he can be found. Before service like this can be effected it must be shown that proper efforts have been made to find out, when and where the defendant is likely to be found; an affidavit filed in support of service of a writ of summons should substantiate this. COHEN v. NURSING DASS AUDDY, **19 C. 201.** [*F.*, L.B.R. 1872—1892, 639, 2 N.L.R. 63, 5 C.L.J. 555; *R.*, 18 A. 241.]

(18)—*Chota Nagpur Encumbered Estates Act, s.* 3—*Process includes summons.*—Process includes summons. In that sense, it bars all suits to which cl. (3), Chota Nagpur Encumbered Estates Act, applies. According to the second part of s. 3 of that Act, all suits instituted after the vesting order is made and while it is in force, are barred. KAMESHAR PERSHAD v. BHIKAN NARAIN SINGH, **20 C. 609.**

(19)—*S.* 80, *Civ. Pro. Code*, 1882—*Summons—Service—Defendant refusing to sign acknowledgment—Substituted service.*—The law requires that there shall be actual service of summons whenever that is practicable, and substituted service is allowed only on proof that the defendant is evading service. Hence, where the copy of a summons is tendered to the defendant personally and he refuses to sign the acknowledgment, the Court should proceed in the manner directed by ss. 80 and 82 of the Civil Procedure Code, 1882. GANGADHUR v. RAMCHANDRA, **7 Bom. L.R. 159.**

Summons—*continued.*

(20)—*Substituted service—Civ. Pro. Code*, 1859, *s.* 57—*Application to set aside ex-parte decree.*—Substituted service, if duly effected under the provisions of the law, is as valid as personal service; and therefore, where substituted service had been effected under s. 57 of Act VIII of 1859, an *ex-parte* judgment would not be set aside on an allegation of no notice, and of good defence on the merits. KISSUR CHUND v. BHOOBUNESSUR CHUNDER, **Bourke, O.C. 25=Cor. 151.**

(21)—*Substituted service—House—Dwelling-house.*—A mofussil Judge stated, in his return to the Sheriff of Calcutta, that substituted service had been effected by fixing a copy of the summons to the "house" of the defendant. *Held*, that the return was insufficient, and that the word "dwelling-house" must be expressly mentioned. BUDDOO BABOO v. LAMBODAR MULLICK, **1 Hyde 132.**

(22)—*Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 49—*Summons, service of—Agents.*—Service of summons on persons merely looking after the affairs of a defendant is insufficient under s. 49 of Act VIII of 1859, such persons not being agents. RAM SOONDUREE DASSIA v. RANEE SURUT SOONDUREE DEBIA, **17 W.R. 33.**

(23)—*Civ. Pro. Code*, 1859, *s.* 17, *cl.* 2—*Recognised agent—Carrying on business.*—A Bombay firm simply employed by the owners, resident in England, of a ship visiting Bombay, to procure freight for her for a particular voyage, cannot, under ordinary circumstances, be regarded as carrying on business in the name of the owners, and, therefore, cannot be deemed recognised agents within cl. 2, s. 17, Civ. Pro. Code. *Quære.*—Whether, in order to constitute a recognised agent within the meaning of the above section, the business carried on by him must be continuous, and not an occasional or desultory business? RATANSI PANCHAM v. CHARLES SAUNDERS, **8 B.H.C.O.C. 159.** [*R.*, 9 B.H.C. 37.]

(24)—*Civ. Pro. Code* (1877), *s.* 76—*Service of process on agent—Carrying on business, meaning of.*—In order to satisfy the conditions laid down in s. 76 of the Civ. Pro. Code, there must be a person residing without the local jurisdiction, but carrying on business or work within those limsts by a manager or agent and sued on account of such business or work, that is, business or work either actually itself carried on by the agent or manager, or forming part of the business in the sense of a connected course of transactions, to the management of which he has been duly appointed. Where an agent has been put forward substantially to take the place of his principal within a particular jurisdiction, he should take his place at the option of a person who has dealt with him, in any legal proceedings that may arise out of the business or work carried on by him. The manager or agent contemplated by the Code means one having an initiative and independent discretion, although subject possibly to principles and general orders prescribed for its guidance.

Advocate High Co
Jammu & Kashmi
Srinagar.

Summons—*continued.*

His position is distinguishable from that of a servant employed only to carry out orders or to execute a particular commission, and from that of a factor or commission agent, who is not in any way identified with the firm. GOCULDAS DWARKADAS v. GANESHLAL HALASROY **4 B. 416**.

(25)—*Service of summons on the defendant—Defendants away in foreign territory—Whether affixing summons to outer door of their residence, proper and sufficient service—S. 89 of Act* XIV *of* 1882.—Where it appears that reasonable efforts have been made to effect personal service on the defendants but without success, the Code of Civil Procedure permits of the summons being affixed to the outer door of the residence of the defendants. In this case the defendants went to a village in Pudukotai territory and it was not known when they would return. The serving officer tried to effect service personally twice but failed. *Held* he was justified in affixing the summons to the outer door of their residence, and that such service was proper and sufficient service. S. 89 of the Code of 1882 only deals with cases in which the defendant resides out of British India, and does not apply to a case where the defendant, being a resident of British India, is away in a foreign territory for a temporary purpose. KASI VISVANATHAN CHETTY v. MUTHU K.R. ARUNACHALLAM CHETTY, 2 **M.W.N. 1911 357=21 M.L.J. 978**. (29 M. 324, *Doubted* ; 21 M. 324, *F.*)

(26)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 17—*Service of summons—Foreign principal carrying on business through agents in India—Service of Indian agents.*—Where a foreign principal carried on business in India through a local firm, service of summons on the manager of the firm is sufficient service on the principal in respect of matters connected with such business. RAJARAM GOVINDRAM v. M.B. BROWN, **7 B. H.C.O.C. 97.**

(27)—*Partners — Service of summons.*—The service of summons on one partner for his co-partner was held to be a good service. RAMCHANDRA BOSE v. G.T. SNEAD, **7 B.L.R. App. 58.**

(28)—*Service of summons—Partners.*—The defendants carried on business in partnership in Calcutta. Service of summons was effected by leaving the summons with one of the defendants, not at the place of business in Calcutta, but in a mofussil station ; *held* that the service was good only as against the defendant served and not as against others. KASTOOR MULL v. JOOKERAM, **11 B.L.R. App. 26.**

(29)—*Service on co-partner for partner.*—Service of a summons intended for one partner upon another partner of the same firm is not a sufficient service. Partners are not the recognized agents of each other within the meaning of cl. 2, s. 17, Act VIII of 1859. LUCHMEEPUT DOGARE v. SIBNARAIN MUNDLE, **1 Hyde 97.**

(30)—*Civ. Pro. Code*, 1882, *ss.* 74, 76, 443—*Service of summons on minor defendants*—

Summons—*continued.*

Partnership suit.—Service of summons on minor defendants must be effected on their guardian *ad litem* appointed in the first instance under s. 443, Civ. Pro. Code. (14 C. 204, *F.*) Where a firm consisted of certain minors and others, and a suit was brought against them to enforce a mortgage of the partnership property, the affixing of the summons at the place of the partnership business, instead of its being served on the minors or upon the guardians personally is not sufficient service of summons under s. 74 or 76, Civ. Pro. Code, even assuming that those sections apply to such a case. JATINDRA MOHAN PODDAR v. SRINATH ROY, **26 C. 267=3 C.W.N. 261.**

(31)—*Act* VIII *of* 1859, *ss.* 60, 66—*Service of summons by post—Foreign territory.*—A summons cannot be sent by post to any place to which letters are not registered by a Post Office. A special bailiff cannot be sent to serve a civil process in a foreign territory. KASIM AJIM DUPLAY v. KASIM MAHOMED BARACHA, **2 B.L.R. A.C. 59=10 W.R. 349**. [*R.*, 1 N.W. P. 172, 8 B.H.C.O.C. 140, 7 B.H.C.O.C. 172.]

(32)—*Service of summons by post on defendant — Return of summons endorsed as "refused"—Person alleged to be defendant not the real defendant—Material irregularity—Interference by High Court—Civ. Pro. Code*, 1882, *ss.* 82 *and* 622.—A Court acts with material irregularity in considering a summons which was sent through the Post Office for service on the defendant and which was returned by it endorsed as " refused " by a person (not shown to have been the defendant) as good service and in passing an *ex parte* decree against the defendant, so as to call for interference by the High Court under s. 622, Civ. Pro. Code (1882). JAGANNATH BRAKHBHAV v. J. C. SASSOON, **18 B. 606.** [*R.*, 29 M. 324 ; *D.*, 21 B. 412.]

(33)—*Service of summons by post in registered cover—Practice.*—A summons was sent by the Sheriff by post in a registered cover to the defendant at Colombo in Ceylon. It was delivered by the postman in the presence of a witness who was personally acquainted with the defendant and the place where he ordinarily resided and who saw the cover delivered to the defendant who refused to accept it. *Held*, that the service in this instance was good. ABDUL ALI v. CORIMJI TAFFERJEE, **1 C.W.N. 56.**

(34)—*Summons—Notice of appeal not served for one year—Fresh summons—Notice—Respondent absent from home—Service.*—In a case where there is nothing whatever to mislead, an appellant who has failed for twelve months to serve notice of appeal upon the respondent will not be allowed to have a fresh summons issued and served. Where a party serving notice of appeal is told that the respondent is not in his house at that time, that he is elsewhere, and is told where he is, and yet chooses to affix the notice on the door of his house, such service is void. DOOLE CHUND v. NIRBAN SINGH, **20 W.R. 62.**

Summons – *continued.*

(35)—*S.* 99-A, *Civ. Pro. Code*, 1882—*Summons – Fresh summons.*—To satisfy the terms of s. 99-A, Civ. Pro. Code, the plaintiff must (1) apply within a year of the last summons unserved and also (2) satisfy the Court that he used diligence in the meanwhile. If he fails to establish any of the two points, his suit must be dismissed. BYAHARIMAL v. SATVA, **3 Bom. L.R. 402.**

(36)—*Application for fresh summons to defendant—Civ. Pro. Code*, 1882, ss. 72, 99-A—*Limitation.*—The Nazar of the Court is the proper officer to whom, under s. 72 of the Civ. Pro Code, 1882, the summons is delivered for service, and whose duty it is to return it to the Court, if unserved. So, where an application for a fresh summons to defendant (the first summons having been returned unserved, was made within one year from the date of the Nazar's counter-signature below the plaintiff's endorsement of non-service, *held* that the application was within the time prescribed by s. 99-A of the Civ. Pro. Code, 1882). PARSOTAM VITHAL v. ABDUL RAHMANBHAI, **13 B. 500.**

(37)—*Summons—Issue of fresh summons—Return of old summons.*—A fresh writ of summons will not be granted till the old one is returned into Court. ISSURCHUNDER SEIN v. ASHOTOSH CHATTERJEE, **1 Ind. Jur. N. S. 283.**

(38)—*Summons—Application for fresh summons—Practice.*—An application for a fresh summons to appear, etc., should be issued on petition showing that a fruitless endeavour had been made on the part of the plaintiff to serve the first summons, and that it was not by any default of his that he had failed. URQUHART v. GILBERT, **1 Ind. Jur. N.S. 224.**

(39)—*Civ. Pro. Code*, 1882, s. 162—*Suit adjourned for hearing—Necessity for issuing fresh summons to witnesses already summoned—Practice.*—Where a suit is adjourned for hearing, it is not necessary to issue fresh summons to witnesses already summoned. The proper course is to warn the witnesses that they would be required to appear on the adjourned day. SUBBARAYADU v. CHENCHURAMAYYA, **24 M. 200.** [*R.*, 2 A.L.J. 345=A.W.N. 1906, 92.]

(40)—*Return of summons—Order of Court—Clearness.*—When summonses are returned unserved, the Court must pass subsequent orders very clearly, stating the delay for non-service, etc. A vague order to the effect "no vigilant steps are taken to secure attendance of witnesses" will not do. PONNA KRISHNAVASUDEMUDU v. KOVURIRI BASURI REDDI, **M. W.N. 1912, 174=15 Ind.Cas. 188.**

(41)—*Summons—No return of service—Powers of Court—Duty of party.*—Where there is no return of service to summons, the law gives the Court a full discretion either to issue a second summons or to take or not to take stronger measures provided by law. It is not imperative on one Court to take measures to expedite

Summons—*continued.*

the service in another Court. It is the business of the party to move the Court to do what is necessary for his case. DOWLAT MUNDUR v. OMRAO SINGH RANA, **14 W.R. 336.**

(42)—*Irregular service of summons—Effect—Act* VIII *of* 1859, *s.* 119—*Joint promissory note.*—An irregular service of summons on two out of three defendants to an action brought on a joint promissory note does not give the third defendant, who had been properly served, ground for objecting to a decree passed against him under Act V of 1866. EWING CO. v. GOSIDAS GHOSE, **3 B.L.R. App. 7.**

(43)—*Summons, non-service of – Decree, suit to set aside, on the ground of non-service of summons—Non-service of summons, defence of, if can be raised*—Res judicata.—The principle of *res judicata*, is a principle of rest and convenience and not of absolute justice. A decree can be set aside either under s. 108, Civ. Pro. Code, 1882, on the ground of non-service of summons, or on review, or by a regular suit on the ground of fraud. Non-service of summons alone is not a ground for setting aside a decree by suit. If the question of non-service of summons cannot be raised by suit, it cannot be raised as a defence to a suit. NARASINGH DAS v. BIBI RAFIKAN, **11 C.L.J. 250=14 C.W.N. 507=37 C. 197=5 Ind. Cas. 198.** (29 A. 212, 4 A.L.J. 51, *F.*)

(44)—*Act* VIII *of* 1859, *s.* 119—*Summons—Service*—Onus *of proof.*—Under s. 119, Act VIII of 1859, the *onus* of proving that the summons was not served is on the party claiming the benefit of that section. SHAIKH TORAB ALI v. CHOORAMUN SINGH CHOWDHRY, **24 W.R. 262.**

(45)—*Act* XIX *of* 1853, *s.* 26—*Suit for damages against witness—Service of summons—Procedure—Plaintiff summoned by defendant—Evidence.*—In order to maintain a suit for damages against a person for not attending as a witness at the hearing of a suit, it is necessary that the requirements of s. 26, Act XIX of 1853, should be fulfilled; in other words, that the summons should have been personally delivered. Service of summons through a pleader is not sufficient. Under the provisions of the Civ. Pro. Code, a defendant who, *bona fide* and for substantial reason, requires that the evidence of the plaintiff should be taken, ought never, in ordinary cases, to have a decree made against him until that evidence has been given. ROY DHUNPUT SINGH BAHADOOR v. PREM BIBEE, **24 W.R. 72.**

(46)—*Service of summons—Evidence—Admission by one defendant—Failure to prove service of summons on other defendants.*—The witnesses who were present at the service of summons cannot be termed secondary evidence of the service of summons. They are the best evidence of such service. An admission made by a defendant in Court is no proof that plaintiff had no cause of action as against that defendant. The plaintiff would still be entitled to a

Summons—*continued.*

decree as against that defendant even though the plaintiff failed to prove service of summons on the defendants who did not appear. SOOGUNDAMOYEE DEBEA v. AZEEMOODDEEN, **W.R. 1864, 33.**

(47)—*Application for revival of suit—Enquiry as to non-service of notice—Evidence—Procedure.*—When a party applying to have his case revived alleges that no notice was served upon him, as the law requires, it is the duty of the Judge to examine on oath the officer by whom that service is reported to have been made, and not to be satisfied with the formal report of the Nazir. The neighbours that signed the receipt given to the *peadah* should, at the expense of the petitioner, be sent for and examined. SREENATH THAKOOR v. MESSRS. R. WATSON AND CO., **4 W.R. Mis. 4.** [*F.*, 7 C. 34=8 C.L.R. 369.]

(48)—*Legal service of notice, report of Nazir not sufficient proof of.*—The report of a Nazir that a summons has been served on a defendant, is not sufficient proof of service as required by law. It is the duty of the Court to examine the officer who served the summons or any person on the part of the plaintiff that accompanied the officer to point out the debtor. RAM SOONDUR CHUCKERBUTTY v. KALEE KOMUL DUTT, **6 W.R. Act X, Rul. 92.**

(49)—*Witness—Service of summons and issue of proclamation—Evidence—Nazir's report—Witness evading service of summons—Penalty.*—The Nazir's report of service of summons or of issue of proclamation is no doubt sufficient to admit of a Court taking steps to enforce the attendance of a witness. But when the Court proceeds to enforce the penalty, and one so heavy as in the case of a witness failing to attend a Court of Justice when duly summoned, it is necessary to see that all the steps for serving the various processes required by law have been duly observed, and the Nazir's report is insufficient for this purpose. The *peadas* who served the processes should be examined on oath, and the party should be allowed to cross-examine them. The only law now in force, under which punishment can be inflicted on a witness evading process, is the Penal Code, and ss. 172 to 175 limit the amount of fine to be imposed in cases such as the present to Rs. 1,000. *In re* NILKANT BHUTTACHARJEE, **W.R. 1864, Mis. 9.**

(50)—*Application for execution—Service of notice—Nazir's return whether sufficient legal evidence.*—The Nazir's return is *per se* no legal evidence at all of service of notice of application for execution. S. 222 of the Civ. Pro. Code, simply directs the Nazir to make a return, but does not in any way constitute that return to be legal evidence, especially when the return happens to be disputed. SHAH KOONDUN LALL v. NOOR ALI, **10 W.R. 3.** (3 W.R. Mis. 11, *F.*) [*F.*, 7 C. 34=8 C.L.R. 369.]

(51)—*Notice, Service of—Nazir's return, if sufficient.*—A bare return by a Nazir, to the effect that the peon swears that a notice has been served on a party, without the deposition on oath of the serving peon before a competent authority, is wholly insufficient in law to prove the service of such notice. RAJ KISHORE DUTT v. BYDONATH SHAHA, **12 W.R. 365.**

(52)—*Evidence—Deposition of serving peon—Report of Nazir—Perjury.*—The same rule which holds that the deposition of the serving peon on oath is evidence, also holds that the report of the Nazir, not being upon oath or on anything on which perjury can be charged, is no evidence. MEAH KHAN v. NARAIN CHUNDER CHOWDHRY, **18 W. R. 197.**

(53)—*Evidence—Notice—Collector's peon's return of service.*—The return of a Collectorate peon as to service of notice is not admissible as legal evidence. MOINOOLLAH v. GOLUCK MONEE CHOWDHRAIN, **15 W.R. 270.**

(54)—*Service—Evidence of serving officer.*—Where a serving officer deposed that, not being able to serve the summons on the defendant personally, he affixed a copy of it on the outer-door of his dwelling-house, *held* that his testimony, if believed by the Judge, was legal evidence of the fact of service. RAMCOOMAR SINGH v. RAM SOONDUR SINGH, **17 W.R. 362.**

(55)—*Service of summons—Signature or mark on summons—Practice of the Presidency Small Causes Court at Bombay—Civ. Pro. Code*, 1882, *ss.* 79 *and* 80.—The service of summons on a person through the Presidency Small Cause Court of Bombay was held not proper when no signature or mark of his was affixed on the original copy of the summons, on the ground that he could not write. MALJI v. AMBI, **8 Bom. L. R. 584.**

(56)—*Non-service of notice, application for revival of suit on the ground of—Duty of Court to enquire into allegation of non-service.*—In the case of a petition for revival of a suit on the ground of non-service of notice on the petitioner, he is entitled to a distinct finding on his allegation that he was not served with notice of the suit. It is not a sufficient answer in such a case to say that the father of the petitioner was alive when the suit was instituted and the petitioner did not allege that the father had not been served with notice. Notice to the father would be notice to the son who represented him, but any how the allegation of non service must be enquired into and, only if it could be shown that notice was served either on the petitioner or on his father, could the petitioner's case be rejected. DIG BIJOY CHUNDER NEOGY v. JADUB CHUNDER THAKOOR, **4 W.R. Mis. 19.**

(57)—*Crim. Pro. Code, ss.* 70 *and* 332—*Service of summons for attendance as a juror—Service on servant of the person summoned.*—*Held* that a summons for attendance as a juror could not, outside a Presidency town, be properly served

Summons—*continued.*

by leaving it with a servant of the person summoned residing in his house, and hence that a person whose attendance as a juror was required was not liable to be punished under s. 332 of the Code of Criminal Procedure for non-attendance in answer to a summons served in the manner described. *In re* BEHARI LAL, **A.W.N. 1899, 13.**

(58)—*Application for examination of opposite party—Duty of applicant to obtain order under s. 165 of Act* VIII *of* 1859.—The defendant, the present appellant took the objection of the plaintiff not having been summoned to attend and give evidence. He had applied to the Judge under s. 162 of Act VIII of 1859 for an order requiring the attendance of the plaintiff, and the vakeel of the latter was called upon to show cause why plaintiff should not attend to give evidence. But on the day named, no cause was shown. Defendant however had failed to apply for an order under s. 165, requiring the plaintiff to attend and give evidence. The High Court *held* that the defendant was not entitled to take the objection as to the omission of summons to the plaintiff because it was the business of the defendant to have asked for such an order after the expiration of the time for showing cause, and that if he failed to apply for it, it was his own fault. ALLED SINGH ROY v. RAM PERSHAD SINGH, **2 W.R. 218.**

(59)—Ex parte *decree—Setting aside—Act* VIII *of* 1859.—Under s. 119 of Act VIII of 1859 if it should be proved to the satisfaction of the Court that summonses were not duly served, it is the duty of the Court to pass an order setting aside the judgment, and appointing a day for proceeding with the suit. It is not a sufficient service, if a copy of the summons is affixed to the house of the defendant's brother, without making any attempt to find the defendant. SHIBOO ROY v. KASHEE ROY, **25 W.R. 394.**

(60)—*Suit to obtain relief respecting immoveable property—Service of summons on agent—Civ. Pro. Code, s.* 16.—A suit for foreclosure or sale of immoveable property is one to obtain relief respecting immoveable property," under s. 16 of the Civ. Pro. Code, so that a service of summons upon the duly constituted agent (of the mortgagee's trustees) in charge the mortgaged premises is sufficient. MICHAEL v. AMEENA BIBI, **9 C. 733=13 C.L.R. 161.**

Issues instructions regarding the service of writs of summons and of notices of appeals. **Civ. Cir. No. 9 dated 6th April 1871, 15 W.R. Civ. Cir. 55.**

Summonses issued under Act VIII of 1859, ss. 59 and 158 to be directed not to the Judge, but to the Moonsiff. **Civ. Cir. No. 17 of 14th May 1872, 17 W.R.H.C. Rules and Ors. 15.**

Instructions to prevent the decision of cases *ex parte* against a defendant without sufficient enquiry as to service of summons. **Civ. Cir. No. 2, 23 W.R. Rules and Ors. of the H.C. p. 4.**

Summons—*continued.*

Petition for administration summons, how to be treated—*See* ADMINISTRATION SUIT, 3 B.L.R. App. 3 (*b*).

Power of Court to refuse to issue—Exclusion of evidence—Ground for remand—*See* CIV. PRO. CODE, 1908, s. 132, O. XVI, XXVI, 8 Ind. Cas. 418.

Summons served on Railway servant without sending it through his officer—*Ex parte* decree—No service—*See* CIV. PRO. CODE, 1908, O. IX, rr. 6,13, s. 104, O. XLIII, r. 1, 6 C.L.J. 45=1 Ind. Cas. 163.

Right of a party to have—Extent of right—Summons when may be refused—Laches of party—*See* CIV. PRO. CODE, 1908, O. XVI, r. 1, 5 N.L.R. 181.

Witnesses—Power of Court to refuse—*See* CIV. PRO. CODE, 1908, O. XVI, r. 1, 13 C.P. L.R. 152.

See CIV. PRO. CODE, 1908, O. XVI, r. 20, 1 B.L.R.S.N. 11 (*d*).

Service of, on Companies—*See* CIV. PRO. CODE, 1908, O. XXIX, rr. 2, 3, 12 Bom. L.R. 730.

Proper appointment of guardian *ad litem*, though no formal order—Service of—On wrong defendant—Irregularity—Procedure—*See* CIV. PRO. CODE, 1908, O. XXXII, rr. 3 (1) 4 (2) s. 99, 30 C. 1021, P.C.=30 I.A. 182=7 C.W.N. 774=5 Bom. L.R. 882.

Misdescription of defendant in plaint—Served on wrong person—Witness, payment of expenses to—*See* COSTS—SPECIAL CASES, 4 B. 619.

See COSTS—TAXATION OF COSTS, 7 B.L.R. Ap. 50.

See DISMISSAL OF SUITS, 18 W.R. 454.

Defendant not served through plaintiff's machinations — Setting aside decree — *See* FRAUD—EFFECT OF FRAUD, 4 Ind. Cas. 596.

Judge's—Misdescription of party taking out Summons—Permission to amend, granted at hearing— Practice—*See* INSOLVENCY —MISCELLANEOUS, 21 B. 205.

To witness—*See* ISSUES—MISCELLANEOUS, Ind. Jur. O.S. 15=1 Hyde, 147.

See LIMITATION—GENERAL, 5 C. 126.

See LIMITATION ACT, 1908, art. 147, 14 B. 269.

See LIMITATION ACT, 1908, ART. 182—STEP IN AID OF EXECUTION, 5 A. 344=A.W.N. 1883, 57.

Lis pendens—Contentious suit—Service of —*See* LIS PENDENS, 15 C. 647.

Service of, on unascertained persons—S. 82, Civ.Pro.Code, 1882—*See* PARTITION — GENERAL 11 C.L.J. 580=5 Ind. Cas. 244.

Summons, issue of, *See* PRACTICE AND PROCEDURE, 1 Bom.L.R. 859.

Summons—*concluded.*

Non-service of—Fresh summons—*See* PRACTICE AND PROCEDURE, 1 Bom. L.R. 859.

Rule of practice of Calcutta Small Cause Court—Time for service of summons—*See* PRESIDENCY SMALL CAUSE COURTS ACT, 1850, ss. 26, 41, 9 B.L.R. 256.

Suit for rent—Service of—on defendant residing outside district—*See* RENT, SUIT FOR, 11 B.L.R. 1=19 W.R. 234.

Suit for damages for breach of contract—Arrest under s. 477, Civ. Pro. Code, 1882--of defendant before judgment—Summons not served on defendant—Application for withdrawal of suit under s. 373, Civ. Pro. Code, 1882—objection by defendant, Procedure—*See* WITHDRAWAL OF SUIT, 15 B. 160.

Civ. Pro. Code, s. 168—When warrant of arrest may be issued to a witness not appearing after—*See* WITNESS—DEFAULTING WITNESS, 5 M.H.C. 104.

Summons Book.

(1)—*Evidence—Proceedings of Small Cause Court—Admissibility.*—The summons book of the Small Cause Court, Calcutta, which is kept in accordance with the practice of the Small Cause Court and is the only record of that Court, is admissible in evidence, though it does not bear the signature of the presiding Judge. QUEEN v. NAKUR SIRKAR, **6 B.L.R. 729.**

(2)—*Evidence—Proceedings of Small Cause Court—Admissibility.*—The record of proceedings in the Small Cause Court is not admissible in evidence unless authenticated by the signature of the presiding Judge. Therefore the summons book kept according to the usual practice of that Court is not admissible in evidence if not signed by the Judge. QUEEN v. SHIBCHANDRA DAS, **6 B.L.R. 730, Note.**

This circular enquires whether Moonsiffs with Small Cause Court powers use Summons Books and Registers. Civ. Cir. Memo No. 7, **23 W.R. Rules and Ors. of the H. C. p. 9.**

Summons to and Attendance of Witnesses.

See CIV. PRO. CODE, 1908, O. XVI, rr. 1—21.

Sunday.

Arrest under Civil Process of Mofussil Court on Sunday, legality of—*See* ARREST, 4 M. H. C. App. 62.

Mahomedan debtor, arrest of on a—, not illegal—*See* ARREST, 7 M.H.C. 285.

See LIMITATION ACT, 1859, B.L.R. Sup. Vol. 360=3 W.R.S.C.C. Ref, 5.

Disposal of suit on—Irregularity—*See* CIV. PRO. CODE, 1908, s. 99, A.W.N. 1907, 168=29 A. 562.

See CONTRACT—CONSTRUCTION OF CONTRACTS, 15 B. 338.

Sunday—*concluded.*

Proceedings of Munsiff taken on, whether vitiated—Applicability of Lord's Day Act to India—*See* PRACTICE AND PROCEDURE, 5 A.L.J. 106=A.W.N. 1908, 43=3 M. L.T. 211 =30 A. 136.

Sunderbund Estate.

See BEN. ACT XI OF 1859, ss. 37, 52, 14 C. 440.

Sunderbuns.

(1)—*Reg.* XIII *of* 1828 (*Bengal*), *s.* 13, *cl.* (2) —*Sunderbuns— Limitation.*—The *Sunderbuns* were not included in the perpetual settlement but remained the property of the Government. Bengal Regulation III of 1828 made provision for the immediate settlement of the limits of the *Sunderbuns* by fixing peremptorily a period at which the demarcation of those limits should be final. Any person objecting to the line of demarcation could not be heard unless he declared and offered proof that, at the time of the survey by the Commissioner appointed under the said law, he was in occupation of a definite quantity of land cleared under cultivation within that time. A person in occupation of cultivated land might, within three months, either pray for further investigation or put forward his claim to hold particular lands free from assessment. [*F.*, 13 W.R. 180.] Where boundaries have been determined by the Commissioner under cl. 2, s. 13, of Bengal Regulation III of 1828, and no appeal therefrom made to the special Commissioner within three months, such determination is a bar to a suit seeking to open the question of boundaries. RAJA BARODAKANT ROY v. THE COMMISSIONER OF THE SUNDERBUNS, **2 B.L.R.P.C. 33=12 M. I.A. 225=11 W.R. A.C, 14=2 Suther. 184= 2 Sar, 413.**

See BEN. REG. III OF 1828, 4 C.W.N. 513.

Sunjogee Bairagi Community.

See MOHUNT, 1 Bom. L.R. 743.

Sunnad.

See SANAD.

Superannuation Funds, Police.

See ACT X OF 1869.

Superintendence of High Court.

See HIGH COURT, JURISDICTION OF.

(1)—*High Court's powers of Superintendence —St. 24 and 25, Vic. c. 104, s. 15—High Court's Jurisdiction to reverse judicial proceeding.*—The powers of superintendence, conferred on the High Court by the St. 24 and 25 Vic. c. 104, s. 15, relate to administrative authority and not judicial powers. The administrative authority may be thus summarised. The High Court has power under s. 15 of the High Courts Act—(1) to direct the exercise of a power or jurisdiction disclaimed by the Lower Court.—(2) to set aside the order made by the

Superintendence of High Court—*continued.*

Lower Court without jurisdiction. The High Court has no power, where no appeal lies and when no power of interference is given by the Civ. Pro. Code to interfere, by way of revision, with the proceedings of subordinate Courts on the strength of these powers of superintendence. TEJ RAM v. HARSUKH, **1 A. 101, F.B.** [*R.*, 9 A. 104, F.B. = A.W.N. 1886, 309, 22 M. 68, 9 B. 432, 12 B. 17, 1 C.W.N. 617, 26 C. 74, 8 M.L.J. 231, 28 M. 28 = 14 M.L.J. 329, 31 A. 59, 13 C.W.N. 1221, 36 C. 994, 6 A.L.J. 22, 33 C. 68, 9 C.W.N. 1046, F.B. = 2 C.L.J. 241.]

(2)—*High Court's power of interference*—*St. 24 and 25 Vic., c. 104.*—S. 15 of St. 24 and 25, Vic. c. 104, was not intended to confer any rights, whatever upon litigant parties. Its whole object was to give to the High Court some control over the Courts subject to its appellate jurisdiction. Nor it intended to be applied for setting aside the decrees of inferior Courts, except where a Court had altogether unmistakeably and clearly gone beyond the exercise of the powers conferred upon it. SREEMUTTY DOSSEE v. SREENIBASH DEY, **12 W.R. 74.** [*Appr.*, 14 W.R. 212; *R.*, 1 A, 101.]

(3)—*Facts sufficiently found by lower Court—Error of law in judgment—High Court to pass proper judgment and not remand for fresh judgment.*—Where the judgment of the lower appellate Courts sufficiently clear and intelligible to enable the High Court to pass the proper judgment upon the case, and it is clear to the High Court how the judgment has determined the question of fact, though there be any error of law in the lower Court's judgment and though the judgment may not be very clear by itself, the High Court should not send it back to the Judge of the lower Court directing merely that a clearer or more intelligible judgment shall be written. Whenever the record enables the High Court to itself deal with and to dispose of the case, it is the duty of that Court to itself pass the proper judgment in the case and not to send it back to the lower Court for a fresh judgment. SHAH JUGHAN v. SHAIKH MUKSOOD ALI, **6 W.R. 97.**

(4)—*S. 622, Civ. Pro. Code, 1882—High Court's power of revision without being moved by parties—Limitation.*—The High Court can deal with a case under s. 622, Civ. Pro. Code, without being moved by any of the parties. An application, therefore, under the section to the High Court will not be governed by any rule of limitation. PURAN MAL v. JANKI PFRSHAD SINGH, **28 C. 680 = 6 C.W.N. 114.** (4 C.W.N. 695, *Appr.*) [*R.*, 12 O.C. 78.]

(5)—*Act* XXIII *of* 1861, *ss.* 4 *and* 35—*Power to call for records of Subordinate Courts—Delay in making application, effect of.*—S. 35 of Act XXIII of 1861 empowers the High Court to call for the record of a case decided without jurisdiction by subordinate Courts, but does not make such a step compulsory. There is a certain discretion enabling the High Court to refuse an application under s. 35, when it is made after the lapse of a considerable time since the decree. BOODHEE v. ALLEE HYDER, **1 N.W.P. 271.**

Superintendence of High Court—*continued.*

(6)—*High Court, powers of superintendence of, over Mamlatdars' Courts—Bom. Act* III *of* 1876.—The intention and effect of Bom. Act III of 1876 has been not to abolish the old Mamlatdars' Courts and create new Courts under the same name, but merely to provide for the continuance of the old Courts with more extensive powers. Consequently, even after the passing of the Act, the jurisdiction of the High Court and its powers of superintendence and revision continues the same as it was prior to the Act. Further, it is highly improbable that the Legislature, in giving largely increased powers to the Mamlatdars Courts would at the same time have exempted them from all supervision and control. BAI JAMNA v. BAI JADAV, **4 B. 168, F.B.** [*F.*, 5 B. 137; *R.*, 7 B. 341 F.B. 25 B. 318 F.B., 31 B. 545 = 9 Bom. L.R. 1028; *D.*, 13 B. 552.]

(7)—*Decree for possession passed by Mamlatdar—Ouster of third person in possession—Jurisdiction.*—The order of the Mamlatdar in this case directing execution of the decree obtained by the opponent in a suit against his tenants by the ouster of the applicant who was no party to that suit, was beyond the jurisdiction of the Mamlatdar and was therefore liable to be set aside under s. 622 of the Civ. Pro. Code, and where the applicant has actually been dispossessed under that order, his remedy to recover possession is by suit either before the Mamlatdar or in a Civil Court. CHINAYA v. GANGAVA, **21 B. 775.** [*F.*, 24 B. 397.]

(8)—*Act* XXII *of* 1861, *s.* 35—*Application to order subordinate Court to receive appeal—Limitation.*—If a Court is to exercise the jurisdiction of sending to some other Court an appeal which has been presented to and dealt with by a subordinate appellate Court which had no jurisdiction to entertain it, the application should be made promptly, at any rate within a reasonable time after the order of such subordinate appellate Court has been quashed by the High Court as made without jurisdiction. *In the matter of* RUSSICK LALL CHATTERJEE, **15 W.R. 518.**

(9)—*High Courts Act, s.* 15—*Interference by High Court—Effect.*—The High Courts exercise the power conferred upon them by s. 15 of the High Courts Act only when there is a capital error in the judgment of the Court below which is complained of, and the plaintiff is entitled to special interference. When, therefore, an order under s. 15 is refused by the High Court, it does not follow that the order of the Court below was right, but it means that the application has not been made under circumstances which would induce the High Court to exercise its extraordinary powers. The plaint in a suit had been returned by the Munsif for presentation to the proper Court, the plaintiff went to the Small Cause Court for filing the suit and that Court also threw out the plaint. The High Court refused to pass an order directing the Munsiff to receive the plaint under s. 15 of the

Superintendence of High Court—*continued.*

High Courts Act. The plaintiff thereupon filed the suit in the Court of another Munsif who received the plaint and decreed the suit. *Held*, that the Munsif did right in receiving the plaint as the plaintiff had a substantial claim and as the order of the High Court did not affect the merits. SREEMUTTY SHOOVANKURRY DABE v. DWARAKA NATH MOOKERJEE, **25 W.R. 344**.

(10)—*St. 24 and 25 Vict., c. 104, s. 15, Construction of.*—On the true construction of s. 15 of the 24th and 25th Vict., c. 104, the power of superintendence to be exercised by the High Court is not merely administrative or ministerial, but also judicial. MUSSUMAT BAJEE KOOER v. RAI DAMODUR DASS, **5 N.W.P. 55**. [*Diss.*, 1 A. 87.]

(11)—*High Court—Right of appeal—Jurisdiction.*—The circumstance of the High Court calling up an appeal from the Court below for special reasons, and trying it as a regular appeal, does not entitle the parties to prefer an appeal directly to the High Court in the proceedings in execution. RAMANOOGRA SAHOY v. BYJNATH LALL, **10 B.L.R. 291, Note=51 W.R. 164.**

(12)—*Charter Act, 25 and 24 Vict., c. 104, s. 15—Superintendence of High Court over Recorder of Moulmein—Act XXI of 1863—Power of Recorder of Moulmein to license advocates—License to practice in Small Cause Court of Moulmein.*—The Charter Act, 24 and 25 Vict., c. 104, s. 15, has distinctly made the Court of the Recorder of Moulmein established under Act XXI of 1863, subject to the superintendence of the High Court, and so has rendered it incumbent on the High Court and given it power to take care that all the acts of the Recorder of Moulmein done in his capacity of Recorder be done regularly and according to law. The fact that the High Court does not possess appellate jurisdiction over all clauses of cases tried in the Recorder's Court, and that the Privy Council shares with the High Court appellate jurisdiction over the Recorder's Court does not remove the Recorder's Court for the operation of s. 15 of the Charter Act. [*F.*, 27 B. 575=5 Bom. L.R. 562; *R.*, 20 B. 480, F.B.] The granting or withdrawing of a license to practise as a pleader in the Small Cause Court of Moulmein is such an exercise of the power and authority possessed by the Recorder as will come under the superintendence of the High Court. The authority thus given to the Recorder is part of his authority as Judge of the Recorder's Court and it is bestowed upon him simply with the view to enable him the more effectively to administer justice in the Court over which he presides. *In the matter of* JOHN THOMPSON, **6 B.L.R. 180=14 W.R. 257.**

(13)—*High Court's Act, s. 15—Collector's Court subject to superintendence of High Court.*—Under s. 153 of Act X of 1859, where a question relating to title to land, or some interest in land, as between parties having conflicting claims thereto has been in point of

Superintendence of High Court—*continued.*

fact actually determined by the Deputy Collector, the appeal lies to the Zillah Judge under ss. 160 and 161. In the present case however, an appeal had been presented to the Collector, and the question was raised whether the High Court could interfere to restrain the Collector from exercising jurisdiction not given to him at all by Act X. *Held* that, under the large and general powers of the 15th section of the Charter Act, it was competent to the High Court to prevent the exercise by the Collector of jurisdiction properly belonging to the Zillah Judge. In exercise of such powers given to them by the said s. 15 of the Charter Act, the High Court set aside the order of the Collector, giving the other side liberty to appeal to the Zillah Judge within a month. BHYRUB CHUNDER v. SHAMA SUNDEREE DEBEA, **6 W.R. Act X 68.** [*Appr.*, 11 W.R. 50; *R.*, 1 A. 101, 15 C.W.N. 863=33 C. 832=14 C.L.J. 284 =11 Ind. Cas. 207.]

(14)—*Decree declaring plaintiff's right to bring property to sale in Collector's Court—Refusal of Collector to sell—Procedure.*—If a decree of a Civil Court declares that the plaintiff has risght to bring certain property to sale in the Deputy Collector's Court, it is the duty of the Deputy Collector to conform to that decree and to take steps for proceeding with the sale of the property accordingly. If he, at the instigation of the defendant, declines to do his duty, it does not give a fresh cause of action for the purpose of obtaining a second declaration of right against the defendant, though it might be a very good ground for asking the High Court by the exercise of its extraordinary powers to put the Deputy Collector right. RUGHOONUNDUN SINGH BAHADOOR v. COCHRANE, **20 W.R. 16.** [*R.*, 20 W. R. 17.]

(15)—*Suit for rent—Decision by Deputy Collector—Appeal to Collector—Revision by High Court—Charter Act, s. 15—Powers of High Court.*—Where a rent suit to recover Rs 254 was decreed by a Deputy Collector for Rs 49, and, in the appeal preferred to the Collector, the full amount claimed was decreed, the High Court interfered, under s. 15 of the Charter Act, and set aside the decree of the Collector as having been made without jurisdiction. In such cases, an appeal lies only to a Civil Court. *In the matter of* ROOKNEY, ROY v. AMRITH LALL, **14 W. R. 254.** [*R.* 1 A. 101, 38 C. 832=15 C.W.N. 863=14 C.L.J. 284=11 Ind. Cas. 207.]

(16)—*Act X of 1859, s. 160—Jurisdiction of Revenue Courts—Jurisdiction.*—A suit for arrears of rent and also for ejectment was dismissed. In the appeal to the Collector, the only questions before him were the extent and character of the lands and the arrears of rent, and no question of jurisdiction was ever raised. *Held* that the Collector had jurisdiction to hear the appeal, as the question of ejectment had been abandoned. DURSUN BHUGUT v. MAHOMED ALI, **13 W.R. 438.** [*R.*, 38 C. 832=15 C.W.N. 863=14 C.L.J. 284=11 Ind. Cas. 207.]

Superintendence of High Court—*continued.*

(17)—*Order in execution passed by Deputy Collector—Appeal to Collector—Sale once completed, when Deputy Collector can set aside.*—In this case, the Deputy Collector, after holding a sale in execution of a decree under Act X of 1859, for certain reasons assigned, set it aside. An appeal was preferred to the Collector, who reversed the order of the Deputy Collector, holding that the officer was not competent to set aside a sale which he had once completed, when there was no default on the part of the auction-purchaser. On special appeal preferred to the High Court under the provisions of s. 35, Act XXIII of 1861, on the ground that, as there is no appeal from an order passed by a Deputy Collector in execution of a decree, the Collector acted without jurisdiction in receiving an appeal and reversing the order of the Deputy Collector, the High Court concurred in the view that no appeal lay to the Collector but considered that the order he had passed was a proper one and consequently, under the authority vested in the High Court by s. 35 of Act XXIII of 1861, passed the same order as that passed by the Collector and reversed the Deputy Collector's order setting aside the sale. ADURMONEE DOSSEE v. KAMINEE SOONDUREE DEBIA, **3 W.R. Act X, Rul. 145.** [*D.*, 5 W.R. Act X, 35 ; *R.* 5 W.R. Mis. 45]

(18)—*Act* X *of* 1859, *s.* 92—*Sale of tenure—Order of Deputy Collector—Appeal.*—A decree-holder made an application to the Deputy Collector for the sale of the tenure of the judgment-debtor. The Deputy Collector admitted the application, and the tenure was sold. The judgment-debtor appealed to the Collector from the order of the Deputy Collector allowing the sale. The Collector reversed the order of the Deputy Collector on the ground that s. 92 of Act X of 1859 precluded the issue of process of any description on a judgment-debtor under that Act for less than Rs. 500 after the lapse of three years from the date of the judgment. *Held* that, under Act X of 1859, no appeal lay to the Collector from the order of the Deputy Collector made in execution of a decree, and consequently, that the order of the Collector was one which he had no power to make ; and that the Deputy Collector's order also was wrong, being in violation of the provisions of s. 92 of Act X of 1859. TARA CHUND MUNDUL v. BHYRUB CHUNDER CHUCKERBUTTY, **15 W.R. 551.**

(19)—*Act* XXIII *of* 1861, *s.* 35—*Genuineness of sale deed disputed—Decision by Collector—Jurisdiction*—A Collector by deciding upon the genuineness of a deed of sale propounded by plaintiff and denied by defendant, exceeds his authority, and his order can be set aside by the High Court under s. 35, Act XXIII of 1861, TOYLUCKONATH SIRDAR v. BALUCK RAM DOSS, **W R. 1864 Act X, Rul. 26.**

(20)—*Act* XXIII *of* 1861, *s.* 35—*When applicable to Revenue Courts—Power of High Court.*—The provisions of s. 35 of Act XXIII of 1861 extend to the Courts of Revenue officers acting without jurisdiction under Act X of 1859. It is competent for the High Court to revise the decisions of the Collector passed in appeals from the Deputy Collector in suits under Act X of 1859, whenever it appears that the Collector has exceeded his jurisdiction. HURPERSHAD v. LALU, **3 N.W.P. 60, F.B.** [*D.*, 12 A. 198.]

(21)—*Zillah Judge—Decision by Collector in regular appeal—Power of Judge to hear appeal—Act* X *of* 1859, *s.* 153—*Award of rent by Deputy Collector—Appeal to Collector—Act* XXIII *of* 1861, *s.* 35—*Decisions passed without jurisdiction—High Court's power to cancel same.*—A Zillah Judge had no jurisdiction to hear an appeal from a decision passed by the Collector in regular appeal. The Collector had no jurisdiction to hear an appeal from the decision of a Deputy Collector in reference to the provisions of s. 153, Act X of 1859. The High Court had, under s. 35, Act XXIII of 1861, power to cancel decisions passed by the subordinate Courts without jurisdiction. MAHESH PANDY v. BALDUT PANDY, **3 Agra Ap. Rev. 10.**

(22)—*Act* XXIII *of* 1861, *s.* 35—*Appeal to wrong Court.*—Where an appeal, in a suit for arrears of rent, which ought to have been preferred to the Collector, was preferred *bona fide* under a mistake to the District Judge, the High Court, on special appeal, allowed the appellant 30 days to appeal, if so advised, to the Collector. MAHARANI ADHIRANI NARAN-KUMARI RAJRANI OF BURDWAN v. PARIK HIT RAWTRA, **7. B.L.R. App. 15=15 W. R. 426.**

(23)—*Decree passed informally—Execution—Powers of High Court—Charter Act*, s. 15—A decree, though passed informally, is a decree, which the Court passing it, is bound in law to execute on the application of the decree-holder. So, where a Deputy Collector, having passed an informal decree, refused execution on application by the decree-holder, it was held that the High Court has power to interfere in the exercise of the powers granted to them by s. 15 of the Charter Act, and order the Deputy Collector to do his duty. *In the matter of* KHENUMKUREE DABEE v. RANEE SHULT SOONDUREE DABEE **14 W.R. 19.** (5 W.R. 25, F.B., *Expl.*) [*Appl.*, 1 A. 101.]

(24)—*High Court's action* suo motu—*Suit for* kubooleat—*Failure to prove rate of rent.*—Where a plaintiff suing for a *kubooleat* at enhanced rates obtained a decree below, though he was found not entitled to the rate of rent which he claimed, the High Court, considering that, under the rulling of a Full Bench, the suit should have been dismissed, of its own motion in special appeal, reversed the decree, notwithstanding that the objection was not taken in the written grounds of appeal. HAMID ALEE v. AFFEEOODEEN, **1 B.L.R.S.N. 14 (b)=10 W.R. 213.**

(25)—*Suit by co-sharer for aliquot part of rent—Other co-sharers made defendants—Nature of suit—Decree by first Court—Dismissal of suit by lower appellate Court—Beng. Act* VII.

Superintendence of High Court—*continued.*

of 1869, *s.* 102—*Charter Act*, *s.* 15—*High Court, powers of*.—A suit by a co-sharer in a taluq against a ryot for an aliquot part of rent, the other co-sharers having been made defendants on account of their resistance to the plaintiff's right to any share of the rent at all, should be treated as a suit instituted on behalf of all co-sharers collectively. Where a suit by a co-sharer against a ryot for an aliquot part of the rent making the other co-sharers defendants, which had been decreed by the first Court, was dismissed by the lower appellate Court as not being maintainable, *held* that, although in the judgment itself there was no expression of opinion on the part of the Judge as to the rights of the parties, yet the decree had, within the latter words of s. 102 of Act VIII of 1869 (B.C.) determined questions between parties having conflicting claims to an interest in land. Where a suit mentioned *supra*, on being dismissed by the lower appellate Court, came up before the High Court in special appeal, and the respondent was not placed in a disadvantageous position in regard to answering the complainant, *held*, that the High Court could interfere under s. 15 of the Charter Act and order the lower appellate Court to try the case on its merits. NOKHODA SOONDREE DASSEE v. KUREEM SHAIKH, **23 W.R. 11.** [*D.*, 25 W.R. 153.]

(26)—*Charter Act*, *s.* 15—*Superintendence—Refusal to exercise jurisdiction—Appeal.*—D had sued P for arrears of rent at the rate of Rs. 50 per annum. In the first Court, there was a decree at the rate of Rs. 25. In the appellate Court, that decision was reversed and a decree was passed at the rate of Rs. 50. On special appeal, this judgment was set aside and the rate decreed by the first Court was held to be the proper rate. In the meantime, D had sued out execution of the lower appellate Court's decree at the higher rate and had realized the whole of the rent at the higher rate. Then B, after applying to the Collector to recover the excess amount which D had realized, and having been told by the Collector that he could not interfere, brought a suit in the Civil Court to recover the amount which D had wrongly obtained from him. In the first Court, he obtained a decree. On appeal, the Sub-Judge dismissed the suit on the ground that the Collector was the only authority who had jurisdiction to refund the excess money. On special appeal: *Held* that no special appeal lay to the High Court as the suit was one of a Small Cause nature; but as the Collector had not exercised a proper jurisdiction and as an injury had been done to P, the claim should have been heard by the Civil Court and there being no bar to such hearing, it was not right for the Sub-Judge to send P back again to the Collector, but he should have heard the appeal and decided the case finally. HARDAYAL MUNDAL v. THIRTHANUND THAKUR, **4 B.L.R. App. 28=13 W.R. 34.** [*R.*, 1 A. 101, F.B., 15 C. 179.]

(27)—*Act* XXIII *of* 1861, *s.* 13—*Suit cognizable by Small Cause Court—No special appeal*

Superintendence of High Court—*continued.*

—High Court—Interference.—The High Court exercising their extraordinary powers dismissed a suit cognizable by the Small Cause Court and from which special appeal lies to the High Court under s. 13, Act XXIII of 1861. MAHARAJA DHIRAJ MAHATAB CHUND BAHADUR v. SHAGOR KUNDU, **5 B.L.R. Ap. 91.**

(28)—*Small Cause Court — Extraordinary jurisdiction—High Court.*—The High Court can interfere by the exercise of its extraordinary jurisdiction in cases in which there has appeared to be a manifest error of law, entailing manifest hardship on one of the parties to a suit. It will remand a case to the lower Court, though the value of the claim may be under Rs. 500 and the case may be one in which a special appeal is not allowed. RAMABAI v. TRIMBAK GANESH DESAI, **9 B.H.C. 283.**

(29)—*Small Cause Court—Jurisdiction—Act* XI *of* 1865, *s.* 6—*Extraordinary jurisdiction of High Court—Annulment of proceedings of the lower Courts.*—On a case properly cognizable by a Small Cause Court having been heard and determined by the Subordinate Judge and by the District Judge, the High Court, in the exercise of its extraordinary jurisdiction, annulled the proceedings of the two lower Courts. BHIMRAV JIVAJI v. BHIMRAV GOVIND, **11 B.H.C. 194.**

(30)—*Act* XXIII *of* 1861, *s.* 35—*High Court—Interference with orders of inferior Courts.*—The High Court could interfere under s. 35, Act XXIII of 1861 with the order of the Court of first instance as well as of the appellate Court, where the orders of both the Courts appeared to be without jurisdiction. SHEO DYAL SINGH v. SHEIKH MAHOMED KAMIL, **3 Agra Mis. 2.**

(31)—*Decree* ultra vires—*Remedies of judgment-debtor.*—Where a Court passes a decree which is *ultra vires*, the remedy of the judgment-debtor is not by way of appeal, but either by an application for review to the Court which passed the decree, or by an application to the High Court to exercise its general powers of supervision conferred upon it by s. 15 of the Charter Act. DOORGA DASS SANDYAL v. PANCHOO RAM MUNDUL, **23 W.R. 271.**

(32)—*Plaint, return of, for presentation to proper Court—Refusal by other Court to entertain plaint—Jurisdiction—High Court's power of revision—Bombay Reg.* II *of* 1827, *s.* 5, *cl.* (2).—In this case the plaint was originally presented to the Second Class Subordinate Judge who, thinking that the subject-matter exceeded his jurisdiction, returned it for presentation in the proper Court. The plaintiff then went to the First Class Subordinate Judge who, finding that the subject-matter was below his jurisdiction, again returned it for presentation to the proper Court. Upon this, the plaintiff went back to the Second Class Subordinate Judge, where there was a new Subordinate Judge, and he was of opinion that he could not review his predecessor's decision. Upon this,

Superintendence of High Court—*continued.*

an appeal was made to the District Judge, who rejected the appeal on the ground that no appeal lay against an order rejecting an application for review. On application for revision to the High Court, it was *held* that the case was one in which the High Court ought to interfere in revision under cl. 2 of s. 5 of Reg. II of 1827, and it accordingly set aside the order of the Second Class Subordinate Judge with a direction that he should admit the plaint as of the date of its original presentation. GIRDHARLAL HAR GOVANDAS v. LALLU JAGJIVAN, **20 B. 50.**

(33)—*Sale in execution of decree—Order of Munsif cancelling sale—Jurisdiction—Order of Munsif made without jurisdiction — High Court's power of interference.*—A Munsif who is in charge of the current duties of the office of Sudder Ameen has no jurisdiction to cancel a sale which has taken place in satisfaction of a decree. [*R.*, 1 A. 101.] As a Court of general supervision, the High Court is competent to declare an order of a Munsif which was wholly without jurisdiction, to be null and void. JOY RAM v. BULWANT SINGH, **5 W.R. Mis. 3.** [*R.*, 1 A. 101.]

(34)—*District Munsif making illegal order which is not appealable—Civil Court hearing appeal and setting aside order—Special appeal to High Court—Act* XXIII *of* 1861, *s.* 35.—Where the District Munsif passes an illegal order which is not appealable and the Civil Judge hears an appeal from that order and sets aside that order as one passed without jurisdiction, and a special appeal is made to the High Court from the order of the Civil Court, the petition of appeal should be treated as a petition under s. 35 of Act XXIII of 1861 and the order of the Civil Court must be set aside, and, under the jurisdiction given by the latter part of the above section, the invalid order of the District Munsif also should be annulled. ANNAMALAI CHETTY v. MUTHULINGA PILLAY, **6 M.H.C. 360.** (6 M H.C. 22, *F.*)

(35)—*Appeal — Civ. Pro. Code, ss.* 209, 364—*Act* XXIII *of* 1861, *s.* 11—*Extraordinary jurisdiction—Decree—Stay of execution.*—Where a Court in consequence of a fresh suit by plaintiff, stayed the execution of a decree passed for costs in favour of the defendant, *held* that the stay order was revisable. No appeal lies against an order staying execution under this rule. The High Court, however, in the exercise of its extraordinary jurisdiction will examine the judicial propriety of such an order. GAMBHIRMAL v. CHERJMAL JODHMAL, **11 B H.C. 151.** [*D.*, 7 C. 733.]

(36)—*Order of High Court executed by lower Court—Power of High Court to give directions.*—The High Court has jurisdiction to direct a lower Court in what manner its own decree or order should be carried into effect by that Court. The High Court has also power to see that the lower Court does not pervert its order or do that which the order did not intend should be done. KALEE DOSS SANDYAL v. ROY LUCHMEEPUT DOOGUR, **14 W.R. 145.**

Superintendence of High Court—*continued.*

(37)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 246—*Claimant in possession — Right under* ladavee *executed by judgment-debtor—Right of decree-holder to enforce mortgage lien against attached property—Unauthorised decision by Subordinate Court—Interference by High Court —Charter Act, s.* 15.—Where the property attached was in the possession of the claimant on his own account and not on behalf of the judgment-debtor, the fact that the claimant preferred to derive his title under a *ladavee* executed in his favour by the judgment-debtor, could not enable the decree-holder to enforce his mortgage-lien against the attached property. Where a Court subordinate to the High Court passed a decision without authority, the High Court had power to interfere with the decision and was not prevented by the provisions of s. 15 of the Charter Act from so interfering. KHELLAT CHUNDER GHOSE v. GOUR CHURN MOJOOMDAR, **18 W R. 402.**

(38)—*Act* VIII *of* 1859, *s.* 230, *application under—Investigation as to applicant's possession.*—Where an application is made for an investigation under s. 230, Act VIII of 1859, in respect of property which a decree-holder has got possession of, in execution of his decree, the Court is bound to investigate and decide whether the property was *bona fide* in the possession of the applicant on his own account or on account of some person other than the judgment-debtors, and should not, without holding any investigation, dismiss the application or give possession to the applicant. *In the matter of* WOOMESH CHUNDER ROY v. BIDHOO MOOKHEE DOSSEE, **11 W.R. 197.** [*R.*, 18 W.R. 395.]

(39)—*Jurisdiction—Purchaser of rights and interests of plaintiff substituted for plaintiff—Withdrawal of suit by purchaser—Charter Act* 24 *and* 25, *c.*104, *s.* 15—*Superintendence of High Court—Act done without jurisdiction.*—Whilst an action was going on, the defendant under an Act X decree which he had obtained against the plaintiff, caused the rights and interests of the plaintiff to be sold, and the property was bought in the name of one J. Afterwards an application was made by J to have his name substituted in the suit for that of the plaintiff and the purchaser's name was accordingly substituted. Subsequently, another application was made in the name of J, under s. 97, Act VIII of 1859, that he might be permitted to withdraw the suit with liberty to bring a fresh suit; and upon that application an order was made that the suit should be withdrawn. *Held* that the Court had no power to order the name of the purchaser J. to be substituted for that of the original plaintiff, or to allow him to withdraw the suit. Neither order was one of that description in respect of which the Legislature intended to give an appeal to the next superior Court, nor was it one in respect of which they intended to declare that there should be no right of appeal. The order was one that was made without jurisdiction. [*Appr.*, 15 W.R. 106, 15 W.R. 485=7 B.L.R. 149, *Cons. and Expl.*, 2 C.L.R. 297.] Where a Judge has

Superintendence of High Court—*continued.*

done a thing which a Court could never under any circumstanes, have power to do and has gone against every principle upon which litigation is conducted, the High Court, in the exercise of the power of superintendence vested in it by s. 15 of 24 and 25 Vic., c. 104, can in its discretion set it aside. JUDOOPUTTEE CHATTERJEE v. CHUNDER KANT BHUTTACHARJEE, **9 W.R. 309**. [*R.*, 1 A. 101; *Expl.*, 7 B. 341; *D.*, 12 W.R. 74.]

(40)—*Lower Court's omission to hear witnesses—High Court to consider evidence and form independent opinion.*—The Additional Principal Sudder Ameen before whom this case came on after a number of witnesses had been examined by his predecessor, allowed, at a late stage, after most of the witnesses had been examined, a very great number of documents to be filed and placed on the record, without any explanation of their being tendered at that late stage, and also without any enquiry whether they were relevant or otherwise. On the whole, the suit had not been in any respect tried or dealt with in conformity with the directions of the Civ. Pro. Code, and the High Court thought it fit and competent to them to come to a conclusion upon the evidence observing that the Court below had also seen the most part of it only in paper and that the case had been protracted through a period of about two years. OPENDRO NARAIN GHOSE v. BAJPAYEE RAJAH KESHUB CHUNDER DEB, **6 W. R. 25.**

(41)—*High Court, whether competent to compel lower Court to make sale absolute—Act* VIII *of* 1859, *s.* 259—*Finality of order setting aside sale.*—On sufficient grounds being established by the applicant, it is competent to the High Court, though it would be a very strong measure, to make an order upon motion to compel the Court below to make absolute a sale which had been made by that Court but which it had not confirmed and thought it was not expedient to confirm. Whether the purchaser has any rights which he may be capable of enforcing by suit is an entirely different question. Where the lower Court has allowed an objection and made an order to set aside the sale, such order, by s. 257 of the Civ. Pro. Code, is final. *In re petition of* MOONSHEE CODIUT ZUMAN, **8 W. R. 109.**

(42)—*Civ. Pro. Code*, 1882, *s.* 622—*Material irregularity — Remand.*—On 11-9-1888, the defendant contracted to sell to the plaintiffs 50 tons of brown rape-seed to be delivered at the plaintiff's godown and that such delivery should be made on or before April-May 1889. On 23-4-1889, the defendant endorsed over to the plaintiffs a delivery order for the seed given him by Messrs. Lang, Moir & Co., which was presented by the plaintiff's to Messrs. Lang Moir & Co., on 26th April. The latter refused to deliver on the ground that they had time till 31-5-1889. On 15-5-1889 the Company stopped payment. Thereupon, the plaintiffs informed the defendant that the seeds were not delivered to them by Messrs. Lang, Moir & Co., and demanded delivery from the defendant. The defendant failed to

Superintendence of High Court—*continued.*

do so. Consequently the plaintiffs sued to recover Rs. 562-8-0 damages as of the 31st May. The lower Court held that the damages were assessable as of the 25th April, on which date the prevailing market rate was high. The plaintiffs thereupon took out a rule for a new trial on the ground that the Judge was in error in assigning 25th April and not 31st May as the date which ruled the question of damages. But the case was decided against the plaintiffs on another point, *viz.*, that the plaintiff having failed to give notice to the defendant of Messrs. Lang, Moir & Co's refusal to deliver seed on 25-4-1889, they cannot call on the defendant to deliver the seed. On a motion having been made to the High Court under s 622, Civ. Pro. Code, 1882, to set aside the order of the lower Court as being one which it was incompetent to make at that stage of the proceedings, *held*, remanding the case to the lower Court for a new trial, that the Court acted with material irregularity within the meaning of s. 622 of the Civ. Pro. Code, 1882, in making the order in question. S. A. RALLI v. PARMANAND JEWRAJ, **13 B. 642.**

(43)—*Civ. Pro. Code, ss.* 516, 622—*Omission to give notice—Irregularity.*—The omission to give notice of the filing of an award under s. 516, Code of Civil Procedure, is a material irregularity, within the meaning of s. 622, which will vitiate a decree passed in terms of the award. RANGASAMI v. MUTHUSAMI, **11 M. 144.** [*F.*, 20 A. 474=18 A.W.N. 132, U.B. R. 1897-1901, Vol. II, 290; *R.* 74 P.R. 1894 F.B., U.B.R. 1897-1901, Vol. II, 24.]

(44)—*Want of reliable evidence—Conjectural grounds—Arbitration.*—Where, on unreliable evidence and on conjectural grounds, the lower appellate Court set aside a judgment of the Court below, and divided the subject of the suit between the parties by way of arbitration, the High Court set aside the decree of the lower appellate Court, and restored that of the first Court. MOHESH CHUNDER SHAWUTH v. JOY KRISHTO SIRCAR, **23 W R. 397.**

(45)—*St.* 24 *and* 25, *Vic. c.* 104 (*High Court's Act*), *s.* 15—*High Court's powers of superintendence—Act* VIII *of* 1879, *s.* 378—*Review of judgment.*—Where a Subordinate Judge rejected an application for review of judgment, on the ground that he had no right to interfere, as the judgment sought to be reviewed was that of his predecessor, *held* that the High Court, under the general powers of superintendence vested in it by s. 15 of the Letters Patent, is competent to point out to the Subordinate Court its error and to direct it to re-consider the application presented to it, and to dispose of it according to law. MATHRA PRASHAD, *In re*, **1 A. 296.** [*R.*, 9 A. 104=A. W. N. 1886, 309, F.B.]

(46)—*Act* XXIII *of* 1861, *s.* 35—*Appeal—Appellate Court exceeding jurisdiction—High Court—Right to interfere.*—Where an appellate Court exceeded its jurisdiction in hearing an appeal from an order of the first Court setting aside a

Superintendence of High Court—*continued.*

sale in execution, on the ground of the non-payment of purchase-money within the proper time, it was competent to the High Court to exercise its power under s. 35, Act XXIII of 1861 to set aside the order of the first Court, if there was sufficient ground for the exercise of such power. AMANEE BEGUM v. KOORBAN ALI, **3 Agra 204.**

(47)—*Civ. Pro. Code (Act X of 1877), s. 622—Execution of decree—Decree-holder not party to decree which reversed the lower Court's decree—Appeal—Jurisdiction.*—No appeal lies against an order refusing an application for execution of a decree for costs. The High Court has power to interfere under s. 622 of Civ. Pro. Code, and to pass such order in the case as the Court thinks fit. In this case the High Court upheld the order of the appellate Court, although passed without jurisdiction, as it was really a right order. BHOYRUB CHUNDER DOSS v. WAJEDUNNISSA KHATOON, **6 C.L.R. 234.**

(48)—*Civ. Pro. Code, ss. 544, 622—Appeal against appellate decree by a party who did not appeal against original decree—Revision by High Court.*—Under the Civ. Pro. Code, when an appeal is presented against the whole decree, the appellate Court has power to inferfere on behalf of parties, who had not appealed as on behalf of parties who have. [*Appr.*, 30 M. 470 = 17M.L.J. 119 = 2 M.L.T. 104; *D.*, 17 M. 265.] Where the appellate Court fails to exercise such a power, in the belief that it has no such power, the High Court has jurisdiction to interfere under s.622, and call upon the appellate Court, at the instance of the party who did not prefer the appeal, to exercise such power. SESHADRI v. KRISHNAN, **8 M. 192.** [*R.*, 11 M. 220, F.B.]

(49)—*Act XXIII of 1861, s.35—Act X of 1872, ss. 468, 469—Sanction to prosecute for perjury—Appeal.*—No appeal lies to the District Court from sanction accorded by a Subordinate Court of first instance to the institution of a prosecution in cases in which such sanction is required. Where a Subordinate Judge gave sanction for an alleged false statement made by a plaintiff in a suit, and the District Judge on appeal cancelled it, the High Court under s. 35 of Act XXIII of 1861, set aside his order. *In the matter of the petition of* BULWUNT RAI, **6 N.W.P. 124.** [*Appr.*, 1 A. 17, F. B.]

(50)—*Act VIII of 1859, s.265—Assignment of decree sought to be executed, impeachment of, as not* bona fide—*Possession of decree by assignee—Appeal—High Court's powers of superintendence.*—When an assignment of a decree sought to be attached and sold under a decree has been impeached by the decree-holder as not being a *bona fide* conveyance, and such conveyance purports to be one of property of the description specified in s. 265 of Act VIII of 1859, the Court is bound to make enquiry as to whether the assignee under the assignment of the decree was or was not in *bona fide* possession of the property. Where the Judge had

Superintendence of High Court—*continued.*

enquired into the above facts, no appeal could be maintained from his order. But, when he has refused such an enquiry which he ought to have made, it is competent to the High Court under the powers of superintendence vested in it by the High Court's Act to require the Judge to make the enquiry. GREESH CHUNDER LAHOOREE v. KASHEESSURREE DEBIA, **8 W.R. 26.** [*R.*, 1 A. 101.]

(51)—*Jurisdiction of High Court—Special appeal.*—Where the District Judge set aside a judgment of the Court below dismissing a suit wherein the plaintiffs had adduced no evidence whatever and there was positive unrebutted testimony on the defendant's side, the High Court, on special appeal, reversed the decision of the lower appellate Court and restored that of the Court of first instance. ANUND CHUNDER CHUCKERBUTTY v. RUTNESSUR DOSS SEN, **25 W.R. 50.**

(52)—*Civ. Pro. Code, 1882, s. 622—Order wrongly dismissing application to sue in* forma pauperis, *open to revision by High Court—Succession Certificate Act* (VII *of* 1889), *s.4.*—Where a Court, having jurisdiction to entertain an application presented to it for leave to sue *in forma pauperis*, declines to do so by reason of its erroneously supposing that a succession certificate, under Act VII of 1889, was necessary before it could be entertained, the case would come within the principle enunciated in 11 M. 220 (F.B.), as warranting the interference of the High Court under s. 622 of the Code of Civil Procedure. KAMATHI v. MANGAPPA, **16 M. 454.** [*R.*, 12 C.W.N. 509 = 9 C.L.J. 331; *D.*, 22 M. 68.]

(53)—*High Courts Act, s. 15—Party guilty of delay—Exercise of extraordinary powers.*—The High Court will not extend assistance by the exercise of its extraordinary powers under s. 15 of the Letters Patent, to parties who are not diligent in applying for it. RADHA MOHUN ROY v. RAJ CHUNDER SHAH, **22 W.R. 522.**

(54)—*Civ. Pro. Code, s.622—Revision—Application by whom to be made.*—It is only on the application of the party interested that the High Court should act as a Court of revision. Where a Munsif considered that a Subordinate Judge acted without jurisdiction in setting aside his orders on appeal, and brought the matter to the knowledge of the District Judge, who, taking the same view, referred the case to the High Court for the exercise of its powers under s. 622, Civ. Pro. Code, *held* that the High Court could not interfere. MAHOMED FOYEZ CHOWDRY v. GOLUCK DASS, **7 C.L.R. 191.** [*Expl. & D.*, 4 C.W.N. 695, 20 A. 72 = 2 A.L.J. 749 = 1905 A.W.N. 191.]

(55)—*Charter Act, 24 & 25, Vic. c. 104, s. 15.*—The High Court will not interfere, where a special appeal is forbidden and where no question of jurisdiction is involved. *In the matter of the petition of* LUKHYKANT BOSE, **1 C. 180.** (1 A. 101, *R.*) [*R.*, 9 B. 432, 9 C.W.N. 1046 = 2 C.L.J. 241, 33 C. 68.]

Superintendence of High Court—*continued.*

(56)—*High Court, extraordinary jurisdiction of*—24 & 25, *Vic. c.* 104, *s.* 15.—Though there would be a strong inclination to interfere under s. 15 of 24 & 25, Vic., C. 104, whenever an erroneous decision of a lower Court is brought to the notice of the High Court, an important consideration to move it into exercising these powers is a charge of judicial misconduct in the Court below, *i.e.*, not misconduct of a moral kind only, but an entire misconception of its duty—*Per Markby. J.* Some special ground, something more than a mere error of law or a wrong conclusion on evidence, must be established for the High Court to interfere under the extraordinary powers of the section—*Per Mitter, J.* [*R.*, 2 C.L.J. 241.] Where a remedy lies by way of regular suit, though it may not be quite complete, the High Court is reluctant to interfere MADHUB CHUNDER GIREE v. SHAM CHAND GIREE, **3 C. 243.** [*R.* 1 C.W.N. 617.]

(57)—*Act* XX *of* 1863, *s.* 5—*Appointment of manager—Jurisdiction—Charter Act, s.* 15.—Under s. 15 of the Charter Act, the High Court can only interfere where the Judge in the Court below either has acted without jurisdiction or has declined to accept the jurisdiction vested in him by the law. Where a District Judge entertained an application by a petitioner under s. 5 of Act XX of 1863 to be appointed manager of a religious endowment and came to the conclusion, after hearing the pleaders on both sides, that the Act did not apply to the property in dispute, *held* that he could not be said to have declined to accept jurisdiction. Under s. 5 of Act XX of 1863, the appointment of a manager is in the discretion of the Court. Where a Court has refused to exercise that discretion on the ground that the property was not transferred under s. 4 of Act XX of 1863 by the Local Government, the High Court would not interfere KHAJAH ASHRUF HOSSEIN v. MUSSAMAT HAZARA BEGUM, **18 W R. 396.**

(58)—*S.* 622, 295, *Civ. Pro. Code*, 1882(=*ss.* 63, 115, *present Code*)—*No revision in case of erroneous decisions*—"*Acted illegally or with material irregularity.—Per Maclean, C. J.*:—The Judge may have been right or wrong in the principles upon which he rejected the claim for rateable distribution; but he certainly had jurisdiction under s. 295 Civ. Pro. Code, 1882, to divide the assets; and if, with a view to that division of assets, he has made a mistake in the principle upon which they ought to have been divided, and, through error, rejected a particular claim, such an error is one of law merely, and not subject to revision under the terms of s. 622. It is clear that, in acting as he did, he was not acting illegally or with material irregularity. (21 C. 792, *R.*; 11 C. 6, *F.*). A Court is bound to go into the question of *bona fides* of the decree of an applicant under s. 295. A mere mistake in law, made by the Judge below, does not bring the case within s. 622. [11 C. 6 P.C. *F.*; 20 C. 8, *R.*] Under the penultimate clause of s. 295 the applicant is without remedy. If there has been any error of law, he can still obtain all he is entitled to. This clause affords some indication of what the Legislature regarded as the proper remedy for any mistake made in the division of assets under s. 295, Civ. Pro. Code, 1882, *viz*, a suit to recover the money, and not an application under s. 622. The inexpediency of whittling away by fanciful distinctions, the effect of decisions which, in themselves, are clear and precise, pointed out. *Per Banerjee J.*:—The rule of law, that an executing Court is not authorised to enquire into the validity or *bona fides* of the decree, is limited in its application to cases where the validity or *bona fides* of the decree is impugned by one of the parties to it. But where the question arises, not between the parties to the decree, but between the holder of the decree and rival decree-holders, it is not only competent to the Court, but obligatory upon it, to enquire into the *bona fides* of the decree, in order to see whether anything is really payable to the holder of the decree the *bona fides* whereof is called in question, inasmuch as s. 295 of the Civ. Pro. Code, requires the Court to see whether the applicant for rateable distribution has or has not obtained satisfaction of his decree. (11 C. 6, *Explained*) [*R.*, 13 C.W.N. 835=10 C.L.J. 30.] *Per Banerjee, J.*:—The third clause of s. 622, *viz.*, "acted illegally or with material irregularity," is not limited to cases of procedure only. This clause is intended to empower the High Court to interfere in non-appealable cases with orders or decisions of lower Courts, where the orders or decisions are vitiated by an error which is so gross and palpable, and has led to injustice so grave and manifest, that it is desirable that the High Court should interfere with them. RAGHUNATH GUJARATI v. RAJ CHATRAPAT SING, **1 C.W.N. 633.** (11 C. 6, P.C. *Expl*; 8 A. 111, *Diss.*; 17 M. 410, *Disappr.*)

(59)—*S.* 622, *Civ. Pro. Code*, 1882 (=*s.* 115, *present Code*)—*Revisonal powers of High Court—Acting in the exercise of jurisdiction illegally or with material irregularity.*—It cannot be said that the lower appellate Court acted illegally or with material irregularity, simply because its decision as to the jurisdiction of the first Court to entertain the suit was erroneous in law; and the High Court cannot interfere. (11 C. 6, P.C., 15 C. 47, 20 C. 8, P.C., 15 C. 47, *R.*] *Per Banerjee J.*:—The scope of cl. 3, s. 622, Civ. Pro. Code, 1882, is not limited merely to cases of material irregularity or procedure, for, the third clause not only refers to cases where a Court has acted with material irregularity, but also to those in which it has acted illegally. The clause is evidently intended to authorise the High Courts to interfere and correct gross and palpable errors of subordinate Courts so as to prevent grave injustice in non-appealable cases. MATHURA NATH SARKAR v. UMESH CHANDRA SARKAR, **1 C. W.N. 626.** (1 C.W.N. 617, *R.*; 11 C, 6, P.C. *Expl.*; 17 M. 410, *Disappr.*) [*F.*; 1 C.W.N. 633, 2 O.C. 67; *Discussed*, 2 C.W.N. 474; *R.*, 3 C.W.N. 581; 32 C. 146; *D.*, 29 C. 33.]

Superintendence of High Court—*continued.*

(60)—*S.* 18, *St.* 24. 25, *Vic. c.* 104—*High Court, powers of*—*cl.* 3, *s.* 622. *Civ. Pro. Code.* 1882—*Meaning of the words "acted illegally," "acted with material irregularity".*—When the error of the lower Court, if any, is nothing more than an error of law, and the party has a full remedy by a regular suit, there is no necessity for the High Court to interfere under s. 15 of the High Courts Act. S. 15, Acts 24 and 25 Vic. C. 104, gives the High Court, in general terms, power of "superintendence over all Courts which may be subject to the appellate jurisdiction." The law having advisedly and wisely left this power unlimited, it is not desirable to limit it by any hard and fast rule, and it is not every error of law that would be a ground for the exercise of this power, and a party's claim to the interference of the High Court is very much weakened when he has another remedy provided for him by law. (1 A 104, 3 C. 243, *R.*) The words "acting with material irregularity" in cl. 3, s. 622, Civ. Pro. Code, 1882, imply only the committing of an error of procedure, but "acting illegally" does not mean the same thing. Cl. 3, s. 622, is intended to authorise the High Court to interfere and correct gross and palpable errors of subordinate Courts, so as to prevent grave injustice in non-appealable cases. The question whether any case comes under the clause has to be determined with reference to the grossness and palpableness of the error complained of, and to the gravity of the injustice resulting from it. MOHUNT BHOGWAN RAMANUJ DASS v. KHETTER MONI DASSI, **1 C.W.N. 617.** (17 M. 410. *Disappr*; 11 C. 6, *Expl.*) [*F.*, 33 C. 487 = 3 C.L.J. 293; *R.*, 1 C.W.N. 626, 3 C.W.N. 581.]

(61)—*Act* XIX *of* 1841, (*Curators*), *scope and object of*—*Jurisdiction of High Court.*—The nephew of a deceased Hindu presented a petition in the Court of the Judge under Act XIX of 1841, praying that the possession of the property of the deceased might be delivered to him and merely denied in a deposition the title of the widow and asserted his own. Upon his statement, the Judge directed the widow to come in and show cause against the application which she accordingly did. A daughter of the deceased also presented a petition in opposition to the nephew's claim. In the meantime, the widow had applied for a certificate to collect debts under Act XXVII of 1860, and to this petition the daughter and the nephew appeared as objectors. The latter also filed a cross-petition for a certificate under the same Act. These three petitions—one under Act XIX of 1841, and two under Act XXVII of 1860—being all before the Court at the same time, by consent of the pleaders on both sides the Judge determined to try at once, and upon the same issues, the different questions of law arising under those two Acts. The Judge in the result disposed of the applications in favour of the nephew. On application made on behalf of the widow, a rule was granted calling upon the nephew why the order of the Judge in the

Superintendence of High Court—*continued.*

Act XIX case should not be quashed as having been made without jurisdiction. It was first objected that the Judge omitted to make the preliminary enquiry necessary under s. 3 before summoning the widow, but it was held that this error of the Judge was cured by the appearance of the widow and her opposition to the application on its merits. The second and the main objection was that, even if the parties were properly before his Court, the Judge had so completely miscarried in his mode of dealing with the application as to have gone beyond his jurisdiction, and that, consequently, the order may and ought to be set aside upon this ground. *Held* that, as the Judge had to decide at the same time upon two questions, namely, the Act XIX case and the case for a certificate under Act XXVII of 1860, he was quite wrong in having decided the case entirely upon issues common to both the Acts: but it cannot be said that such error could give the High Court jurisdiction to interfere with an order which was final by law and from which neither appeal nor review was allowed. The Judge in this case had jurisdiction over the subject-matter and he had jurisdiction to frame the issues whether rightly or wrongly. JUSODA KOONWAR v. BABOO GOUREE BYJNATH PERSHAD, **6 W. R. Mis. 53.** [*F.* 34 C. 929 = 12 C.W.N. 65; *R.* 2 N.L. R., 76, 138 P.R. 1906 = 116 P.L.R. 1908.]

(62)—*Appellate jurisdiction of High Court—Act* VIII *of* 1859—*Act* XXIII *of* 1861. *s.* 11—*Charter Act s.* 15.—The High Court cannot admit an appeal which the law (Act VIII of 1859 and s. 11 of Act XXIII of 1861) does not allow. S. 15 of the Charter Act is not applicable to the question. GOBIND NATH SANDYAL v. RAM COOMAR GHOSE, **9 W.R. 115.**

(63)—*Civ. Pro. Code, Act* VIII *of* 1859, *ss.* 129, 363—*Rejection of document—No appeal from order—Interference by High Court—Letters Patent, s.* 15.—As s. 363, Act VIII of 1859 barred an appeal from an order rejecting a document passed under s. 129 of the Code, the High Court refused to interfere with the order under s. 15, Letters Patent. H. C. ERSKINE, *In the matter of*, **18 W.R. 511.**

(64)—*St.* 24 *and* 25 *Vic., c.* 104, *s.* 15—*High Court—Powers of supervision—Jurisdiction.*—Where a decision passed by a Court is expressly declared by law not to be subject to appeal, the High Court cannot interfere in the matter in the exercise of any powers under s. 15 of St. 24 and 25 Vic., C. 104. SHAIKH BABUR ALI v. GOKHUL LALL, **24 W.R. 62.**

(65)—*Civ. Pro. Code*, 1859, *ss.* 170, 246—*Special appeal—Absence of summoned witness—Charter Act*, 24 & 25 *Vic., C.* 104, *s.* 15.—The petitioner was a party to a certain proceeding instituted under the provisions of s. 246, Act VIII of 1859. He was summoned to give evidence personally in these proceedings but did not attend and the Court, considering that he had failed to comply with the order

Superintendence of High Court—*continued.*

without lawful excuse, decided the matter before it with reference to the provisions of s. 170, Civ. Pro. Code, adversely to the petitioner. The petitioner tried to get the High Court to admit an appeal under the provisions of s. 15, Act 24 & 25 Vic., on the ground that the order was passed on no legal evidence. *Held* that as no appeal lay from an order under s 246, the petition could not be allowed, as it would amount to a special appeal. *In the matter of* DHUNPUT SINGH v. INDUR CHUNDER DOOGUR, **13 W.R. 121.**

(66)—*Application for review – Special appeal.* —An appeal which has been preferred to the Judge was withdrawn the next day through another pleader. Subsequently an application was made to the Judge to have the appeal restored to the file, on the ground that the second pleader had no authority from his client to withdraw the appeal. The Judge refused to interfere. *Held* that the order was one passed on an application for review of the former order and therefore no special appeal lay from the second order. Further, as the only ground upon which the Judge was asked to proceed was a petition from the appellant said to have been sent to her vakil by post; the Judge could not be directed to take any further action in the matter. MADHOMUTTY DEBIA v. DHUNPUT SINGH, **13 W.R. 167**

(67)—*Order exempting a defendant from liability—Excess of jurisdiction—Act* XXIII *of* 1861, *s.* 35—*High Courts Act* (*St.* 24 & 25 *Vic.*, *c.* 104), *s.* 15—*Error of law—Jurisdiction.*—An order made in appeal by a Zillah Court in a case in which no special appeal lies, exempting a particular defendant from liability, even though erroneous, cannot be called an act done, or order made, without jurisdiction, and s. 35, Act XXIII of 1861, does not apply to such a case. [*F.*, 12 W.R. 129]. Although the High Court is competent, under s. 15 of the High Court's Act (24 & 25 Vic., c. 104) to require the inferior Courts to exercise a jurisdiction which they possess, and which they have declined to exercise, or to set aside anything which has been done plainly without jurisdiction, that section will not enable the High Court, by way of motion, to deal with an order made by a lower appellate Court in cases where it has jurisdiction, and the law expressly declares that its order shall be final. SHOWDAMINEE DOSSEE v. MANICK RAM CHOWDHRY, **9 W. R. 386.** [*R.*, 1 A. 101, 7 B. 341.]

(68)—*Act* XXIII *of* 1861, *s.* 27—*Charter Act*, *s.* 15—*Extraordinary powers of High Court in cases where no special appeal lies.*—In a case in which a special appeal is forbidden by s. 27, Act XXIII of 1861, the High Court, on allowing the objection against the admission of special appeal and on being asked to treat the petition of special appeal as if it were an application to the Court to exercise its extraordinary powers, and to quash the order of the Judge on the ground that it was made without jurisdiction, the High Court ought simply to reject the appeal without prejudice to the appellant's rights to make an

Superintendence of High Court—*continued.*

application at some future time in proper form to have the Judges order quashed. SOONUT DASS v. BHOBAN LALL, **20 W. R. 478.**

(69)—*Charter Act*, *s.* 15—*Improper exercise of jurisdiction—Wrong view of law - High Court's interference.*—The High Court will only interfere under s. 15 of the Charter Act when it is shown that a lower Court has either declined jurisdiction or has improperly exercised jurisdiction, and not when it is wrong in its view of law, but did not refuse jurisdiction. ISUR CHUNDER PODDAR v. SHOSHEE DHUR SEN, **18 W. R. 289.**

(70)—*Two decrees of different Courts against same person—Execution of one decree—Application for stay by holder of other decree—Jurisdiction—Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 272—*Letters Patent*, *s.* 15.—Certain properties of M having been attached in execution of a decree obtained against him by W in the Sudder Ameen's Court, J who held a decree of the Principal Sudder Ameen's Court against the same judgment-debtor, applied to the Court of Sudder Ameen for stay of its proceedings, on the allegation that W's decree had been obtained by fraud. The Sudder Ameen rejected the application, and an appeal to the Judge was also dismissed on the ground that there was no fraud. *Held* that under s. 272 of Act VIII of 1859, J should have in the first instance applied direct to the Court which gave him the decree. *Per Hobhouse, J.*—The judgment of the lower appellate Court was on the face of it a good judgment for a reason given, and under a jurisdiction which, so far as the appellant's case was concerned, the Judge must be supposed to have had, and the High Court should, therefore, decline to exercise its extraordinary jurisdiction under s. 15 of its Charter. JUMAL ALI v. SHAIKH WAHED ALI, **11 W.R. 97.**

(71)—*Charter Act*, 24 *and* 25 *Vic.*, *c.* 104, *s.* 15—*High Court's powers of superintendence.* —The uniform practice of the High Court has not been to interfere, in exercise of the powers of superintendence under s. 15, Charter Act, except in cases in which the lower Court was not competent to deal with the subject-matter or had improperly declined jurisdiction. It is no ground for the High Court to interfere with the order of any of the Courts inferior to it by way of motion that that Court has put an erroneous interpretation upon a provision of law. *In the matter of the petition of* KASINATH ROY CHOWDHRY, **7 B. L. R. 146. Note = 11 W. R. 402.** [*R.*, 7 B.L.R 144, 18 W.R. 239, 18 W.R. 511, 1 A. 101, F.B.]

(72)—*Act* XVII *of* 1873—*Execution sale of property under enquiry—Refusal to confirm sale—High Court's interference--High Courts Act*, *s.* 15. —At the time of the sale of certain immoveable property in execution of decrees against Ameer Sahib (of Moorshidabad) the right, title and interest of the property sold was under enquiry by the Commissioners appointed under Act XVII of 1873 as to whether it belonged absolutely to the Nawab Nazim, or was held by the

Superintendence of High Court—*continued.*

Government of India for the purpose of upholding the dignity of the Nawab Nazim for the time being, and the President of the Commission addressed a letter to the Governor-General's Agent which letter was communicated to the executing Court and intimation was given at the time of sale that whoever purchased the property in question would purchase an empty title. After the sale, the Commissioners came to an actual finding under s. 12 of the Act, declaring the property to be held by the Government of India, and stating their opinion that the Nawab Nazim had no right of alienation and could not delegate such power to anybody else. In consequence, the Court which held the sale refused to confirm it. The High Court held that it was so manifestly right and proper in the interests of all parties to withhold confirmation of sale that it was unnecessary to enquire whether the order of the lower Court was in strict conformity with the law or not, and that this was not a matter which the High Court can interfere with under s. 15 of the High Courts Act. KALEE MOHUN SIRCAR v. HUMAYOON KADER MAHOMED ALI MIRZA, **24 W.R. 311.**

(73)—*Review—Irregularity in granting review — Jurisdiction* — 24 *and* 25 *Vic., cap.* 104, *s.* 15 — *High Court's power of interference.*— Two concurrent suits having been disposed of by the lower appellate Court in a manner adverse to the claim of the plaintiff, he appealed to the High Court in one of the cases only, having been precluded from doing so in the other, as its value was below 500 rupees. The High Court reversed the decision of the Judge who, thereupon, with a view to correct what had become a manifest error in the other case, granted a review after 90 days had elapsed and without recording his reasons. *Held* that the Judge's failure to comply with all the provisions of the law did not make his act one without jurisdiction, and looking to the peculiar circumstances of the case, it did not call for the High Court's interference under s. 15 of the Charter Act. ASRAFANNISSA BEGAM v. SYAD INAET HOSSEIN, **5 B. L. R. 316 = 13 W. R. 439.** [*R.*, 14 W. R. 212, 1 A. 101.]

(74)—*Civ. Pro. Code*, 1859, *ss.* 256, 257—*Application for cancellation of sale—Sale in execution—Grounds for setting aside—Appeal.* —Where an application for cancellation of sale does not specifically mention the grounds referred to in ss. 256 and 257 of the Civ. Pro. Code, and such application is treated by the lower Court as one to cancel the sale on the ground of material irregularity leading to substantial injury, the High Court sitting as a Court exercising extraordinary jurisdiction, cannct consider that the jurisdiction of the lower Court was taken away because of such omission. The finding of the lower Court on the two points which are required to be proved for setting aside a sale, *viz.* material irregularity and substantial injury arising therefrom, is final, and the High Court cannot, therefore, go behind that finding and upon the record find

Superintendence of High Court—*continued.*

any facts other than those which the lower Court had found. SOOKOOMAR SINGH v. KASHEE SINGH, **13 W. R. 250.**

(75)—*Exercise of jurisdiction—Application for execution.*—In proceeding, on an application for execution of decree, to try the question of limitation by seeing whether, under the law, there was any effectual proceeding taken by the decree-holder in furtherance of the execution of his decree to keep it alive, a Court has not *refused* jurisdiction in the matter, but has exercised it. *In the matter of* KALEE PERSAUD CHOWDHRY v. RAM SOONDUR SIRCAR, **12 W. R. 129.** (9 W.R. 386, *F.*)

(76) *High Court—Error on facts—No question of jurisdiction—No interference by High Court.*—Where a Court has jurisdiction to try a case, and has tried it, the High Court will not interfere with the decision of the lower Court merely because that there is error apparent in the decision on the facts. *Petition of* PEAREELAL SAHOO, **7 W.R. 130.** [*R.*, 1 A. 101.]

(77)—*Charter Act, s.* 15—*Extraordinary powers of High Court—Jurisdiction.*—It is only in cases where the lower appellate Court has exercised jurisdiction where it has none by law, or has refused to exercise jurisdiction when it clearly has, that the High Court can interfere under s. 15 of the Charter Act. But in cases in which no appeal lies to it, it cannot interfere under that section with the decision of the lower appellate Court, even if it is worng in law or has proceeded upon a misconception of the facts of the case. KALEE HUR DOSS v. ROODRESSUR CHUCKERBUTTY, **15 W. R. 90.** [*R.*, 1 A. 101, 13 C.W.N. 605.]

(78) *Charter Act, s.* 15—*Powers of High Court under.*— An order which, if right, would be admittedly passed with jurisdiction cannot be said to be made without jurisdiction, when wrong. Under s. 15 of the Charter Act, the High Court will not interfere except in cases where there is a refusal to exercise jurisdiction properly given, or where there is an improper exercise of jurisdiction. KHOWAZ RAM BUX SINGH v. BISHENDHAREE GEER, **23 W.R. 402.** [*R.*, 1 A. 101.]

(79)—*Act* VIII *of* 1869 (*B.C.*)—*Attachment—Claim—Postponement of sale—Security not taken—Jurisdiction—High Courts Act s.* 15—*Revision.*—Where, in a case under Act VIII of 1996 (B.C.) a claim is preferred in respect of property attached, and the Court postpones the sale without taking security or having the decree amount deposited, it is an erroneous proceeding in a case in which the Court has jurisdiction and is exercising it, and the High Court has no jurisdiction under s. 15 of the High Courts Act to interfere and set the decision aside. *In the matter of* J. G. BAGRAM, **20 W. R. 10.** [*R.*, 22 W.R. 277, 1 A. 101, 19 C. 544, F.B.]

(80) *St.* 24 *and* 25 *Vict., c.* 104, s. 15—*Power of High Court—Act VIII of* 1859, *ss.* 206, 363 —*Refusal of party to attend as witness.*—The High Court refused to interfere, in the exercise of its general powers of superintendence, with

Superintendence of High Court—*continued.*

an order of a lower Court which, though apparently arbitrary and indiscreet, that Court was authorized by law to make. *In the matter of the petition of* JANKEE BULLUB SEN, **3 B. L.R. Sup. Vol. 716, F.B.=7 W.R. 519.** [*R.*, 1 A. 101, F.B., 23 C. 610; *Expl.*, 12 W.R. 406.]

(81)—*Jurisdiction—Miscellaneous appeal—High Court's powers.*—Where, in execution of the decree of a Court of Small Causes against immoveable property belonging to the judgment-debtor, the property was attached and sold by the Zillah Court, but the Judge refused to confirm the order of sale, *held* that the decision of the Judge was upon a matter entirely within his own jurisdiction and upon which there was no appeal. When the Courts below exceed their jurisdiction or refuse to exercise it, the High Court can interfere, but it cannot do so (except by way of appeal), on the sole ground that the lower Court's decision has been erroneous on a point of law. *In the matter of the petition of* DURGA CHARAN SIRKAR, **2 B. L R.A.C. 165=11 W.R. 23.** [*F.*, 18 W.R. 289, 1 A. 101, F.B.; *R.*, 11 W.R. 402, 23 W.R. 402.]

(82)—*Application for certificate of representation—Inquiry into genuineness of alleged will—Proceedings under ss.* 170 *and* 171, *Crim. Pro. Code—Discretion of Court—Interference by High Court.*—The widow of S applied for a certificate of representation. Her application having been opposed by one K who produced what he alleged to be a will of S giving him certain powers over the estate, the Judge ordered that a certificate should be granted to K. The widow subsequently petitioned to the Judge to examine her witnesses and to make further inquiry into the genuineness of the will, and the Judge, after examining one of her witnesses, considered that there were sufficient grounds for investigating the charge of forgery and directed that K should be sent to the Magistrate. *Held* that, though the Judge did not properly exercise his discretion in making the order directing that K should be sent to the Magistrate, the High Court had no authority to interfere with the order, as it was made with jurisdiction. Under s. 171, Crim. Pro. Code, a party to civil proceedings if he desires to proceed against the opposite party in the way of instituting a charge of an offence under any of the sections therein enumerated, may apply to the Court for its sanction to such proceedings, and the Court may thereupon give or refuse its sanction. The initiative is taken by the party interested and the Court takes no part in it except in the way of giving or withholding its sanction. But s. 170 contemplates cases in which the Court itself, for sufficient reason, takes the initiative, and it does so when, in the course of any proceeding, it clearly and distinctly appears that some of the parties are guilty of the offences previously specified, and for some reason or other the duty of prosecuting devolves on the Court. The Court should not proceed in the manner there described except where the propriety or

Superintendence of High Court—*continued.*

necessity of doing so in unmistakable. *In the matter of* KOONJ BEHARE GHUR, **11 W.R. 171.**

(83)—*St.* 24 *and* 25 *Vic.*, *c.* 104, *s.* 15—*Superintendence—Jurisdiction of High Court—Execution of decree.*—In execution of a decree, the only parties that are before the Court, and over whom the Court has jurisdiction, are primarily the judgment-creditor and the judgment-debtor; and if any third party wishes to intervene and to have any rights of his decided in reference to the property disposed of as between the judgment-creditor and the judgment-debtor, he can come in only under certain conditions or specific provisions of law When a claimant can only be allowed to come in under certain provisions of law, a person who appears on behalf of that claimant, must show that he has a right to be heard. Where a claim was disallowed to certain property attached in execution of a decree, and the property was sold and after satisfaction of the decree, it was ordered that the surplus proceeds should be rateably distributed among the judgment-creditors who had subsequently attached, *held* that the Principal Sudder Amin had no jurisdiction to make another order setting aside the previous order for distribution, so far as it affected some of the creditors, on the application of the unsuccessful claimant again preferring his claim to the property. The High Court could, therefore, interfere to set it aside under its general power of superintendence. Excepting in some special cases of obvious and gross illegality, the High Court cannot be called upon to exercise the extraordinary powers given to it by s. 15 of the Charter Act, as if they were ordinary powers of appeal. *In re* MAHARAJADHIRAJ MAHATAP CHAND BAHADUR, **2 B.L.R.A.C. 217=11 W.R. 54.** [*R.*, 1 A. 101, F.B.]

(84)—*Civ. Pro. Code*, s. 622—*Final judgment of competent Court—Superintendence of the High Court.*—A decision of a competent Court, whether right or wrong, which by law is final and without appeal, when the Court has not acted, in the exercise of its jurisdiction, illegally or with material irregularity, cannot be set aside under s. 622 of the Civ. Pro. Code. MUHAMMED YUSUF KHAN v. ABDUL RAHMAN KHAN, **16 C. 749=16 I. A. 104, P.C.=5 Sar. 362.** [*F.*, L.B.R. 1893—1900, 548; *Cons.*, 1 C.W.N. 617; *R.*, 13 A. 533, 17 M. 410 F.B., 2 O.C. 67, 27 M. 504, 25 A. 509=23 A.W.N. 104.]

(85)—*Interference by High Court in special appeal — Conditions.* — The High Court will always refuse to interfere with the appellate judgment of a lower Court, unless it commits some error of law or is under some misapprehension of law. NOOR ALI MIAN KHONDKAR v. ASHANULLAH, **11 C. 608.**

(86)—*Order refusing to rectify decree—Appeal—Powers of High Court.*—The general powers of the High Court are not sufficiently extensive to enable it to hear an appeal against an order of a Zillah Judge refusing to rectify a decree

Superintendence of High Court—*continued.*

under which the appellant was unable to pay certain costs. MAHOMED BUSHEEROOLLAH CHOWDHRY v. RAMKANT CHOWDHRY, **9 W. R. 394.** [*R.*, 1 A. 101.]

(87)—*High Court—Irregular proceedings of lower Courts—Separate remedy open to party affected—Interference by High Court—Charter Act*, s. 15.—Where an order of the lower Court is tainted with irregularity, without causing failure of justice, and there is a separate remedy open to the party affected by the order, the High Court would not interfere under the Charter Act, s. 15. BISHNO CHUNDER BHATTACHARJEE v. SHOSHEE MOHUN PAL CHOWDHRY, **22 W.R. 277.**

(88)—*Charter Act*, s. 15—*Regular suit available.*—Where there is a remedy by a regular suit, the High Court cannot interfere by the exercise of its extraordinary powers under s. 15 of the Charter Act. *In the matter of the petition of* A. B. MILLER, **4 B.L.R.A.C. 72, Note=12 W.R. 103.**

(89)—*Mortgage decree—Decree directing sale of all mortgaged properties—Discretion to bring to sale one of the properties—Charter Act*, s. 15—*Extraordinary powers of High Court—Existence of remedy by regular suit.*—Where a person obtains a decree enabling him to recover the mortgage-debt by sale of the two mortgaged premises, he is in law entitled to proceed against both or either of those properties as he thinks proper. Where there is a remedy by a regular suit, the High Court cannot interfere by the exercise of its extraordinary powers under s. 15 of the Charter Act. KHORSHED ALI v. CHOWDHRY WAHID ALI, **15 W.R. 170.** [*R.*, 1 A. 101.]

(90)—*Act* VIII *of* 1859, *s.* 246—*Attachment—Claim—Possession—High Courts Act*, s. 15—*Remedy by regular suit.*—Where a person prefers a claim to property attached alleging that he had purchased it from the judgment-debtor before the attachment, the Court is bound under Act VIII of 1859, s. 246, to enquire into the question whether the property was purchased by the claimant *benamee* for the judgment-debtor or not, and whether the property is or is not in the possession of the party against whom the execution is sought or of some other person in trust for him. It is only in cases where there is no remedy that the High Court ought to interfere under the special provisions of the Charter Act, and not where the complainant has a remedy by a regular suit. HUREEHUR MOOKERJEE v. NOBIN CHUNDER DOSS, **20 W.R. 202.** [*R.*, **1 A.** 101.]

(91)—*Reg.* II *of* 1827, *s.* 5—*Civ. Pro. Code*, ss. 270, 271—*Interference in exercise of High Court's extraordinary jurisdiction.*—Where the matter in dispute is between rival decree-holders and not arising between the parties to the suit, the High Court will not exercise its extraordinary jurisdiction, for the party affected can bring a regular suit against the others. MAHASHANKAR HARISHANKAR v. VALIBHAI UMANJI, **6 B.H.C A.C. 174.**

Superintendence of High Court—*continued.*

(92)—*Rival decree-holders—Execution of decree—Charter Act*, s. 15—*Discretion of High Court.*—A, a decree-holder, allowed B, another decree-holder, to obtain a decree in a regular suit entitling him to follow the disputed property in execution of his decree and had nothing in the way of moving the Court by a regular suit to make the property liable for his decree. Further, he allowed another decree-holder to apply for attachment and sale of the suit properties, in execution of his decree. A's application for attachment and sale having been rejected, he applied to the High Court under s. 15 of the Charter Act after the expiry of 90 days. *Held*, that this was not a case in which the High Court could exercise the extraordinary powers vested in them under the above section and that the applicant should seek his remedy only in a regular suit. *In the matter of* KALEE KISHORE SEN v. J.P. WISE, **17 W.R. 477.**

(93)—*Sale of moveable property in execution—Order setting aside sale—Power of High Court to interfere—Procedure.*—In the case of a sale of moveable property in execution of a decree, the Court has no authority to enquire into any objections raised to the sale by the judgment-debtor. If there had been any irregularities in the sale-proceedings, the remedy is an action for damages. Had there been fraud, such fraud might constitute a cause of action to set aside the sale by separate suit, but does not give the Court any jurisdiction to interfere summarily with the sale. There is no appeal provided for in such cases by the law, and the High Court has no power to interfere with the order of the lower Court setting aside the sale and to put matters right, even though the lower Court has acted wholly without jurisdiction and has done injury to a *bona fide* purchaser. DA COSTA v. HALL, **5 W.R. Mis. 25.** [*F.*, 7 W.R. 277; *Cons. and doubted*, 8 W.R. 109; *D.*, 11 W.R. 511; *Expl. and D.*, 12 W.R. 406; *Expl.*, 14 W.R. 9.]

(94)—*Act* VIII *of* 1859, *s.* 269—*Resistance or obstruction to delivery of possession—Order made without jurisdiction—Charter Act*, s. 15—*High Court's interference.*—The High Court refused to interfere under s. 15 of the Charter Act with an order lawfully made by a Judge under s. 269 of Act VIII of 1859, upon a complaint of resistance or obstruction to the delivery of possession under s. 264 of the Act, and stated that it would not have interfered even though the order was one made without jurisdiction, after the delay, that had taken place, the petitioners having a remedy by regular suit to establish his right. MUSSAMUT JUHOORUN BEGUM v. SYUDMAHOMEDWAJED.—**18 W.R. 87.** [*R.* 33, C. 487=3 C.L.J. 293.]

(95)—*Civ. Pro. Code*, 1882, *s.* 622. *s.* 103 (=*O.* IX, *r.* 9), *s.* 283 (=*O.* XXI, *r.* 63), *s* 278 (=*O.* XXI, *r* 58), *s* 647 (=*s* 141, *new Code*) *—Objection under s.* 278—*Striking off for default—Remedy—Revisional power of High Court — Presumption as to jurisdiction—*

Superintendence of High Court—*continued.*

Revisional Powers of High Court—When can be exercised.—Where an objection under s. 278, Civ. Pro. Code, entertained and adjourned by an *Additional Subordinate Judge*, subsequently somehow came before the *Sub-Judge* who struck off the case for default; and where neither the order of transfer of the case to the *Sub-Judge* under s. 25 of the Code was on the record, nor was it otherwise shown how he obtained jurisdiction to deal with the objection; *held* that the High Court should not interfere in revision and that the proper remedy for the petitioner was an application under s. 103 read with s. 647, or a suit under s. 283. [*Appl.*, 15 A. 405 =13 A.W.N. 172.] *Held* also, in the same case, on the principle *omnia præsumuntur rite et solemniter esse acta*, that the High Court should not presume that the subordinate Court had acted without jurisdiction. The special and extraordinary remedy by invoking the revisional powers of the High Court should not be exercised, unless as a last resource for an aggrieved litigant. SHEO PRASAD SINGH v. KASTURA KUAR, **10 A. 119 = A.W.N. 1888, 26.** [*R.*, 12 O.C. 109, 30 A. 331=5 A.L.J. 297 = A.W.N. 1908, 142.]

(96)—*High Court's powers of supervision—Act* XIV *of* 1859, *s.* 15—24 *and* 25 *Vict.*, *c.* 104, *s.* 15.—A party dissatisfied with a legitimate finding under s. 15 of Act XIV of 1859 has no remedy by way of appeal or review, but has only a special remedy by the institution of a suit in the Civil Court. He cannot invoke the interference of the High Court under s. 15 of the Charter Act (24 and 25 Vict., c. 104, s. 15), except in cases where the Judge has exercised a jurisdiction which he has not, or has refused to exercise a jurisdiction which he has. DOORGA SOONDUREE DEBIA v. KASHEE KANT CHUCKERBUTTY, **14 W.R. 212.** [*F.*, 1 A. 101.]

(97)—*Civ. Pro. Code, Act* VIII *of* 1859, *s* 351—*Act* XXIII *of* 1861, *s.* 35—*Remand by lower appellate Court—Application to High Court to set aside such order whether maintainable.*—A mortgagee having foreclosed the mortgage, sued the representatives of the original mortgagor for possession of the property mortgaged. The Court of first instance decreed his claim. The lower appellate Court remanded the case for re-trial. Against this order the plaintiff presented a miscellaneous application to the High Court. *Held* that as it was competent to the petitioner to have presented an appeal from the order of the Judge remanding the suit, the High Court had no power under s. 35, Act XXIII of 1861, to entertain a miscellaneous application to set aside the Judge's order. MEER TUKEE ALI v. MEER SAADAT ALI, **5 N.W.P. 14.**

(98)—*Civ. Pro. Code*, 1882, *ss.* 588 (*cl.* 6), *and* 622—*Appeal—Power of High Court to revise.*—In execution of an *ex parte* decree, a tenure was sold in Court-auction. The judgment-debtor made an application to set aside the *ex parte* decree and the decree was set aside. The decree-holder applied under s. 622 of Civ. Pro. Code, to set aside the order of the lower Court. *Held* that the High Court ought not to interfere under s. 622 inasmuch as an appeal lay from the order. RAM KRISTO ROY v. NAIK TARA DASS, **12 C.L.R. 449.** [*D.*, 8 C.L.J. 43=11 C.W.N. 112.]

(99)—*Civ. Pro. Code*, 1882, *s.* 622—*Object of section—Interlocutory orders—Interference by High Court.*—The purpose with which s. 622 of the Civ. Pro. Code, 1882, was framed was to enable a party to a suit to get a decision or order of a lower Court rectified by the High Court when there would otherwise be no remedy. So, interlocutory orders against which no immediate appeal lies, but in respect of which a remedy is supplied by s. 591 which provides that the order may be made a ground of objection in the appeal against the final decree, cannot be interfered with by the High Court under s. 622. MOTILAL KASHIBHAI v. NANA, **18 B. 35.** [*F.*, 19 A.W.N. 210, 30 M. 230=17 M.L.J. 79=2 M.L.T. 88, 12 O.C. 405; *Appl.*, 1 S.L.R. 120, 11 O.C. 238; *R.*, 22 P.L.R. 1900, 140 P.L.R. 1904=14 P.R. 1904, 2 S.L.R. 22.]

(100)—*Transfer of execution proceedings from one Court to another—Discretion of Judge so transferring—Interference by High Court—Civ. Pro. Code*, 1882, *s.* 622.—Where a Judge, in the exercise of his discretion, transfers execution proceedings under a decree from one Court to another, the High Court will not, except under circumstances of a very special nature, interfere with such discretion under s. 622 of the Civ. Pro. Code. KRISHNA VELJI MARWADI v. BHAN MANSARAM, **18 B. 61=P.J. 1893, 258.** [*R.*, U.B.R. 1905, 3rd Qr., Civ. Pro. Code, p. 28.]

(101)—*Decision of Special Judge on questions of fact—Dekkhan Agriculturists' Relief Act* (XVII *of* 1879, *Bombay*)—*Interference by High Court—Civ. Pro. Code*, 1882, *s.* 622.—Where, under the Dekkhan Agriculturists' Relief Act (XVII of 1879, Bombay), the Special Judge entertains a clear opinion that the findings of the Court of first instance on questions of fact are erroneous, and exercises his discretion in setting aside the decree on that ground, the High Court will not, in the exercise of its extraordinary jurisdiction under s. 622, Civ. Pro. Code, 1882, interfere with that discretion except under most exceptional circumstances. RAYACHAND MAYACHAND v. SULTAN RAHIMBHAI, **18 B 347.** [*R.*, 19 B 286.]

(102)—*Petition to High Court—Allegations in affidavit—Powers of High Court.*—The High Court will refuse to exercise their extraordinary powers as regards a finding of the lower Court that a summons had not been served, where the petitioner (who disputes the finding) omits to allege in the affidavit that the summons was served. *In the matter of* BIDDYABUTTEE DOSSEA, **14 W.R. 8.**

(103)—*Execution sale—Cancellation of—Irregularity—Jurisdiction.*— Where an execution

Superintendence of High Court—*continued.*

sale of an estate in the towjee of Nuddea was confirmed, fifteen mouzahs of which were in the 24 Pergunnahs, the question as to how far those mouzahs were conveyed to, or a valid title to them was created in favour of the purchaser, was held to be one which must be raised between him and the judgment-debtor in a place other than the High Court, and that the High Court should not set aside the sale upon this ground in exercise of their powers of superintendence. It is not because an estate has been sold at auction for less than its market value that the judgment-debtor is entitled to have the sale set aside, and the property put up for sale again. He must show that such inadequate price has been directly and presumably the result of the irregularity in the sale of which he complains. HUBEEBOOL HOSSEIN v. MR. W. O. ALLENDER, MANAGER, ON BEHALF OF THE LAND MORTGAGE BANK, **14 W.R. 44.**

(104)—*Execution—Rejection of security offered for stay of proceedings — Interference of High Court under s. 15 of its Charter—Civ. Pro. Code*, 1859, *ss.* 209, 221.—S. 15 of the Charter Act does not justify the High Court in interfering with an order of a Court rejecting, as insufficient, the security offered by a judgment-debtor for staying proceedings in execution till a suit brought by him against the judgment-creditor is decided. The most obvious course in such a case is that suggested by the latter part of s. 209, Civ. Pro. Code, which directs, that "whenever a suit shall be pending in any Civil Court, against the holder of a decree of such Court by the person or persons against whom the decree was passed, the Court may, if it appear just and reasonable to do so, stay execution of the decree either absolutely or on such terms as it may think just until a decree should be passed in the pending suit." Under s. 221, Civ. Pro. Code (of 1859), also, a Court executing a decree has the power, in every step in execution, of staying the proceedings before going further. JODOO MONEE DOSSEE, *Petitioner*, **11 W.R. 494.** [*R.*, 28 C. 734.]

(105)—*First Court's order to make up stamp deficiency—High Court's powers to interfere in revision.*—The High Court has no power to interfere, under its revisional powers, with an order passed by the Court of first instance to make up the deficiency of stamp. *In the matter of* OMRAO MIRZA v. MARY JONES, **12 C.L.R. 148.** [*Diss.*, 14 C. 768; *F.*, 170 P. L.R. 1903; *Rel. on*, 14 C.W.N. 343; *R.*, P.L. R. 1900, p. 22.]

(106)—*Bengal Act* VIII *of* 1869, *s.* 102—*Suit for rent*—24 *and* 25, *Vict.*, *c.* 104, *s.* 15—*Superintendence of High Court.*—A suit for arrears of rent, decreed by the first Court, was dismissed by the lower appellate Court, on the ground that the plaintiff, being only a sharer, could not sue separately for her portion of rent. A special appeal was preferred. *Held* that the judgment and not the decree was to be looked at in applying s. 102 of Act VIII of 1869 (B.C.). The judgment showed that a question of title was not even considered and the decree in

Superintendence of High Court—*continued.*

general could not be considered to have determined it. No appeal, therefore, lay under that section. [*R.*, 25 W.R. 153.] The powers conferred by the 15th section of 24 and 25 Vict., c. 104, ought not to be exercised in such a way as to indirectly do what the law forbids to be done directly. Where the lower appellate Court having jurisdiction has only erred in the exercise of it, and no appeal is allowed by law, the High Court is not at liberty to exercise its superintending power under Charter Act. KARIM SHEIKH v. MUKHODA SOONDERY DASSEE, **15 B.L.R. 111=23 W.R. 268.** [*R.*, 1 C. 180=24 W.R. 440.]

(107)—*Act* X *of* 1859, *s.* 159—*Collector's judgment in appeal—Finality—High Court's Act, s.* 15—*Superintendence of High Court over Collector's Court.*—Under s. 159, Act X of 1859, the Collector's order in appeal is final whether his decision was one passed on the merits of the case or disposing of the appeal on preliminary objections. The words of s. 15 of the High Courts's Act (24 and 25 Vic., c. 104), which gives the High Court the power of superintendence over all Courts subject to its appellate jurisdiction, refer to the general appellate jurisdiction of the Court and not to particular cases in which that jurisdiction is extraordinarily exercised, or to a superintendence which is placed by a distinct law in the Commissioners and the Board of Revenue. Therefore, the superintendence of the High Court does not extend over a Collector's Court. HURO MOHUN MOOKERJEE v. KEDARNATH DOSS, **5 W.R. Act X, Rul. 25.** [*N.F.*, 15 C. W.N. 863=14 C.L.J. 284.]

(108)—*Appeal before Collector without objection by respondent—Application for revision of Collector's order—Jurisdiction—High Court—Act* XXIII *of* 1861, *s.* 35—*s.* 15, *Charter Act.*—The applicant in this case who was respondent in the Collector's Court allowed the appeal to be heard without objection. He then asked the High Court to exercise the general powers of superintendence vested in it by s. 35 of Act XXIII of 1861, and s. 15 of Act 24 and 25, Vic., cap. 104, and to set aside the proceedings before the Collector as being without jurisdiction. *Held* that the fact that he had allowed the appeal to go on without, in any way objecting to the jurisdiction of the Collector was sufficient to prevent him from moving the High Court to exercise its extraordinary powers of relief in his favour by setting aside proceedings of which he was willing enough to avail himself so long as there was a chance of their turning out to his own advantage; and the High Court therefore declined to interfere. DROBO MOYEE DABEE v. BIPIN MUNDUL, **10 W.R. 6.** [*Diss.*, 13 B. 650; *Appl.*, 126 P.R. 1906; *R.*, 14 A. 413, 33 C. 352, F.B.=2 C.L.J. 259=9 C.W.N. 1065, 38 C. 832=15 C.W.N. 863=14 C.L.J. 284=11 Ind. Cas. 207; *D.*, 14 W.R. 254.]

(109)—*Letters Patent, s.* 15.—*High Court's powers—Jurisdiction—Act* X *of* 1859, *ss.* 109, 153.—A tenure having been sold for arrears of

Superintendence of High Court—*continued.*

rent, the Collector ordered delivery of possession to the purchaser, but on discovering subsequently, on the motion of an objector, that the same tenure had been already sold for arrears due on it, the Collector re-called his order. As it was doubtful whether the Collector had or had not the power to review an order passed in execution, and with reference to the equity of the case being in favour of the order for recall, *held*, that it would not be a proper exercise of the powers vssted in the Court by s. 15, Letters Patent, to interfere with the last order. NARAYANI DAYI DEBI v. CHANDI CHARAN CHOWDHRY, **3 B.L.R. App. 65 = 11W.R. 512.**

(110)—*Order in execution passed by Collector—Appeal—Act* XXIII *of* 1861, *s.* 35—*Legality of Collector's order whether can be looked into by High Court on appeal.*—In this appeal from an order of a Judge reversing a sale for arrears of rent under Act X of 1859, on the ground of irregularity producing substantial damage to the judgment-debtor, the appellant contended that the Judge had no jurisdiction, the Collector's order being one passed after decree, and relating to the execution thereof, and the High Court decided that, under the circumstances, the Judge had no jurisdiction to take up the appeal. The respondent, however, argued, that, granting the Judge's want of jurisdiction, the High Court was bound, under s. 35, Act XXIII of 1861, not only to annul the illegal order of the Judge, but to pass such other order in the case itself as may seem just and proper, and urged that the order of the Collector was altogether illegal and improper. The High Court, however, *held* that the powers given to it by s. 35 of Act XXIII of 1861 did not permit the looking into the legality or otherwise of the Collector's orders regarding the sale, as judgment-debtor had not preferred his appeal in the first instance to the Commissioner, to whom the party should have appealed, in the first place under s. 35 of the Act. SIRDAR GOLAB SINGH v. RAM BUDDUN SINGH, **4 W.R. Act X, Rul. 28 = 1 Ind. Jur. N. S. 1.**

(111)—*Suit in Mamlatdar's Court—Erroneous procedure of Mamlatdar, High Court—Revision.*—The procedure of the Mamlatdar in this case in having referred for authority to a circular of the Executive Government was irregular, as, in the exercise of judicial functions, he was bound to be governed by the law as he understood it, or as it had been expounded by superior judicial authority, and not as it was expounded by unjudicial persons. But the mere fact of the Mamlatdar having fallen into such formal error cannot make it a case fit for the invoking of the interference of the High Court by way of exercising its extraordinary jurisdiction so as to upset the irregular order of the Mamlatdar. NANA BAYAJI v. PANDURANG VASUDEV, **9 B. 97.** [*R.*, 13 B., 552; 17 B. 645; *D.*, 10 B. 78.]

(112)—*Act* VIII (*B C.*) *of* 1869, *s.* 102—*Suit for rent—Title—Second appeal—Civ. Pro. Code,*

Superintendence of High Court—*continued.*

Act X *of* 1877, *s.* 622.—Two persons were contesting with one another as to who was rightfully entitled to the property in which the defendants had tenures, and both of them brought rent suits against the tenants. These rent suits came first before the Subordinate Judge and afterwards before the District Judge. Subsequent to the institution of those rent suits, the plaintiff in one of them sued the plaintiff in another to establish his title, and while that suit was pending, the District Judge allowed the rent suits to stand over, thinking he might decide them in accordance with the decision which might be arrived at in the title suit. The title suit having been decided against the plaintiff, the Judge dismissed his rent suits against the tenants. *Held*, on appeal, that no question of title could be said to have been decided in such rent-suits and that consequently, no second appeal would lie. Under the circumstances, there was no ground for the interference of the High Court under s. 622 of the Civ. Pro. Code. DURGA NARAIN MISSER v. GOBURDHAN GHOSE, **9 C. L. R. 86.**

(113)—*High Court—Powers of superintendence—Per Seton-Karr and Jackson, JJ.* (*Norman J., dissenting*).—The High Court is not competent, either under s. 15 of the Charter Act or under s. 16 of the Letters Patent, to interfere, as a superintending Court, in a case where an old decree, passed at a time when the Collector was not under the jurisdiction of the late Sudder Court, is being executed. GOPAL SING v. THE COURT OF WARDS, **7 W. R. 430.**

(114)—*Decision of Small Cause Court without jurisdiction—High Court competent to interfere, only on reference under s.* 22 *of Act* XI *of* 1865.—This was an application to the High Court to call for the record of a case decided in a Court of Small Causes, on the ground that the Small Cause Court acted without jurisdiction and that the High Court should set aside those proceedings under the provisions of s. 35 of Act XXIII of 1861. The law having provided a certain procedure by which a party may move the Small Cause Court to bring the matter to the notice of the High Court, namely, by stating a case and referring to the High Court for an opinion and orders under s. 22 of Act XI of 1865, and the petitioner not having followed such course open to him under the law, the High Court declined to interfere. MESSRS. R. E. BELL AND CAMRBELL v. THAKOOR DOSS GOSSAN, **6 W.R. Mis. 26.**

(115)—*Suit of Small Cause nature—Jurisdiction—S.* 15 *of High Court's Charter.*—Where in a case of a Small Cause Court nature, to recover the value of the produce or certain lands alleged to have been illegally cut and carried away by the defendants, the lower appellate Court found upon the real issues between the parties that the plaintiff was entitled to recover the money he claimed, *held* the mere fact that the lower Court had no jurisdiction to determine a part of the dispute, *viz.*, whether the land whose produce was carried

Superintendence of High Court—*continued.*

away was or was not in British territory, was not a sufficient ground for the exercise of the extraordinary powers of the High Court under s. 15 of its Charter. BHYRUL SINGH v. JHOGRU PATNEE, **11 W.R. 506.**

(116)—*Court of Small Causes, decision of—Interference by High Court*—24 *and* 25 *Vict., c.* 104, *s.* 15—*Act* XI *of* 1865, *s* 4.—Where a Court of Small Causes rejects the application of the defendant in a suit to send for a document filed in another suit (which the defendant wanted to put in as evidence), *held* that the High Court cannot under s. 15, c. 104 of 24 and 25 Vict., and s. 4 of Act XI of 1865, interfere. *In the matter of* MUNNOO SINGH, **19 W. R. 306.** [*R.*, 1 A. 101.]

(117)—*Suit of Small Cause nature—Special appeal—Act* XXIII *of* 1861, *s.* 27—*High Court's interference—Charter Act, s.* 15.—In cases where s. 27, Act XXIII of 1861, forbids any special appeal, the High Court has no right to interfere under s. 15 of the Charter Act for the purpose of re-hearing the case upon a point of law. KETIKI CHUTIANY v. LUKHEE KANT BOSE, **24 W.R. 440.**

(118)—*Act* XVII *of* 1873—*Submitting decree to Commissioners—Error of law—Jurisdiction.*—Where judgment-creditors submit their decree to the Commissioners appointed under Act XVII of 1873, as if it were a new and unascertained claim, they commit an error of judgment. If in such a case the Commissioners take the opportunity of expressing in connection with that claim, their opinion upon a matter which has already been determined by the decisions of the High Court and of the Privy Council, the High Court has no authority to inquire into an award of the Commissioners. OMRAO BEGUM v. COMMISSIONERS APPOINTED UNDER ACT XVII OF 1873, **24 W.R. 394.**

(119)—*Freedom from arrest in Court—Principle violated—High Court's power of interference under Charter Act, s.* 15.—Although the principle of freedom from arrest in a Court *eundo, morando et redeundo*, is more or less a recognised maxim of law, the High Court will refuse to exercise the extraordinary powers vested in it under s. 15 of the Charter Act, and to declare that a Magistrate who does not interfere with the process of the peon of the Civil Court, which was being served in his Court on a person accused, but acquitted, has wrongly refused jurisdiction. *In the matter of* GUZEREE LALL, *Petitioner*, **13 W.R. 393.**

(120)—*Jurisdiction—Perjury or forgery in Civil Court—Power of High Court—Stay of criminal proceedings—Crim. Pro. Code*, 1861 (*Act* XXV *of* 1861), *s.* 171.—If, in the course of hearing a suit, a Civil Court commits a party to the suit for trial on a charge of perjury or forgery, or directs that the case be made over to a Magistrate for investigation of such charge, the High Court, in the exercise either of civil or criminal jurisdiction, cannot, in the event of a regular or special appeal being lodged against the decision of the lower Court, interfere to stay the criminal proceedings until the appeal shall have been heard and determined. *In the matter of the petition of* RAMPRASAD HAZRA, **B.L.R. Sup. 426, F.B. = 5 W R. Mis. 24.** [*F.*, 6 C. 308, 23 C. 610; *Appl.*, 1 A. 17; *Cons.*, 34 C. 848 = 11 C.W.N. 712 = 6 C.L.J. 531; *D.*, 31 M. 510 = 4 M.L.T. 186 = 18 M.L.J. 466 = 8 Cr. L.J. 390.]

(121)—*Bombay District Municipal Amendment Act* (II *of* 1894), *s.* 23—*Order by District Judge rejecting application to set aside Municipal election—Order for payment of opponent's costs, whether could be revised by High Court under s.* 622, *Civ. Pro. Code.*—A District Judge acting under s. 23 of the Bombay District Municipal Amendment Act, 1894, is not a Court within the meaning of the word in s. 622 of the Civ. Pro. Code, 1882, and the High Court, therefore, has no jurisdiction to revise his orders rejecting an application to set aside the election of certain Municipal Councillors and directing the applicant to pay the actual costs incurred by the opponent. BALAJI SAKHARAM v. MERWANJI NOWROJI, **21 B. 279.**

(122)—*Jurisdiction—High Court—Municipality—Discretion—Repairs.*—The Chairman of the Howrah Municipality brought a suit against the petitioner for a sum of money alleged to be due on account of expenses incurred in cleaning a tank belonging to the petitioner. The first Court held that the Municipality had expended more money than was necessary. On appeal the Judge set aside the decision and gave a decree for the full amount on the ground that the matter was purely within the discretion of the Municipality. On application by the petitioner, the High Court refused to interfere. *In the matter of* JOGESH CHUNDER DUTT, **16 W R. 285.**

(123)—*Ministerial officers, dismissal of by District Judge—Civil Courts Act* (VI *of* 1871), *ss.* 35, 36—*Superintending powers of High Court—Charter Act, s.* 15.—The extraordinary powers of superintendence possessed by the High Court under s. 15 of the Charter Act should not be exercised except for the purpose of protecting a complainant in a matter wherein otherwise he would not be able to obtain redress coupled with the further qualification that the applicant must show himself worthy of the interference of the Court. So, where a person, who was dismissed from the post of Sheristadar of a Munsiff's Court by a District Judge complained to the High Court that the District Court acted *ultra vires* in dismissing him, *held* that, it being open to the applicant, under the Civil Courts Act, to seek his remedy from the Local Government, the High Court could not interfere. *In the matter of* AKBAR ALI, **19 W.R. 148.** [*R.*, 20 W.R. 470.]

(124)—*Ministerial officer—Dismissal of Sheristadar on complaint of Munsif—Power of High Court—Act* VI (*B.C.*) *of* 1871.—A Sheristadar dismissed by the Judge on the complaint of a Munsif, if aggrieved, may apply to

Superintendence of High Court—*continued.*

the Local Government under Act VI (B.C.) of 1871 ; but the High Court cannot interfere in the matter in the exercise of its powers of superintendence. *In the matter of* FAKEER CHAND LALL, *petitioner*, **20 W.R. 470.**

(125) —*Practice—Reviews—Jurisdiction—Act* VIII *of* 1859, ss. 377, 378.—In the case of an application for review after more than three years from date of order, the Principal Sudder Amin may decide that there were just grounds for the delay, and then on the same proceeding admit the review. Though ss. 377 and 378 contemplate two classes of circumstances, there is nothing in them to show that the finding under the one section and the order under the other, cannot be recorded in one and the same proceeding. JONNISSA BIBI v. SURJA KANT ACHARJI, **2 B.L.R. A.C. 181=11 W.R. 56.** (9 W.R. 181, *R.*) [*R.*, 13 W.R. 120, 1 A. 101, F. B.]

(126)—*Lease—Suit by heir of lessor for her share of rent—Joinder of parties.*— Where a *kabuliyat* was executed in favour of a person who subsequently died leaving two daughters, one of the daughters cannot sue alone for her moiety of the rent. She ought to sue together with her sister for the whole rent, and if she could not induce her to become plaintiff with her, she ought to make her a defendant. JAGADAMBA DASI v. HARAN CHANDRA DUTT, **6 B.L.R. 526, Note=10 W.R. 108.** [*R* , 6 B.L.R. 523.]

(127)—*Application to revise cases before Provincial Small Causes Court.*—This circular announces rule passed with a view to facilitate applications for the exercise of the powers of superintendence vested in the High Court, with reference to cases before the Mofussil Small Cause Courts. Civ. Cir. No. 13 dated 4th June 1870. **13 W.R. Civ. Cir. 17.**

See ACT XXXV OF 1858, 8 W.R. 375.

See PUN. ACT XVIII OF 1884, s. 13, 42 P. R. 1888.

See APPEAL—DECREE AND EXECUTION OF DECREES, 5 W.R. Mis. 45.

See ARBITRATION—GENERAL, 29 C. 167, P. C.=6 C.W.N. 226=29 I.A. 51.

Superintendence of High Court—*See* COMPANY—WINDING UP OF COMPANY, 5 B.H.C. O.C. 83.

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 6 W.R. Mis. 15.

See EXECUTION OF DECREE—MISCELLANEOUS, 6 W.R. Mis. 96.

See PAUPER APPEALS, 18 B. 454.

See BEN. REG. V OF 1812, s. 26, B.L.R. Sup. 655=7 W.R. 273=2 Ind. Jur. N.S. 178.

See RENT, SUIT FOR, 2 W.R. Act X, Rul. 16, 6 W.R. Act X, 56.

See REVIEW—REVIEW, WHEN LIES, 4 B. H.C.A.C. 87.

Superintendence of High Court—*concluded.*

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 4 B.H.C. A. C. 173.

See SPECIAL OR SECOND APPEAL — GROUNDS OF APPEAL, 6 W.R. 196.

See SPECIFIC RELIEF ACT, 1877, ss. 54, 56, 57 P.R. 1899.

See ST. 24 AND 25, VIC., C. 104, s. 15, 9 A. 104, F. B.=A.W.N. 1886, 309, B.L.R. Sup. Vol. 714=7 W.R. 520.

Powers of—When to be exercised—*See* ST. 24 AND 25 VIC., C. 104, s. 15, 2 C.W.N. 727.

Superintendent.

Trustee, manager or—of a mosque — *See* ACT XX OF 1863, ss. 14, 18, 8 C. 32=9 C.L. R. 433.

Superstitious Uses.

(1)—*Superstitious uses in India.*—The English rule of law which prohibits the bequest of money to superstitious uses has no application in this country. A bequest for the giving of alms for the testator's spiritual benefit is void because the object is both uncertain and not purely charitable. JOSEPH EZEKIEL JUDAH v. AARON HYE NUSSEEM EZEKIEL JUDAH, **5 B.L.R. 433.** [*R* , 15 M. 424, 31 C. 166=8 C. W.N. 273, 5 Bom. L.R. 1010, 33 B. 122=10 Bom. L.R. 417.]

See HINDU LAW—RELIGIOUS ENDOWMENT, 12 B.H.C. 214.

See WILL — CONSTRUCTION, 2 Hyde, 65, 2 B.L R O.C. 148, 15 M. 424.

Supreme Court—Bombay.

See HIGH COURT, JURISDICTION OF BOMBAY.

See LETTERS PATENT, HIGH COURT, 1865.

(1)—*Letters Patent*, 1823, s. 53—*Admiralty jurisdiction conferred.*—The admiralty jurisdiction of the English High Court of admiralty was, by s.53 of the Letters Patent of the Supreme Courts, 1823, conferred on the Supreme Court. **10 B H.C. 110.**

(2)—*Inhabitant—Carrying on business.*—Constructive inhabitancy by carrying on bueiness within the jurisdiction of the Supreme Court of *Bombay*. HER HIGHNESS RUCKMABOYEE v. LULLOOBHOY MOTTICHUND, **6 M.I.A. 234 ; 8 Moo. P.C. 4=1 Sar. 423.**

(3)—*Power of Supreme Court to admit persons as Attorneys and Solicitors.*— The Supreme Court of Judicature at *Bombay* had no power to admit persons as Attorneys and Solicitors to practise in the Courts there, except such as are qualified in the manner pointed out by the *Bombay* Charter and Letters Patent of 1823, establishing the Court, *viz.*, those who have been admitted Attorneys or Solicitors in one of the Courts at *Westminister* or were practising in the Recorder's Court at *Bombay*, at the time of the publication of that Charter. MORGAN v. LEECH, **2 M.I.A. 428=3 Moo. P.C. 368=1 Sar. 215.**

Supreme Court—Bombay—*concluded*.

(4)—*Judges of—Jury.*—By the constitution of the Supreme Courts in *India*, the Judges, for the purpose of the trial of an action, sit as a jury as well as Judges, and the same weight is to be given to a decision of the Judges, in such circumstances, as to the verdict of a jury in England in which the Judge who tries the cause makes no objection. MUSADEE MAHOMED CAZUM SHERAZEE v. MEERZA ALLY MAHOMED SHOOSTRY, **6 M.I.A. 27=8 Moo. P.C. 110=1 Sar. 489.**

Supreme Court—Calcutta.

See HIGH COURT—JURISDICTION OF CALCUTTA.

See LETTERS PATENT, HIGH COURT, 1865.

(1)—*Inhabitant of Benares—Trade and business house in Calcutta—Jurisdiction.*—An inhabitant of *Benares*, trading at *Calcutta*, and having a house of business there, *held*, to be subject to the jurisdiction of the Supreme Court. BABOO JANOKEY DOSS v. BINDABUN DOSS, **3 M.I.A. 175=1 Sar. 263.**

(2)—*Jurisdiction of the Supreme Court, of Calcutta.*—Under the jurisdiction of the Supreme Court at Calcutta, a person, though resident at Benares, is liable to its jurisdiction, if privy to, and co-operating in, a misdemeanour committed within it. Where, therefore, a party resident at Benares was indicted with others before the Supreme Court for a conspiracy, in procuring the prosecutor to be arrested in a fictitious action at law, and the instructions for the arrest were proved, to the satisfaction of the jury, to have originated with the appellant, it was held by the Judicial Committee that, the offence being completed within the jurisdiction of the Supreme Court at Calcutta, that Court had rightly assumed jurisdiction over the parties privy to it; though, from the slight nature of the evidence, they directed a new trial. JANNOKEE DOSS v. THE KING, **1 M.I.A. 67 = 1 Sar. 94.**

See EVIDENCE—DECREES, JUDGMENTS AND PROCEEDINGS IN SUITS, W.R. 1864, 159.

Supreme Court—Madras.

See HIGH COURT, JURISDICTION OF MADRAS.

See LETTERS PATENT, HIGH COURT, 1865.

(1)—*Supreme Court at Madras — Equitable jurisdiction.*—The Supreme Court at *Madras* (established by the *Madras* Charter of 1800) has an equitable jurisdiction, similar to, and corresponding with, the equitable jurisdiction exercised by the Court of Chancery in *England*, over charities. ATT. GEN. v. BRODIE, **4 M.I.A. 190=6 Moo. P.C. 12=11 Jurist 137=1 Sar. 335.**

(2)—*Property of infant—Protection—Registrar—Commissions.*—By a general Order, made on the equity side of the Supreme Court of *Madras*, it was ordered that, "Whenever it shall appear that the property of any infant is unprotected, and not secured for his or her benefit, the Registrar shall, with the previous consent of the Court, or a Judge, institute proceedings on behalf of such infant, for the purpose of protecting his or her person or property." In pursuance of this order, the Registrar of the Supreme Court, upon petition, obtained an order giving him liberty to file a bill in the equity side of the Supreme Court as the next friend, and on behalf of infants for an account of the estate of their father, who died intestate, against their mother, A, the Administratrix; and, notwithstanding an appeal against such order, such bill was filed, to which the defendant put in a plea, which being overruled, a further appeal from such decision was interposed to Her Majesty in Council. By the practice of the Supreme Court, the Registrar is entitled to a commission of 5 *per cent.* on all sums of money paid into Court. *Held*, by the Judicial Committee, that the order of the equity side of the Supreme Court, being made under the general jurisdiction of the Supreme Court, and not under the Statute 2 & 3 Vict., c. 34, was void, it being against public policy to allow an Officer of the Court to institute suits, in the conduct of which he might have a direct personal interest, and the orders made in pursuance thereof, reversed. KERAKOOSE v. SERLE, **3 M.I.A. 329=4 Moo. P.C.459=1 Sar. 286.**

Supreme Courts, Equity Procedure.

See ACT VI OF 1854.

Supreme Courts, Lunacy.

See ACT XXXIV OF 1858.

Supreme Courts, Officers Trading.

See ACT XV OF 1848.

Surbarahkar.

See ACT XL OF 1858, 3 Agra, 220.

Surbarakari Tenures.

See BEN. ACT X OF 1859, ss. 15, 16, 8 B.L.R. 280=16 W.R. 289.

See LANDLORD AND TENANT—TRANSFER OF TENANT'S INTEREST, 9 C. 526=13 C.L.R. 114.

Surety.

1.—GENERAL.
2.—DISCHARGE OF SURETY.
3.—ENFORCEMENT OF SECURITY.
4.—LIABILITY OF SURETY.
5.—MISCELLANEOUS.

See CIV. PRO. CODE, 1908, s. 55.
See CIV. PRO. CODE, 1908, s. 145.
See CONTRACT ACT, 1872, ss. 126—147.
See GUARANTEE.
See PRINCIPAL AND SURETY.

Surety—continued.

——1.—General.

(1)—*Suretyship—Consideration—Forbearance to sue on defendant's request*.—Where the defendant, by a letter, requests the plaintiff to grant time to the debtor for the payment of his debt, and in consequence, the plaintiff brings no suit against the debtor, *until the expiry of the time requested for*, there is forbearance to sue by the plaintiff, so as to constitute it a sufficient consideration to make the defendant liable as a surety. VIRA SADASIVA RAJENDRA UDAYAR BAHADUR v. RAMACHANDRA RAJA, **2 M.W.N. 1911, 145.**

(2)—*Punjab Civil Code, Part* II, *s.* 1, *para.* 6—*Re-opening of suit already decided—Powers of Commissioner—Appeal time—Principal and surety—Cause of action distinct—Debt extinguished only on payment*.—The Commissioner is vested with power to revise the decisions of Courts subordinate to him for special reasons, although no appeal should have been preferred, *provided* such revision takes place within the time prescribed for the hearing of appeals. He cannot therefore reopen a case after the appeal time has expired without any appeal having been filed. In contracts of guarantee or suretyship, the surety is not jointly liable with the principal, his undertaking being collateral and secondary. Though judgment may have been obtained against the principal, yet, if it is not satisfied, an action would clearly lie against the surety. In the Punjab, it is usual (and the practice is convenient) to implead both principal and surety and make them co-defendants when the principal makes default. Still as they are separately responsible, if the creditor elects to sue the principal first and fails to obtain satisfaction from him, there is no legal objection to his subsequently proceeding by separate action against the surety. MAJOR MERCAR v. MR. DECORTANZE, **8 P.R. 1866.**

(3)—*Surety for portion of debt—Payment by surety of such portion—Rights of surety—Rights to benefits of securities held by creditor—Indian Contract Act* (IX *of* 1872). *s.* 141.—The right of a surety, who has paid a debt, to the securities held by the creditor, depends upon principles of equity. The reason of the rule is because, as between the principal debtor and the surety, the former is under an obligation to indemnify the latter. The equity between the creditor and the surety is for the creditor not to do any thing to deprive the surety of his right. But the right of the creditor to hold his securities until his whole debt is paid is paramount to the surety's claim upon such securities, which only arises when the creditor's claim agalnst such securities has been satisfied. One K was largely indebted to the Bank of Bengal in 1889 up to Rs. 3,15,000. The Bank pressed him to give sufficient security for the debt. Thereupon, K mortgaged certain lands of his to the Bank, which were valued at Rs. 1,35,000. The mortgages were stamped to secure this amount only, but were drawn to cover the whole liability of K to the Bank. There were recitals in the instruments to the

Surety—continued.

——1.—General—*continued.*

effect that K owed large sums of money to the Bank on certain bills, and that all sums of money then due by K, or thereafter to become due by him under those bills would be paid off. Certain other securities also were given by the debtor to the Bank. The total sum thus secured was Rs. 1, 90,000 and the unsecured amount was only Rs. 1,25,000. On 9th September 1889, two of the bills on which K was liable to the Bank fell due. The Bank refused to renew the bills unless security for Rs. 1,25,000 was given. At the request of the debtor, the plaintiff agreed to stand security for the amount. This amount, the plaintiff subsequently paid to the Bank and brought the present suit against the Bank and prayed that he might be declared entitled to share in the benefit of the mortgages given as security to the defendant Bank, and that, out of the amount realized from the mortgages, he should be paid an amount proportioned to the amount of K's debt which he had paid to the defendant. The plaintiff contended that the mortgages were given as security for the whole debt of Rupees 3,15,000 due to the Bank, that of this he had paid off to the Bank a part, *viz.*, Rs. 1, 25,000 that as the Bank held the mortgages from the debtor as security for that part as well as for the rest of the debt, he (the plaintiff), as a surety who had paid that part, was entitled to that extent to stand in the place of the Bank (the principal creditor) and to obain the benefit of the securities held by it.—*Held* that the plaintiff had no right to the benefit of the securities held by the Bank until the debt due by K to the Bank had been paid in full. GOVERDHANDAS GOKULDAS TEJPAL v. THE BANK OF BENGAL, **15 B. 48.**

(4) — *Suit by creditor against principal debtor and surety—Dismissal of suit against principal debtor and decree against surety—Appeal by surety—Cross appeal by creditor without making debtor respondent—Dismissal of suit against surety by appellate Court—Second appeal by creditor—High Court's inability to interfere—Contract Act, s.* 134.—A creditor sued the principal debtors and the surety. The suit was dismissed against the debtors but decreed against the surety, who appealed. The creditor also appealed but failed to make the principal debtors respondents to his cross appeal, which was dismissed. The appeal of the surety was allowed, and the suit of the creditor was dismissed. The creditor appealed to the High Court, joining the principal debtors as well as the surety as respondents. *Held*, that the creditor, by reason of his omission to join the principal debtors as respondents to his cross-appeal, made it impossible for the lower appellate Court or the High Court to review the decision of the original Court in favour of the principal debtors, and that, therefore, he could not claim a decree against the surety. MATHEWSON v. RAM KANAI SINGH, **16 Ind. Cas. 387.** (14 B. 267, 1 L.B.R. 150, 12 C. 330, 5 B. 647, *R.*)

Surety—continued.

——1.—General—*continued.*

(5)—*Surety for judgment-debtor—Claim against, how enforceable.*—A surety for judgment-debtor must be proceeded against by summary process in execution and not by a separate suit. KUSAJI v. VINAYAK, **23 B. 478.** [*F.*, 25 B. 409=3 Bom. L.R. 35, 109 P.R. 1906 =1 P.L.R. 1907, 4 L.B.R. 197=14 Bur. L.R 170.]

(6)—*Principal debtor and surety—Suit by creditor against surety.*—Where a person becomes surety for another with respect to a certain liability of the latter, the creditor is at liberty at once to proceed against the surety, and his suit against the surety cannot be dismissed on the ground that he has not already proceeded against the principal debtor or that he has not impleaded him in the suit. INAYATULLAH v. RANI. **A.W.N. 1886, 306.** (4 C.L.R. 145, *F.*)

(7)—*Law not preventing creditor from proceeding simultaneously against principal and surety—Law not compelling creditor to exhaust his remedy against principal before suing his surety—Omission to sue principal when opportunity arises, effect of.*—There is nothing in the law which prevents the creditor from proceeding simultaneously against the principal and the surety, or which compels him to exhaust his remedy against the principal before suing the surety, and the omission to sue the principal when the opportunity arises is not equivalent to giving him an extension of time. MANGURIAM MARWARI v. RAJPATI KOERI, **20 C. 366, Note.**

(8)—*Bill of exchange—Guarantee—Default of acceptor—Co-surety, suit for contribution by—Cause of action—Limitation.*—The plaintiff and the defendant as co-sureties guaranteed to a bank the payment of a bill of exchange by the acceptor. The acceptor having become insolvent, the plaintiff paid the amount of the bill, and sued the defendant for one moiety as contribution. *Held* that the cause of action being the right to contribution, the right accrued, not when the bill was dishonoured, but when it was taken up by the plaintiff, and consequently limitation began to run from that date, (2 W.R. 159, *F.*) and that as between parties to the bill, the Courts are not bound to look at their liabilities as stated on the face of the bill, but must give effect to the arrangement into which the parties entered at the time when it was made. (*Reynolds* v. *Wheler*, 30 L.J.C.P. 350. *F.*) M. CONSTANTINE v. W. DREW, **1 N.W.P. 100.** [*F.*, 2 M.H.C. 26; *R.*, 9 B.H.C. 121, 17 B. 486.]

(9)—*Security—Contribution—Liability to costs incurred in defence of suit.*—One of several sureties who is compelled to pay the whole debt, can in equity compel the others to contribute towards payment of it. This equitable right is one independent of contract although it may be taken by special agreement. As a general rule, one co-surety cannot recover from

Surety—continued.

——1.—General—*continued.*

the others the costs of defending an action, unless he is authorised or induced by the latter to do so, or unless, from some combination of circumstances, it became necessary to defend such suit. MRS. K.C. BYRNE v. C.H. MACLEOD, **86 P.R., 1868.**

See BEN. ACT VIII OF 1869, Marsh, 410=2 Hay, 510.

Agriculturist—Remedy against principal barred—Liability of surety—*See* BOM. ACT XVII OF 1879, s. 72, 5 B. 647.

Sureties, liability of, under administration bond—*See* ADMINISTRATION BOND, 7 M.L.T. 90=5 Ind. Cas. 761.

For performance of appellate decree—Appeal—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 7 B.L.R 81=15 W.R. 538.

Security bond—Right to question the validity of bond—*See* APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE, 26 C. 246=3 C.W.N. 84.

Security for production of judgment-debtor within certain time—Death of judgment-debtor before expiry of specified time—Liability of surety in execution—Release of surety—Appeal—*See* CIV. PRO. CODE, 1887, ss. 336, 349, 24 M. 637.

Pre-emption decree—Surety for payment of mesne profits—Proceedings against—*See* CIV. PRO CODE, 1908, s. 47, 113 P.L.R. 1909=147 P.W.R. 1909.

Becoming liable for decree in a suit—His right to sue for declaration of non-liability as to portion of decree amount—*See* CIV. PRO. CODE, 1908, s. 47, 28 M. 117=14 M L J. 430.

Appeal against order—Liability of surety as party—*See* CIV. PRO. CODE, 1908, ss. 47 and 52, 145, A.W.N. 1888. 13.

Execution—Surety bond—Liability of—Suit to enforce liability—*See* CIV. PRO. CODE, 1908, ss. 47, 145, 13 Bom. L.R. 909.

See CIV. PRO. CODE, 1908, ss. 47, 145, O. XLI, r. 5, 22 C. 25.

Judgment-debtor failing to apply for insolvency—Non-appearance—Discharge of—*See* CIV. PRO. CODE, 1908, s. 55, O. XXI, r. 40, 61 P.W.R, 1910.

For performance of appellate decree—Enforcibility in execution proceedings—*See* CIV. PRO. CODE, 1908, ss. 144 (1), 145, O. XLI, r. 6, 13 M. 1

Uncertified payment of decree-amount made by surety out of Court—Suit by surety against principal debtor—Admissibility of evidence of payment—*See* CIV. PRO CODE, 1908, O. XXI, r. 2, 12 B. 235.

Right of decree-holder to proceed against—*See* CIV. PRO. CODE, 1908, O. XXI, r. 40, 30 P.L.R. 1905=50 P.R. 1905.

Surety—continued.

——**1.—General**—*continued.*

Suit on mortgage—Surety made party—Effect on suit of death of surety—*See* CIV. PRO. CODE, 1908, O. XXII, r. 4, s. 104, O. XLIII, r. 1, 25 A. 206=A.W.N. 1903, 15.

Security for due performance of appellate decree, suit for enforcement of—*See* CIV. PRO. CODE, 1908, O. XLI, r. 6, 23 C. 212.

For performance of appellate decree, whether could be proceeded against by way of execution —*See* CIV. PRO. CODE, 1908, O. XLI, r. 6, 125 P.R. 1906=94 P.L.R. 1907.

Lex-loci contractus—*See* CONTRACT—MISCELLANEOUS, 8 C. 337=9 I.A. 58, P.C.

Contract to indemnify a surety for his bail-bond is illegal—*See* CONTRACT ACT, 1872, s. 24, 10 Bom. L.R. 553=32 B. 449.

Oral evidence to prove executant of document a mere surety whether admissible—Decree for contribution whether grantable — *See* EVIDENCE ACT, 1872, s. 92, 25 A. 337=A.W.N. 1903, 64.

Note of hand—Oral evidence to prove suretyship—*See* EVIDENCE ACT, 1872, s. 92, 8 C.W.N. 101.

Principal and—Execution against surety—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 4 C. 331, P.C.

See EXECUTION OF DECREE—MODE OF EXECUTION, 19 B. 578.

See EXECUTION OF DECREE — PRIVY COUNCIL, EXECUTION OF ORDERS AND DECREES OF, 15 M. 203=2 M.L.J. 1.

Execution of decree—Liability of—Bond for appearance of judgment-debtor—*See* EXECUTION OF DECREE—MISCELLANEOUS, 186 P.L.R. 1905.

Agreeing to make good the sum by which sale-proceeds of the property fell short of the decretal amount—Extent of his liability—*See* EXECUTION OF DECREE—MISCELLANEOUS, 5 Ind. Cas. 139.

Execution proceedings—Surety for a judgment-creditor, liability of—*See* EXECUTION OF DECREE—MISCELLANEOUS, 2 Bom. L.R. 203.

Of guardian—Liability, whether extends to guardian's dealings with properties other than those specified in the petition for appointment of guardian—*See* GUARDIAN—GENERAL, 12 C.W.N. 481.

Principal debtor not sued—Suit against the, sustainable—*See* HINDU LAW—CONTRACT, 4 M.H.C. 190.

Debts contracted by a Hindu grand-father as, when binding upon grandsons—*See* HINDU LAW—DEBTS, 6 Bom. L.R. 434=28 B. 409.

Hindu Law — Son's liability for father's surety-debt—Contract Act, s. 131—*See* HINDU LAW—DEBTS, 11 M. 378.

Surety—continued.

——**1—General**—*continued.*

Obligation of Mitakshara son to discharge debt of father incurred as—*See* HINDU LAW—DEBTS, 13 C.W.N. 9=4 M.L.T. 429=1 Ind. Cas. 153.

Liability of Hindu son to pay debt contracted by father as—*See* HINDU LAW—DEBTS, 28 M. 377.

See HINDU LAW—DEBTS, 26 A. 611=1 A.L.J. 330.

Liability of a Hindu son to pay debt contracted by father as a—*See* HINDU LAW—DEBTS, 1 N.L.R. 173.

See LEASE—GENERAL, A.W.N. 1886, 241.

See LEGAL PRACTITIONERS—MUKHTEAR, 7 C.W.N. 281.

Whether liable for acts and defaults of administrator, who obtained letters of administration by fraud—Surety not party to fraud or cognisant of it. *See* LETTERS OF ADMINISTRATION, 12 C.W.N. 802, P C.=35 C. 955=35 I.A. 109=14 Bur. L.R. 197=4 M.L.T. 21=18 M.L.J. 367=10 Bom. L R. 648=8 C.L.J. 94.

See LIMITATION ACT, 1908, art. 65, 4 C.L.R. 34.

For a judgment-debtor before the passing of the decree, liability of — *See* LIMITATION ACT, 1908, ART 182—GENERAL, 8 Bom. L.R. 807=31 B. 50.

Maintainability of application for execution against—When judgment-debtor has applied for insolvency—*See* LIMITATION ACT, 1908, ART. 182—APPLICATION IN ACCORDANCE WITH LAW, A.W.N. 1906, 54=3 A.L J. 13=28 A. 387.

Principal and—deed for the benefit of creditor—Effect on surety's position—Indian Contract Act, s. 139—*See* NEGOTIABLE INSTRUMENTS—BILL OF EXCHANGE, 3 C. 174.

See PRIVY COUNCIL, PRACTICE OF—QUESTIONS OF FACT, 9 B.L.R. 364=16 W.R.P.C. 11=14 M.I.A. 86.

See PROBATE AND ADMINISTRATION ACT, 1881, ss. 51, 78, 29 C. 68=6 C.W.N. 7.

Administration-bond—Suit by—against administratrix to be discharged from obligation—Maintainability of suit—*See* PROBATE AND ADMINISTRATION ACT, 1881, s. 78, 28 M. 161=14 M.L.J. 482.

For administrator — Whether guarantee continuing one—Extent of surety's liability—*See* PROBATE AND ADMINISTRATION ACT, 1881, s. 78, A.W.N. 1908, 288=6 A L.J. 19=31 A. 56=1 Ind. Cas. 143.

Insolvency proceedings—Debt not proved—Creditor's remedies against surety—Surety's rights—*See* PROVINCIAL INSOLVENCY ACT, 1907, s. 16 (2), 7 N.L.R. 122.

See RES JUDICATA—PARTIES, 3 B L.R. App. 37=11 W.R. 407.

Surety—continued.

——1.—**General**—*concluded.*

Security bond for appearance of judgment debtor at insolvency enquiry attesting witness to, whether liable for misrepresentation as to solvency of—*See* RIGHT OF SUIT—MISCELLANEOUS, 4 B. 465.

See SUCCESSION CERTIFICATE ACT, 1860, s. 5, 14 M. 473.

Effect of guarantee contingent upon an event which does not happen—*See* TRANSFER OF PROPERTY ACT, 1882, s. 68, 14 Bur. L.R. 159.

Position of—*See* VENDOR AND PURCHASER—COMPLETION OF TRANSFER, 8 Ind. Cas. 674.

——2.—**Discharge of Surety.**

(1) *Act* XXIII *of* 1861, *s.* 8—*Security for appearance—Appearance of defendant after inquiry—Liability of surety.*—Where, during the pendency of an inquiry under Act XXIII of 1861, s. 8, the defendant is set at large upon security being furnished for his appearance at any time when called upon while such inquiry is being made, the liability of the surety is at an end, if, when the Court has concluded the inquiry, the defendant has appeared. BALMER, LAWRIE & CO. v. HUREE NARAIN PODDAR, **24 W.R. 292.**

(2)—*Security bond—Change of ownership—Liability of sureties.*—Where certain persons executed a security bond to 3 persons, A, B, and C (who owned certain property) under which the sureties bound themselves to be answerable for the good conduct and proper discharge of his duties on the part of their gumastah D and to make good any defalcations, and the property was afterwards transferred to B alone, *held*, that, when A and C ceased to have any interest in the property and B claimed to be the sole owner, there was such entire change in the nature of the service that the sureties' liability did not continue, and that, consequently, they were not liable to be sued upon their bond. RAJ KRISTO MOOKEJEE v. ISSUR CHUNDER MOOKERJEE, **23 W.R. 90.**

(3) *Surety depositing moneys for another's debt, by way of security—Arrangement between principal debtor and creditor as to debt, without surety's knowledge—Surety, discharge of.*—In a suit on a promissory note, the defendant contended that plaintiff's son-in-law had owed him certain debts, that plaintiff deposited her money Rs. 1,300, in cash with the defendant upon the latter undertaking to forbear suing plaintiff's son-in law for one week, that the deposit was made on the condition that, when the son-in-law paid the money to the defendant, the deposit should be returned to the plaintiff, that the defendant, by way of receipt for the Rs. 1,300 in his hands, executed the plaint promissory note to the plaintiff, that the son-in-law did not pay the amount due from him within the week stipulated, and that thereupon the defendant went to the son-in-law and

Surety—continued.

——2.—**Discharge of Surety**—*continued.*

obtained from him a promissory note for Rs. 1,800 for the money due by him. *Held* that any guarantee which was given by the plaintiff to the defendant ceased to have effect or operation when the latter made the new arrangement with his principal debtor and took from him the pro-note for Rs. 1,800, that such fresh contract discharged the obligation of the surety, that the Rs. 1,300 thereafter remained in the hands of the defendant as the moneys of the plaintiff, and as such might properly be regarded as due under the promissory note, according to which it was payable on demand, and that further the defendant had no right to retain it as the circumstances had been entirely altered by the defendant's own act without the knowledge or concurrence of the plaintiff, and that that was an undefended suit upon the defendant's own statement of the case, and that the plaintiff should therefore get a decree. CREET v. SETH AND SETH, **A. W. N. 1887, 136.**

(4)—*S.* 130, *I.C.A.*, 1872—*Surety under an administration bond.*—In Calcutta, a surety under an administration bond, who is not a legatee, and who is powerless to institute administration proceedings, can apply under s. 130, I.C.A. for revocation of the guarantee, on the ground of maladministration by the executor. RAJ NARAIN MOOKERJEE v. FUL KUMARI DEBI. **28 C. 68=6 C.W.N. 7.** (19 B. 245, *Ref.*). [*R.*, 52 P.R. 1902 =89 P.L.R. 1902, 31 C. 242; *Not F.*, 28 M. 161=14 M.L.J. 482, 31 A. 56=6 A.L.J. 19= A.W.N. 1908, 288.]

(5)—*Civ Pro.Code*, 1882, *ss.* 336, 622 (=*ss.* 55, 115, *new Code*)—*Insolvency—Liability of surety, when ceases—Order refusing to discharge surety—No appeal, but only revision lies.*—The liability of a surety under s. 336, Civ.Pro.Code, becomes discharged by the judgment-debtor applying to be made an insolvent. And an order refusing to discharge the surety is not appealable, and is therefore open to revision under s. 622, Civ. Pro. Code. BANNA MAL v. JAMNA DAS, **15 A. 183=A.W.N. 1893, 68.** (15 C. 171, *R.*) [*F.*, 58 P.L.R. 1902; *Appr.*, 16 A. 37; *R.*, 100 R.R. 1894, U.B.R. 1892—1896, civil 269; *D.*, 31 P.L.R. 1903=8 P.R. 1903, 13 M.L.J. 484.]

(6)—*Surety—Alteration of position and risk without consent of surety—Discharge of surety.*—Where a Salt Darogah deposited security for the due performance of his duties among which was the collection of outstandings from *molungees* to be appropriated by Government in case of loss to the State from his failure to perform them, and the Government, without his consent, altered his position and risk, *held* that such alteration relieved him from his engagement as surety in respect of such outstandings. SHIBNARAIN BANNERJEE v. THE GOVERNMENT, **W.R. 1864, 137.**

(7)—*Principal and surety—Novation of bond—Evidence.*—The treasurer of a Collectorate

***Surety*—continued.**

——2.—Discharge of Surety—*continued*.

was found, on going into his accounts, to have been a party with another in embezzling Government moneys in the Collectorate. His defalcations ran over several years. A surety bond had been given on behalf of the treasurer, and the bond was renewed three times by the same surety during the period the treasurer was in office, but the surety never asked for the old bonds to be delivered up when they were renewed. In an action by Government against the surety to recover the amount embezzled, *held* that the renewal of the bonds did not discharge the surety from his liability under the first bond, as the renewed bonds were not in substitution of the first bond. The *ex parte* deposition of a witness who might have been called and cross-examined at the trial ought not to have any weight given to it. The lower Courts having admitted inadmissible evidence, the Judicial Committee examined the whole evidence, and, on being satisfied that there was sufficient evidence to support the decision of those Courts independent of such inadmissible evidence, dismissed the appeal. LALA BANSHIDHAR v. THE GOVERNMENT OF BENGAL, **9 B.L.R. 364, P.C. = 14 M.I.A. 86 = 16 W.R. P.C. 11 = 2 Suther. 448 = 2 Sar. 689.**

(8)—*Death of surety—Effect on his liability to pay.*—The death of a surety does not operate to extinguish the security. MT. PARBATI BAI v. GANPAT, **16 C.P.L.R. 8.**

(9)—*Surety bond voluntarily executed not taken off file—Plea of being only joint surety—Repudiation of obligation—Separate securities—Acceptance of additional separate security.*—A surety who has voluntarily and with eyes open signed a security bond, and who has allowed it to stand on the record as subsisting, is bound by it. His intentions and motives in giving the bond should be gathered from what he has said in the instrument. The acceptance of separate securities of five sureties does not invalidate the acceptance of the separate security of an additional surety. Security of 5 individuals tendered by a plaintiff on appeal from the Zillah Court having been reported by the Nazir to be insufficient, the security bond of an additional surety was offered, and, being reported sufficient, was accepted by the Zillah Court. An appeal having been lodged against the sufficiency of this new security, and the Provincial Court having pronounced it insufficient, it was referred back to the Zillah Court with directions, that unless sufficient security was given, possession of the property in dispute should be delivered to the Collector. The Zillah Court, upon further investigation, being satisfied with the sufficiency of the additional surety, a security bond was executed in that Court, by the appellant, the additional surety alone, the other five sureties having failed to perfect their securities. On application after the decision in the cause, and pending an appeal to the King in Council by the appellant, to be discharged from the liability of his suretyship, on the ground that

***Surety*—continued.**

——2.—Discharge of Surety—*concluded*.

the rejection of his security by the Provincial Court for insufficiency thenceforth rendered his security null and void, and that the acceptance of his security alone by the Zillah Court without the other five securities, was without his knowledge and consent,—it was *held* by the Privy Council (affirming the judgment of the Court below) that the security bond, being on record, was not avoided by the rejection by the Provincial Court on its supposed insufficiency; the Zillah Court having revived the same by its acceptance of the appellant as surety, and he having taken no steps to discharge his liability by having the security bond taken off the file. RAJAGOPAL INDER NARAIN ROY v. RAJA JAGARNATH GURG, **5 W.R.P.C. 129 = 2 M.I.A. 311 = 1 Suther. 93 = 1 Sar. 193.**

(10)—*Giving time to principal debtor—Subsequent interest.*—Where the payment of a certain sum, with interest, had been decreed against some as principals, and against some others as sureties, the decree-holder would not, if he had allowed time to the debtors with a view to increase the amount of interest, be entitled to interest after the date, when he might, and ought to, have realized the entire debt from out of the property of the principal debtors, if it had been proceeded against. RAMANUND KOONDOO v. CHOWDHRY SOONDER NARAIN SARUNGY, **4 C. 331, P.C. = 3 Sar. 862 = 3 Ind. Jur. 79 = 2 Shome L.R. 172.**

See RES JUDICATA — COMPETENCY OF COURT, 6 N.W.P. 77.

——3.—Enforcement of Security.

(1)—*Civ. Pro. Code*, 1882, *ss.* 253, 583—*Surety for payment of decretal amount under appellate decree—Security how enforced—Effect of expression "in an original suit" in s.* 253.—Under Act VIII of 1859 and the supplemental Act XXIII of 1861, the ordinary mode of enforcing payment by a surety was by summary process in execution, not by means of a separate suit. This was so equally whether the security had been taken in the course of the original suit or of the appeal. No alteration in the law has been made as regards this subject by the Code of 1882. Under ss. 253 and 583 of Act XIV of 1882, the Court is empowered to proceed against a surety for the fulfilment of the decree in appeal who has accepted that obligation under s. 546, in the same way as against a surety who has become liable under s. 253 to satisfy a decree of a Court of first instance. The introduction of the words "in an original suit" in s. 253 may be treated as superfluous. VENKAPA NAIK v. BASLINGAPA, **12 B. 411.** [*Diss.*, 23 C. 212; *F.*, 23 B. 478, 25 B. 402, 109 P.R. 1906 = 1 P.L.R. 1907, 4 L.B.R. 197 = 14 Bur. L.R. 170; *Appr.*, 13 M. 1, 17 A. 99; *Expl.*, 30 B. 506 = 8 Bom. L.R 367; *R.*, 15 M. 208, 19 B. 578, 22 B. 42, 13 C.P.L.R. 104; 2 Bom. L.R. 203, 7 O.C. 210, 31 B. 128 = 8 Bom. L.R. 932.]

Surety—continued.

——3.—Enforcement of Security—*concluded.*

(2)—*Order against surety in execution proceedings—Appeal—Surety bonds under s* 484, *Civ. Pro. Code—Liability under, how far enforceable after fresh security under s.* 545.—A surety for the performance of a decree against whom an application for execution has been made, under s. 253 of the Code, has a right of appeal, as if he was a party to the suit, against an order passed on such application. The liability of persons who have become sureties under ss. 483, 484 of the Civ. Pro. Code, for the production of property attached in the course of a Civil suit by the Court of first instance, could not properly be extended beyond the amount, including costs, awarded to the plaintiff by the Court of first instance. This and no other sum would be such "as the said Court may adjudge against the said defendant." Under ss. 483, 484 of the Civ. Pro. Code, the security is to be for defendant's placing at the disposal of the Court of first instance, such property as shall satisfy its decree, not the possible decree of a higher Court. The liability of the surety binding himself on the defendant's default to pay the sum awarded against him in the suit could not be made to extend to the amount afterwards awarded in the first or the second appeal. What the Code contemplates in such cases is apparently security to be given to the Court for the execution of its own decree which. in the regular course, should promptly follow judgment. If an appeal is made, it is left to the appellate Court to regulate the terms on which it will take security for the execution of its own decree. SHEK SULEMAN v. SHIVRAM BHIKAJI, **12 B. 71.** [*R.*, 28 M. 117=14 M.L.J. 430; *D.*, 23 M. 73=9 M.L.J. 265.]

—— 4.—Liability of Surety.

(1)—*Security bond—Liability of surety, extent of.*—A person who stood surety for a clerk in a "*choongee*" office, pledged his house to the extent of Rs. 100 for the due discharge of the duties of his office. It was stipulated in the bond that if the clerk were to embezzle or misappropriate any sum of money, the whole of the property could be seized on account of the deficiency. The clerk was convicted of bribery for having allowed certain goods to pass the "*choongee*" without payment of duty which was Rs. 8. The President of the Municipality sued the surety for the enforcement of the terms of the bond. *Held* that the surety was liable only for such sums as were shown to have been misappropriated, that he could not be held liable for losses which might have accrued to the Municipality from misconduct on the part of the clerk other than misappropriation, and that, if he could be held liable at all, it could only be for the amount of damage actually sustained by the Municipality. TORAB ALI v. THE PRESIDENT OF THE MUNICIPAL COMMITTEE OF ALLAHABAD, **6 N.W.P. 170.**

(2)—*Surety—Liability—Extent and duration of.*—The liability of a surety subsists only so

Surety—continued.

——4.—Liability of Surety—*continued.*

long as the liability of the principal debtor to his creditor exists, and in reference to that person only to whom he made himself responsible. MOHIP NARAIN v. MR. F. A. SHAW, **25 W.R. 250.**

(3)—*Act* XXIII *of* 1861, *s.* 36—*Execution of decree—Appeal—Security—Restitution of property.*—The liability of a surety executing a security bond, under s. 36 of Act XXIII of 1861, for the fulfilment of the decree, does not cease upon the decision of the Court of regular appeal because that decision is not final. As long as there is possibility of that decision being reversed, his liability continues to exist. NARAYAN DEV v. GAJANAN DIKSHIT, **10 B. H.C. 1.**

(4)—*Surety before decree in original suit—Enforcement of security—Surety in appellate Courts—Civ. Pro. Code, ss.* 253, 549—*Execution against surety—Procedure.*—If a person becomes surety for a party before the passing of a decree in an original suit, he becomes, as it were, a party to the suit itself, and the security bond executed by him may be enforced in the same manner as a decree may be executed against a defendant. [*R.*, 13 C.P.L.R. 104.] S. 253 does not apply to a surety who has become a surety in an appellate Court. Therefore, where a security bond was executed by a surety on behalf of an appellant for the costs of an appeal under s. 549, Civ. Pro. Code, the bond cannot be summarily enforced against the surety in execution, but the remedy is by separate suit. KALI CHURN SINGH v. BALGOBIND SINGH, **15 C. 497.** (2 A. 604, *Diss.*; 12 C. 402, *F.*) [*F.*, 22 C. 25, 23 C. 212; *Cons.*, 25 B. 409; *Diss.*, 17 A. 99 =15 A.W.N. 19, L B.R. 197.]

(5)—*Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 338—*Sureties—Fulfilment of all appellate decrees, meaning of.*—Where a person agrees to be surety to "fulfil all such orders and decrees as may be given against the defendant in appeal," the expression "all decrees" cannot be cut down to the first decree of the appellate Court, but must be taken to apply also to the decree made by that Court on remand of the case by the High Court in special appeal. APPAJI BHIMARAV v. SHIVLAL KHUB CHAND, **3 B. 204.**

(6)—*Civ Pro. Code*, 1859, *s.* 338—*Extent of surety's liability.—Per Kemball, J.*—Where a person agrees to be surety under s. 338 of Civ. Pro. Code, 1859, to fulfil *all* such orders and decrees as may be given against the defendant in appeal, the expression "all decrees" cannot be cut down to the first decree of the appellate Court, and must apply also to final decree made by that Court on remand by the High Court in special appeal. *Per Pinhey, J., Contra.* SHIVLAL KHUBCHUND v. APAJI BHIVRAV, **2 B. 654.**

(7)—*S.* 260, *I.C.A.*, 1872—*Revocation of guarantee—Change in constitution of firm.*—A person, becoming a surety to a firm for another's conduct as cashier, will not be liable to

***Surety*—continued.**

——4.—Liability of Surety—*continued.*

compensate any defalcation which occurs subsequent to a change in the constitution and the name of the firm. NEEL COMUL MOOKERJEE v. BIPRO DASS MOOKERJEE, **28 C. 597.**

(8)—*Surety—Security placed with one surety to indemnify co sureties—Withdrawal of security—Liability of sureties* inter se—*Proper application of security.*—If a surety without taking any sort of precaution to see to the proper application of a sum of money placed in his hands for indemnifying his co-sureties, permits the party for whom he is surety to withdraw the money, he loses his remedy against the co-sureties to the extent to which he allowed the security to be withdrawn from him. It is the duty of each surety as between himself and co sureties to see that money placed in the hands of sureties for the purpose for which they have become sureties is not misapplied. WOON CHIT POE v. WEE CHANG, **15 W. R. 185.**

(9)—*Contract of guarantee—Evidence to prove it—Damages, measure of.*—In a suit by the plaintiff to recover from the defendant, the amount misappropriated by his employee, A, whose honesty the defendant had guaranteed, it was contended on behalf of the defendant that the evidence proving the guarantee consisted merely of a statement made at the time that the defendant believed A to be honest and that, though he subsequently wrote two letters wherein he specially referred to A's honesty, he refused to sign any guarantee bond. *Held* that the words used at the time of taking A into service, were sufficient evidence of a contract of guarantee and as the same was confirmed by subsequent letters the contract was complete. In a suit against the surety for damages for the dishonesty of the employee, the Court must act upon the principle that the damages must be proved to have resulted from the dishonest act of the employee. On this principle, the amount misappropriated by the employee can be claimed, but not the travelling allowance paid to him to join the appointment or the costs of a suit against the employee. DECERTANZE v. MERCER, **1 P. R. 1866, O. J.**

(10)—*Surety for gumastah—Defalcations after guarantor's death—Liability.*—Where a person engages to be a surety for a gumashta, and to make good all defalcations made by him, the engagement would refer only to defalcations made by the gumashta during the period of the guarantor's life, and would not apply to a time after the guarantor's death when all power of advising and controling the gumashta would cease. MESSRS JAMES LYALL & CO. v. AMORABUTTY DOSSEE, **20 W.R. 12.**

(11)—*Suit against sureties for misconduct of servant—Parties.*—Where a bond of indemnity was in respect of service under five persons, the sureties could not be made liable for the misconduct of the employe if he was engaged only by three of those five persons. PARBUTTINATH ROY v. TEJMOY BANERJI, **5 C. 303.**

***Surety*—continued.**

——4.—Liability of Surety—*continued.*

(12)— *Surety for Nazir— Liable only to Government—Act* VIII *of* 1859, *s* 225.—A surety for a Nazir, under his obligation to the Government to indemnify the Government for any loss that the latter might incur, is not liable, except to the Government, for any wrongful acts done by him. BACHA GOPE CHOWDHRY v. BRAJAGOBIND DAS, **9 B.L.R. App. 26=18 W.R. 259.**

(13)—*Sureties of naib—Their liability.*—The sureties of *naib* are discharged from their liability to the principal, if the latter takes bonds from the *naib* in acknowledgment of the debts, giving him different periods of time for payment, without the knowledge and consent of the sureties. W.G.N. POGOSE v. ANUNDO CHUNDER GOHOO, **1 W.R. 81.** [*F.*, 15 W.R. 252; *R.*, 1 Agra 38.]

(14)—*Undivided Hindu family— Ancestral property—Liability of deceased brother, whether binds survivor.*—A suretyship entered into by an undivided member of a joint Hindu family on behalf of a stranger, is not binding on the family property in the hands of his sole surviving brother, where the suretyship was not for the benefit of the undivided family, and no mortgage was executed or special lien given on his share in the family property. NARSINBHAT *bin* BABUBHAT v. CHENAPPA *bin* NINGAPPA, **2 B. 479.** (11 B.H.C. 76, *F.*) [*R.*, 5 M. 232.]

(15)—*Civ. Pro Code*, 1882, *s.* 336, *Security bond under—Conditions not contemplated by section, whether enforceable.*—Where a security-bond given under s. 336, Civ. Pro. Code, happened to contain a covenant by the surety as to what would happen in case the judgment-debtor's application to be declared an insolvent were refused, such a stipulation was held not to come within the purview of the section so as to be enforceable in the manner provided by it. JANKI DAS v. RAM PARTAB, **16 A. 37=A.W.N. 1893, 203.** [*R.*, 100 P.R. 1894; *D.*, U.B.R. 1892—1896, Civil, 269.]

(16)—*Civ. Pro. Code*, 1882, *ss.* 336 (=*s.* 55, *new Code*), 344—*Judgment-debtor applying to be declared insolvent—Cessation of liability of surety.*—The obligation of a surety who executes a bond undertaking to produce a judgment-debtor whenever the Court should want him, and stands security under s. 336 for the judgment-debtor's applying to be declared an insolvent, ceases when the judgment-debtor files his petition under s. 344, Civ Pro. Code, to be declared an insolvent. RAMZAN v. GERARD, **13 A. 100=A.W.N. 1891, 6.** (15 C. 171, *Appr. & Appl.*) [*F.*, 19 B. 210; *Appl.*, 16 A. 37; *R.*, 100 P. R. 1894 U.B.R. Civil 1892—1896, 269.]

(17)—*Civ.Pro.Code*, 1882, *s.* 336 (=*s.* 55, *new Code*)—*Judgment-debtor—Surety—Application by judgment-debtor to be declared insolvent—Release of surety.*—A person standing surety of the judgment-debtor udder s. 336, C.P.C., is released from his obligation when the judgment-debtor has applied to be declared an insolvent.

Surety—continued.

——4.—**Liability of Surety**—*continued.*

DWARKADAS PARSHOTAMDAS v. ISABHAI DAUDKHAN, **19 B. 210.** [*F.*, 24 M. 560, 26 M. 366.]

(18)—*Ss.* 336, 344—*Judgment-debtor applying for insolvency—Liability of surety.*—A person who executes a bond undertaking to produce a judgment-debtor at any time when the Court should direct him to do so, and standing security under s. 336 for the judgment-debtor's applying to be declared insolvent, is released from his obligation under the bond, when the judgment-debtor files his petition under s. 344 to be declared insolvent, though this petition may afterwards be dismissed owing to his non-appearance. KAYLOSH CHANDRA SHAHA v. CHRISTOPHORIDI, **15 C. 171.** [*F.*, 19 B. 210=24 M. 560, 26 M. 366; *Appr.*, 13 A. 100=11 A.W.N. 5, 16 A. 37; *R.*, 15 A. 183=13 A.W.N. 68, 100 P.R. 1894, U.B.R. 1892—1896, Vol. II, 269.]

(19)—*Act* VIII *of* 1859, *s.* 204—*Summary procedure against surety—Execution of decree.*—In consideration of the plaintiffs being allowed to proceed with the execution of a decree which they had obtained in the High Court, A became surety upon a bond for the payment of what might be due to the defendants by such plaintiffs in the event of their decree being reversed or modified by the Privy Council to which an appeal was pending. *Held* that the summary procedure under s. 204, of Act VIII of 1859 might be enforced against A as such surety (Compare Act X of 1877, s. 253). CHUNDER KANT MOOKERJEE v. RAM COOMAR COONDOO, **3 C.L.R. 505.**

(20)—*Security for restitution of costs paid over to decree-holder—Surety, whether can be proceeded against in execution—Civ Pro. Code, ss.* 253, 546.—On the ground that he proposed to file an appeal to the High Court, a judgment-debtor applied for stay of an execution taken out by the decree-holder to recover the costs under a decree passed by the lower Appellate Court. The execution was not stayed, and the costs which were deposited by the judgment-debtor were paid to the decree-holder on the execution of a security-bond, by which the surety undertook to guarantee the refund of the amount to the judgment-debtor, in case of his success in the High Court. The judgment-debtor was successful in the High Court, and the surety was held not liable to be proceeded against by way of execution of the decree of that Court. S. 546 of the Civ. Pro. Code has relation to stay of execution when an appeal is pending and cannot therefore cover the security in the present case. Nor can s. 253 of the Code apply for; that section contemplates that there shall be a suit pending at the time security is given, and it could not therefore apply to a case like the present one where no suit could be said to have been pending, as the litigation in the Court of first instance and the lower appellate Court had ended, and no second appeal had been instituted in the High Court

Surety—continued.

——4.—**Liability of Surety**—*concluded.*

when the security was given. HARDEO DASS v. ZAMAN KHAN, **8 A. 639=A.W.N. 1886, 238.** [*R.*, 2 Bom. L.R. 203, 125 P.R.1906=94 P.L.R. 1907.]

(21)—*Proceeding against surety in execution—Separate suit.*—A surety can be proceeded against in execution proceedings and a separate suit against him is not necessary. JAMSHEDJI v. BAWABHAI, **25 B. 409=3 Bom. L.R. 35.**

(22)—*Execution of decree against surety—Payment by instalments—C.P.C., 1877, ss* 210, 253.—A decree cannot be executed against a surety who has become such after it was passed. A surety who executes a surety-bond before a Deputy Collector conducting a sale in execution of decree, but who does not appear before the Court which ordered the sale, does not make himself a party to the suit, so as to make the decree executable against him; nor can the circumstance that, subsequent to his becoming a surety, the Court, behind his back, altered the decree by making it payable in instalments make him a person who had become a surety before the passing of the decree. CHANDAN KUAR v. TIRLHA RAM, **3 A. 809=A.W.N. 1881, 78.**

(23)—*Minor, contract by—Contract Act* (IX *of* 1872), *ss.* 11, 128—*Principal and surety—Surety's liability.*—A minor cannot be sued on a bond executed by him during minority and not ratified by him after his majority. A surety to a bond passed by a minor for moneys borrowed for purposes of litigation not found to be necessary, is liable to be sued on it whether the contract of the minor is considered to be void or voidable. KASHIBA NIKADE v. SHRIPAT NERSHIV, **19 B. 697.** [*R.*, 23 B. 1, U.B.R. 1897—1901, 313, L.B.R. 1893—1900, 656. 33 C. 713=10 C.W.N. 673=3 C.L.J. 422.]

See COSTS—MISCELLANEOUS, 6 W.R. Mis. 35.

See EXECUTION OF DECREE— MISCELLANEOUS, 62 P.R. 1871, 16 P.R. 1876, 75 P.R. 1876.

See LEASE—GENEREL, 126 P.L.R. 1901.

See RENT, SUIT FOR, 5 N.W.P. 222.

——5.—**Miscellaneous.**

(1)—*Sureties for good behaviour—Object of the law in requiring—Money deposited with surety under such circumstances not recoverable.*—Under the rules of the Crim. Pro. Code, a person called upon to furnish bail for good behaviour cannot pay cash in lieu of such security. The object of the law in requiring other persons to stand bail for the good behaviour of a person, is to protect society from the perpetration of crime, by requiring the sureties to look after their charge and see that he does not misconduct himself. This the surety may naturally be expected to do, so long as he is

Surety—continued.

—5.—Miscellaneous—*continued.*

and remains subject to the risk of having his bail-bond forfeited and himself mulcted to the extent of his liability therein. But if the surety were to receive, from the person for whose good behaviour he stands surety, in consideration of undertaking the risk, the deposit of a sum of money equal to the amount of bail, he would not have the same interest in watching his doings; he may be quite indifferent and allow his charge to do whatever he pleases, conscious that, if the bail-bond be forfeited, he would only be called upon to make good its value; he will, in short, have served his friend a good turn, but will thus have defeated the requirements of law. Any act which is in itself opposed to the principles of law is incapable of relief, and the abetment of such an act also places itself beyond relief. Money deposited by a person, under the above circumstances, with one who stood surety for his good behaviour, cannot be recovered from the surety even after the period fixed in the bail-bond had expired without any act being done by the person bound over, so as to entail the forfeiture of the bond. FATEH SINGH v. SANWAL SINGH, **1 A. 751.**

(2)—*Civ. Pro. Code*, 1859, *s.* 204—*Execution of decree—Subsequent arrangement—Surety—Regular suit.*—After a decree was obtained by the appellant in a suit, the Collector, assuming to act under s. 244, Civ. Pro. Code, proposed that the amount of the decree should be paid by instalments and that the respondent should execute a surety bond hypothecating his property for the payment of a portion of these instalments. The respondent did execute a bond accordingly. Now the appellant proceeded to execute the decree against the respondent under s. 204, Civ. Pro Code. *Held*, that the terms of s. 204 are not applicable. The respondent became security for the performance of a part of the substituted agreement, and not for the performance of the decree, nor a part of the decree. The appellant's remedy against the respondent must be sought by the institution of a suit. CHUNDEE DEEN v. HUSSUN ALI, **3 N.W.P. 88.** [*R.*, 6 N.W.P. 261.]

(3)—*Act* VIII *of* 1859, *s.* 204—*Execution of decree—Security bond for payment of decree-debt—Execution against surety—Regular suit.*—S. 204 of Act VIII of 1859 permits a decree-holder, when a person has become liable as security for the performance of the decree, *to execute the decree against such person*; that is to say, the Code gives a remedy to a decree-holder against the surety in addition to any remedy he may have on the surety-bond. A suit may be brought by the decree-holder to enforce the contract made with him by the surety in the bond and the lien on the property mortgaged, to secure the performance of that contract. ABDUL KADIR v. BABOO HUREE MOHUN, **6 N.W.P. 261.**

(4)—*Execution of decree—Surety bond—Separate liabiltiy of surety.*—The petitioner in this case was a surety who had undertaken to be

Surety—continued.

—5.—Miscellaneous—*continued.*

liable for the debt or to suffer execution to be taken against him on failure of the payment of any of the instalments, of the decree by the debtors. The lower Court had erroneously considered the petitioner to be in the same position as the debtors. He might have made himself responsible for their debts, but he could not be regarded as generally and severally liable with them. Also, proceedings against one or other of the joint debtors which could keep the decree alive against all of them, cannot affect him. His responsibility was a separate one, and execution should have been taken against him from the date when his liability commenced, and the decree could be kept alive as against him only by proceedings irrespective of those taken against the judgment-debtors. HURKHOO SINGH v. BABOO RAM KISHEN, **6 W.R. Mis. 44.**

(5)—*Suit against surety for tenant—Jurisdiction of Revenue Court.*—A Revenue Court has no jurisdiction to entertain a suit against a surety for payment of rent. BABU LAL v. ISHRI PRASAD NARAIN SINGH, **2 A. 582, F.B.**

(6)—*Suit for rent—Decree against surety—Jurisdiction of Revenue Court.*—A Revenue Court (under Act X of 1859) cannot entertain a suit against a surety for payment of rent. BHUGWAN CHUNDER ROY CHOWDHRI v. MANICK BIBEE, **9 C. 383=11 C.L.R. 577.**

(7)—*Lease for term—Surety for performance of conditions of lease—Eviction before expiry of term—Suit by surety's representatives.*—Lease, for a term of years, of a Pergunna in Bengal, to A., to which B. became surety for the due performance of the conditions, and afterwards a co-partner with A. in the lease. Before the expiration of the demised term, the representatives of the lessors evicted the lessee from the Pergunna. *Held*, that a suit would lie by B.'s representatives against the lessor's representatives, for ouster from the lease, although they were not parties to the contract with the original lessors. RAJAH BURDAKANTH ROY v. ALUK MUNJOOREE DASIAH, **4 M.I.A. 321=7 W.R. P.C. 15=1 Suther. 191=1 Sar. 355.**

(8)—*Reg.* XVI *of* 1797, *s.* 4—*Surety—Liability for costs.*—H sued S to recover possession of her husband's share of moveable and immoveable property, and eventually obtained a decree in the High Court. S appealed to the Privy Council and while the appeal was pending, H prayed to be allowed to take out execution, and N became her surety for Rs. 10,000. The decree, however, was not executed. The Privy Council reversed the decision of the High Court and dismissed the suit of H with costs. S then sought to execute his decree for costs against N the surety. *Held* that N was not liable. *In the matter of the petition of* NAFAR CHANDRA PAL CHOWDHRY, **6 B.L.R. App. 126=14 W. R. 410.**

(9)—*Civ. Pro. Code*, 1882, *s.* 349—*Surety bond — Insolvency of defendant — Default of principal—Surety, liability of—Enforcement of*

Surety—continued.

—5.—**Miscellaneous**—*continued.*

liability.—The Civ. Pro. Code provides no means for enforcing in execution a surety bond passed under s. 349, and the proper course is for the plaintiff to obtain an assignment of the bond with a view to suing on it. MINGAL ANTONE KANE v. RAMCHANDRA BAJI, **19 B. 694.** [*Rel. on*, 7 Ind. Cas. 917; *R.*, 31 C. 162.]

(10)—*Surety for guardian of a minor's estate—Release of surety—Minors Act* (XX *of* 1864), *s.* 12—*Contract Act* (IX *of* 1872), *s.* 130—*Protection to surety against guardian.*—A surety for the guardian of a minor's estate appointed under the Minors Act (XX of 1864) applied to be released from his obligation as surety on account of the guardians' mal-administration of the estate. *Held* that the very object of requiring such security was to guarantee the minor against such misconduct or mismanagement on the part of the guardian, that the surety, therefore, could not be discharged, and that s. 130 of the Contract Act (IX of 1872) was not applicable to the case. *Quære*—Whether the surety may not apply to the Court for protection against the guardian? BAI SOMI v. CHOKSHI ISHVARDAS MANGALDAS, **19 B. 243.** [*F.*, 28 M. 161=14 M.L.J. 482; *Appr.*, 5 A.L.J. 349, Note; *Appl.*, 5 P.L.R. 1901; *Expl.*, 6 C.W.N. 7=29 C. 68; *R.*, 52 P. R. 1902.]

(11)—*Civ. Pro. Code, s.* 349—*Surety bond—Summary enforcement.*—A surety bond given under s. 349, Civ. Pro. Code, cannot be enforced summarily; and no appeal lies from an order refusing summary enforcement of such a bond. The only course open to the party, who desires it should be enforced, is to move the Court to put it in suit. MOIDIN v. CHANDU. **7 M. 273.** [*R.*, 19 B. 694, 31 C. 162.]

(12)—*Act* VIII *of* 1859, *s.* 204—*Surety—Execution of decree.*—A suit was instituted by C against H S in the Hoogly Court, and was dismissed with costs. On appeal by the plaintiff, the defendants obtained an order in the High Court calling on C to give security for costs in the Court below and on appeal, and one R had as surety charged his house in Calcutta with the payment of costs to the extent of Rs. 2,000. The appeal was dismissed with costs, amounting to more than Rs. 2,000. An application by the defendants for execution against R under s. 204, Act VIII of 1859, by attachment and sale of the house, was granted. HIRA LAL SEAL v. A. CARAPIET, **9 B.L.R. App. 17.**

(13)—*Civ. Pro. Code* (*Act* VIII *of* 1859), *s.* 204—*Security bond subsequent to judgment—Enforcement.*—In execution of a decree against the judgment-debtor, certain property was attached and advertized for sale. The sale was stayed on the application of one H, a third party, who gave a bond for the due payment of, the amount of the decree. The decree-holder, on default by the judgment-debtor, applied for leave to enforce the original decree

Surety—concluded.

—5.—**Miscellaneous**—*concluded.*

against H, by attachment and sale of the property of the surety. *Held* that the decree-holder's application must be refused, inasmuch as the security bond could not be summarily enforced against the surety under s. 204 of Act VIII of 1859. GAJENDRENARAYAN ROY v. HEMANGINI DASI, **4 B.L.R. App. 27=13 W. R. 35.** (7 W.R. 327, *F.*) [*F.*, 3 N.W.P. 88; *R.*, 2 A. 604, F.B.; *D.*, 15 W.R. 538, 3 C. 318.]

(14)—*Act* VIII *of* 1859, *ss.* 76, 83, 204—*Execution of decree—Sureties.*—The provisions of s. 204, Act VIII of 1859, apply to cases such as that of parties who become sureties under s. 76 or 83 of the Civ. Pro. Code, and not to parties who agreed, after the decree was passed, to stand security for the payment of the debt if the judgment-debtors were unable to liquidate it. BABOO RAM KISHAN DOSS v. HURKHOO SING, **7 W.R. 329.** [*F.*, 13 W.R. 35=4 B.L.R. App. 27, 3 N.W.P, 88; *R.*, 2 A. 604; *D.*, 15 W.R. 21, 15 W.R. 538, 3 C. 318=1 C.L.R. 347.]

(15)—*Suit to recover debt from surety—Admission by principal no evidence of amount of debt as against the surety.*—*Held* that, in a suit by a creditor to recover the amount of his debt from a person who had become surety for the debtor, an admission of the principal debtor as to the amount of the debt is not evidence as against the surety. RAM BHAJAN LAL v. SHEO PRASAD, **A.W.N. 1907, 293=3 M.L.T. 62=5 A.L.J. 142.**

Sureties of farmers—Property in Bengal, Rev. Cir. No. 2. **25 W.R. Rev. Cir. 6.**

Surety Bond.

See CIV. PRO. CODE, 1908, s. 145.

See CONTRACT ACT, 1872, SS. 124—147.

See PRINCIPAL AND SURETY.

See SURETY.

Concellation of—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 7 B.L.R. 81=15 W.R. 538.

See EVIDENCE ACT, 1872, s. 68, 26 C. 222=3 C.W.N. 228.

Surplus Collections.

Suit for redemption decreed—Second suit for surplus collections made by the mortgagee during mortgage, not maintainable—Right to claim such collections synchronous with right to redeem mortgaged property—*See* MORTGAGE—REDEMPTION, 5 A.L.J. 192=A.W.N. 1908, 96=30 A. 225.

Surprise.

"Fraud—or mistake or such other grounds," meaning of—*See* BELCHAMBERS RULES AND ORDERS, Rules 615. 617, 28 C. 272=5 C.W.N. 337.

Surrender.

Doctrine of surrender—*See* HINDU LAW—REVERSIONERS, 2 C.W.N. 132.

Doctrine of—Application of doctrine to mortgage by widow—*See* HINDU LAW—WIDOW, 13 C.W.N. 541=9 C.L.J. 453=1 Ind. Cas. 434.

See MORTGAGE—MISCELLANEOUS, 24 A. 538=A.W.N. 1902, 155.

Surrender of Tenure.

See LANDLORD AND TENANT—ABANDONMENT OF TENURE.

See LANDLORD AND TENANT—TRANSFER OF TENANT'S INTEREST.

(1)—*Surrender of durmarasi mokurari tenure—Mere relinquishment after notice—Effect.*—A man, who is bound by lease to pay his rent, cannot, by merely informing his landlord that he is going to relinquish the land, get rid of his obligation, and the mere fact that the landlord silently receives the notice cannot be construed into an assent to the relinquishment; and no Court has any right under such circumstances to find that the landlord did assent—*Per Garth, C.J.* The principle, that a patnidar cannot, at his own option, relinquish his tenure, is applicable to all intermediate tenures other than farming leases between the zemindar and the cultivator of the soil.—*Per Field, J.* JUDOONATH GHOSE v. SCHOENE KILBURN & CO., **9 C. 671=12 C.L.R. 343.** (20 W.R. 383, *R.*) [*R.*, 19 C. 489, 26 C. 460.]

See BEN. ACT VIII OF 1885, s. 86, 28 C. 256 =5 C.W.N. 351.

Surrender of holding by tenant in Central Provinces—No transfer of ownership—*See* C.P. ACT XVII OF 1889, 9 C.P.L.R. 122.

Surrender of holding by tenant—Necessity for regietration of—*See* C.P. ACT XI OF 1898, s. 35, 14 C.P.L.R. 29.

Surrender of service inam to Government—*See* LANDLORD AND TENANT — PAYMENT OF RENT BY TENANT, 18 B. 250.

Occupancy raiyat dying intestate—Liability of heirs to pay rent—*See* LANDLORD AND TENANT—TENANT'S LIABILITY FOR RENT, 19 C. 790.

Survarakari Tenure.

"Mourasi Sarvarakari" tenure—Mode of Succession—*See* LAND TENURE—IN ORISSA, 11 C. 699.

Survey.

See EVIDENCE—MISCELLANEOUS DOCUMENTS.

See MEASUREMENT OF LANDS.

(1)—*Non-survey of land, no ground for dismissal of suit.*—A suit should not be dismissed because the land has not been surveyed. KALEE DUTT KRISTO v. THE COLLECTOR OF KAMROOP, **25 W.R. 101.**

Survey—*concluded.*

(2)—*Excess land—Milleck lands—Land released by resumption proceedings—Previous survey*—Mal.—Where the admitted milleck lands of a ryot are found to be over and above land released by resumption-proceedings based on a former survey, no presumption arises that the excess land is *mal.* DINOBUNDHOO SUHAYE v. THE COURT OF WARDS, **11 W.R. 347.**

Power of Revenue-officer to make and prepare Record-of-Rights without order of Government—*See* BEN. ACT VIII OF 1885, ss. 104 to 108, 117, 118, 119, 145, 158, 189, 30 C. 339=7 C.W.N. 33.

Proprietor of estate—Survey and measurement, right to—Rent, receipt of—*See* APPEAL—MISCELLANEOUS, 7 C. 684=9 C.L.R. 444.

See INAM, 13 B. 525.

See JURISDICTION OF CIVIL COURTS, 21 W.R. 79.

See MEASUREMENT OF LANDS, 2 B.L.R. S.N. 5 (*b*)=10 W.R. 361.

Suit for possession—Effect of survey proceedings—*See* POSSESSION—SUITS FOR POSSESSION, 4 Ind. Cas. 547.

Survey and Settlement, Bombay.

See BOM. ACT I OF 1865.

Survey Award.

(1)—*Survey award, what is a.*—To constitute a survey award, there must be a decision on a *bona fide* contention between the parties, after a proper investigation into the points at issue betwen them. A plaintiff, suing for confirmation of possession, must, as a first step, prove that he is in actual *bona fide* possession of the land over which he wishes to have his title confirmed. NUBO KISHEN ROY v. GOBIND CHUNDER SEIN, **6 W.R. 317.**

(2)—*Reg. VII of 1822—Adjudication by Deputy Collector — Jurisdiction — Civ. Pro. Code*, 1859, *s.* 14—Bona fide, *meaning of.*—A Survey Deputy Collector's award that a party has been in possession of certain land for more than a year, where the fact is not disputed, is not a summary award under Reg. VII of 1822. The adjudication by Revenue Authorities of the boundaries of two districts does not effectually settle the question of jurisdiction which must be tried by a Civil Court under s. 14 of the Civ. Pro. Code, 1859. The legal meaning of *bona fide* is, with care and after due inquiry. RADHA PERSHAD SINGH v. RAM JEEWUN SINGH, **11 W.R. 389.** [*Diss.*, 12 W.R. 150; *R.*, 16 W.R. 109.]

(3)—*Survey Deputy Collector striking off case for default to deposit fees by plaintiff—Award—Cause of action.*—The order of a Deputy Collector in the Survey Department, striking a case off his file owing to plaintiff's omission to deposit the Ameen's fees, is no award, and cannot be a cause of action. KRISTO CHUNDER DOSS v. SOUDAMONEE DOSSEE, **12 W.R. 174.**

Survey Award – *continued.*

(4)—*Entry on settlement paper, no award.*—An objection to an entry made in the settlement papers was disallowed summarily without enquiry, on the ground that the papers had been drawn out more than a year before the objection was raised. *Held* that such an order was not "award," as it did not adjudicate on the right of the parties, or on the question of possession, and, that therefore, it was not an order on which a Court could base its judgment rejecting the suit without disposal of the point at issue upon the evidence. MOHUNT HEERA DASS v. BABOO HURMOO SINGH, **1 N.W.P. 77.**

(5)—*Survey award—Effect—Act* XIII *of* 1848.—Act XIII of 1848 operates in certain cases to give to a survey award full effect of a decree of a Civil Court by taking away from the Courts the power of entertaining any suit for contesting the justice of such award after a limited time. MOKUND MOORAREE BISWAS v. WOOMA CHURN MOOKERJEE, **23 W.R. 173.**

(6)—*Survey award, who are entitled to benefits of.*—*Held* that parties to a survey-award and persons representing the Government which was a party, are entitled to all the benefits which can be derived from the award. RAJ MOHUN MITTER v. THE COMMISSIONER OF THE SUNDERBUNS, **7 W.R. 344.**

(7)—*Award by Survey Authorities in favour of a person without possession—Its evidentiary value.*—The mere fact of a survey-award being given in favour of a person, without any proof that he got possession under it or was in possession before it, cannot be conclusive against all other testimony. ALI ASHRUF v. CHONGA GOBIND ROY, **5 W.R. 220.**

(8)—*Act* IV *of* 1840—*Intervenor—Third party—Evidence of award.*—An award under Act IV of 1840 between an intervenor and a party other than the plaintiff is no evidence against the plaintiff. AMEEROONISSA KHATOON v. JUGGURNATH ROY, **11 W.R. 113.**

(9)—*Award by survey Authorities—Evidence—Limitation—Jumma Wasil Bakee papers, how proved.*—An award by Survey Authorities which is not followed by possession, and therefore infructuous, is no answer to a plea of adverse possession for upwards of 12 years after the date of the award. A survey award is binding on a vendee, if the award had been passed against those from whom his title had been derived. The best evidence is required to prove a *Jumma wasil Bakee paper.* ALLYAT CHINAMAN v. JUGGUT CHUNDER ROY, **5 W. R. 242.**

(10)—*Act* IV *of* 1840. *Award under, failure to set aside.*—*Held* that the plaintiff, having failed to set aside an award made under Act IV of 1840 within the period of limitation, could not claim in opposition to the award. MOHUNT GOPAL NATH v. ABDOOL GHANEE, **1 Agra 120.**

(11)—*Award by survey authorities—Compromise—Joint undivided estate—Co-proprietors of.*—A co-proprietor of a joint undivided estate is bound by a survey award and compromise to

Survey Award—*continued.*

which the other co-proprietors were parties on proof of service of notice of the proceedings on the proprietors jointly and not on him individually. HUR LAL ROY v. SOORAJ NARAIN ROY, **3 W.R. 7.**

(12)—*Survey award—Admission.*—In a suit to recover possession of certain land where plaintiff alleges possession on occasion of a Survey award between himself and defendant's predecessors, defendant's admission in a rent-suit of plaintiff's title and possession, and defendant's intervention in a suit for a kubooleut against the ryots. *Held* that the survey award is evidence *quantum valet* of the fact of possession, that defendant's alleged admission is an important part of plaintiff's case; and that plaintiff's cause of action is defendant's intervention in the rent suit. KASHEE KISHORE ROY CHOWDHRY v. BAMA SOONDAREE DEBIA CHOWDHRAIN, **23 W.R. 27.** [*R.*, 9 C.L.R. 305.]

(13)—*Award by Survey Authorities—How affects the decree of a competent Court—Limitation.*—The mere fact of a survey Court demarcating a certain land to be in a certain district and deciding it to belong to the party in possession cannot override the decree of a competent Court proceeding on evidence of title and deciding it to belong to another party in another district. Adverse possession to have benefited the former should have been pleaded before that decree was made. HURO NATH ROY v. ANUND CHUNDER ROY, **1 W.R. 329.** [*R.*, 7 W. R. 200; *Expl.*, 11 W.R. F.B. 16.]

(14)—*Suit to set aside survey award—Chur land—Right to sue for rent.*—In a suit to set aside a survey award which declared the extent of the plaintiff's and opposite party's respective titles to certain Chur lands, it was held that the opposite party had no right to sue for rents on the plea of joint possession before fixing what lands are to be appropriated by him, and what by the intervenor as provided for by the survey award. TARINEE KANT LAHOORY v. HANEE MUNDUL, **7 W.R. 203.**

(15)—*Evidentiary value in contested suit.*—A survey-award was held not to be conclusive evience of a contested right in a regular suit. KOYLASH CHUNDER GHOSE v. RAJ CHUNDER BANERJEE, **12 W. R. 180.** [*R.*, 9 C L.R. 305.]

(16)—*Survey award—Effect of award - Suit to set aside award under Act* IV *of* 1840—*Proof of title.*—In a suit to set aside an award under Act VI of 1840. *Held*, that the plaintiff ought to furnish some decisive proof of his title, to justify the Court in disturbing the award of a competent authority, and that resumption proceedings instituted by Government, which declared only that the lands were unfit for resumption and therefore left them in the plaintiff's possession, were not such convincing proof of title. BAMASOONDEREE DABEA CHOWDHRANEE v. BHUGRUTTEE DABEA CHOWDHRANEE; GREES CHUNDER CHOWDHRY v. BHUGRUTTEE DABEA CHOWDHRANEE, **1 Hay 495.**

Survey Award—*continued.*

(17)—*Award under Ben. Reg.* VII *of* 1822, *s.* 33—*Power of Court to set aside award*—*Held* that an award of arbitrators under s. 3, Reg. VII of 1822, could not be set aside by the Courts of Judicature. FURZUND ALI v. AHMED HOSSEIN, **1 Agra 267.**

(18)—*Award by Survey Authorities*—*How far binding*—*Survey proceedings, evidentiary value of.*—An award cannot legally be given in favour of a party for more than he claims ; and what is beyond the award is not binding or conclusive. An official opinion of the superintendent of survey regarding the trustworthiness of the survey proceedings is not legal evidence. The survey-proceedings are not conclusive as to title. Where they record a legal award of a competent Court, possession under it should not ordinarily be disturbed, unless a superior title be shown by the opposite party. LULEET NARAIN SINGH v. NARAIN SINGH, **1 W.R. 333.** [*R.*, 9 C.L.R. 305.]

(19)—*Act* IV *of* 1840—*Act* VIII *of* 1852, *s.* 14—*Survey award*—*Act* IV *of* 1840, *order of Magistrate under*—*Adjudication by competent authority.*—Neither an order by a Magistrate under Act IV of 1840 as to possession of lands nor an award by a surveyor is a decision by a competent authority. Where a plaintiff sued in the Court of B for the recovery of certain lands and the defendants objected that the lands in question were not in the District of B: *Held* that the Court had power, under s. 14, Act VIII of 1859, before it proceeded to try the suit, to enquire and determine whether the lands were in B or not. The rejection of a plaint under the same section cannot give jurisdiction to a Court which does not otherwise possess it. HURRONATH ROY v. R. W. SCOTT, **B.L.R. Sup. Vol. 636=7 W.R. 200.**

(20)—*Survey award*—*Evidentiary value of.*—A survey award sought to be set aside cannot be treated as evidence. ESHAN CHUNDER SEIN v. HUREE CHURN DEY, **2 W.R. 278.**

(21)—*Award of Survey Authorities*—*Order of Magistrate under Act* IV *of* 1840—*Limitation.*—An award of the Survey Authorities adopting an order of a Magistrate passed under Act IV of 1840 is legal, because it is an adjudication founded on a previcus order of a competent Court. Being a legal award under Act XIII of 1848, the special limitation of three years applies to it. RAMGUTTY NAG CHOWDHRY v. BURODA CHURN BOSE, **1 W.R. 120.**

(22)—*Award by Survey Authorities*—*Suit by auction-purchaser to set aside*—*Limitation Act* (XIII *of* 1848).—*Held* that a suit is not barred by Act XIII, 1848, when brought to cancel an award given by Survey Authorities by an auction-purchaser at a sale for arrears of revenue subsequent to the award. PUREEAG SINGH v. SHIB RAM CHUNDERI MUNDUL, **3 W.R. 165.**

(23)—*Award of competent authority.*—When a survey award is contested by a plaintiff within the proper time, and the accuracy or otherwise of the same is the very question to be tried,

Survey Award—*concluded.*

it cannot be held to be the award of a "competent authority" within the meaning of s. 14, Act VIII of 1859. ANUND CHUNDER MITTER v. DOORGA DOSS ROY, **2 W.R. 213.**

(24)—*Its nature*—*Act* VIII *of* 1859, *s.* 14—*Jurisdiction.*—An award of the Survey Authorities is an award within the purview of s. 14, Act VIII of 1859. Land demarcated to belong to an estate in one district, belongs *de facto* to that jurisdiction. While it so remains, a suit in respect of it should not be instituted in the Court of another District. RADHAMADHUB BANERJEE v. RAJA DAMOODUR SING AUDHAJ, **W.R. 1864, 369.** [*Diss.*, 11 W.R. 389.]

(25)—*Survey award*—*Suit to set aside*—*Limitation.*—In a suit by a plaintiff, on the allegation that he was in possession, to cancel a survey award demarcating the land as a portion of lands in the possession of the defendant, *held*, that the plaintiff's right to claim a declaration of title against the defendant arose, when the defendant prosecuted the survey proceedings and obtained the award. RAJ KISTO ROY v. BEER CHUNDER JHOOBRAJ, **4 W.R. 100.**

(26)—*Evidence of actual possession*—*Presumption of correctness.*—Survey proceedings are evidence of actual possession, and must be regarded as correct so far as the appearance of the country is recorded thereon, but if questioned in time, are not conclusive on the question of title. RAJAH LEELANUND SINGH v. RAJAH MOHENDERNARAIN SINGH, **13 W.R.P.C. 7=13 M.I.A 57=2 Suther. 286=2 Sar. 482.**

See APPELLATE COURT—POWERS OF APPELLATE COURT, 1 B.L.R.A.C. 25=10 W.R. 71.

See BOUNDARY, 13 W.R.P.C. 7=13 M.I.A. 57.

See LIMITATION ACT, 1908, arts. 45, 46, 1 B.L.R. A C. 12=10 W.R. 48.

See PARTITION—PRIVATE PARTITION, 10 W.R. 336.

Survey, Bengal.

See BEN. ACT V OF 1875.

Survey Maps.

See EVIDENCE—MAPS.

See EVIDENCE—MISCELLANEOUS DOCUMENTS.

(1)—*Survey map* — *Limits of permanently settled estate.*—The Revenue authorities cannot go behind a survey map and question the boundaries of a permanently-settled estate as fixed therein. SARAT SUNDARI DABI v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **11 C. 784.** [*R.*, 30 C. 291, P.C.]

(2)—*Maps and surveys*—*Evidentiary value*—*Act* IX *of* 1847—*Permanent Settlement of* 1793—*Assessment* — *Lands* — *Burden of proof.*—Maps and surveys made in India for revenue

Survey Maps—*concluded.*

purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive and may be shown to be wrong : but in absence of evidence to the contrary they may be properly judicially received in evidence as correct when made. Act IX of 1847 has no application to lands included in the Permanent Settlement of 1793 and the assessment of which lands was then fixed for ever. No new assessments of such lands can be lawfuliy made. In every case the question what lands were included in the Permanent Settlement is a question of fact and not of law. This question may or may not be proved by subsequent survey maps. The *onus* of proving that any particular lands were included in the Permanent Settlement of 1793, in other words the *onus* of proving that the Government Revenue then fixed was assessed upon any particular lands is clearly on those who affirm that such was the the case. JAGUDINDRA v. SECRETARY OF STATE, **5 Bom. L.R. 1=7 C.W.N. 193, P.C. = 30 C. 291=30 I.A. 44=8 Sar. 412.**

Topographical — , value of, as evidence in cases of boundary disputes — *See* EVIDENCE ACT, 1872, s. 36, 11 C.W.N. 230=9 C.L.J. 415.

And map for private purposes — Comparative value as evidence—*See* FISHERY, 12 C.W. N. 334.

Survey Officer.

See BEN. ACT V OF 1875, s. 40, 21 C. 935.

Survey Officer's decision as to tenure, binding effect of until reversed by Court's decree—Settlement Officer's statements of facts in *dharepatrak*, admissible in evidence as entries coming under s. 35 of Act I of 1872—*See* BOM. ACT I OF 1880, ss. 20, 21, 21 B. 695.

Surveyor.

(1)—*Surveyor employed by Collector managing khasmehal—"Public Officer."*—A surveyor employed by the Collector in the *Khas mehal* department is a *public officer*. BAJOO SINGH v. QUEEN-EMPRESS, **26 C. 158=3 C.W.N. 115.**

Surveyor's Report.

Surveyor's report, evidentiary value of, in Land Acquisition cases—*See* ACT I OF 1894, 10 Bom. L.R. 660=33 B. 325.

Survey Proceedings.

Allegation of misconduct and collusion of survey officers—*See* COSTS—SPECIAL CASES, 1 Hay 520.

Survey Records.

Evidentiary value in suit for possession—*See* POSSESSION — EVIDENCE OF POSSESSION AND TITLE, 7 C.L.R. 269.

Surviving Partner.

See PARTNERSHIP.

Surviving partner, rights and liabilities of—*See* TRUSTS ACT, 1882, ss. 88, 95-*a* and 96, 9 Bom. L.R. 606.

Survivorship.

See HINDU LAW—INHERITANCE.

See HINDU LAW—JOINT FAMILY.

(1)—*Of joint tenancy, scope of.*—The survivorship in the case of joint tenancy is not an incident to it, in the case of real estate only, but exists also in the case of leasehold property and personal estate. WILLIAM WEBBE v. LESTER, **2 B.H.C. 52.**

Right of, defeated by attachment — *See* ATTACHMENT—MISCELLANEOUS, 2 Bom. L. R. 32.

Government grant for family maintenance—Joint ownership—*See* GRANT— MISCELLANEOUS, 11 C. 1, P.C.

Gift to two persons jointly—Survivorship—*See* HINDU LAW—WILL, 15 B. 443.

Parsis—Custom—Presents to bride—Joint ownership—Right of survivor—*See* HUSBAND AND WIFE, 16 B. 630.

Doctrine of, applies to a family firm of Cutchi Memons—*See* MAHOMEDAN LAW, CUTCHI MEMONS, 9 Bom. L R. 274.

Money settled on husband or wife—Sum lent on mortgage by which interest was payable to both jointly—Death of husband——Widow's right of survivorship—Aliyasantana Law—*See* MALABAR LAW—HUSBAND AND WIFE, 25 M. 385.

See RIGHT OF OCCUPANCY—TRANSFER OF RIGHT, 109 P.R. 1894, F.B.

See SUCCESSION CERTIFICATE ACT OF 1889, s. 4, 1 C.W.N. 32.

Suspicion.

Expression of mere—Not actionable—*See* DEFAMATION, 13 M. 34.

Is not a ground on which to reject evidence of witnesses who though not independent are not shaken in cross-examination and are believed by the first Court—*See* EVIDENCE—MISCELLANEOUS, 6 Bom. L.R. 233.

Court not to proceed on—*See* GOSSAINS, 2 Ind. Cas. 385=14 C.W.N. 191.

Suti Tenure.

(1)—*Assignment in breach of stipulation—Forfeiture.* — An assignment without consent of a *suti* tenure does not involve a forfeiture. An assignment even though in breach of a stipulation does not necessarily create a right of forfeiture. The Courts both in England and in India lean strongly against a forfeiture ; so that, if a plaintiff comes into Court relying upon a forfeiture he must prove his rights strictly. CHHABILDAS v. KRISHNARAO, **5 Bom. L.R. 1016.**

Svamibhogam Rent.

Landlord and tenant—Demise of temple lands by Collector at—Tenancy at will—*See* LANDLORD AND TENANT—EJECTMENT, 1 M. H.C. 109.

Symbolical Possession.

See POSSESSION.

Symbolical possession in execution proceedings is as good as actual possessicn as between the parties thereto—*See* EXECUTION OF DECREE—MISCELLANEOUS, 1 Bom. L.R. 48.

Synagogue.

Religious community worshipping at one synagogue—Resolutions at meeting of community dismissing officers of synagogue—Necessity of notice to officers—Decision by domestic tribunal for community, whether Court can interfere with—*See* RELIGIOUS COMMUNITY, 11 B. 185.

Tacking.

See MORTGAGE—TACKING.

Of various periods of adverse possession—*See* POSSESSION—ADVERSE POSSESSION, 9 O.C. 230.

Tahsildar.

See LIMITATION ACT, 1908, arts, 2, 6, 7, 8, 9, 22, 24, 25, 40, 48, 49, 1 B.L.R. S.N. 20, (*b*).

Petition by raiyats to Tahsildar—*Bona fide* statements against Zemindar held privileged—*See* PRIVILEGED COMMUNICATION, 12 M. 374.

Tahzimni Tenure.

Nature of—*See* LANDLORD AND TENANT—MISCELLANEOUS, 80 P.W.R. 1910=6 Ind. Cas. 1010.

Taidnuvees.

See LOCAL INVESTIGATION, 6 W.R. Act X, 81.

"Tainati Peon."

And chowkidar, distinction between—*See* LEASE—CONSTRUCTION OF LEASE, 6 C.L J. 572.

Takarridar.

Takarridar—*Succession to his holding by his adopted son—Claim by proprietary body of Mauzia Talwandi, Tehsil Dina Nagar, District Gurdaspur—Land entered as* Shamilat Deh—*Charitable gift*—Muafi—*Occupancy tenant—No analogy between* Takarridar *and* Mukarridar *of Rawalpindi—Punjab Tenancy Act* (XVI *of* 1887), *ss.* 5, 6 *and* 59.—In 1829 A.D. one S. acquired some land as a charitable gift (Dharm Arth) from the Sikh Government. In 1850, S received Muafi grant from the British Government for his life. In 1875, on his death the grant was resumed and an engagement for payment of revenue at full rates was made with

Takarridar—*concluded.*

his son R, and he was recorded as *Takarridar* in the proprietary column paying a small amount of rent (Malikana) to the proprietary body. This entry was repeated in the last settlement of 1890-91 and was continued till R's death in 1901 when mutation was effected in favour of R's adopted son K. *Held* that, the term *Takarridar* is neither defined in the Punjab Tenancy Act (XVI of 1887) nor it falls within the definition of various tenants detailed therein. *Held*, also that under the above circumstances, *Takarridar* occupies the position of a proprietor and not that of an occupancy tenant, and his adopted son is entitled to succeed him. *Per Kensington, J.*—R could establish occupancy rights under s. 5 of the Punjab Tenancy Act. The mere fact that the land has all along been shown in the settlement record as *Shamilat Deh* proves nothing, especially as in 1890 Settlement Record R was entered in the column for proprietors. R's *Takarridari* tenure has no analogy to that of *Mukarridari* of Rawalpindi District as explained in. BUDHA SINGH v. KANSHI RAM, **120 P.W.R. 1908.** (10 P.R. 1896, *R.*)

Takavi Advances.

Ex-proprietary tenants mortgaging trees to Government for takavi advances—Relinquishment of their rights to zemindar—Right of Government—*See* ACT XII OF 1884, s. 5, 26 A. 540.

Taking Instructions.

In contravention of Act XVIII of 1879 what amounts to—*See* ACT XVIII OF 1879, 6 M.L.J. 142.

Talbanah.

Talbanah—*Refund.*—Where the *talbanah* deposited for the purpose of giving notice to the other side had not been applied to its proper purpose, process not having been served, *held* that there could be no objection to its being refunded, NATHU SINGH v. BHOPAT RAM, **A.W.N. 1881, 74.**

See ACT XXIII OF 1861, s. 2, 3 B L.R. App. 25.

Taluq Board.

Suit against President of—held wrongly framed—Special limitation under s, 156—*See* MAD. ACT V OF 1884, ss. 27, 156, 16 M. 296.

Taluqdar.

Right of a—in Guzerat to recover trove—Government, Right of—*See* ACT VI OF 1878, 19 B. 668.

Guardian not competent to enter into contract binding ward personally—*See* BOM. ACT VI OF 1862, s. 12, 11 B. 551, P.C.

Debts incurred during management of Taluqdari by Settlement Officer—Taluqdari's personal liability for—Such debts not enforceable as against landed estate—Power of taluqdar to charge estate—*See* BOM. ACT VI OF 1862, ss. 12, 20. 11 B. 78.

Taluqdar—*concluded.*

Punitive post—Cost—Liability of taluqdar —*See* BOM. ACT VII OF 1867, s. 16, 16 B. 455.

See BOM. ACT VI OF 1888, ss. 16, 21, 16 B. 408.

Testamentary intention expressed by Taluqdar in a letter of reply to Government, whether constitutes will—*See* U.P. ACT I OF 1869, ss. 2, 20, 22, 18 C. 1=17 I.A. 82, P.C.

Suit relating to taluqdari village lands—Court Fees Act (VII of 1870), s. 7 art. 5, proviso—Difference between amount of jama payable by taluqdar and full survey assessment, a remission within cl. 3 of proviso—*See* COURT FEES ACT, 1870, s. 7, art. 5, proviso, 11 B. 541.

Partition and account against—*See* DECREE —DECREE, FORM OF, 14 C. 493=14 I.A. 37, P.C.

Rent, enhancement of—Tenants directly holding from Government—Settlement for 30 years made with Taluqdar—Right to enhance after expiry—*See* ENHANCEMENT OF RENT—GENERAL, 9 C.L.R. 189.

Powers of—*See* SETTLEMENT DECREE. 12 O.C. 267=3 Ind. Cas. 868.

Rules of succession applicable to non-taluqdari property — Acquisitions by taluqdar — Succession—*See* SUCCESSION, 11 O.C. 256.

Payment of assessment by—under protest—Right of, to sue—*See* VOLUNTARY PAYMENT, 14 B. 299.

Taluqdars, Ahmadabad.

See BOM. ACT VI OF 1862.

Taluqdars, Gujarat.

See BOM. ACT VI OF 1888.

Taluqdari Estate.

(1) *Taluqdari estate—Sale of income.*—The income of a taluqdari estate could not be sold in execution of a decree in the absence of the sanction of Government. NARAN v. CHUDASAMA, **1 Bom. L.R 212.**

(2) "*Taluqdar's estate*"—*Meaning of.*—The expression "taluqdar's estate" means an estate held by Taluqdar as a Taluqdar. KHODABHAI v. CHHAGANLAL, **9 Bom. L.R. 1122.**

Taluqdari Settlement.

See LANDLORD AND TENANT—RELATIONSHIP OF LANDLORD AND TENANT, 11 C. 318, P.C.=12 I.A. 133.

Taluqdari Settlement Officer.

Taluqdari Settlement Officer, acting as Collector for the purposes of s. 320 of the Civ. Pro. Code, 1882—*See* CIV. PRO. CODE, 1908, ss, 68, 70, 71 and sch. III r. 9, 6 Bom. L.R. 822.

Taluqdar of Kathiawar.

Whether a ruling chief—*See* JURISDICTION OF CIVIL COURTS, 8 B. 415.

Taluqdars' Relief, Oudh.

See U.P. ACT XXIV OF 1870.

Tambol.

See JURISDICTION OF CIVIL COURTS, 141 P.R. 1888.

Tambol Register.

Evidentiary value of—*See* GUARDIAN—GENERAL, 86 P.W.R. 1910=7 Ind Cas. 505=213 P.L.R. 1910.

Tamlik-nama.

See DEED—CONSTRUCTION OF DEEDS, A.W.N. 1881, 6.

Construction—*See* DEED—CONSTRUCTION OF DEEDS, A.W.N. 1883, 233.

Tanjore District.

See LANDLORD AND TENANT—MISCELLANEOUS, 27 M, 517.

Tank.

(1)—*Surplus water of tank—Channel—Easement.*—A right of easement may be acquired in the surplus water of a tank flowing through a defined channel, whether natural or artificial. RAYAPPAN v. VIRABHADRA, **7 M. 530.** [*R.*, 14 C.P L.R. 145, 11 C.W.N. 95 = 4 C.L.J. 370.]

(2)—*Rent, assessment of—Permission to excavate silted-up tank—Rent, not fixed—Excavation at considerable expense—License—License to effect improvement, if can be revoked—Hindu shastra—Land, grant of, digging purpose—Sanad, a piece of evidence—Tank what includes—Tank, enjoyment of, for how long—Expectation—Estoppel—Zemindar's duty to maintain old tank—Resumption—Reversion—Rent, a recurring obligation—Right to receive rent, if can be held adversely—Limitation Act* (IX *of* 1908), *sch.* I, *art.* 130.—In 1850, the ancestor of the defendant applied to the predecessor of the plaintiff for being allowed to excavate an unclaimed silted up tank in the plaintiff's (Maharaja's) zemindari. The tank was previously possessed by some one or other of the tenants. The permission was given by a *Chiti* bearing the plaintiff's ancestor's seal, and the grantee was required to re-excavate the tank by employing earth cutters, and the only restriction imposed was that the limits of the ancient tank were not to be exceeded. There was no provision for the payment of any rent presently or in future, and nothing was said as to the duration of the grant. The ancestor of the defendant re-excavated the tank at a considerable expense, and it was in the exclusive possession of the family of the defendant from father to son, and at the date of the suit, still supplied good drinking water. It was never assessed with rent, nor considered as a part of the rent-paying lands of the mehal. In the Survey and Settlement record, the Settlement Officer recorded, on the 21st November, 1894, the tank with its bank as jamas 'not paying rent.' The exclusive possession of the defendant continued as before and

Tank—*continued.*

no action was taken by the plaintiff. In a suit brought on the 25th February, 1908, praying for recovery of possession of the tank with its banks, or in the alternative, for assessment of fair rent: *Held*, that, as a Hindu Raja, presumably possessing all the instincts and traditions of a Hindu Raja, the ancestor of the plaintiff, granted the land for the purpose of the re-excavation of the ancient tank, he could never have meant to grant a mere license, and a consistent course of conduct proved that this was so. *Held*, also, that the defendant was entitled to hold the tank with its banks without payment of rent, so long as the tank served the purpose for which the grant was made. That, when the predecessor of the plaintiff granted permission to the ancestor of the defendant to spend an indefinite amount of money for the reconstruction of the bank, he encouraged and created an expectation in the grantee that he would be allowed to enjoy the improved property without any let or hindrance, and his heir, the plaintiff, was equitably bound to give effect to such expectation (28 C. 693, 28 I.A. 211, *R.*). So long as the tank continued to be a tank, no assertion of adverse title by the defendant could give the plaintiff a cause of action for resumption or assessment of rent. (27 C. 156, 26 I.A. 216, *R.*) As the defendant relied upon his *sanad* as the root of his title and claimed rent-free title under the *sanad* and not by adverse possession as an alternative source of title, his possession could not be used for any purpose other than that of explaining the grant on which he relied. *Per Caspersz, J.*—It is the zemindar's duty to maintain old tanks in their zamindaries (11 A. 364, 14 B.L.R.209, *R.*). It was valid to allow a tenant to spend money and re excavate an old tank. A license to do a thing, to effect improvement, could not be revoked after the improvements had been carried out. The *sanad* was merely a piece of evidence showing the intentions of the parties and the nature of the subject-matter. If it had been intended to assess the tank at some future date, some apt and necessary provision would have been made among the terms of the document. If any rent had been previously paid for the tank, or any part of it, that fact also would have been mentioned. The word 'tank' included the banks which were necessary for the enjoyment of the water. If a person having a right to avoid a transaction on any legal ground, being aware of, and reasonably capable of enforcing, such right, manifests an intention to confirm the transaction, he cannot afterwards avoid it. (2 C.L.J. 125, *D.*) When private owners in this country, in times past, granted lands for various public purposes, such lands are liable to resumption, when the particular purpose has been exhausted. In such cases, there is a reversion in the grantor *Obiter*: As the obligation to pay rent is a recurring obligation, the landlord was not barred within the meaning of art. 130, sch. I of the Limitation Act. There cannot be any claim to hold adversely in respect of a right to receive rent. That right is not a limited interest; it is, in fact, the entire interest of the landlord. That, as the tank was never dissociated from being a part of the revenue paying properties of the zemindar, question of limitation under art. 130, sch. I, Limitation Act, could not arise. *Per Chatterjee, J.*—According to the Hindu Shastras, the grant of land for digging tanks, the digging of new tank and wells and the re-excavation of old ones, is extremely meritorious. MAHARAJA BIRENDRA KISHORE v. AKRAM ALI, 15 C.L.J. 194.

Tank—*concluded.*

Yearly tenant of a—*See* ACT I OF 1894, s. 23, 28 C.152=5 C.W.N. 349.

Right of tenant to dig a—on his land—*See* BURDEN OF PROOF—LANDLORD AND TENANT, 8 B.L.R. App. 69.

Repairs to a, the Government was bound to do—Zemindar interested—Suit for contribution against Zemindar—*See* CONTRACT ACT, 1872, s. 70, 18 M. 88=4 M.L.J. 205.

Surplus water of tank—*See* EASEMENT, 7 M. 530.

Water of—Different modes of drawing water—*See* EASEMENT, 8 C.W.N. 158.

Public tank, right to repair—Long user—*See* INJUNCTION—SPECIAL CASES, 6 M. 229.

Village tank, right of villagers to insist on repair at common cost—*See* INJUNCTION—SPECIAL CASES, 12 M. 241, P.C. =16 I.A. 48.

Suit against Government for recovery of a—Acts constituting adverse possession—*See* POSSESSION—ADVERSE POSSESSION, 5 Ind. Cas. 118=7 M.L.T. 139=20 M.L.J. 74.

Assessment of rent—Adverse possession—Limitation—*See* RENT, 15 C.L.J. 203.

Tanki Tenure.

Revenue-sale—Act VII of 1868 (B.C.), ss. 1 and 14—Ejectment—Act XI of 1859, s. 29—Subsisting title at the date of suit—Recognition of title as *tankidar*, if sufficient to give right of suit—"Revenue"—"Proprietor"—Amount due from *tankidar* and payable to Government—Sale by Collector for Government dues, if legal—*Tanki tenure*, nature of settlement of—*See* LANDLORD AND TENANT—MISCELLANEOUS, 7 C.L.J. 460.

Tariff.

See ACT VIII OF 1894.

Tarwad.

See MALABAR LAW—JOINT FAMILY.

See MALABAR LAW—TARWAD.

Declaration of membership of a—Valuation for purposes of jurisdiction—*See* MAD. ACT III OF 1873, s. 12, 15 M. 501=2 M.L.J. 255.

Specific Relief Act, s. 42—Consequential relief—Kanom—Suit by junior member of, for declaratory decree—*See* DECLARATORY DECREE, SUIT FOR—SUITS CONCERNING DOCUMENTS, 17 M. 232.

Tastik.

Arrears of cash allowance—Suit to recover—*See* LIMITATION ACT, 1908, arts. 61, 131, 12 Bom. L.R. 157=5 Ind. Cas. 869=34 B. 349.

Taveris.

See MALABAR LAW—TARWAD.

Members of divided, of tarwad, whether bound by execution proceedings, to which they were not party, obtained against Karnavan of original tarwad—*See* MALABAR LAW—TARWAD, 3 M.L.T. 189=18 M.L.J. 132.

Tawazhi.

Suit by member of a, for separate maintenance—*See* MALABAR LAW—MAINTENANCE, 16 M.L.J. 275.

Tax.

(1)—*Statute—Construction.—Power to levy tax.*—A statute should not be construed as if it was a contract. The power to impose tax needs no correlative right. BRAUSON v. THE MUNICIPAL COMMISSIONERS FOR THE TOWN OF MADRAS, **2 M. 362, F.B.** [*R.*, 27 M. 13, 1 S.L.R. 228.]

(2)—*Tax, levy of, by a private person.*—The levy of tax on goods brought for sale at a fair by a private individual or a corporation is illegal in virtue of Act XIX of 1844. MAHADHU v. SAKHARAM, **5 Bom. L.R. 703.**

(3)—*Taxes on trades in ancient India—Muhtarafa—Trade-tax, Zemindar's right to collect—Reg.* XXV *of* 1802, *s.* 4—*Reg.* XXV *of* 1832.—The right of the sovereign power to collect taxes on professions is of extreme antiquity in India, but these dues, though farmed out, were not exercisable by the owners of land. as such, but by the sovereign. The Zemindar of Karvetnagar has not the right of collecting the Muhtarafa or trade-tax from artizans in his Zemindari, delegated to him by Government, and the assignees of the Zemindar cannot legally exercise this right. *Quære.*—Whether it was competent to Government to commit the collection of this branch of the revenue to Zemindars for their own benefit. VEDANTA v. KANNIYAPPA, **9 M. 14, F.B.** [*R.*, 16 M. 34.]

(4)—*Levy of house-tax—Distinct cause of action each year—Payment of tax one year without protest no bar to suit to recover tax paid under protest in subsequent year.*—The levy of the house-tax in each year would give a new and distinct cause of action. and the payment of the tax without protest for one year would not bar a suit to recover a sum paid in subsequent year under protest on account of a tax which was not legally chargeable for that year on the plaintiff. PITAMBERDAS v. JAMBUSAR TOWN MUNICIPALITY, **17 B. 510.**

(5)—Hak "Mogalai in Choki"—*Preventing levy of—Reg.* II *of* 1827, *s.* 43 *and* VII *of* 1831, *s.* 31—*Act* XX *of* 1839—*Acts* VI, XVI *and* XIX *of* 1844—*Act* VIII *of* 1859, *s.* 6.—Plaintiff sued

Tax—*continued.*

to recover 6 years' annual produce of a *hak* called "*Mogalai in Choki*" stating that his father had purchased it from two persons in 1825 and continued to realise the produce thereof up to 11th of September 1844, when the Deputy Collector of Continental Customs and Excise by proclamation forbade him to collect his dues any longer under pain of punishment. The said produce of the *hak* consisted of the levy of certain fees on articles imported and exported through three of the City gates of Surat. *Held* that this *hak* was abolished by Act XIX of 1844 as the Act did not make any distinction between duties and other taxes and cesses belonging to the Government and those belonging to private persons. The omission to provide for compensation was held not to raise any inference that Act XIX of 1844 was not intended to apply to private persons, as there is the same omission in Act XX of 1839. The Court was not precluded from so deciding merely because the provisions of Act XX of 1839 had not been complied with in forbidding the levy of the fees in question. *Held*, further, that the intention of Act XIX of 1844 was to abolish *haks* such as this entirely, instead of leaving them to be abolished at different times, as provided for in Act XX of 1839. NASARVANJI PESTONJI v. DEPUTY COLLECTOR OF CUSTOMS, **2 B H.C. 75.** [*F.*, 8 B. 398; *R.*, 9 M. 14, F.B.]

(6)—*Choongee tax, when leviable—Confined to articles sold or consumed within a town.*—The Choongee tax, if legal, is a tax upon articles brought into a town or manufactured therein and sold or consumed there; but if the articles be intended for sale or consumption elsewhere, the tax would then amount to a transit duty. GAMAN v. SULUKHUN MULL, **149 P.R. 1868.**

Imposition of—*See* BURMA ACT (XVII OF 1884), s. 45, L.B.R. (1872-1892), 405.

Levy of—by Municipality—*See* MAD. ACT III OF 1871, ss. 38, 61, 7 M.H.C. 249.

Member of firm of attorney's holding a Government appointment—Liability of to pay separate, as such—*See* MAD. ACT I OF 1884 ss. 103, 110, 23 M. 529.

Tax on buildings—Standard hypothetical rent—Lying-in Hospital—*See* MAD. ACT I OF 1884, s. 123, 10 M. 38.

Liability of Government to pay tax for importing timber—*See* MAD. ACT I OF 1884, ss. 170, 174, 338, 341, 12 M.L.J. 209=25 M. 457.

School buildings not taxable—Illegally levied suit to recover—*See* MAD. ACT IV OF 1884, s. 63, 21 M. 367.

See U. P. ACT XV OF 1873, s. 15, 21 A. 348=A.W.N. 1899, 97.

Imposed without jurisdiction--Legality--Right to recover excess—Limitation—*See* LIMITATION ACT, 1908, arts. 2, 62, 7 A.L.J. 496=6 Ind. Cas. 401=32 A. 491.

Tax—*concluded.*

Mortgage—Suit to recover mortgage debt by sale of mortgaged property—Property sold to realize Municipal taxes — Personal claim—Limitation Act, 1877, sch. II, arts. 97 and 116—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, P.L.R. 1900, p. 201.

Taxation.

University buildings—Exemption—Charitable purposes—*See* BOM. ACT III OF 1888, ss. 143, 144, 16 B. 217.

Mutual Assurance Company—Taxation—*See* MAD. ACT I OF 1884, sch. A, 11 M. 238.

Taxation of Costs.

See COSTS.

(1)—*Commission to take evidence in England in respect of suit in India—Taxation of bill of costs—Principle of taxation—Objection to taxation—Procedure by taxing master—Commission to England—Production of vouchers—Rule in respect of—Discretion of taxing master—Principle of party taxation—Obtaining transcript of evidence given and of perusing it, costs of—Amount allowed to witness by taxing master—Discretionary—Interference by Court—Fees of Commissioner, scale of.*—On the issue of a commission to take evidence in England in respect of a suit in India, the bill of costs as regards such commission must be taxed by the taxing master of the Court in India and not in England. It is to be taxed on the same principle and on the same scale as would be adopted in England. Where the taxing master finds any difficulty, he must refer to England for information. When an item in the taxation is objected to, the master is to re-consider and review his taxation, and, in doing so, he must throw the *onus* of proof as to the necessity of the item, upon such party as, having regard to its particular nature, he considers ought to bear it. It is impossible to lay down any particular rule as regards the production of vouchers in cases of commission to England. To require them in all cases in the first instance would occasion an unnecessary increase of costs in the proceedings. To rule that they should never be called for, would be to establish a dangerous precedent which unscrupulous practitioners might readily avail themselves of. The proper procedure is this: Upon the objections being brought in, it should be in the discretion of the taxing master, either of his own motion or on the application of the party objecting, to require vouchers for, or further proof of, all or any of the items objected to, and, failing the production of the vouchers or proof that he may require, to disallow the item. The principle of party and party taxation in England is that the successful party shall receive only such costs as were necessary to enable him to conduct the litigation. *Quære*:—Whether, on taxation as between party and party, the costs of obtaining a transcript of the evidence given and perusing it, should be allowed or not? The taxing master has a discretion to make payments to witnesses, and Courts will always be averse to review

Taxation of Costs—*continued.*

such discretionary allowances. Where a Court in India appoints a Commissioner to take evidence in England, it expects that his fees shall not exceed those which the Supreme Court in England would allow to a special Examiner or Commissioner acting in England under its orders; and parties should choose their Commissioners with reference to this undertaking. If they desire that higher fees should be allowed to the Commissioner whom they name, they should obtain an order from the Judge appointing the Commissioner. THE GOKULDAS BULABDAS MANUFACTURING COMPANY, LIMITED v. JAMES SCOTT, **15 B. 209.**

(2)—*General rule as to—Taxing master's discretion—Interference by Court.*—As a general rule the Judge in Chambers will not interfere with items of taxation which are entirely within the Taxing Master's discretion or go into details of such discretionary items, but there is nothing to prevent him from doing so if it appears to him that the interests of justice require his interference; and it would be his duty in all such cases to review and revise taxation and judge and decide for himself what would be a just order to make under the circumstances. BANOO BEGUM v. MIR AUN ALI, **9 Bom. L.R. 983=32 B. 262.**

(3) — *Originating summons — Costs of counsel.*—In an originating summons, parties are entitled to instruct counsel; and without any certificate the costs of one counsel must be allowed on taxation. FATMABIBI v. SHAIKH HUSSAIN, **9 Bom. L.R. 1071.**

(4)—*Solicitor—Expert knowledge as to handwriting—Extra charges for the work—Taxing Master's decision—Review by Chamber Judge.*—In a suit to obtain probate of a will, the defence was that the will was a forgery. The defendant's solicitor failing to obtain an expert in handwriting, made a special study of the subject occupying 128 hours, and arrived at the conclusion that the will was not genuine. He then, notwithstanding counsel's opinion to the contrary, got the suit decided in his client's favour. In his bill of costs, the defendant's solicitor claimed his extra fees for the special work: but the Taxing Master disallowed the claim: *Held*, in review of taxation, that the solicitor was entitled to a special remuneration for his work in qualifying himself as an expert in handwriting. DAHIBAI v. SUNDERJI, **9 Bom.L.R. 819=31 B. 430.**

(5) — *Taxation in probate proceedings.*—Pleader's fees in appeals in probate proceedings should, according to a long standing practice of the High Court, be assessed at Rs. 30. SUNDRABAI v. COLLECTOR OF BELGAUM, **10 Bom.L.R. 1197=33 B. 256.**

(6)—*Act* XXVI *of* 1864, *s.* 9—*Certificate—Costs—Powers of appellate Court.*—A certificate in respect of costs under s. 9, Act XXVI of 1864, may be given at any time. An omission of the original Court to certify the case under the section may be supplied by the appellate Court,

Taxation of Costs—*concluded.*

if the case is a fit one to be brought before the latter Court. KEWATA MUG v. NOBOCOOMAR DOSS, **19 W.R. 207.**

(7)—*Taxation, Counsel's fees—Taxing Master—Plaint in short causes.*—The Taxing Master should allow counsel's fees on taxation, where plaints in short causes are drawn by counsel, if he is of opinion that it was not ureasonable to submit them to counsel to be drafted or settled. GUNNAJI BHAVAJI v. MAKANJI, **10 Bom. L. R. 969.**

See LEGAL PRACTITIONERS—ATTORNEY AND CLIENT, 3 C. 473.

See LIMITATION ACT, 1908, art. 84, 1 B. 253.

See PRACTICE AND PROCEDURE, 33 C. 827.

See RULES OF HIGH COURT AND SUPREME COURTS—BOMBAY, 16 B. 152.

Taxing.

Taxing provisions of statute — Right of Government to claim exemption when not named in statute—*See* STATUTES. CONSTRUCTION. OF, 12 M.L.J. 208=25 M. 457.

Taxing Master.

See COSTS—TAXATION OF COSTS.

See TAXATION OF COSTS.

Taxing Master, decision of, can be reviewed by the Chamber Judge—*See* COSTS—TAXATION OF COSTS, 9 Bom. L R. 983=32 B. 262.

Finality of decision of—*See* COURT FEES ACT, 1870, s. 5, 15 A. 117=A.W.N. 1893, 45.

Taxing Officer.

See TAXING MASTER.

Taylor's Medical Jurisprudence.

Evidence Act (I *of* 1872), *ss.* 57, 60—*Science, evidence of books of.*—Under the provisions of the penultimate paragraph of s. 57 and the first proviso of s. 60 of the Evidence Act, Taylor's Medical Jurisprudence may be referred to. *In re* HATIM, **12 C.L.R. 86.**

Tazi Mandi Chitties.

Act XXI *of* 1848 (*Gambling*)—Tazi mandi chitties.—The Gambling Act (XXI of 1848) is inapplicable to the transaction with respect to opium known as *tazi mandi chitties.* KANAYA LAL v. CHAGMAL BATTIA, **8 B.L.R. 412.**

Teacher.

Limitation period applicable to suit for pay of, or instructor—*See* LIMITATION ACT, 1908, art. 121, 8 M.H.C. 87.

Teiskhana Papers.

See EVIDENCE ACT, 1872, s. 35, 23 C. 366.

Teiskhana Register prepared by patwari, not a public document—*See* EVIDENCE ACT, 1872, ss. 35, 74, 18 C. 534.

Teji Mandi Transactions.

Nature of—Wagering—*See* CONTRACT ACT, 1872, s. 30, 12 Bom. L.R. 590.

Telegrams.

This circular deals with telegrams to Board. **Rev. Cir. No. 3, 25 W.R. Rev. Cir. 30.**

Telegraph.

Telegraphic messages--their disclosure—*See* EVIDENCE — PAROL EVIDENCE, 2 N.W.P. 210.

Mistake of Reuter in transmitting message —Effect—*See* SALE—GENERAL, 9 M.L.T. 353 =8 Ind. Cas. 291.

Telegraphs, Electric.

See ACT VIII OF 1860.

Temple.

See ACT XX OF 1863.

See CIV. PRO. CODE, 1908, s. 92.

See HINDU LAW — RELIGIOUS ENDOWMENTS.

See RELIGIOUS ENDOWMENTS.

See RIGHT OF SUIT—ENDOWMENTS, SUITS RELATING TO.

(1)—*Management of temple by rotation among two branches of trustees — Discontinuance of possession by one branch—Adverse enjoyment by the other—Extinction.*—The management of a temple had been conducted by two branches of a deceased trustee's family in rotation until 1881, by a family arrangement among them, and the members of the junior branch had, since 1882, discontinued possession of the immoveable properties belonging to the temple as also the performance of the duties usually appertaining to the office of trustee of the temple; and the members of the senior branch were, in turns, successively in possession of the properties of the temple and were performing the duties of the office of trustee, to the exclusion of and adversely to the members of the junior branch. *Held*, that the right of the members of the junior branch became extinguished in 1900, whether the appropriate article applicable to the case be art. 127 or art. 142 or art. 124. It is competent to co-trustees to settle a scheme of management by each of the co-trustees in rotation, at any rate where no emoluments are attached to the hereditary office of trustee. Where the office has emoluments attached thereto the emoluments will be subject to partition in the strict sense of the term like any other family property. But whatever may be the number of co-trustees, the office is a joint one and the co-trustees all form, as it were, one collective trustee and, therefore, must execute the duties of the office in their joint capacity. It would be competent for a Court in the exercise of its equitable jurisdiction to settle a scheme for the management of a public, religious or charitable trust by the various co-trustees in

Temple—*continued.*

rotation, if such management would be more beneficial to the interests of the trust than the joint and concurrent management thereof by a large number of co-trustees; so, it is also competent to the co-trustees themselves to settle a scheme of management by turns. RAMANATHAN CHETTY v. MURUGAPPA CHETTY, **27 M. 192.** (19 A. 428, *Disc.*) [*Confirmed on Appeal*, 29 M. 293, P.C. = 16 M.L.J. 265 = 1 M.L.T. 327 = 10 C.W.N. 825 = 4 C.L.J. 189 = 8 Bom. L.R. 498 = 3 A.L.J. 707 = 33 I.A. 139; *R.*, 4 M.L.T. 486 = 19 M.L.J. 59, 3 Ind. Cas. 408, 11 C.L.J. 2, 6 M.L.T. 319].

(2)—Mohini *arrangement—Release of assessment on temple lands—Temple to receive assessment from some lands—Effect.*—In lieu of *Mohini* allowance payable to a temple by the Government, the latter exonerated the temple from its liability to pay the assessment on its own lands, and directed the first crop assessment payable on certain lands by defendant's ancestors to be paid to the temple. The defendant's ancestors executed a muchilika to Government undertaking to pay the assessment to the temple. The trustees of the temple also executed a muchilika to Government agreeing to receive the assessment in satisfaction of their claims to the *Mohini* allowance. *Held*, in a suit for the assessment by the temple, that the claim of the temple to such assessment was not based upon any contract between the temple and the defendant's ancestors irrespective of any possession by the latter of lands. It was a claim to enforce the liability upon property, as, by the arrangement, the lands, the revenue of which was assigned to the temple, became inam lands vested in the latter who became entitled to the melvaram on such lands. VYTHILINGA MUDALIAR v. RAMACHANDRA NAICKER, **14 M.L.J. 379.** [*R.*, 15 M.L.J. 7.]

(3)—*Inam—Temple—Inam when extinguished.*—Where the right to the tree-tax alone was assigned as inam to a temple, the inam becomes extinct when the trees cease to exist. But when the inam consisted of the land on which the trees stood, the temple is entitled to the melvaram on the land. JAGANNATHA BANDIAJIAR v. MUTHIA PILLAI, **14 M.L.J. 477.**

Right of worshipper to complain of breach of trust of temple funds—*See* CIV. PRO. CODE, 1908, s. 92, 3 B. 27.

See CIV. PRO. CODE, 1908, s. 115, 26 M. 85.

Hindu law—Mirasi right in temple—Suit against office-holder—Compromise for sale of office and emolument—Public policy—Execution of decree passed in terms of compromise—Power of executing Court to refuse to execute decree—*See* COMPROMISE—GENERAL, 26 M. 31.

Office of dancing girl attached to—Courts bound to recognise endowments connected with—Custom—*See* HINDU LAW—CUSTOM, 14 B. 90.

Temple—*continued.*

Mitakshara law—Hindu father not competent to make gift of family land to temple—*See* HINDU LAW—GIFT, 11 M.L.J. 310.

Bequest to complete and to instal an idol—Validity—*See* HINDU LAW—WILL, 7 A.L.J. 296 = 5 Ind. Cas. 584 = 32 A. 337.

See JURISDICTION OF CIVIL COURTS, 23 B. 122, 4 M.H.C. 349.

Landlord and tenant—Demise of temple lands by Collector at Swamibhogam rent—Tenancy at will—*See* LANDLORD AND TENANT—EJECTMENT, 1 M.H.C. 109.

Customary contribution to—from tenants—when leviable—*See* LANDLORD AND TENANT—TENANT'S LIABILITY FOR RENT, 17 M. 43.

See LIMITATION ACT, 1908, s. 10, 8 B. 432.

Right to hold—office with lands attached, whether can be acquired by adverse possession—*See* LIMITATION ACT, 1908, s. 28, 21 M. 278.

Suit for declaration of right to office of Dharmakarta of—and possession of property attached to it—Prescription—Hereditary right—Right to possession dependent on right to office—*See* LIMITATION ACT, 1908, arts. 120, 124, 144, 26 M. 113.

Marriage fee for use of temple—Custom—Legal obligation—*See* MARRIAGE FEES, 5 M.H.C. 147.

Suit by some members of a caste for declaration of exclusive right to worship at—Cognisability of suit by Civil Court—Reg. II of 1827—*See* PARTIES TO SUIT—SUIT BY REPRESENTATIVES OF A CLASS, 7 B. 323.

Suit for declaration by some of the worshippers at a temple—Omission to obtain leave to sue, not fatal to suit—*See* PARTIES TO SUIT—SUIT BY REPRESENTATIVES OF A CLASS, 23 M. 28 = 7 M.L.J. 281.

Temple managed by three Sabhas, suit to recover land belonging to, whether maintainable by members of two Sabhas only—*See* PARTIES TO SUIT—MISCELLANEOUS, 23 M. 82.

Suit relating to—property—Plaint in name of idol—*See* PLAINT—AMENDMENT OF PLAINT, 19 A. 330 = A.W.N. 1897, 75.

Possession of temple property by the shevaks as servants of the idol, whether could be adverse to rights of hereditary manager—*See* POSSESSION—ADVERSE POSSESSION, 12 B. 322.

Manager and trustee on behalf of temple idol—Shevaks mere votaries in temple—Right to management or to custody of temple land, as against manager—*See* POSSESSION—ADVERSE POSSESSION, 12 B. 325 Note = P.J. 1879, 361.

Suit for damages against previous manager of—*See* PROVINCIAL SMALL CAUSE COURT ACT, 1887, sch. II, art. 18, 21 M. 245.

Temple—*concluded.*

Dignities and emoluments appertaining to office in—Dignities and emoluments not separable—Suit for dignities and emoluments—Maintainability — *See* RIGHT OF SUIT—OFFICE OR EMOLUMENT, SUITS RELATING TO, 7 M.L.J. 23.

See VALUATION OF SUIT, 96 P.R. 1887.

Temple Committee.

See ACT XX OF 1863.

See HINDU LAW—RELIGIOUS ENDOWMENT.

See RELIGIOUS ENDOWMENTS.

(1)—*Temple Committee—Dismissal of trustee.*—A temple Committee proposed to inquire into certain alleged charges against a trustee and called upon him to appear on a certain day before them to answer those charges. He did not obey the order of the Committee and, by his contemptuous and evasive conduct, the Committee was led to infer that he was really guilty, and they, therefore, dismissed him from his office. *Held* that the Committee was amply justified in dismissing the trustee. NARASIMHA CHARIAR v. MUTHUKUMARSWAMY MUDALIAR, **11 M.L J. 236.**

See PARTIES TO SUIT—SUIT BY REPRESENTATIVES OF A CLASS, 2 M. 200.

Dismissal of Dharmakarta by some members—Absence of meeting—Illegality of the dismissal—*See* RELIGIOUS ENDOWMENTS, 23 M. 483=10 M.L J. 117.

Temple-trustees.

See ACT XX OF 1863, 21 M. 179.

Temple trustee—Joint right of management—Partition of right—Civil Court—Jurisdiction—*See* HINDU LAW—PARTITION, 19 A. 428=A.W.N. 1897, 103.

Temporary Absence.

(1)—*Act* XI *of* 1865, *s.* 8—*Dwelling—Temporary absence—Intention of not returning—Effect of.*—The mere fact that defendant has a house within the precincts of the Small Cause Court jurisdiction is not sufficient proof that he was dwelling there. The question is one of fact. Did he live there? Did he intend to return? Was his absence temporary? The above questions ought to be considered. Temporary absence with nothing to show an intention of not returning to a former place of abode is consistent with dwelling there within the meaning of s. 8 of Act XI of 1865. GUNDA MULL v. MULLA MULL, **17 P.R. 1871.** [*F.*, 32 P.R. 1879.]

See JURISDICTION—CAUSES OF JURISDICTION, Bourke O.C. 127=Cor. 152.

Temporary Lodging.

Civ. Pro. Code, Act X *of* 1877, *s.* 17, *expl.* I—*Cause of action—Temporary lodging of defendant—Institution of suit.*—The words, "temporary lodging," in expl. I, s. 17 of the Civ. Pro. Code, cannot be separated from the cause

Temporary Lodging—*concluded.*

of action. A suit cannot be brought before the Court within the local limits of whose jurisdiction the defendant has a temporary lodging, if the cause of action did not arise within those limits. GANGA RAM v. SAIN DASS, **75 P.R. 1878.**

Temporary Residence.

Jurisdiction—for pleasure—Person without residence elsewhere — *See* JURISDICTION—CAUSES OF JURISDICTION, Bourke O.C. 127=Cor. 152.

See JURISDICTION—CAUSES OF JURISDICTION, Cor. 46=2 Hyde 117.

Temporary residence, if enough to give jurisdiction to a Court—*See* LETTERS PATENT, HIGH COURT, 1865,—BOMBAY, cl. 12, 3 Bom. L.R. 291=25 B. 176.

Tenancy.

See JOINT TENANCY.

See LANDLORD AND TENANT.

See RENT.

See RIGHT OF OCCUPANCY.

Tenure in existence for more than twenty years, split up into two—New tenancies created—Presumption of fixity of tenure inapplicable—*See* BEN. ACT VIII OF 1885, s. 50, cls. (2) and (3), 13 C.W.N. 410=36 C. 287=1 Ind. Cas. 4.

Sub-division of—under s. 88, Bengal Tenancy Act, rent-receipts how far evidence of —*See* BEN. ACT VIII OF 1885, s. 88, 10 C.W.N. 216.

Purchase of occupancy holding by a co-sharer— Right of other co-sharers to joint possession—*See* CO-SHARERS—ENJOYMENT OF PROPERTY BY CO-SHARERS, 13 C.P.L R. 153.

Purchase of occupancy holding by a co-sharer—Right of such purchaser in the holding —*See* CO-SHARERS—ENJOYMENT OF PROPERTY BY CO SHARERS, 14 C.P.L.R. 9.

Termination of—*See* EVIDENCE ACT, 1872, ss.109, 114, U.B.R. 1897—1901, Vol. II, 414.

Whether reservation of annual rent makes tenancy one from year to year—*See* LANDLORD AND TENANT—EJECTMENT, 11 C.W.N. 1124.

Agricultural lands—created not only by contract, but by occupation—*See* LANDLORD AND TENANT—RELATIONSHIP OF LANDLORD AND TENANT, 25 C. 324.

Creation of—Payment of rent and acceptance thereof, effect of, as to creation of tenancy—*See* LANDLORD AND TENANT, MISCELLANEOUS, 5 C.L.J. 9.

Proof of tenancy when lease was inadmissible—*See* LEASE—GENERAL, 2 Ind. Cas. 202=14 C.W.N. 141.

What constitutes cultivating partnership as distinguished from tenancy—*See* PARTNERSHIP—PARTNERSHIP WHAT CONSTITUTES, 10 C.P.L.R. 29.

Tenancy—*concluded*.

Alternative defence—and limitation—*See* PLEADINGS, 7 C.W.N. 294.

Instrument extinguishing tenant rights—Necessity for registration of—*See* REGISTRATION ACT, 1908, s. 17, 14 C.P.L.R. 29.

See SUCCESSION, 19 P.R. 1867, 96 P.R. 1867.

Tenancy, Agra.

See U.P. ACT II OF 1901.

Tenancy, Amendment, Chota Nagpur.

See BEN. ACT V OF 1903.

Tenancy-at-will.

(1) — *Tenancy-at-will, what is.—Obiter*— A tenancy-at-will is a holding by a tenant entirely dependent on the will of the landlord capable of being terminated at any time by the will and demand of the landlord, without any previous notice, and for the refusal to deliver up possession. a suit in enjeotment may be at once brought. ABDULLA v. PAKKERI, **2 M. 346.**

Declaration of tenancy-at-will, suit for—Jurisdiction of Civil Court—*See* U. P. ACT XXII OF 1886, s. 108, 4 O.C. 180.

Permanent occupancy—Course of decisions—*See* BURDEN OF PROOF—LANDLORD AND TENANT, 13 M. 60.

See KABULIAT—GENERAL, 2 B.L.R. S.N. 15 (*b*).

See LANDLORD AND TENANT—EJECTMENT, 19 B. 150.

Landlord and tenant—Demise of temple lands by Collector at Swamibhogam rent—*See* LANDLORD AND TENANT—EJECTMENT, 1 M.H.C. 109.

Tenancy, Bengal.

See BEN. ACT VIII OF 1885.

Tenancy, Bengal, Amendment.

See BEN. ACT III OF 1898.

See BEN. ACT I OF 1907.

Tenancy, Central Provinces.

See C.P. ACT IX OF 1883,

See C.P. ACT XVII OF 1889.

See C.P. ACT XI OF 1898.

Tenancy, Chota Nagpur.

See BEN. ACT VI OF 1908.

Tenancy from year to year.

(1)—*What is.*—A tenancy from year to year is a holding under contract, express or implied that the tenant may hold, until the end of any year entered on, unless the tenancy shall be determined either by agreement of both parties or by reasonable notice to quit by either party, terminating at the same period of the year at which the tenancy was commenced. ABDULLA v. PAKKERI, **2 M. 346.**

Tenancy-in-common.

See CO-SHARERS.

See HINDU LAW—INHERITANCE.

See HINDU LAW—JOINT FAMILY.

See HINDU LAW—PARTITION.

(1)—*Tenants-in-common—Courts of Equity.*—Courts of Equity will not interfere where a tenant-in-common acts reasonably for the purpose of enjoying the property held in common, in any way in which an owner could enjoy such property without injury to his co-parceners, such as where such co-parcener either cuts down a tree, pulls down a wall, or builds up doors in a portion of the property held beneficially by him alone. But the case is different when there is a clear and distinct infringement of the right of a co-parcener by a wilful and deliberate act for the purpose of creating a right as against him or otherwise injuring him. GOPEE KISHEN GOSSAIN v. HEM CHUNDER GOSSAIN, **13 W.R. 322.**

(2)—*Partition between tenants-in-common.*—A decree directing a partition, or the equivalent of a decree substantially undistinguishable from a decree, is a declaratory decree converting the parties into tenants-in-common. A tenant-in-common is entitled as of right to have a partition made of the property which he holds in common with others, whatever the means whereby he acquires that character. LADE v. SADASHIVA, **6 Bom. L.R. 35.**

(3)—*Possession of Deed — Tenants-in-common.*—When deeds relate to two or more portions of an estate or to an estate which is held by tenants-in-common if any one of the interested parties gets possession of the deeds none of the other parties can get them from him: for no one can show a better title to have them than he has. This rule of law applies only where all the parties have equal rights. HUNSRAJ v. MONGHIBAI, **7 Bom. L.R. 622.**

(4)—*Adverse possession between tenants-in-common.*—To constitute adverse possession as between tenants-in-common there must be an exclusion or an ouster. Exclusive receipt of profits by one tenant-in-common continuously for a long period would be sufficient evidence to presume an actual ouster of the other tenant-in-common. GANGADHAR v. PARASHARAM, **7 Bom. L.R. 252=29 B. 300.**

(5)—*Tenants-in-common—Adverse possession—Ouster, how presumed.*—To constitute adverse possession as between tenants-in-common, there must be an exclusion or ouster. Ordinarily sole possession by one tenant-in-common maintained continuously for a long period, without any claim or demand by any person claiming under the other tenant-in-common, is evidence from which an actual ouster of the other tenant-in-common may be presumed. MUHAMMAD ISHAQ v. NATHU, **10 A.L.J. 59.**

(6)—*Tenants-in-common—Ejectment suit by one against another—Exclusion—Ouster—Adverse possession.*—One tenant-in-common cannot maintain an ejectment against another tenant-in-common, because the possession of

Tenancy-in-common—*continued.*

one tenant-in-common is the possession of the other, and, to enable the party complaining to maintain an ejectment, there must be an ouster of the party complaining. But where the complainant, a tenant-in-common, has not been in the participation of the rents and profits for a considerable length of time, and other circumstances occur, the Judge should consider whether a presumption that there has been an ouster would arise. To constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster. BANDACHARYA v. SRINIVASACHARYA, **5 Bom. L.R. 742.**

(7)—*Co-sharers—Possession by one tenant-in-common when adverse to others—Non-participation of profits for a long time, effect of.*—In order to establish adverse possession by one tenant-in-common against his co-tenants, there must be exclusion or ouster and the possession subsequent to that must be for the statutory period. Mere non-participation of rents and profits would not necessarily of itself amount to exclusion, but such non-participation or non-possession may, in the circumstances of a particular case, amount to an adverse possession. What the circumstances may be which may have to be considered in determining the question of ouster, discussed. AYENENUSSA BIBI v. SHEIKH ISUF, **16 C.W.N. 849.**

(8)—*Tenants-in-common enjoyment of property—One of the tenants laying drain pipes under the property held in common—Right of the co-tenant to restrain him—Injunction.*—The plaintiff sued to restrain the defendant who had commenced to lay a drain pipe, for the purpose of carrying off the drainage from his premises, under the surface of a piece of land which was held by the defendant in common with the plaintiff: *Held*, that the act of the defendant was not an infringement of the rights of the co-tenants giving rise to a cause of action, because the laying of the drain and the incidental temporary interference with the soil could not be regarded either as an ouster or destruction or even an act of waste. One tenant-in-common cannot maintain an action against the other for a temporary removal of the subject-matter of the tenancy-in-common, the party removing it having at the same time an intention of making a prompt restitution. MOHANCHAND v. ISAKBAI, **2 Bom. L.R. 898=25 B. 248.**

Right of tenants in common to maintain joint action—*See* CIV. PRO. CODE, 1908, O. I, rr. 1, 4 (*a*), 13 C.P.L.R. 130.

Grant of village to members of joint Hindu family and another—No tenancy-in-common—*See* DEED—CONSTRUCTION OF DEEDS, 27 A. 310=A.W.N. 1904, 269.

Effect of—Gift to two or more persons without specifying shares—*See* GIFT, 39 P.R. 1909 =59 P.L.R. 1909=55 P.W.R. 1909=1 Ind. Cas. 720.

The share of a tenant in common will pass after his death to his representative and not by survivorship to the survivors—*See* HINDU LAW —WILL, 28 M. 363=15 M.L.J. 299.

Tenancy-in-common—*concluded.*

Possession of one tenant-in-common not adverse in the absence of ouster, denial of title or abandonment—Sharers under Mahomedan Law —*See* LIMITATION ACT, 1908, arts. 123, 127, 144, 5 N.L.R. 41=2 Ind. Cas. 15.

Profits—Exclusive receipt—Effect—Suit for possession — Limitation — *See* LIMITATION ACT, 1908, arts. 142, 144, 5 S.L.R. 49.

Adverse possession — Tenants-in-common—Burden of proof.—*See* LIMITATION ACT, 1908, art. 144, 7 M.L.T. 155=5 Ind. Cas. 491=20 M.L.J. 323.

Mortgage by one of several co-tenants-in-common—Mortgage-security impaired by wrongful act of other co-tenant—Suit for damages by mortgagee against wrong-doer, maintainability of—*See* MORTGAGE—MISCELLANEOUS, 28 M. 208=15 M.L.J. 249.

Joint responsibility to pay Government assessment—Whether implies impartibility of the land — *See* PARTITION—GENERAL, 13 Bom. L. R. 963.

Question of adverse possession between tenants-in-common on what depends—*See* POSSESSION—ADVERSE POSSESSION, 11 Bom. L.R. 51=33 B. 317=1 Ind. Cas. 322.

Created by a sale-deed—Right of one of the tenants to enforce by suit a covenant contained in the deed—*See* TRANSFER OF PROPERTY ACT, 1882, s. 55, 15 M.L.J. 396.

Tenancy, Punjab.

See PUN. ACT XXVIII OF 1868.

See PUN. ACT XVI OF 1887.

Tenant.

See LANDLORD AND TENANT.

See LEASE.

(1)—*Tenant under two zemindars*—Ijmalee.—A tenant under two zemindars whose lands are *ijmalee*, may stand on his rights as to one, and waive them as to the other. SHIB NARAIN GHOSE v. KASHEE PERSHAD MOOKERJEE, **1 W.R. 226.**

Meaning of—*See* BEN. ACT VIII OF 1885, s. 52, 27 C. 417=4 C.W.N. 107.

Right of, to prove that title of registered purchaser of zemindari, claiming rent, was declared void by competent Court—*See* BEN. ACT VIII OF 1885, s. 60, 12 C.W.N. 622.

Determination of tenancy—*See* BOM. ACT III OF 1876, 1 Bom. L.R. 464.

Denial of landlord's title—*See* BOM. ACT II OF 1906, s. 15, 1 Bom. L.R. 797.

Sub-tenancy, sub-tenants of a tenant, do hold under a right derived from the landlord—*See* BOM. ACT II OF 1906, s. 15 (*a*), 1 Bom. L.R. 71.

See U.P. ACT III OF 1878, s. 8, A.W.N. 1899, 187.

Tenant—*concluded.*

Does not include rent-free grantee within s. 32, cl. 2—Agra Tenancy Act—*See* U.P. ACT II OF 1901, ss. 4 (5) and 32 (2), Chapter III, 5A. L.J. 734=31 A. 49=A.W.N. 1908, 279=1 Ind. Cas. 705.

Suit by the heirs of a tenant whose holding was let to a third person by the landlord—Limitation—*See* U.P. ACT II OF 1901, ss. 79, and 81, 2 A.L.J. 69=27 A. 372=A.W.N. 1904, 281.

Whether representative of tenant by sufferance, who enters after his death, is a, within meaning of art. 139—*See* LIMITATION ACT, 1908, art. 139, 18 M.L.J. 26=3 M.L.T. 256=31 M. 163.

Agreement to pay each lambardar his proportionate share of rent—No partition of holding—*See* PARTITION—FORM OF PARTITION, 14 C.P.L.R. 33.

Mortgage by fixed rate tenant—Suit by zemindar to redeem it on death of such tenant without heirs—Zemindar not a person having "interest." in property—*See* TRANSFER OF PROPERTY ACT, 1882, s. 91, A.W.N. 1908, 210 =5 A.L.J. 578.

By sufferance, whether representatives of, can be converted, without their own consent, into such, by mere assent of lessor — Such representative holding over after death of—Whether a trespasser—*See* TRANSFER OF PROPERTY ACT, 1882, s. 116, 18 M.L.J. 26 =3 M.L.T. 256=31 M. 163.

Tenant and Landlord, Procedure.

See BEN. ACT VIII OF 1869.

Tenant and Landlord, Procedure, Chota Nagpur.

See BEN. ACT I OF 1879.

Tenants, Government, Punjab.

See PUN. ACT III OF 1893.

Tenants' Improvements, Malabar Compensation for.

See MAD. ACT I OF 1887.

See MAD. ACT I OF 1900.

Tenants-in-common.

See TENANCY-IN-COMMON.

Tender.

See TRANSFER OF PROPERTY ACT, 1882, s. 83.

(1)—*Plea of tender—Payment into Court.*—A plea of tender before action must be accompanied by a payment into Court after action. HAJI ABDUL RAHMAN *v.* HAJI NOOR MAHOMED, **16 B. 141.** [*Diss.*, 4 L.B.R. 108; *Appr.*, 11 C.L.J. 226=14 C.W.N. 617, 5 Ind.Cas. 165; *R.*, 5 C.L.J. 270=34 C. 305, 4 M.L.T. 335; *D.*, 5 C.L.J. 78, Note.]

Tender—*continued.*

(2)—*Tender amounting to payment—Costs.*—Though a mere unaccepted tender, not followed by payment into Court, would not entitle the defendant to costs, yet where the tender was made in such a way as to amount to payment, the defendant was entitled to costs. A person employed to receive money is not bound to receive a cheque, but if he so accepts it, it amounts to payment. BOLYE CHUND SINGH v. MOULARD, **4 C. 572.** [*R.*, 5 C.L.J. 270=34 C. 305.]

(3)—*Tender of part only of debt—Costs.*—Where the defendant tendered, before suit, only a part of the amount claimed by the plaintiff, in satisfaction of the entire debt, it would not be a legal tender, so that the amount of the entire claim, and not the difference between the sums claimed and tendered, would decide the *fourm* in which the plaintiff could sue and the costs to which, in consequence, he would be entitled. CHUNDER CAUNT MOOKERJEE v. JODOO NATH KHAN, **3 C. 468=1 C.L.R. 470.** [*R.*, 10 C.L.J. 91.]

(4)—*Tender of money to creditor when valid.*—The law requires for a valid tender that the money due should be produced to the creditor. A mere notice to the creditor of the payment of the principal to a third party is not sufficient for this purpose. MULCHAND v. BABAJI, **1 Bom. L.R. 841.**

(5)—*Of debt by debtor—Refusal by creditor—Subsequent suit for recovery of debt—Debtor failing to pay amount in Court—Effect on interest.*—A person cannot be muloted in interest after he has offered the amount due on a certain debt, if the amount has been wrongfully refused by the creditor. But when the creditor brings his suit, it is the duty of the debtor on receiving intimation of the suit, to at once pay the money into Court. Thus, where the debtor made a tender of the debt to the creditor which was wrongfully refused by him, and the creditor subsequently instituted a suit against the debtor, who, however, failed to pay, the amount at once into Court, it was held that the debtor should not be liable for interest from the date of his tender until the date of the suit, but that interest from the date of the suit up to the date of realisation was to be awarded to the creditor. This interest need not be at the contract rate. MAUNG SHAN v. NVO. WIN, **4 L.B.R. 108.** (16 B. 141, *Diss.*)

(6)—*Contract Act* (IX *of* 1872), *s.* 38—*Tender.*—Under a mortgage-deed taken to secure the re-payment within three years of a sum of Rs. 16,000 advanced by the plaintiff, with interest at 15 per cent. from the 2nd July 1874; the date of the mortgage, it was stipulated that interest should be paid every six months, but that if a year's interest should be unpaid, then the whole amount due for principal and interest should become payable at once; and also that the mortgagor might, after payment of interest, pay towards satisfaction of the principal any sum not less than Rs. 1,000. The first year's

Tender—*continued.*

interest was allowed to get into arrear, but in September 1875, the defendant went to the plaintiff with Rs. 19,000, a greater sum than was due for principal and interest and told him to repay himself from that sum. The offer was refused and the plaintiff thereupon brought a suit on the 9th July 1877 for Rs. 16,000 with interest from the date of the mortgage to the date of the suit and subsequent interest. *Held* that the tender made by the defendant, although not valid according to English Law was valid under s. 38 of the Indian Contract Act. *Per Wilson, J.*—S. 38 of the Indian Contract Act substantially requires that there should be a genuine and unconditional offer, in case of payment, to pay unconditionally at a proper place, made by a person in a position to pay. KANYE LALL KHAN v. KHETTER MONEY DOSSEE, **5 C.L.R. 105.**

(7)—*Tender of payment by ryot.*—A ryot's tender of payment to be valid, must be made at the proper place and to a person authorized to receive the same. ISHAN CHANDRA ROY v. KHAJA ASSANULLA, **8 B.L.R. 537, Note**

(8)—*Tender of arrears of rent due—Tender, when legal and valid, effect of—Cheque, tender by, if proper—Waiver—Current coin—Interest, if chargeable after tender and before deposit in Court—Bengal Tenancy Act* (VIII *of* 1885), *ss.*56 *and* 61—*Deposit, effect of—Indian Coinage Act* (XXIII *of* 1870)—*Indian Paper Currency Act* (XX *of* 1882)—*Indian Coinage and Paper Currency Act* (XXII *of* 1899).—A tender to be valid, must be made in the current coin of the realm. Under the Indian Coinage Act (XXIII of 1870), the Indian Paper Currency Act (XX of 1882) and the Indian Coinage and Paper Currency Act (XXII of 1899) legal tender includes coins and currency notes, and a tender by a cheque is not a legal tender. When a tender is actually made, but in a currency different from that required by the law, for instance by a cheque on a banker, the objection to the form of the tender may be expressly or impliedly waived by the creditor, and he will be deemed to have waived the objection, if he rejects the tender on the ground of the insufficiency in amount, or on some other ground, without making any objection to the legality of the tender in point of quality. (4 C. 572, *R.*) A tender is not vitiated, because a receipt is asked. JAGAT TARINI DASI v. NABAGOPAL CHAKI, **5 C.L.J. 270=34 C. 305.** [*R.*, 7 M.L.T. 253=5 Ind. Cas. 343.]

(9)—*Money payable by decree—Tender during Court hours valid though not received.*—Where a tender of a sum required by a decree to be paid is made during the hours the Court is open, the money must be received, or if not received the tender is yet a valid tender, for it is the Court which has not received the money tendered. PAIKAN PATEL v. DOMA POWAR, **3 C. P.L.R. 100,**

(10)—*Of mortgage amount with a protest.*—Payment of the mortgage money into Court by

Tender—*continued.*

the occupant of the mortgaged property accompanied with a protest and a threat of legal proceedings to recover the amount paid into Court, is not a good tender or such a tender as is contemplated by the Ben. Reg. XVII of 1806, ss. 7 and 8. S. 7 of Ben. Reg. XVII of 1806 provides for the equitable right of redemption "to the mortgagor and the owner of such property, or his legal representative." *Quære*—Whether a tender of the mortgage money and interest by a stranger, though in possession of the mortgaged property, is a good tender? PRANNATH ROY CHOWDRY v. ROOKEA BEGUM, **7 M.I.A. 323 =4 W. R. P.C. 37=1 Suther. 367=1 Sar. 692.**

(11)—*Tender — Mortgage-money due on a prior mortgage deposited by the mortgagor with puisne mortgagee.* — When mortgage-money due on a prior mortgage was deposited by the mortgagor with a puisne mortgagee who sent a notice to the prior mortgagee to receive payment of the amount deposited with him, but no money was actually tendered for payment, nor was it deposited in Court when the prior mortgagee filed his suit. *Held*, that the tender was not sufficient, and the interest on the prior mortgage did not cease to run from the date of the notice. BURA RAM v. NUR BUKHSH, **115 P.L.R. 1902.**

Of rent—Refusal—Running of interest—Tender how kept good—*See* BEN. ACT VIII OF 1885, ss. 54, 61 and 67, 11 C.W.N. 983, F.B. =6 C.L.J. 273=35 C. 34.

Of amount of decree—Stay of execution—*See* CIV. PRO. CODE, 1908, O. XXI, r. 55, 2 Hay 302.

Contract of sale, terms of—How far fulfilled —When defective—Estoppel—*See* CONTRACT —MISCELLANEOUS, 4 C.W.N. 313.

Contract for sale of Government paper—Necessity for—*See* CONTRACT—MISCELLANEOUS, 9 C. 791.

See CONTRACT—MISCELLANEOUS, 26 C. 142=3 C.W.N. 116.

Condition of proper—*See* CONTRACT ACT, 1872, ss. 2 (*c*), 37, 38 and 67, 4 M.L.T. 335.

Effect of—*See* HINDU LAW—PARTITION, 5 Ind. Cas. 343=7 M.L.T. 253=20 M.L.J. 709.

Effect of—Refusal to accept—Effect upon creditor's costs—*See* LANDLORD AND TENANT —TENANT'S LIABILITY FOR RENT, 6 M.L.T. 255=3 Ind. Cas. 346=10 C.L.J. 538.

See MORTGAGE—GENERAL, 6 A. 399=A. W.N. 1884, 138.

Insufficient—of mortgage money—*See* MORTGAGE—REDEMPTION, 16 C. 307, P.C.

See MORTGAGE—REDEMPTION, 3 N.W.P. 80.

Of amount due on mortgage, absence of—Transfer of Property Act, s. 60—*See* MORTGAGE—REDEMPTION, 5 O.C. 127.

Tender—*concluded.*

Offer by debtor to pay debt made through letter, whether amounts to a valid—*See* MORTGAGE—TACKING, 22 B. 440.

Pre-emption decree—Tender in Court—Refusal —Effect—*See* PRE-EMPTION —PURCHASE MONEY, 79 P.R. 1881.

Calling of, if necessary in the case of grant of lease containing a covenant—*See* SPECIFIC RELIEF ACT, 1877, s. 45, 13 C.W.N. 129=36 C. 271=1 Ind. Cas. 968.

See SUCCESSION CERTIFICATE ACT OF 1860, 1 B.L.R.S.N. 7 (*c*)=10 W.R. 105.

Of mortgage money in Court—Interest upon mortgage money subsequent to its deposits in Court—Construction of documents—Mortgage —*See* TRANSFER OF PROPERTY ACT, 1882, ss. 60, 83, 84 and 91, 4 C.C. 387.

Tender of mortgage money—*See* TRANSFER OF PROPERTY ACT, s. 82, 10 Bom.L.R. 203=32 B. 521.

Meaning of—Subsequent inability to pay—whether interest will run—*See* TRANSFER OF PROPERTY ACT, 1882, s. 84, 6 M.L.T. 262=3 Ind. Cas. 729=19 M.L.J. 648=33 M. 100.

See TRANSFER OF PROPERTY ACT, 1882, s. 135, 2 C.W.N. 147.

Tenure.

See LANDLORD AND TENANT.

See LAND TENURE.

(1)—*Tenure— Measurement — Possession of land up to boundary line.*—The holder of a tenure was entitled to get possession of all land up to his boundary line wherever that ran, without reference to the quantity which the land on measurement might prove to be, even though it exceeds the quantity which was alleged by him to be comprised therein. ESAN CHUNDER GHOSE v. PROTOB CHUNDER ROY, **20 W.R. 224.**

(2)—*Transferable nature of tenure, how decided.*—It is a question of great difficulty to know what tenures are transferable. In every district of Bengal there is a different custom, and this question can only be decided by reference to local custom. What is the custom in Lower Bengal is not so in the Eastern or Northern parts and *vice versa*. In some parts the *khoodkhast* tenants are allowed to sell without reference to their landlords: in other parts the practice has not been allowed and the only method by which the question in each case can be decided is by reference to local custom, and not by the evidence of a few antagonistic witnesses. JOY KISSEN MOOKERJEE v. RAJKISSEN MOOKERJEE, **1 W.R. 153.**

(3)—*Transferable tenures, if necessarily mokuraree.*—It is not necessary that a tenure should be *mokuraree* in order to be transferable. HUROMOHUN MOOKERJEE v. RANEE LALUN MONEE DOSSEE, **1 W.R. 5.**

Tenure—*continued.*

(4)—*Suit for enhancement—Document of title produced in support of defendant's plea of mokuraree title—Objection as to absence of expression denoting hereditary character of tenure—Evidence of transfers and treatment of estate as hereditary descending from father to son—Documents produced in Courts in India, dangers attendant on dependent talookdar, importance of title deeds of.*—In this case, appellant took objection to the documentary evidence produced by the defendant to the effect that those documents, if genuine, contained no "words of inheritance," *i.e.*, no expressions importing the hereditary character of the alleged tenures. Their Lordships of the Judicial Committee were of opinion that such objection not having been taken in the Courts below, it was not open to the appellant to do so now. He was not suing for the recovery of the land or to disturb the possession of the defendant but only for enhancement of rent. The pleadings admitted the existence of the tenures and the lawful occupation of the defendant. The only question between the parties was whether the talooks were *tashkis* or *mokuraree*, i.e., whether they were held at variable or at a fixed and invariable rent. Moreover, if the objection were open to the appellant, it would hardly prevail against the evidence which the record afforded that, for upwards of a century, these talooks had been treated as hereditary, and, as such, had both descended from father to son, and been the subject of purchase. [*F.*, 11 W.R.P.C. 10, 8 C.L.J. 513; *Expl.*, 14 W.R. 107; *R.*, 9 W.R. P.C. 3, 1 N.W.P. 165, 21 W.R. 439, 7 C.W. N. 734, 9 C.W.N. 663, 1 C. L.J. 572, 15 C.W.N. 994.] It was set forth as a suspicious circumstance that, though the *furud* was produced in this case in 1806, the *bundobusts* or settlements of 1174, to which it referred, were then not produced. But, the Judicial Committee observed that their production was not then necessary for the purpose of the suit. Further, documents are not produced in the Court of India without some risk, and of all men the dependent talookdar has the greatest reason to be careful of his title deeds, since, whatever may have been the recognition of his title by his existing zemindar, he may at some future time have to establish that title by the strictest proof against one coming in by purchase at a sale for arrears of revenue. BABOOGOPAL LALL TAGORE v. TELLUCK CHUNDER RAI, **2 W.R.P.C. 1=10 M.I.A. 183=1 Suther. 558=2 Sar. 98.**

(5)—*Dur-putnee tenure—Possession and payment of rent for 12 years.*—The mere fact that person has been in possession of lands for 12 years paying rent is not sufficient to establish a dur-putnee tenure. RAM KULPO BHUTTACHARJEE v. TARA CHAND BANERJEE, **11 W. R. 358.**

(6) — *Surburakaree tenures in Cuttack — Alienation.*—A surburakaree tenure of the province of Cuttack, which province has not been permanently settled, is not alienable without

Tenure—*concluded*

the consent of the Zemindar. DOORJODHUN DOSS v. CHOOYA DAYE, **1 W.R. 322.** [*R.*, 11 C. 699.]

(7)—*Different suits for arrears of rent—Indivisible tenure—Splitting up of.*—An indivisible tenure cannot be split up into parts with a view to the institution of different suits against the tenants for arrears of rent. MESSRS. R. WATSON & CO. v. KRISTO MOHAN RUKHIT, **19 W.R. 239.**

(8)—*Revenue sale—Purchase by Government—Right of Government to cancel tenure—Reg.* XI *of* 1822.—The decision of the Privy Council reported in 13 W.R. 24, P.C., which declared the under-tenant entitled to retain possession of his land during the subsistence of his tenure in cases where the Government after their purchase of the tenure at the Revenue sale had not taken some step to avoid or cancel the under-tenure, has no application to a case in which the proceeding of Government shows that it had exercised the power of cancellation. *Held* also that the decision applies to tenures which had been purchased between 1817 and 1822, and not to tenures created after Reg. XI of 1822 had informed persons that their rights were liable to be cancelled by the purchaser at a sale by auction for arrears of revenue. KAZEE MOONSHEE AFTABOODDEEN MAHOMED v. SANIOOLAH, **23 W.R. 245.** [*Cons.*, 25 W.R. 536; *R.*, 2 C.L.R. 13.]

Under-tenure, whether *ipso facto* avoided by sale of the estate for arrears of revenue—*See* BEN. ACT XI OF 1859, ss. 27, 28, 29, 37, 6 C. L.J. 472.

Presumption as to—*See* BEN. ACT VIII OF 1885, s. 5, cl. 5, 6 Ind. Cas. 362.

Transfer of tenure and registration—*See* BEN. ACT VIII OF 1885, s. 12, 19 C. 17.

See BEN. ACT VIII OF 1885, ss. 15, 16, 195 (*e*), 19 C. 504.

Change of—Effect on law of succession—*See* BOM. ACT V OF 1862, 12 Bom. L.R. 573=7 Ind. Cas. 659.

Irredeemable or perpetual tenure--*See* MORTGAGE—REDEMPTION, 16 M.L.J. 358=1 M.L. T. 290=29 M. 501.

See PRE-EMPTION—RIGHT TO PRE-EMPT, 34 P.R. 1868.

Tenure-holder.

Holding mela liability to pay road-cess, income tax—*See* BEN. ACT IX OF 1880, s. 106, 28 C. 637=6 C.W.N. 128.

See BEN. ACT VIII OF 1885, 27 C. 205=4 C.W.N. 76.

Tenure of Groves.

Incidents of—Landlord and Grove-holder—Landlord, rights of—to resume grove by portions—*See* LANDLORD AND TENANT—MISCELLANEOUS, 9 C.C. 109.

Tenures, Bhagdari and Narwadari.

See BOM. ACT V OF 1862.

Tenures, Chota Nagpur.

See BEN. ACT II OF 1869.

Territorial Jurisdiction.

(1) *Part of territorial jurisdiction of Court, removal of, by notification—Suits filed but not heard before notification — Jurisdiction.* —A plaint filed against a resident of a village, within the local jurisdiction of a Small Cause Court at the time when the plaint was filed, but without it at the time when the suit was ready for hearing, could not be heard by that Court. MELA RAM v. PIRANDITTA, **36 P.R. 1876.** [*Overruled*, 95 P.R. 1876.]

See CESSION OF BRITISH TERRITORY, 1 B. 367, P. C.=3 I.A. 102=1 A. C. 322.

Territorial Law of British India.

See ESCHEAT, 1 B.L R. O.C. 87.

Testamentary Guardian.

Removal of—When his interests are adverse to minor— *See* GUARDIAN AND WARDS ACT, 1890, s. 7, 16 M.L.J. 357.

Testamentary Suits.

Appointment of Receiver by High Court—*See* RECEIVER, 17 B. 388.

Testator.

See HINDU LAW—WILL.

See HINDU WILLS ACT.

See MAHOMEDAN LAW—WILL.

See PROBATE.

See PROBATE AND ADMINISTRATION ACT, 1881.

See SUCCESSION ACT, 1865.

See WILL.

See PROBATE—REVOCATION OF GRANT, 10 C. 19, P.C.=10 I.A. 80=13 C.L.R. 314.

See SUCCESSION ACT, 1865, s. 50, 27 C. 169.

Liability of lands purchased from Hindu devisee for testator's debts, same as in English Law — *See* VENDOR AND PURCHASER — NOTICE, 4 C. 897=4 C.L.R. 193.

Mental capacity of—in dispute—Execution of Will, proof of—Presumption—Rules for deciding such cases—*See* WILL—EXECUTION, 21 C. 279.

Test Case.

(1)—*Order directing stay of proceedings and trial of test case—Right of persons obtaining adverse decision.*— Persons obtaining an order directing the trial of one out of 44 cases as a test case and stay of proceedings in the rest, are not, after getting an adverse decision in the test case, precluded from requiring the consideration by the Court of the other cases. KASHIN PRASAD SINGH v. SECRETARY OF STATE FOR INDIA IN COUNCIL, **29 C. 140.**

Testimony, Prisoners.

See ACT XV OF 1869.

Thakand Survey Map.

See EVIDENCE—MISCELLANEOUS DOCUMENTS.

Thakbust Map.

See EVIDENCE—MAPS.

See EVIDENCE—MISCELLANEOUS DOCUMENTS.

(1)—*Evidentiary value of—Statement recorded in presence of parties—Effect.*—The presence at the preparation of, and the signing by the parties or their agent of, a *thakbust* map may fairly be taken to be an admission by the parties of the boundary lines between adjoining villages. In this case the dispute was whether certain land belonged to the estate of the plaintiff or to that of the defendant. Plaintiff produced *thakbust* and survey maps for 1852 to 1853, the former containing a statement in support of his case. The defendant produced a survey map of the years 1855 to 1856, in support of his case, but failed to produce any *thakbust* map of the same year. It was found that the predecessor of the defendant had full notice of the *thak* proceedings, that he objected to the boundary line as laid down in the plaintiff's map between their estates, and that the objection was disallowed. *Held*, that the evidentiary value of the *thakbust* map and the survey maps produced on behalf of the plaintiff was greater than that of the survey map produced on behalf of the defendant. DUNNE v. DHARANI KANTHA LAHIRI, **35 C. 621.** (2 W.R. 210, 21 W.R. 115, 9 C.L.R. 305, 8 C. 975, 7 C.W.N. 849, 16 C. 186, 16 C. 30, 16 C. 291, 30 I.A. 44, *R.*)

(2)—Thakbust *maps—Jungle lands, possession of, presumption as to*—Ex parte *entry in* thakbust *records without enquiry, value of.*—Certain plots of lands were entered in the *thakbust* maps as belonging to a certain Pergunnah in which the plaintiffs claimed them to be, and no question of the demarcation of boundary of these lands was raised in any of the many disputes which arose between the parties during the survey proceedings. It was further found that the title to those lands was with the plaintiffs: *Held*—that, having regard to the nature of the property which was jungle land, possession must be presumed to have been all along with the plaintiffs. A mouzah appertaining to Pergunnah Pukhuria had not been separately measured or *thaked* in the course of the survey proceedings. On a statement being called for from the person in possession of the mouzah for its non-appearance on the *thak* map, his agent appeared and stated that the mouzah was wholly covered with jungle, that, it being situated by the side of Garhgojali which was defendant's property, had been measured along with it, and that 10 *gundas* share of Garhgojali should be taken for that mouzah. Proceeding on these allegations the Deputy Collector made an entry to that effect. A petition made by

Thakbust Map—*concluded.*

the defendant's *Mukhtear* denying the allegations of the plaintiff's agent was rejected as the matter had been disposed of. With the help of this disputed entry the Subordinate Judge proceeded to mark off a certain area as belonging to the plaintiff as part of the said mouzah. The High Court set aside that decision: *Held*—that, as the decision of the Subordinate Judge was based on the entry made *ex parte* and without enquiry and on an allegation of the zemindar's agent which was immediately contradicted, the decision of the High Court was correct. MAHARAJA JAGADINDRA NATH ROY BAHADUR v. RANI HEMANTA KUMARI DEBI, **15 C.W.N. 887. P.C.**

Value of thak and survey maps as evidence generally and also when question is as to land being included in permanent settlement—*See* ACT IX OF 1847, ss. 3, 5, 6, 30 C. 291, P. C. = 30 I.A. 44 = 7 C.W.N. 193 = 5 Bom. L.R. 1.

Value of, as evidence of possession and title—Specified land included in estate at thak survey—Presumption that it was included within estate at permanent settlement—*See* BEN. ACT XI OF 1859, ss. 22, 37. 7 Ind. Cas. 849.

See DECLARATORY DECREE, SUIT FOR—GENERAL, 13 B.L.R. App. 12 = 21 W. R. 134.

Entry in thakbust map, if relevant evidence—*See* EVIDENCE ACT, 1872, s. 36, 7 C.W.N. 849.

See PRINCIPAL AND AGENT—AUTHORITY OF AGENTS, 3 B.L.R. A.C. 377.

Value of—in proving that a particular land formed part of a permanently-settled estate—*See* SALE—SALE FOR ARREARS OF REVENUE AND CESS—GENERAL, 9 C.W.N. 383.

Thakoor.

Gift to idol not in existence at testator's death—Gift for daily worship of the—*See* HINDU LAW—GIFT, 29 C. 260 = 6 C.W.N. 267.

Thakur's Relief Act, Broach.

See BOM. ACT XV OF 1871.

Thatch.

Small Cause Court—Suit to recover thatch—Moveable property—Question of title—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 7 B.L.R. App. 41 = 15 W.R. 499.

Theft.

(1)—*Theft of negotiable instrument—Title of subsequent holder compared with that of the last holder.*—When an instrument, such as a Government pro-note, has been stolen, the person from whom it was stolen has a good title to it, not only as against the thief, but as against any person who subsequently becomes the holder, unless such person can prove that the instrument had become negotiable at the time it

Theft—*concluded.*

was stolen, and that he obtained it *bona fide* for value without notice of the theft. THE BANK OF BENGAL v. MENDES, **5 C. 654**= **5 C L.R. 586.**

Clause in patta requiring tenant to be responsible for theft of crops by him—Effect—*See* MAD. ACT VIII OF 1865, ss. 76, 83, 27 M. 543.

Currency note cashed at Government treasury by one who stole it—Conviction of thief—Note, to whom belongs—*See* CURRENCY NOTE, 7 M.H.C. 233.

Claim to stolen notes—Verdict of Criminal Court—Evidence of ownership—*See* EVIDENCE—MISCELLANEOUS DOCUMENTS, 3 B.L.R. App. 2.

Or misappropriation by father—Decree for damages—Execution-sale — Right of sons—*Bona fide* purchaser's equity—*See* HINDU LAW—JOINT FAMILY, 24 C. 672.

Dishonest removal of crops by ryots holding on varam tenure—No offence of theft—*See* LANDLORD AND TENANT—MISCELLANEOUS, 13 M.L.J. 123, F.B. = 26 M. 481.

And forgery by servants, duty to guard against—Duty on mercantile men, not extraordinary—*See* MASTER AND SERVANT, 6 C. W.N. 429.

See NEGOTIABLE INSTRUMENTS—HUNDIS, 18 B. 570.

Thekadar.

(1) — *Thekadar, meaning of.*—The term "Thekadar" is properly applied to hereditary cultivators only when they have also a theka or lease of a share, in or the whole of, the profits of an estate, and it by no means refers to their cultivatory rights. The term is never used as convertible with *mourousee, assamee or khastkar.* BAIJ NATH v. MUNGLEE, **2 N.W.P. 411.**

(2)—*Thekadar, who is—Creation of interest—Formalities—Acceptance of theka—Effect.*—A *thekadar* is ordinarily a person who holds a *theka* or lease of the whole of a zemindar's interest in a village. It is not essential that the *theka* should be in writing. There is nothing in the law which renders a writing necessary to the creation of such an interest. It is not to be inferred from the mere circumstance that certain persons accepted a *theka*, that they forewent their then existing rights. LEELA DHUR v. BHUGWANT, **3 N.W.P. 39.**

(3)—*Holding from inferior proprietor—Liability to superior proprietor.*—A thekadar holding from an inferior proprietor is not as such responsible to the superior proprietor, and the latter has no concern with any arrangements which the inferior proprietors may come to amongst themselves for the collection of rents. DHIWAROO PATIL v. DAJIBA BHAOO, **14 C. P.L.R. 81.**

Meaning of—*See* U. P. ACT II OF 1901, ss. 4, 19, 21, 23, 24, 25, 6 A.L.J. 649=2 Ind. Cas. 552.

Thekadar—*concluded.*

Suit for theka jama for period during pendency of ejectment proceedings—Accrual of cause of action—*See* C.P. ACT XVI OF 1889, s. 65-A, 16 C.P.L.R. 33.

Suspension or remission of rent—Intention of parties determining liability to pay rent—*See* C. P. ACT XI OF 1898, s. 18, sub-s. (6), 14 C.P.L.R. 138.

Enhancement of rent in case of protected thekadar—*See* RENT, 12 C.P.L.R. 39.

Thika Lease.

Trespasser granting thika lease—*See* LANDLORD AND TENANT—RELATIONSHIP OF LANDLORD AND TENANT, 1 C.W.N. 142.

Third Party Directions.

(1)—*Third party directions—General principles — Practice — Procedure.*—The general principles on which a Court will issue third party directions are: (1) that there must be a clear case of contribution or indemnity from the third party; (2) that all the disputes arising out of a transaction, as between the plaintiff and the defendant, and between the defendant and a third party can be tried and settled in one action; and (3) that, in cases of contract and sub-contract, it must appear that the contract between the plaintiff and the defendant has been imported into the contract between the defendant and the third party. W. AND A. GRAHAM & CO. v. CHUNILAL HARILAL & CO., **11 Bom. L.R. 1056=34 B. 423=4 Ind. Cas. 131.**

(2)—*Third party proceedings, object of—When leave should be granted—Refusal to give directions on summons amounts to a dismissal of the third party—High Court Rules, Ch.* VIII.—The object of third party proceedings is to enable the Court to try once for all an issue of fact in which all parties are alike interested. The Court has to see, first, that nothing is done which would put a plaintiff to additional expense or difficulty, and secondly, that he is not embarrassed by the introduction of third parties in his suit. An action comes to an end as regards the third party when the Court refuses to give directions on summons. Such refusal amounts to a dismissal of the third party from the action. In giving leave to serve notice of claim for contribution or indemnity on a third party, the Court will not consider whether the claim is a valid one but only whether the claim is *bona fide*, and whether, if established, it will result in contribution or indemnity. SHIVLAL v. SHRIKISSON AND MITCHELL AND CO., **9 Bom. L.R. 374=31 B. 465.**

(3) *Application for—Notice—Rule* 131 *of High Court Rules.*—An application for a third party notice, under Rule 131 of the High Court Rules, must be made before the written statement is filed, unless special leave has been obtained from the Court. NIPPON MENKWA KABYSHIKS KAISHNA v. GURMUKHRAI, **10 Bom. L.R. 1024.**

Thirty Years Old Documents.

See EVIDENCE ACT, 1872, s. 90.

See EVIDENCE—SECONDARY EVIDENCE, 5 C. 886=6 C.L.R. 199.

Thoroughfare.

See JUDICIAL OFFICERS, LIABILITY OF, 5 M.H.C. 345.

Obstruction to thoroughfares—*See* JURISDICTION OF CIVIL COURT, 3 B.L.R.A.C. 295 =12 W.R. 160=3 B.L.R. App. 120.

Threshing Floor.

See USER, 16 A. 181=A.W.N. 1894, 15.

Thugy's Register.

(1)—*Revenue Register No.* IX—*Entries in —Presumptive proof—Proof of a document, Stages in the.*—Revenue Register No. IX is generally a record of what the parties tell a thugyi. The entry of an outright sale or a mortgage in Register IX is strong *prima facie* evidence in favour of the party proving such entry, but this presumption may be rebutted by oral evidence or by the conduct of the parties themselves. A document should not be placed on the record till fully proved or admitted. It may be well to point out that there are two stages in the proof of a document. The first stage is to establish the fact that a document of a particular nature exists and is in the custody of a particular person, and the second stage is to identify the document produced in Court as being the identical document referred to. If document are admitted by the parties or their pleaders against whom they are produced, both stages are complete and the endorsement should be "admitted by plaintiff or defendant." If the existence or execution is denied, the document be proved by the testimony of one or more witnesses and endorsed "Proved by witness Maung..." If not proved or admitted the documents should be marked "Rejected" and returned to the parties producing them. KYAW ZAN v. MAUNG THA DUN, **L.B.R. 1893—1900, 616.**

(2)—*Entry of mutation of names and transfer of occupancy right — Oral Contract.*—When mutations and transfers take place under a law which allows alienation of occupancy right, then as between private persons the mere record in a revenue register of a transfer does not of itself sufficiently show without further evidence what were the terms of the transaction in which such mutation and transfer in the revenue register have taken place, and even representations made as to this by the parties to the mutation may have been falsely made to serve their own purposes. When the terms of the contract under which the mutation took place have not been reduced to writing in an instrument of title duly executed, and the terms of the oral contract under which that mutation took place are in dispute, any direct evidence as to the making of the oral evidence may be supplemented or rebutted by evidence as to possession and enjoyment and other surrounding facts of probative value. HLA TWE v. MAUNG ME, **L.B.R. 1893—1900, 178.**

Tidal River.

See FISHERY, 8 M. 467.

Tiffin House.

Tiffin house, license for— *See* ACT XLVIII OF 1860, s. 11, 4 Bom. L.R. 1=26 B. 396.

Tiled Huts.

If immoveable property—*See* PRESIDENCY SMALL CAUSES COURTS ACT, 1895, s. 38, 31 C. 340=8 C.W.N. 246.

Timber.

(1)—*Standing timber--Immoveable property.*—For the purposes of the Mofussil Small Cause Courts Act, standing timber must be classed as immoveable property. UMED RAM v. DAULAT RAM, **5 A. 564, F.B.=A.W.N. 1883, 148.** [*F.*, 11 M. 193; *R.*, 10 A. 159.]

(2)—*Act* VII *of* 1865—*Cutting timber—Cost of cutting—Cost of removal.*—Where timber had been cut and sold by a person having no authority to do so, and was confiscated by Government under Act VII of 1865, the Government was liable for the expense of conveying the timber from the place where it was lying. There is no equity to make the Government pay the expense of cutting the timber. THE DEPUTY COMMISSIONER OF NOWGONG v. NOTHIRAM BHUAYA, **21 W.R. 435.**

Drift and stranded—*See* ACT VII OF 1878, s. 45, cl. IX, 24 C. 504, P.C.=24 I.A. 33=1 C.W.N. 249.

Of particular description, grant of right to fell—Interest in soil itself not granted—Grant of valuable forest rights—No sale of—Standing —Moveable property —*See* BEN. ACT VIII OF 1885, ss. 144, 184 and 193, sch. III, art. 2, 7 C. L.J. 152.

License to Government to fell—Notification by Government constituting the land reserved —Forest—Refusal by Settlement Officer to offer commutation for Jenmi rights—Right of Jenmi to claim compensation—*See* MAD. ACT V OF 1882, ss. 4, 10, 23, 7 M.L.J. 13.

Liability of Government to pay tax for importing timber—*See* MAD. ACT I OF 1884, ss. 170, 174, 338, 341, 12 M.L.J. 208=25 M. 457.

Zemindar generally owns, on tenant's holding—Tenant has no right to cut and remove such timber—Zemindar not entitled to interfere with tenant's enjoyment of trees on his holding during subsistence of relationship of landlord and tenant— *See* LANDLORD AND TENANT— PROPERTY IN TREES, ETC., ON LEASED PREMISES, 5 A.L.J. 99=3 M.L.T. 194=A.W.N. 1908, 51=30 A. 134.

Sanad granted to inamdars by Peshwar's Government—Right of grantees to soil of forest timber and junglewood—*See* LAND TENURE —IN BOMBAY, 11 B. 688, Note=P.J. 1881, 276.

See LEASE—GENERAL, 3 C.P.L.R. 18.

Timber—*concluded.*

Timber, mango tree is—*See* REGISTRATION ACT, 1908, s. 2, 1 Bom. L.R. 489=24 B. 31.

Agreement to cut—For a certain period—*See* REGISTRATION ACT, 1908, s. 2, 17 (*d*), 20 M. 58, F.B.=6 M.L.J. 281.

Grant of right to cut standing timber for certain years — Admissibility of document embodying said right without registration—*See* REGISTRATION ACT, 1908, ss. 2, 17, 5 M. L.J. 253.

Time.

Power of Court to enlarge time before and after decree—*See* CIV. PRO. CODE, 1908, ss. 148, 152, O. XX, r. 3, 13 O.C. 28=5 Ind. Cas. 443.

Whether, is of the essence of contract, determination of—Relief against forfeiture—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 6 C.L.J. 176.

Being essence of contract—Reasonable—*See* SPECIFIC PERFORMANCE, 11 C.W.N. 946, P.C.=17 M.L.J. 454=4 A.L.J. 740=6 C.L. J. 682=2 M.L.T. 448.

Tin-shed.

Not a "permanent building"—*See* BEN. ACT XI OF 1859, s. 37, cl. 4, 30 C. 498.

Tipperah.

See CIV. PRO. CODE, 1908, s. 86, 9 C. 535 =12 C.L.R. 465.

Tirni.

(1)—Tirni *or grazing dues—Lambardar entering in his own name cattle of another—Liability to pay grazing dues.*—The points for decision in this case were whether proprietors in the district of Montgomery who were the owners of cattle were liable to pay the grazing dues known as *tirni* for the year 1875-1876, and whether the defendant, a lambardar of the village, was liable for the dues in respect of the cattle of which the owner's names were not disclosed by him at the time of enumeration of the cattle of the village. On the first point the Chief Court decided that, whether the *tirni* Rules of 1860 or of 1872 were in force on 1st April, 1875, when the financial year 1875-1876 commenced and the liability for that year attached to the defendants in the suit, the defendants were liable to pay *tirni* for that year for their village which then stood upon the *tirni Guzar* list. On the question as to the liability of the defendant lambardar to pay dues for certain cattle, it appeared on the evidence that when the *tirni Moharrir* went to the village in order to enumerate the cattle, the lambardar caused the cattle to be entered in his name after declining to give the names of the real owners, and under the circumstances the Courts had properly held that it was not open to him to deny his responsibility for the dues upon the above cattle, or even that there was an implied contract that he would himself pay. JALLA v. SHANKAR DAS, **142 P.R. 1879.**

Title.

See BURDEN OF PROOF—DECLARATION OF TITLE.

See BURDEN OF PROOF—POSSESSION AND PROOF OF TITLE.

See DECLARATORY DECREE, SUIT FOR—DECLARATION OF TITLE.

See ESTOPPEL—DENIAL OF TITLE.

See POSSESSION—EVIDENCE OF POSSESSION AND TITLE.

See PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 23.

(1)—*Title, Meaning of.*—By title, within the meaning of the Acts, is meant the nature of a man's title, and not what lands he holds under that title. SYAMA SUNDARI DASSYA v. JOGOBUNDHO SOOTAR, **16 C 186.**

(2)—*Possession*—Prima facie *evidence of title—Burden of proof.*—Possession is *prima facie* evidence of title, and is primarily exclusive, and it is for him who impugns this exclusive title, to show that the possession originated in a way not to affect his own right. KRISHNA CHARYA v. LINGAWA, **20 B. 270.** [*R.*, 78 P. R. 1902=137 P.L.R. 1902.]

(3)—*Suit for declaration of title—Possession of plaintiff, nature of, to entitle him to a decree.*—Where plaintiff sues for declaration of his title, and his possession extends over a period of more than 12 years, and the nature of that possession is such as could be successfully relied upon as a bar to a suit by a stranger to recover possession, a Court of Justice is competent to declare his title upon such possession. JUGGUT CHUNDER v. BANEE MADHUB BANERJEE, **23 W.R. 205.**

(4)—*Possession and title—Acquisition of title.*—As a general principle of law, the fact of obtaining possession affects the title, and has, in all systems of law, European and Oriental, been always treated as a most important element in the acquisition of title. SELEM SHEKH v. BAIRDONATH GHATAK, **3 B.L.R.A.C. 312 =12 W.R. 217.** [*F.*, 14 W.R. 250, 9 B.H.C. 147; *Appr*, 47 P.R. 1871; *R.*, 2 B. 299=12 W.R. 456; *D.*, 21 W.R. 421, 5 C. 336=4 C.L.R. 257, 7 C. 753=10 C.L.R. 129.]

(5)—*Party in possession, Ejectment of—Defect in adversary's title not sufficient—Plaintiff to prove his title.*—A claimant, trying to oust a party in possession of an estate, must establish his own right to the estate, and not rely upon the failure of the title impeached. JEWALA BUKSH v. DHARUM SINGH, **10 M.I.A. 511=2 Sar. P.C.J. 189.**

(6)—*Suit for possession—Submersion—Title.*—Where in a suit for possession, the last person found to have been in occupation is the plaintiff, whose possession has never been disturbed, owing to the land having ever since remained submerged, the plaintiff is entitled to a decree for confirmation of title. MAHARANEE INDURJEET KOOER v. MOHUNT JUMMA DOSS, **14 W.R. 164.**

Title—*continued.*

(7 & 8)—*Boundary disputes—Property attached for benefit of real owner—Previous possession evidence of title.*—Disputes respecting the boundaries of the *Zamindaries* of *Yettiapooram* and *Ramnad*, in the District of *Madura*, having led to acts of violence by the ryots, the Government, in the year 1836, to preserve the public peace, attached the disputed lands and took possession for the benefit of the party to whom the lands should be judicially awarded. At and before the time of the Government taking such possession, the *Zemindar* of *Yettiapooram* was in possession of certain lands adjacent to, and taken as a part of, the lands in dispute. The lands remained under attachment by Government for a period of nearly twenty years; no steps having been taken regarding them till the year 1855, when the *Zemindar* of *Yettiapooram* brought a suit against the Collector of *Madura* and the *Zemindar* of *Ramnad*, to recover possession of the land so formerly occupied by him, and for the mesne profits thereof while in possession of the Government. Although no clear title in this suit was proved by either *Zemindar*, it was held by the Courts in *India*, and affirmed on appeal by the Judicial Committee, that the fact of possession of the lands by the *Zemindar* of *Yettiapooram* before, and at, the time of the attachment by the Government was, in the circumstances, evidence of title, and the Government was ordered to restore the lands to him. THE ZEMINDAR OF RAMNAD v. THE ZEMINDAR OF YETTIAPURAM, **10 M.I.A. 47 =2 Sar. P.C.J. 65.**

(9)—*Possession—Both parties obtaining pottah from Government—Title.*—Where, in a suit to recover possession, both parties lay claim to the land as having been in their possession for some 15 years, and as having been reclaimed from jungle by them, and both parties claim it as being included in their pottahs from Government, and neither party allege that their rights commenced under their respective pottahs, *held* that, as the pottah of the plaintiff conferred no new rights to the land, the mere fact that the land was contained in that pottah was not sufficient ground for deciding in favour of plaintiff. GOLAM REZA CHOWDHRY v. CHANDOO MEAH LUSHKUR, **15 W.R. 45.**

(10)—*Possession, presumption of, from evidence of title—Waste lands.*—In disputes as to the right to possession of jungle lands, it is only in cases where neither party has exercised any acts of ownership over the lands in question that the Court may resort to evidence of title, and presume that the party proved to have the title has also possession. RAM BHANDU v. KUSU BHATTU, **5 C.L.R. 481.**

(11)—*Claim for two plots as ancestral* jammai *lands—Claim for one plot admitted—Proof of possession as to second plot.*—The plaintiff sued to recover possession of two plots of lands alleging that they formed a portion of his ancestral *jammai* land. The Court of first instance found that the plaintiff was entitled to plot No. 2, but held that plot No. 1 was

Title—*continued.*

not parcel of the ancestral *jammai*. On appeal, the lower appellate Court found that the plaintiff had proved that he had been in possession of plot No. 1, and was therefore entitled to it also. On second appeal, the High Court held that the plaintiff was bound to prove not only possession but also title, and that, as he had not proved his title to plot No. 1, he was not entitled to it. *Held*, on appeal under s. 15, Letters Patent, that, on second appeal, the High Court was not entitled to question the sufficiency of the evidence or the propriety of the finding, and that plot No. 2 having been found to be parcel of the *jammai*, it was sufficient to give evidence of possession and ownership to prove that the other plot was also parcel. BRODA KANT BUPARI v. JODHISTEER NATH, **10 C.L.R. 99.** (7 B.H.C.A.C. 82, *D.*)

(12)—*Title to land—Possession of title deed—Receipt for rent paid—Evidence.*—In a dispute as to who is the owner of certain land, where neither A nor B (the two claimants) ventures to state who his opponent is, and the evidence of the witnesses on this point is entirely in doubt, *held* that the person in possession of title deeds and of receipts for rent must succeed, unless there is something on the record counteracting such evidence. KHODA BUKSH KHAN v. MUSSAMUT CHOA, **19 W.R. 162.**

(13)—*Possession, Suit for—Title*, prima facie *evidence of — Possessory suits Evidence Act*, s. 110—*Specific Relief Act* (*I of* 1877), s. 9—In a suit for possession, where the plaintiff proved that he had been in possession of the lands in dispute and that he had been ousted by the defendants, who were unable to give any proof of their right so to oust him or of a superior title, *held* (*Prinsep, J.*, dissentiente) that the prior possession of the plaintiff was *prima facie* evidence of title, and that he was entitled to a decree. *Per Prinsep, J.*—Proof of prior possession and of illegal dispossession are in themselves no evidence of title except in a possessory suit under the Specific Relief Act (I of 1877). S. 110 of the Evidence Act applies only to actual and present possession, and does not declare generally that possession shall always be *prima facie* evidence of title. KAWA MANJI v. KHOWAZ NUSSIO, **5 C.L.R. 278.** [*Not F.*, 9 C. 130, 17 C. 256; *Cons.*, 12 A. 46: *R.*, U.B.R. 1905, Evidence 110.]

(14)—Maurasi *title — Presumption.*— The Court can presume that a tenant holds under a *maurasi* title from the fact of the land having been in the possession of the same family on continuous payment of rent to the zemindar for nearly a hundred years. BRAJANATH KUNDU CHOWDHRY v. LAKHI NARAYAN ADDI, **7 B.L.R. 211.**

(15)—*Finding of absence of claim under hereditary title, sufficiency of, to negative mourasee right in plaintiff.*—The defendants in this case appealed to the High Court on two grounds:—1st—That the lower Courts

Title—*continued.*

had treated an alleged lease pottah, from one W to the plaintiff, and a suit for rent brought by W against the plaintiff, as good and sufficient evidence of the right to possession, without enquiring either into W's title or the *bona fides* of the suit, although both were questioned by the defendants. 2nd—That the lower Courts ought not to have found that the plaintiff was a *kudeemee* ryot, because he had, both in the Act IV case and in the suit for rent, represented himself as a *ticcadar*. The High Court held that the judgment of the lower appellate Court contained the finding that the plaintiff possessed no *kudeemee mourasee* right and that the judgment of that Court had been based on the absence of any claim by the plaintiff to that right on occasions when he might naturally have been expected to assert it had he possessed it. THAKO MUHTOON v. AMEERUN, **2 W.R. 243.**

(16)—*Possession—Suit for confirmation of title.*—If, in a suit for confirmation of title, the plaintiff be found to have no title, the Court need not go into the question of possession. JUSSODA DASSEE v. SHEIKH MAHOMED FUKEER, **W.R. 1864, 367.** [*R.*, 3 B.L.R. App. 109.]

(17)—*Suit for declaration of title—Claim for possession in execution of declaratory decree—Not maintainable.*—Where a person has obtained a declaratory decree, he cannot without obtaining an actual decree for possession, claim possession in virtue of that decree, as the original suit in which such decree was passed was not for possession, but for a declaration of his title only. JEORA KHAN SINGH v. THAKOORE SINGH, **2 N.W.P. 303.**

(18)—*Title—Person in lawful possession of land wrongfully dispossessed.*—A person, who is lawfully in possession of land, though he may have no other title, is entitled to recover possession from the other person who has no title and wrongfully enters into possession. MAUNG KYAW v. MAUNG AN, **L.B.R. 1893—1900, 484.**

(19)—*Title to house-site—Estoppel of tenant or licensee, Evidence Act, s.116.*—In a suit to recover a house-site, it is not necessary for plaintiff to prove a good title against the whole world. It is sufficient for him to prove a good title against the defendant in the suit. The occupation by defendant being proved to be permissive, defendant is estopped from denying plaintiff's title under Evidence Act, s. 116. MAH HLI v. MAUNG SAN DUN, **L.B.R. 1893—1900, 4.**

(20)—*Collector's* pottah—*Muniment of title—Evidence of holding and conditions.*—The *pottah* granted by the Collector is not a muniment of title, but only an evidence of holding, according to a local and fiscal regulation. FREEMAN v. FAIRLIE, **1 M.I.A. 305=1 Sar. P.C.J. 123.**

(21)—*Registry in Collector's Book, no evidence of title.*—The registration of the name of a

Title—*continued.*

party in possession of land, on the Collector's books, as owner, is not conclusive evidence of his title, as the land may be affected by prior equitable charges, and it is the duty of a purchaser to investigate the prior title. VARDEN SETH SAM v. LUCKPATHY ROYJEE LALLAH, **9 M.I.A. 303=Marsh 461=1 Suther P.C.J. 480 =1 Sar. P.C.J. 857.**

(22)—*Conflicting evidence—Criterion of truth—Proclamation—Reg.* XXXVII *of* 1793, *s.* 20—*Registration—Presumption* — Muddudmash—Onus.—There is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence—where perjury and fraud must exist on the one side or the other—than to consider what facts are beyond dispute, and to examine which of the two cases best accords with those facts according to the ordinary course of human affairs and the usual habits of life. The act of registration after a proclamation under s. 20, Regulation XXXVII of 1793, amounts to a public, open and notorious assertion of title on the one side, and the omission to register, unexplained by proof of the ill-health of the claimant, or absence in a distant country, or ignorance, affords an equally strong presumption of the non-existence of any title on the other. Where a party sought to obtain possession of certain property denominated a *Muddudmash* against a defendant, whose adverse possession had existed from 1761, upon the allegation that such adverse possession was in the character of agent to the plaintiff, the Judicial Committee *held* (affirming the judgment of the Court below) that the proof of such agency lay on the plaintiff; and the balance of evidence being in favour of the defendant's right to possession, the circumstances of his having registered himself as owner in 1797, without any opposition, or subsequent claim, to register on the part of the plaintiff, and having continued in undisturbed possession from that period, was conclusive against the claim set up by the plaintiff. MEER USDOOLLAH v. MUSSUMAT BEEBY IMAMAN, **5 W.R. P.C. 26=1 M.I.A. 19=1 Suther. 46=1 Sar. 89.**

(23)—*Title, evidence of, direct proof when not available—Conduct and admissions of defendant as proof of title*—Mulki *papers, evidentiary value of*—*Registers kept under Reg.* VIII *of* 1800, *entries in*—*Statements against proprietary interest*—*Statements in road-cess return as to character of interest*—*Burden of proof, when shifted—Effect of erroneous statement as to nature of tenure by unauthorized person—Purchase at execution-sale held under s.* 124, *Act* I (*B.C.*) *of* 1879 *limited to interests actually sold.*—When, owing to lapse of time and other causes, direct evidence of title *e.g.*, a sanad or grant, is not available, it is enough for the plaintiff to establish a *prima facie* case, if the evidence on which it is based is corroborated by the conduct and admissions of the defendant or his predecessors-in-interest, or unrebutted by any positive evidence which

Title—*continued*.

can be relied on. *Mulki* papers or returns filed by *elakadars* under the provisions of Reg. VIII of 1800, para 3, although not of the same evidentiary value as the Registers themselves. inasmuch as they require proof of origin and authentication, are nevertheless good evidence of title, if they contain statements made at a time when there was no dispute and against the proprietary interest of the maker. Statements made in road-cess returns by *khorposhdars* or holders of a maintenance grant as to the character of their tenure are good evidence of title against a defendant claiming under them, if not as admissions, certainly as positive evidence in support of plaintiff's claim. A plaintiff may rely on the admissions of defendant as to his title in proof of his claim just as much as on any other evidence, and if a defendant goes into the witness-box and admits his title, there is no further *onus* upon him to prove it, at least as against such defendant. An erroneous statement made without knowledge in an affidavit filed as a matter of routine, by a person whose authority to make it was not proved, could not bind a party to a proceeding, nor affect the character of a sale held in such proceeding under the provisions of s. 124, Act I (B.C.) of 1879, so as to confer upon the auction purchaser a right which he could not obtain by the sale itself. MUNSHI KALI SANKAR SAHAI v. MAHARAJA PRATAP UDAI NATH SAHI DEO, **16 C.W.N. 683.**

(24)—*Entry of name in Collector's books as occupant of land—Effect.*—The fact of a person's name being entered in the Collector's books as occupant of land does not necessarily of itself establish that person's title or defeat the title of any other person. BHOGJI v. BAPUJI, **13 B. 75**. [*F.*, 5 Bom.L.R. 957, 6 Bom.L.R. 983.]

(25)—*Ancestral property—Suit for confirmation of possession of share—Self-acquisition—Onus—Registration in Collector's books, not of itself proof of title.*—Plaintiff came into Court alleging that, although there were four brothers, sons of the common ancestor, who would, under the ordinary rules of Hindu law, be the inheritors of the property in equal shares jointly, still the property in suit was not that of the common ancestor but the self-acquisition of two of his grandsons. Defendants stated that there was no such self-acquisition as was alleged by the plaintiff and that the four brothers inherited equal shares of the property. Plaintiff was, under the circumstances, held to be bound in the first place to prove his allegation of self-acquisition and, the suit being one for confirmation of possession, he was also bound fully to show his previous possession. Registration by itself not amounting to proof of title the lower Court had erred in law when it treated the registration in the Collector's book as the main evidence in proof of the plaintiff's allegation; until, therefore, plaintiff did prove self-acquisition in a legal way, he could not be entitled to any decree. GOBINDNATH SEIN v. GOBIND CHUNDER SEIN, **10 W.R. 366.**

Title—*continued*.

(26)—*Plaint—Parties—Collector—Entry in Revenue register—Title—Effect.*—In a suit for the recovery of a share in land in right of heirship, the plaintiff cannot make the Collector a party-defendant, simply because he has entered in his Revenue register only the name of one person as occupant of that land. The proper prayer for relief should be for an award of his share in the property of the deceased or for a declaration of his right to such a share and not for the entry of his name in the Collector's book. The fact that another person's name has been entered in the Collector's book, as occupant of the land, does not necessarily of *itself* establish that person's title or defeat the title of the plaintiff. The Collector's book is kept for purposes of revenue and not for purposes of title. FATMA KOM NUBI SAHEB v. DARYA SAHEB, **10 B.H.C. 187.** [*F.*, 13 B. 75; *R.*, 10 B. H C. 192, 10 B.H.C. 194, L.B.R. (1893—1900), 176, 6 Bom. L.R. 983, 5 Bom. L.R. 956, 13 Bom. L.R. 879=35 B. 487.]

(27)—*Cause of action—Entry in Revenue register—Title—Action against Collector.*—The mere fact that the Collector has entered in the Revenue books the name of one parcener in a certain property as the occupant or owner thereof, cannot give the plaintiff a cause of action to sue the Collector. The Collector's book is kept for purposes of revenue and not for purposes of title. But if the Collector issued a species of injunction against the plaintiff drawing his share of the profits, then an action may be maintained against the Collector. THE COLLECTOR OF POONA v. BHAVANRAV BALKRISHNA, **10 B.H.C. 192.** (10 B.H.C. 187, *F.*) [*F.*, 13 B. 75; *R.*, 10 B.H.C. 194, 5 Bom. L. R. 956, 6 Bom. L.R. 983.]

(28)—*Implied agreement to register—Refusal to register—Unregistered title - Joining causes of action.*—The principle enunciated in 10 W. R. 51 (F.B.) that, where a man seeks to establish any right which arises out of his title, that title must be complete, and that, in cases falling within the Registration Act, the title cannot until registration be complete as against a person who has registered his title, applies equally to a suit for possession. When a man enters into a contract of purchase with another, and receives the purchase-money, and the contract is one which, under the law in force at the time, requires registration, he does virtually agree that he will register that contract and so enable the other party to reap all the advantages of it, and is therefore compellable to do so. PRABHURAM HAZRA v. T. M. ROBINSON, **3 B.L.R. App. 49=11 W.R. 398.**

(29)—*Claim to property—Inconsistent titles—Registration in Collector's office—Evidence.*—In a claim to certain property on the ground of the same having been held by third person *benamee* for the husband of the claimant, and also on the ground of a *hibbalnamah* executed in favour of the claimant, there are no inconsistent titles; and even if there are, the claimant is entitled to succeed on

Title—*continued.*

the strength of the *hibbahnamah*. The mere fact of a person's name being registered in the Collectors' books is no evidence of title. AMEEROONISSA BIBEE v. WOOMAROODDEEN MAHOMED CHOWDHRY, **14 W. R. 49.** [*F.*, 17 W.R. 480.]

(30)—*Oral evidence—Title to land.*—Oral evidence, if believed, may be as good for proving title to land as documentary evidence. DURBAN FAKIR v. NOBIN CHANDRA MOZUMDAR, **1 B.L.R.S.N. 16 C.=10 W.R. 217.**

(31)—*Setting up title based on false deed—Title established by genuine deed.*—A party is not precluded from relying upon a title established by a deed conclusively found to be genuine, because he has foolishly and wickedly set up a false deed which, if treated as a conveyance and not as a mere confirmation, may be inconsistent with that title. PATTABHIRAMIER v. VENKATA ROW NAIKAN, **7 B.L.R. 136, P.C. =13 M.I.A. 560=15 W.R.P.C. 35=2 Suther. P.C.J. 410=2 Sar. P.C.J. 623.**

(32)—*Suit to recover property as mortgaged—Property in possession of defendant for long—Burden of proof—Forged documents produced to prove title—Other evidence of title good—Effect.*—Suit by A to recover real estate in the possession of B and of his predecessors, whose title had been unchallenged for forty-four years, on the ground that the estate was mortgaged only by A's ancestors, and that B and those claiming under him were only usufructuary mortgagees in possession. *Held*, that the *onus probandi* was on A, who could only succeed by the strength of his own title, and not by reason of the weakness of B's title. If a party put in evidence, in support of his title, documents proved to be forged, but the other evidence adduced by him is not impeached, the Court, in rejecting the forged documents, will take the unimpeached evidence into consideration and, if satisfied, adjudicate thereon. SEVVAJI VIJAYA RAGHUNADHA VALOJI KRISTNAN GOPALAR v. CHINNA NAYANNA CHETTY, **10 M.I.A. 151=2 Sar. P.C.J. 88.**

(33)—*Suit for possession—Title*—Onus.—In a suit to recover possession of land, where plaintiff showed that he had been in peaceable possession till forcibly dispossessed, and defendant failed to show any right by which he had dispossessed the plaintiff, the lower appellate Court was held to have done right in declining to inquire further into plaintiff's title and in replacing him in possession. TRILOCHAN GHOSE v. KAILAS NATH SIDHANTA BHOWMIK BHATTACHARJI, **3 B.L.R.A.C. 291=82 W.R. 175.** (10 W.R. 102, 9 W.R. 602, *R.*)

(34)—*Suit for possession — Title-deeds in plaintiff's name*—Onus *of proof.*—Where, in a suit for declaration of title to property and for recovery of possession thereof from the defendant, the plaintiff produces and shows the title-deed in her name, the *onus* is on the defendant to disprove the plaintiff's title. SWARNAMAYI RAUR v. SRINIBASH KOYAL, **6 B.L.R. 44.**

Title—*continued.*

(35)—*Confirmation of possession and declaratory decree, suit for—Judgments of Indian Courts concurrent—Interference by Privy Council—Practice.*—A person suing for confirmation of possession and seeking a declaratory decree must make out his title affirmatively. Where the Courts in India concurrently hold that he has not done so even though the High Court may not have attended to the depositions of material witnesses, the Privy Council will not interfere with the decision of the High Court. SHEIK TORAB ALLY v. SHEIK MAHOMED TAKKEE, **19 W.R. 1.** [*Appl.*, 20 B. 798.]

(36)—*Act* VIII *of* 1859, *s.* 246—*Suit to set aside summary order—Confirmation of title—*Bona fides—*Onus.*—In a suit to set aside a summary order under the provisions of s. 246, Act VIII of 1859, on the allegation that the order was illegal, it is for the plaintiff to prove its illegality. Where a plaintiff alleges that he is in possession of property and asks for a declaration of his title only, the *bona fides* of that title being questioned by the defendant, it is for the plaintiff to make out that that title is really and substantially what it purports to be on the face of the deed on which he relies. MAHIMA CHANDRA KUNDU v. MOULVI NURUDDIN, **3 B.L.R.A.C. 70=11 W.R. 422.** [*D.*, 15 W.R. 155; *R.*, 15 W.R. 202.]

(37)—*Act* XIV *of* 1859. s. 15—*Burden of proof—Duty of Court.*—No doubt the general principle is that a plaintiff who comes to set aside an award made under s. 15 of Act XIV of 1859 must clearly establish his own title before the party in possession can be required to make good his case. But the Judge, before applying this principle with great strictness, must look into the summary case itself and ascertain if there had been a proper inquiry and trial in that case. SURBO MOHUN ROY v. SURUT CHUNDER ROY, **16 W.R. 34.**

(38)—*Act* IV *of* 1840—*Award—Possession with defeated party—Suit for possession—Title—Award not conclusive.*—Plaintiff obtained an award under Act IV of 1840. He did not choose to maintain his right to possession under that award, as he is bound, before the Survey Authorities. The defendants took actual possession, though they did not even attempt to set aside that award. Now the plaintiff sued for the recovery of possession on the strength of the award. *Held* that the award was not sufficient proof of the plaintiff's title. Although the fact of the defendant's acquiescence in that award, so far as it was to be inferred from defendants not having sued to set it aside, may be strong evidence in favour of plaintiff's title, it did not follow that it was conclusive evidence. The defendants were not bound to bring a suit to set aside an (Act IV) award if they obtained possession of the land peaceably without any suit. JOOGUL KISHORE SHAHA v. RAJ KRISHEN SURMAH, **3 W.R. 129.**

(39)—*Magistrate's order giving possession—Title.*—An order giving possession of lands, made by the Fouzdarry (Police Magistrate's)

Title—*continued.*

Court upon a charge of breach of the peace, coming before the Magistrate, is not a determination respecting the right to such lands. MUSSAMUT IMAM BANDI v. HUR GOBIND GHOSE, **7 W. R. P. C. 67=4 M. I. A. 403=1 Suther. P.C.J. 208=1 Sar. P.C.J. 371.**

(40)—*Person dispossessed suing to establish title to property, not bound to set aside decree under s. 15 of Act* XIV *of* 1859.—The suit of the plaintiff who had been dispossessed of immoveable property was based on title, and so it was *held* that he had no occasion to ask distinctly for setting aside a decree that had been awarded to the defendant under s. 15 of Act XIV of 1859, because on plaintiff's succeeding in obtaining a decree on title, the effect of defendants' decree would by itself cease and determine. *Held* also that the lower appellate Court was not justified in dismissing the suit merely because the boundaries in the plaint differed from the boundaries in the decree under s. 15 of Act XIV of 1859. If, for the lands sought to be obtained by the plaintiff in the present suit, he could show title, he would be entitled to obtain a decree. SREENATH SURMAH v. BISHONATH SURMAH, **6 W.R. 268.**

(41)—*Evidence—Summary award under s. 15, Act* XIV *of* 1859—*Suit for possession—Evidence of prior possession.*—Where the plaintiff sued to recover possession of certain property as *mal* lands belonging to his estate and from which he had been dispossessed by an award under s. 15, Act XIV of 1859, he was entitled to adduce evidence of his possession prior to the award, and the Court was bound to consider the evidence so tendered by the plaintiff. BULLUBEE KANT BHUTTACHARJEE v. DOORJODHUN SHIKDAR, **7 W.R. 89.**

(42)—*Civil Court, competency of, to decree possession in suit on allegation of illegal dispossession—Defendant's failure to prove title—Adverse possession for statutory period, title even against rightful owner—Prior possession for shorter period, sufficient title against mere wrong-doer.*—Notwithstanding the provisions of s. 15 of Act XIV of 1859, it is competent to Civil Courts to give a decree for immoveable property on the bare ground of illegal dispossession in a suit brought after six months from the date of such dispossession, where the defendant has failed to prove his own title to the same. Irrespective of the said s. 15 of Act XIV, the High Court *held* that possession for a period of sixty years and upwards is sufficient to create a title in the possessor which no other person can question or repudiate. Also, adverse possession, for any period sufficient under the Limitation Act, is itself a title, even against the rightful owner himself, and against a mere wrong-doer, prior possession however short will itself support title. Illegal dispossession is itself a good cause of action such as the Civil Courts are bound to recognise. In the case of suits for recovery of immoveable property on allegation of dispossession, the Civil Courts have to determine the particular cause of

Title—*continued.*

action that has arisen between the parties to the suit; and it is with reference to this cause of action only that their determination would be final and conclusive as provided for by s. 2, Act VIII of 1859. They cannot look beyond the parties to the suit and proceed to find out who is the rightful owner if the plaintiff and defendant are not. Such an enquiry would be not only useless in its practical result, but also illegal as declared by the Privy Council in 5 W.R.P.C. 69. The High Court, therefore, did not uphold the contention of the defendant that the lower appellate Court has committed an error in law in decreeing the *julkur* in dispute, to the special respondent, solely on the ground of prior possession and illegal dispossession without any proof of title, and dismissed the appeal, holding that such objection of the defendant was itself erroneous in law and that the decision of the Principal Sudder Ameen in favour of the plaintiff had not been shown to be erroneous at all. KHAJAH ENAETOOLLAH CHOWDHRY v. KISHEN SOONDUR SURMA, **8 W.R. 386.** [*N.F.*, 17 C. 256; *Diss.*, 26 C. 579=3 C.W.N. 568; *R.*, 11 W.R. 550, 5 C.L.R. 278, 29 B. 213=7 Bom. L.R. 12; *D.*, 9 W.R. 259.]

(43)—*Rent suit—Question of title legitimately raised—Jurisdiction.*—If a question of title legitimately arises between the parties to a rent-suit, that must be determined for the purposes of that suit, and the Court is not compelled to dismiss the suit for rent. CHOWRASSEE KOOER v. BOKHOOREE SINGH, **24 W.R. 350.**

(44)—*Suits for trifling matters of low valuation—Competency of Court to determine important titles incidentally in suits for small amounts.*—Defendant-appellant contended in the High Court that, in this suit which was for a trifling matter and valued only at Rs. 20, it was not competent to the lower Court to have passed a decision practically affecting the title to a very large estate; but it was held that there was nothing in the law to preclude the title to large properties being incidentally proved and adjudicated upon in causes for small amounts, and it is no objection to the suits in which they are so adjudicated that the judgments in such suit may afterwards be made use of by either party, in proceedings relating to more important questions between them. OMRAO SINGH v. KURRUK SINGH, **2 W.R. 218.**

(45)—*Question of title—Decision in rent suit—Scope of enquiry.*—Questions of title ought not, as a general rule, to be decided in a suit for rent, but documents of title sometimes require incidentally to be pronounced upon and it is often a very necessary part of the inquiry. But that inquiry must be restricted to the purposes of the suit, and is not to affect or bar any decision that might be afterwards come to upon these documents in a regular suit. MUSSAMUT INDERBUTTEE KOOER v. SHAIK MUHBOOB ALI, **24 W.R. 44.**

Title—*continued.*

(46)—*Act* VIII *of* 1859, *ss.* 229 *and* 230, *question of title whether triable in suits under.*—The question for decision in this case was whether, in a suit framed under the provisions of s. 230 of Act VIII of 1859, the Courts are to confine themselves to the question of *bona fide* possession on the part of the objector on his own account, or on account of some person other than the defendant, or, whether the validity of the title of the objector is also to be determined; and it was *held* by the High Court that the intention of the Legislature was that the question of title should also be tried and not the mere question of *bona fide* possession, and that the matter in dispute, in such a case, is to be investigated in the same manner and with the like powers as if there was a suit for the property between the parties. RUCHA RAE v. PERMESHUR DYAL. **2 N.W P. 252.** [*F.*, 27 A. 453=2 A.L.J. 132=A.W.N. 1905, 50.]

(47)—*Suit for possession, maintainability of, where both parties are lessees.*—In a suit to recover possession of certain lands which, the plaintiffs alleged, belonged to them by virtue of a talooka putta granted by the Zemindars, the defendant pleaded that the lands belonged to some third party under whom they held as tenants. The first and the lower appellate Courts held that the suit was not maintainable as the plaintiff and the defendants held under certain superior landholders. *Held*, in special appeal, that the suit would lie. When a plaintiff sues under a title given by a superior landholder, he is entitled, if that title is called in question, to have it put in issue and determined. *Held*, also, that the lessors on either side were unnecessarily made parties, there being no cause of action against either of them. NAGUR CHAND v. DOORGA DOSS CHOWDHRY, **11 W.R. 137.** (2 W.R. 138, *F.*)

(48)—*Question of title when can be determined finally—Effect of grant of letters of administration*—Questions of title can only be determined finally in a regular case. After granting letters of administration, the District Court is *functus officio*, except in regard to the exhibition of an inventory and the revocation of the letters. NGA PWE v. MI CHAN THA, **U.B.R. 1910 4th, Qr., 69.** (1 L.B.R. 155, 2 L.B.R. 161, 4 L.B.R. 287, *R.*)

(49)—*Hindu Law—Debts of adoptive mother—Liability of adopted son—Act* VIII *of* 1859, *ss.* 246, 256, 257—*Suit to set aside execution sale—Intervenor—Auction purchaser at execution sale—Caveat emptor.*—When there is no proof that an adopted son succeeded and appropriated the assets of his adoptive mother, he could not be made liable for her debts, even though he was her heir. Ss. 256 and 257 refer to cases whether there has been an irregularity in publishing and conducting a sale and on this point the order of the Court is declared to be final, and the person against whom such order has been made is precluded from bringing a regular suit to establish his claim to have the sale set aside *because it had been irregularly conducted*. Therefore, the representative of a judgment-debtor is

Title—*continued.*

competent to bring a regular suit to have an execution sale cancelled on grounds other than irregularity in publishing or conducting it, and ss. 256 and 257 are no bar to such suit. When the attached property which was afterwards sold, was, at the time the petition of intervention under s. 246 was made, the sole property of the intervenor and in his sole possession, the property ought to have been at once released and the decree-holder referred to a regular suit. An auction-purchaser at an execution sale, is bound to satisfy himself beforehand of the value and quality of the property sold, just as much as if he were purchasing the same under private contract, and he has only to thank himself if he has made a bad bargain, as the maxim *caveat emptor* applies in such case. JUMMAL ALI v. TIRBHEE LAL DOSS, **12 W.R. 41.**

(50)—*Pleading—Proof—Variance—Specific title set up not proved.*—When the plaintiff comes into Court upon a specific allegation of title, he is bound to prove that title. Where he claims exclusive possession of property on the ground that it is his separate property by virtue of his purchase out of his money, but fails to prove it, his suit should be dismissed *in toto*, even though it appears that he has some interest in the property as a member of a joint Hindu family. SREENARAIN CHUCKERBUTTY v. A. B. MILLER, **15 W.R. O.C. 7.** [*R.*, 13 Ind. Cas. 455.]

(51)—*Civ. Pro. Code, Act* VIII *of* 1859, *s.* 2—*Dismissal of suit to recover property by right of gift—Subsequent suit by right of inheritance.*—A plaintiff's cause of action is a very different thing from his title; the one is something done contrary to a person's interest which obliges him to seek the aid of a Court of justice, the other is the proof that that something affords him a valid ground for relief. (10 W.R. 426, *Appl*). A litigant cannot be allowed to keep back one of his titles, on the ground that he had still a right in reserve, as he is bound to disclose all his titles at once. Dismissal of a suit brought by a person claiming property by gift to his mother bars a subsequent suit by that person claiming the same property as heir to his grand-father, when the cause of action was the same in both the suits. BROJO LALL ROY v. KHETTUR NATH MITTER, **12 W.R. 55.** [*R.*, 11 B.H.C. 224, 12 O.C. 347.]

(52)—*Jurisdiction—Adjudication of title of a party not before Court.*—A Civil Court commits an error in law in adjudicating upon the title of a third party who is not before it and who cannot possibly be prejudiced by the decision in the suit. KRISHNA CHUNDER SEN v. SHAIKH TAZDEE, **24 W.R. 19.**

(53)—*Suit—Ejectment against some and declaration of title against others—Validity of suit.*—A suit could not be brought praying for the ejectment of some of the defendants and declaration of title against other defendants. NAYAN MANNI v. GODA SHAGARA, **1 M.H.C. 652.**

(54)—*Doubtful title—When it will not be enforced by Court.*—The Court will not enforce

Title—*continued.*

a doubtful title on a purchaser only where (*a*) there is a reasonable decent probability of litigation resulting, or (*b*) the title depends on the construction and legal operation of some ill-expressed and inartificial instrument, and the Court holds the conclusion it arrives at to be open to reasonable doubt in some other Court. (Fry on Specific Performance, p. 388, quoted). KALLY DOSS SEAL v. NOBIN CHUNDER DOSS, **14 C. 518.**

(55) —*Court's discretion to force title on unwilling purchaser.*—There must be something more than a very probable ground for believing that the title will prove unassailable before it can be forced on an unwilling purchaser. The cases in which the Courts have forced a title on an unwilling purchaser, appear to have been for the most part cases in which the doubt alleged was dependent upon some question of law which the Court could solve or upon the bare possibility of a fact being alleged which had through a long period of time been treated as affording no ground for doubting the title. JERAM v. VEERBAI, **5 Bom. L. R. 885.**

(56)—*Madras Rent Recovery Act* (VIII *of* 1865)—*Revenue Court—Questions of title.*—A Revenue Court has power to determine incidentally questions of title. THIMMAKKAL v. NACHIAR AMMAL, **9 M.L.J. 162.**

(57)—*Act* XXXII *of* 1860—*Sale of lands for arrears of income-tax—Mokurruree title to land whether affected—Act* XI *of* 1859.—This was a suit to obtain possession of certain lands under a mokurruree title, the defendant having purchased the lands at a sale for arrears of income-tax, and, as alleged by the plaintiff, dispossessed him. The lower appellate Court decided that, with reference to Act XI of 1859, such a sale would render the mokurruree title void but the High Court held that since Act XI has no relation whatever to a sale under Act XXXII of 1860, the lower Court must decide the case according to the provisions of that Act under which the sale was made. SHEO PERSHAD SINGH v. MUTHOORA PERSHAD, **10 W.R. 31.**

(58)—*Objection to admissibility of documents in evidence, not raisable for first time in special appeal.*—Lakheraj *title—Registration—Reg.* XXXIX *of* 1793—*Burden of proof.*—Plaintiff claimed the suit land as *lakheraj* situated within the share of a co-sharer of his. The decree of the first Court dismissing the plaintiff's suit was reversed by the lower appellate Court, and defendant on appeal raised the special objection that the khusrah butwarra-papers, relied on in the lower appellate Court were not admissible in evidence; but it was held that there having been many opportunities in both the lower Courts for the defendant to have objected to the admissibility of those papers, and no such objection having been there taken, it could not be permitted to be raised for the first time in the stage of special appeal. Defendant also objected that no decree can pass, admitting a *lakheraj* title as valid, without its being shown that the *lakheraj* land had been registered under Reg. XXXIX of 1793, but the High Court was of opinion that the case did not come within the provisions of Reg. XXXIX of 1793, inasmuch as there was no case of resumption or release of *lakheraj* lands. The present case was one of quite another description, *viz.*, a question as to whether certain lands claimed as *lakheraj* lay within the share of one defendant or not. Where a *lakheraj* title has been put forward and possession under such title proved, the burden would be on the party claiming the land as *mal* to prove that he has collected rent as from such *mal* land. CHADEE SINGH v. BEHAREE, **10 W.R. 90.**

(59)—*Act* X *of* 1859, *s.* 24—*Question of title—Suit for accounts.*—S. 24 of Act X of 1859 does not apply to cases in which pure questions of title are involved. Thus, it does not apply to a suit for accounts where the plaintiff never was in receipt of rent or recognized by defendant to be entitled to it and the defendant never was his agent employed by him and never acted as his agent. JUMEER MUNDUL v. MOHIMA CHUNDER GHOSE, **5 W.R. Act X, Rul. 15.**

(60)—*Act* X *of* 1859, *s.* 77, *scope and applicability of—Determination of person who last received rents—Cases of conflict of title, s.* 77 *not applicable to.*—In this suit for a kubooleat and a declaration of title to rents, the first Court held that plaintiff showed that his vendor was the last person who received rents and that, therefore, under s. 77 of Act X of 1859, plaintiff was entitled to a decree which was accordingly given to him. On appeal by the defendant, the Judge found that the plaintiff came in relying on the title of the rihts of his vendor who, actually, had no rights at all, and dismissed the suit of the plaintiff. On special appeal it was urged that the Judge had only to see, as under s. 77, whether the first Court was right or wrong in having held that plaintiff's vendor was the last person who collected the rents. The High Court *held* that since the pleadings showed a conflict of title and the Judge had found as a fact that plaintiff had no title, s. 77 was not the law to be applied to the case. MUSHENTOOLLAH v. KASSIM NUSIO, **4 W.R. Act X, Rul. 34.**

(61)—*Title, priority of—Purchase at a sale in execution of a landlord's claim for rent—Purchase in execution of a mortgage-decree of portions of the holding—Rent, right to claim—Encumbrance, setting aside of—Bengal Tenancy Act* (VIII *of* 1885), *s.* 167—*Limitation—Notice served within a year from the date of confirmation of sale, if valid—Estoppel, conduct.*—A purchaser at a sale in execution of the landlord's claim for rent acquires a title to the whole of the holding, preferential to that which a mortgagee, by his purchase in execution of his mortgage decree, acquires in portions of the holding. A purchaser of an entire *durputni* taluq, at a sale in execution of a decree for arrears of rent made in a suit brought against the original *durputnidars* by the *putnidar*, acquires a good

Title—*continued.*

and preferential title to the whole taluq, over the purchaser in execution of a mortgage-decree obtained against some of the *durputnidars*, who were encumbrancers on the *darputni* to the extent of the shares covered by the mortgage encumbrances; and, on the basis of that title, the former can recover the full rents from the tenants of the taluq. (13 C.W.N. 413, *F.*) A person, who claims to hold encumbrances and disputed, in a previous litigation, the right of the purchaser of the entire holding under the sale for arrears of rent, and thus denied the right of the purchaser to issue notices to annul the encumbrances, involving the purchaser of the entire holding in litigation to prove his title, cannot, by reason of his having raised the dispute and caused the delay, in equity, be allowed subsequently to say that the title under which the purchaser claimed to issue the notice was perfected, for the purposes of s. 167 of the Bengal Tenancy Act, on the date of his actual purchase and not on any subsequent date, such as the date of the confirmation of his title by the decision in the previous litigation. BIBI TAIBATANNESSA CHOWDHURANI v. PRAVRATI DASI, **10 C.L.J. 640=4 Ind. Cas. 750.**

(62)—*Act* VIII *of* 1859, *s.* 2—*Prior suit—Matters subsequent — Proprietary title under decree, effect of—Limitation.*—Where a plaintiff standing on her proprietary title, which originated in a mortgage followed by purchase and which was affirmed by a decree, alleged against the defendant an obstruction and hindrance to the plaintiff's right caused by some resistance offered by the defendant to the plaintiff's procuring the proper entry in the revenue records of her name as proprietor, *held*, that the former adjudication between the parties could not affect the plaintiff's right in respect of matters which had arisen subsequent to it, and s. 2 of the Civ. Pro. Code could not apply to such a case. If a person fully possessed of and entitled to property brought a suit which resulted in the further confirmation of his title by a decree he would henceforward hold his property not under that decree above, but also under the original title affirmed by the decree. AMRIT KOOER v. ROOP KOOER, **2 N.W.P. 459.**

(63)—*Possession for* 12 *years without paying rent*—Lakheraj *title.*—This was a suit by an unsuccessful intervenor in a rent suit under s. 77 of Act X of 1859. Having so failed, he brought his suit in the Civil Court to establish his title. The title set up was long continued possession and holding of the lands in dispute as *debutter lakheraj*. *Held*, that the plaintiff was entitled to a decree, having proved possession of the land without payment of rent for 12 years. BISSONATH KOMILLA v. BROJO MOHUN CHUCKERBUTTY, **10 W.R. 61.** [*D.*, 10 W.R. 477.]

(64)—*Ejectment by Collector—Suit for declaration of title—Limitation.*—Where the object of a party is to establish his title to the property from which he was turned out by the Collector,

Title—*continued.*

he can bring his suit within 12 years. AZEEZOODDEEN MAHOMED v. MAHOMED MEAJAN, **25 W.R. 65.** (7 W.R. 153, 8 W.R. 294, *F.*)

(65)—Mogulaee *dues—Suit for dues and for title—Reg.* IV *of* 1827, *ch.* II, *s.* 3.—A suit brought for the amount of one year's Mogulaee or Government dues, and amended by claiming, pursuant to Reg. IV of 1827, ch. II, s, 3, ten years' dues, is one for the title to the dues as well as for the dues themselves. BOMANJEE MUNCHERJEE v. SYED HOSSOIN ABDALLAH, **5 W.R. P.C. 61=1 M.I.A. 494=1 Suther. P.C. J. 77=1 Sar. P.C.J. 142.**

(66)—*Title of vendor as between private individuals and as against Government—Land cleared and cultivated in Burma without payment of revenue—Sale of interest in such land.*—S. 55 (2) of the Transfer of Property Act, 1882, enacts that the seller shall be deemed to contract with the buyer that the interest which the seller proposes to transfer to the buyer subsists, and that he has power to transfer the same. Though this Act is not in force in Burma outside Rangoon, it is admitted by the advocates for both parties that the principle upon which this provision is based is applicable. In Burma it is constantly the practice for persons to clear and cultivate land, without paying revenue, and then to sell their interest in the land to others. If the purchaser knows the nature of the interest he is buying, he gets all that he bargained for. As between private individuals, plaintiff's vendor had a possessory title to the land and a better title than any other private person could then show. EDUMBA TAVAN v. SAWMY, **L.B.R. 1893—1900, 455.**

(67)—*Title, validity of, to land under potta obtained fraudulently.*—A person acquires no valid title to the lands under the potta obtained by him by deceit and by suppression of the true state of affairs. MA TAW v. MAUNG SHWE PON, **L.B.R. 1893—1900, 428.** (L.B.R. 1872—1892, 428, *Rel. on.*)

(68)—*Title, suit to establish, to attached property without previous application for removal of attachment.*—There is nothing in the Civ. Pro. Code to debar the owner of property which has been wrongly attached or sold as the property of another, from bringing a suit to establish his title, even though he may have made no application to get the attachment removed, and even where, as in the present case, a person did object to the attachment of certain property attached in execution of a decree, claiming it as his own, but the objection was struck off as default of prosecution. It has been ruled by one of the High Courts in India that such person might sue for damages for the wrongful attachment of such property without suing to establish the rights which he claimed thereto. MAUNG PO MIN v. MA NYEIN E, **L.B.R. 1893—1900, 234.** (3 A 564, *F.*; 12 W.R. 140, 3 B.L.R. 283, *D.*; L.B.R. 1872—1892, 139, *R.*)

Title—*continued.*

(69)—*Mortgage by father — Mortgagee dispossessed by sons—Claim title—Act* VIII *of* 1859, *ss.* 229, 230.—B, a Hindu father, executed a *zuripeshgi* lease of his share in certain joint family property to K, who was put in possession thereof. R and S, the sons of B, brought a suit against their father to obtain a declaration of their right to hold their separate shares by partition of the family property. K intervened in that suit under s. 230 of Act VIII of 1859, setting up his mortgage and praying that his incumbrance might be recognized and maintained. The Court declined to go into the question of this mortgage, confined itself to the question between the plaintiffs and their father, and gave judgment for a certain share by partition, but thought proper to accompany that decree by a declaration that the plaintiff should get possession only of the property held, and in the same manner as held, by the father. In execution, the plaintiffs were put into actual possession of the whole of their share and K was dispossessed. Then K, under s. 230, applied to be restored to possession on the ground that he held the same under a good and valid mortgage from B. The sons disputed the validity of the mortgage. The Court below refused to enter into the question of right between the parties. *Held*, that the lower Court ought to have gone fully into the question of title, and decided all questions between the parties. BABOO JADUNATH SINGH v. KALIPRASAD, **6 B.L.R. App. 55=14 W.R. 358.**

(70)—*Suit for possession—Plea of mortgage found to be invalid — Adverse possession.*—In a suit for possession, defendant pleaded a mortgage which was found to be invalid. *Held* that, though it is possible that a bad title can be cured by long possession, it was not so in this case. KISHEN SINGH v. THOOLA SINGH, **2 P.R. 1866.**

Adjudication of—*Res judicata—See* ACT XIX OF 1863, ss. 8, 9, 2 A. 294.

See ACT X OF 1870, s. 39, 7 C. 406=9 C.L.R. 117.

See BEN. ACT X OF 1859, s. 77, 3 B.L.R A. C. 202.

Suit for possession upon—Limitation—*See* BEN. ACT VIII OF 1869, s. 27, 9 C, 423.

See BEN. ACT VIII OF 1869, s. 27, 9 C.L.R. 253.

See BEN. ACT VIII OF 1869, s. 27, B.L.R. Sup. Vol. 628=2 Ind. Jur. N. S. 112=7 W.R. 186.

Suit for possession — Question of title — Limitation—*See* BEN. ACT VIII OF 1869, s. 27. 12 C. 606.

See BEN. ACT VIII OF 1869, s.102, 9 C.L.R. 86.

Proceeding under s. 103, Ben. Tenancy Act, 1885—Decision of Revenue Officer—Effect in subsequent suit for—and ejectment—*See* BEN. ACT VIII OF 1885, ss. 104 to 108, 117, 118, 119, 145, 158, 189, 30 C. 339=7 C.W.N. 33.

Title—*continued.*

Mamlatdar's order under Act V of 1864—Not binding on Civil Courts as to title—*See* BOM. ACT V OF 1864, 1 B. 624.

Suit for rent—Decision of question of—Appeal—*See* BOM. ACT XVII OF 1879, s. 3 (3), cl. (x), 16 B. 128.

Municipality requiring documentary proof of—*See* BOM. ACT VI OF 1873, s. 33, cl. (1), 19 B. 27.

Of sub-tenant of a Government tenant to land adjoining the tenant's holding cleared and cultivated by the sub-tenant—*See* BUR. ACT II OF 1876, L.B.R. 1872—1892, 489.

To land—*See* BUR. ACT II OF 1876, s. 6, L. B.R. 1872—1892, 601.

See BUR. ACT II OF 1876, ss. 7, 17, L.B.R 1893—1900, 24.

To land relinquished by landholder—*See* BUR. ACT II OF 1876, ss. 55 (*a*), 56 (*a*), L.B.R. 1893—1900, 462.

See MAD. ACT VIII OF 1865, 3 M. 127, F.B.

Partition proceedings—Question of title—Jurisdiction of Court to try—*See* PUN. ACT XVII OF 1887, s. 117, 146 P.L.R. 1902.

Question of—*See* PUN. ACT XVII OF 1887, s. 158 (2), 2 P.L.R. 1901=29 P.R. 1901.

See PUN. ACT XVII OF 1887, s. 158 (2), 8 P.L.R. 1901.

Settlement Officer's decision on questions of title not final—Suit to contest such orders—Limitation—*See* U.P. ACT XIX OF 1873, ss. 62, 63, A.W.N. 1881, 15.

See U.P. ACT XIX OF 1873, s. 113, 26 A. 225.

Revenue Court's decision *ex parte* on question of—Appealability of—*See* U.P. ACT XIX OF 1873, ss. 113, 114, 214, 219, 18 A. 210=A.W.N. 1896, 30.

Partition, suit for—Question of—Decision of Revenue Court upon—Jurisdiction of Revenue Court—*See* U.P. ACT XVII OF 1876, ss. 74, and 75, 2 O.C. 351.

Partition—Decree, title, question of, decided in partition proceedings — Appeal—*See* U.P. ACT XVII OF 1876, ss. 74 and 75, 4 O.C. 298.

Decision of question of—By Court of Revenue—Subsequent civil suit for declaration of title——*Res judicata—See* U.P. ACT XII OF 1881, ss.36, 39, 95, 96, 18 A. 270, F.B.=A.W.N. 1896, 59.

Revenue Court—Decision on question of title—*Res judicata—See* U.P. ACT XII OF 1881, s. 43, 25 A. 282=A.W.N. 1903, 40.

Suit for rent—Dismissal of suit—Subsequent suit in Civil Court to establish title to and for possession—Limitation—*See* U.P. ACT XII OF 1881, s. 148, A.W.N. 1885, 261.

See U.P. ACT XII OF 1881, s. 148, 25 A. 88, F. B.=A W.N. 1902, 204.

Title—*continued.*

See U.P. ACT I OF 1900, ss. 88, 152, 1 A.L.J. 377.

Admission of title in pleading—Suit for possession of land—Plea of limitation—*See* ADMISSION—ADMISSIONS IN PLEADINGS, Marsh, 549.

See APPEAL—MISCELLANEOUS, 5 W. R. Act X, Rul. 94.

Award declaring title—Subsequent suit for possession—Period of limitation—*See* AWARD, A.W.N. 1881, 70.

Claim based on title for possession of immoveable property—Right of benamidar to sue in his own name—*Res judicata*—*See* BENAMI TRANSACTION—GENERAL, 18 A. 69=A.W.N. 1895, 160.

No claim for declaration of—Or for possession—Maintainability of suit—Suit for removal of boundary marks—*See* BOUNDARY, A.W.N. 1884, 4.

See BUILDING, 9 C.W.N.72=31 C. 979.

Mistake as to title—*See* BUILDING, 3 B. L.R.A.C. 18=11 W.R. 574.

Onus of proof of—*See* BURDEN OF PROOF—CLAIMS TO PROPERTY ATTACHED, 12 B. 270.

Recovery of possession—Evidence of peaceable possession till dispossession—Proof of title, *onus* of—*See* BURDEN OF PROOF—LIMITATION AND ADVERSE POSSESSION, 7 C. 591=9 C.L.R. 164.

Suit based on title—Proof of dispossession alone not sufficient—*See* BURDEN OF PROOF—LIMITATION AND ADVERSE POSSESSION, 9 C. 130=11 C.L.R. 393.

Grant of certificate to collect debts opposed by alleged adopted son—Refusal by Judge to investigate—*See* CERTIFICATE TO COLLECT DEBTS, 6 C. 303=7 C.L.R. 475.

Alluvial lands—*Chur*—By accretion to new formation—*See* CHUR LANDS, 2 B.L.R. P. C. 4 =11 W.R. P.C. 2=12 M.I.A. 136.

Decision as to title in proceedings in execution—Fresh suit not maintainable in respect of title—*See* CIV. PRO. CODE, 1908, s. 47, 9 B. 458.

Purchase at execution sale with knowledge of defective—right to refund of purchase-money—Warranty of—in Court-sale—*See* CIV. PRO. CODE, 1908, O. XXI, r. 93, 3 A.L.J. 819=A. W.N. 1906, 310.

Suit for breach of covenant of title—What must be proved—*See* CONTRACT—BREACH OF CONTRACT, 2 B. 273.

Possession of goods by person other than owner—*See* CONTRACT ACT, 1872, s. 108, exception 1, 12 B.L.R. 42=20 W.R. 467.

Covenants for—&c.—Defects of title known to purchaser—*See* COVENANTS, 16 C. 330.

Title—*continued.*

Absconding officer—Irregular proclamation—Sale of property—Of purchaser—*See* CRIM. PRO. CODE, 1898, ss. 87, 88, 89, 22 A. 216.

See CRIM. PRO. CODE, 1898, s. 145, 6 C.W. N. 882.

Declaration of right—Title not proved—Maintainability of suit on the strength of possession—Trespasser—*See* DECLARATORY DECREE, SUIT FOR—GENERAL, A.W.N. 1887, 55.

Want of—In vendor at the date of sale—His subsequently acquiring title—*See* DEED—PROOF OF DEEDS, 15 W.R. P.C. 12=6 B.L. R. 501.

Proof of—*See* EJECTMENT, SUIT FOR, 2 Hay 303.

See ENHANCEMENT OF RENT—ENHANCEMENT, NOTICE OF, 5 W.R. Act X, 14.

See ESTOPPEL—ESTOPPEL BY CONDUCT, 2 W.R.77.

See ESTOPPEL—MISCELLANEOUS, 3 W.R. Act X, 11.

Ex parte decree—Unexecuted and barred by limitation—evidence of title—*See* EVIDENCE—DECREES, JUDGMENTS AND PROCEEDINGS IN SUITS, Agra F. B. 78=Ed. 1874, 60.

Survey map—Possession—*See* EVIDENCE—MAPS, 9 C.L.R. 305.

See EVIDENCE—MISCELLANEOUS DOCUMENTS, 4 W.R. 57.

Suit for declaration of title—Thak map if evidence—*See* EVIDENCE—MISCELLANEOUS DOCUMENTS, 7 C.W.N. 612.

See EVIDENCE—PAROL EVIDENCE, 8 W.R. 366.

Proof of—Unregistered deed of sale—Registration Act, s 49—*See* EVIDENCE—SECONDARY EVIDENCE, 1 C.L.R. 542.

Resumption Chittas, evidentiary value of—*See* EVIDENCE—MISCELLANEOUS, 14 C. 120.

Evidence of—*See* EVIDENCE—MISCELLANEOUS, 2 B.L.R. P.C. 114=12 M.I.A. 286= 12 W.R.P.C. 6, 26 C. 11, P.C.=25 I.A. 225.

Proof of—*See* EVIDENCE ACT, 1872, s. 90, 6 C. 209.

Distinction between claims founded on official and on private documents—*See* EVIDENCE ACT, 1872, s. 110, U.B.R. 1897—1901, Vol. II, 416.

See EVIDENCE ACT, 1872, s. 110, L.B.R. 1872—1892, 474.

Execution of decree—Question of title between decree-holder and third person—*See* EXECUTION OF DECREE—GENERAL, 6 A. 12 =A.W.N. 1883, 173.

See GHATWALÆI TENURE, 1 B.L.R. A.C. 120=10 W.R. 179.

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itle—*continued.*

Possession, *prima facie* evidence of—*See* HINDU LAW—ADOPTION, 5 W.R.P.C. 69.

Power of Inam Commissioner—Duties not judicial—Certificate by Commissioner not conclusive evidence of — *See* INAM, 2 M.H.C. 341.

See INTERVENOR. 5 W.R. Act X, Rul. 78.

See ISSUES—FRAMING ISSUES, 2 B.L.R. P.C. 1=12 M.I.A. 145=11 W.R.P. C. 1.

Case to be decided on issues—Plaintiff's title assumed--Case not to be dismissed—*See* ISSUES—MISCELLANEOUS, 6 Ind. Cas. 446.

See JURISDICTION OF CIVIL COURTS, 20 A. 520=A.W.N. 1898, 136, 4 C.P.L.R. 142, 9 W.R. 359.

Question of proprietary title by whom to be determined—Decision of Assistant Collector—Appeal — *See* JURISDICTION OF REVENUE COURTS, 4 A.L J. 686=A.W.N. 1907, 271=30 A. 25.

Suit for declaration of title to land—Questions of title—*See* JURISDICTION OF REVENUE COURTS, P.L.R. 1900, p. 239.

See JURISDICTION OF REVENUE COURTS, 3 N.W.P. 141, 9 W.R. 306.

See LANDLORD AND TENANT—GENERAL, 28 C. 738=5 C.W.N. 858.

See LANDLORD AND TENANT —EJECTMENT, 17 B. 631, 18 B. 110.

Mortgage—Foreclosure—Rent — Notice to tenant— *See* LANDLORD AND TENANT — TRANSFER OF LANDLORD'S INTEREST, 12 C.L.R. 479.

Question of, to particular property — *See* LETTERS OF ADMINISTRATION, L.B.R. 1893—1900, 40.

To space occupied by a building, right to prescribe for—*See* LIMITATION — GENERAL, 16 M.L.J. 281=29 M. 511.

Possession and declaration of—Suit for—*See* LIMITATION ACT, 1908, art. 45, 5 C.L.R. 452.

Extinguishment of—by adverse possession—Burden of proof—*See* LIMITATION ACT, 1908, arts. 142, 144, 7 M.L.J. 186.

See LIS PENDENS, L.B.R. 1893 –1900, 346.

See MAGISTRATE—JURISDICTION OF, 11 M.L.J. 122.

Sale in execution of decree—Title of purchaser, when accrues — Mesne profits— *See* MESNE PROFITS—GENERAL, 24 A. 475=A. W.N. 1902, 145.

Suit for redemption—Question of title—*See* MORTGAGE—REDEMPTION, 3 Agra 142.

Evidence of—Commission for partition—*See* PARTITION—EFFECT OF PARTITION, 19 C. 618.

Title—*continued.*

See PARTITION—RIGHT TO PARTITION, 30 P.R. 1898.

See PARTITION—SUITS FOR PARTITION, JURISDICTION OF CIVIL COURTS IN, 82 P. R. 1898, F.B.

Partition, suit for—Question of—Dismissal of objection involving question of titles—Appeal—Jurisdiction of Civil Court—Land Revenue Act of 1901, ss. 111 and 112—*See* PARTITION—SUITS FOR PARTITION, JURISDICTION OF CIVIL COURTS IN, 7 O.C. 161.

Order of Revenue Court containing adjudication upon question of—*See* PARTITION—MISCELLANEOUS, 6 O.C. 372.

Plaint, plaintiff how far bound by case set up in his—Declaration of proprietary title and ejectment of tenant, suit by talukdar for—Denial of taluqdari title and assertion of adverse title by defendant—Burden of proof—*See* PLEADINGS, 6 O.C. 119.

Possession without title—Nature of interest of person in possession of immoveable property —*See* POSSESSION—GENERAL, 24 A. 157.

Adverse possession — Declaration of— *See* POSSESSION—ADVERSE POSSESSION, 2 C. 418.

See POSSESSION— ADVERSE POSSESSION, 3 B.L.R.A.C. 343=12 W.R. 192.

See POSSESSION—SUITS FOR POSSESSION, 20 A. 299= A.W.N. 1898, 36, 102 P.R. 1879, 9 C.L.R. 365, 14 C 592, Marsh. 389=2 Hay 434, 3 B.L.R. App. 93, 3 B.L.R.A.C. 99, Note =11 W.R. 301.

Possession, suit for, on certain title—Decree on different title—*See* POSSESSION—SUITS FOR POSSESSION, 7 C.L.R. 103.

Question of—Limitation—Bengal Act VIII of 1869, s. 27—*See* POSSESSION—SUITS FOR POSSESSION, 14 C. 624.

Not distinctly stated in plaint or issue—Effect—*See* POSSESSION—SUITS FOR POSSESSION, 4 M.L.T. 344.

See PRACTICE AND PROCEDURE, 5 W.R. P.C. 63=10 M.I.A. 476.

Right to an artificial watercourse—Presumption of—from long continued enjoyment—*See* PRESCRIPTION — EASEMENTS — WATER, RIGHTS CONCERNING, 6 C. 394, P.C.=7 C.L. R. 529=7 I.A. 240.

Determination of jurisdiction—*Bona fide* contention of defendant involving question of title, effect of—*See* PRESIDENCY SMALL CAUSE COURTS ACT, 1882, s. 19, cl. (*g*), 15 B. 400.

Question of—*See* PRESIDENCY SMALL CAUSE COURTS ACT, 1882, s. 69, 31 C. 1001.

Application for grant of probate—Questions relating to testator's title—*See* PROBATE—GENERAL, 19 A. 458=A.W.N. 1897, 106.

Citation necessary before grant of letters—Revocation consequent on defective citation—Application for probate, incompetency of Court to go into question of title on—*See* PROBATE—EFFECT OF PROBATE, 12 B. 164.

Title—*continued.*

Suit for recovery of money—Question of—Jurisdiction—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, ss. 15, 23, 25, sch. II, arts. 11, 15 and 16, A.W.N. 1888, 193.

See PROVINCIAL SMALL CAUSE COURTS ACT, 1887, sch. II, arts. 31, 35, 80 P.R. 1896.

Specific Relief Act, s. 42—Suit for decree declaratory of—without prayer for consequential relief—Relief by way of injunction not sought—Effect—Civ. Pro. Code, 1882,s . 424—Notice under—*See* PUBLIC OFFICER, 14 B. 395.

Receipt containing declaration of—as to immoveable property when admissible without registration—*See* REGISTRATION, 4 B. 590.

See REGISTRATION ACT, 1908, s. 48, 3 B. L.R.A.C. 312=12 W.R. 217.

Question of—Jurisdiction of Revenue Court as to question of title raised in a rent suit—Oudh Rent Act, s. 127—Entries in Government record not conclusive proof of title—*See* RENT, SUIT FOR, 7 O.C. 340.

Civ. Pro. Code, 1882, s. 331, power of Court to go into questions of—on investigation under—Enquiry not limited to questions regarding possession—Forum of appeal from order under the section—*See* RESISTANCE TO EXECUTION OF DECREE, 14 B. 627.

Partition — Proceedings— Determination of question of—*Res judicata*—*See* RES JUDICATA—ADJUDICATIONS, 5 A. 28=A.W.N. 1883, 20.

Adjudication of—of intervenor in rent suit—*See* RES JUDICATA—ADJUDICATIONS, 8 C. 470=10 C.L.R. 416.

Suit for declaration of title as absolute owner—Second suit as mortgagor not barred—*See* RES JUDICATA—CAUSE OF ACTION, 6 Ind. Cas. 696.

Prior suit based on lease—Title of plaintiff Recognised—Subsequent suit on—not barred—*See* RES JUDICATA—CAUSE OF ACTON, 23 M. 629.

Suit for rent of a Small Cause nature—Incidental determination of title therein — *Res judicata*—*See* RES JUDICATA—COMPETENCY OF COURT, 2 A. 97.

Act XVIII of 1873 (N.W.P. Rent Act), s. 95, cl. (*n*)—Decision of—by Revenue Court—*See* RES JUDICATA—COMPETENCY OF COURT, 2 A. 200, F.B.

Landlord and tenant—Act XVIII of 1873 (N. W.P. Rent Act)—Application under s. 39—Decision of—under lease—*Res judicata*—*See* RES JUDICATA—COMPETENCY OF COURT, 2 A. 428.

Decision on—by Revenue Court—Denial of tenancy—*See* RES JUDICATA—COMPETENCY OF COURT, 3 A. 40.

U.P. Act XIX of 1873, ss. 113, 114, Competency of Revenue Court to decide question of title to rent under—Subsequent Civil suit, barred by *Res judicata* — Civil Pro, Code, 1882, s. 13—*See* RES JUDICATA COMPETENCY OF COURT, 9 A. 388=A.W.N. 1887, 53.

Title—*continued.*

Determination of title by Revenue Court—*See* RES JDICATA—COMPETENCY OF COURT, A.W.N. 1881, 16.

Revenue Court—Determination of title—Civil Court—*Res judicata*—*See* RES JUDICATA—COMPETENCY OF COURT, A.W.N. 1881, 82.

Res judicata—Previous Small Cause Suit—Incidental determination of title—Subsequent suit for declaration—*See* RES JUDICATA—COMPETENCY OF COURT, A.W.N. 1883, 203.

Question of, raised in a rent suit—*See* RES JUDICATA—COMPETENCY OF COURT, 6 C. W.N. 66.

See RES JUDICATA — COMPETENCY OF COURT, 17 M. 106=4 M. L.J. 24, 54 P.R. 1904.

Question of title raised incidentally in Small Cause suit, how for *res judicata* in subsequent original suit—*See* RES JUDICATA—MATTERS IN ISSUE, 1 M.L.J. 313.

See RES JUDICATA—RELIEF NOT GRANTED, 3 C.L.R. 447.

Proof of plaintiff's—in a suit for possession against a trespasser — Possession good title against all but rightful owner—*See* RIGHT OF SUIT—GENERAL, 9 O.C. 273.

Intention of parties that title should pass—Whether want of consideration will prevent it from passing—Intention of parties that some, though not what the deed purported to pass, title should pass—Effect—*See* SALE=GENERAL, 4 M.L T. 279.

See SALE—GENERAL, 1 B.H.C. 77.

Sale of property—Absence of—At time of sale—Subsequent acquisition of title—*See* SALE—GENERAL, 6 B.L.R. 501, P.C.=15 W.R. P.C. 12.

Sale in execution of a Revenue Court decree—Title of purchaser — Sale certificate and delivery of possession whether necessary to perfect title—*See* SALE—SALE FOR ARREARS OF RENT—GENERAL, 5 A. 297=A.W.N. 1883, 41.

See SALE—SALE IN EXECUTION OF DECREE—RIGHTS OF PURCHASER ON SETTING ASIDE SALE, 6 B.H.C. A.C. 258.

Refusal to examine plaintiff's—on erroneous ground—*See* SPECIAL OR SECOND APPEAL—ERRORS OF LAW OR PROCEDURE, Marsh. 6=1 Hay 28.

Question of—arising whether excludes jurisdiction—*See* SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 21 B. 248.

See SPECIFIC PERFORMANCE, A.W.N. 1884, 169.

See SPECIFIC RELIEF ACT, 1877, s. 9, A.W.N. 1889, 89.

Throwing cloud on — Declaratory suit—Proper remedy—*See* SPECIFIC RELIEF ACT, 1877, s. 42, 14 C.W.N. 576=5 Ind. Cas. 531.

Title—*concluded.*

Investigation of title — *See* SUCCESSION CERTIFICATE ACT, 1860, 3 C. 616.

Inquiry into *Prima facie*—*See* SUCCESSION CERTIFICATE ACT, 1889, s. 7 (3), 17 M. 477.

Proof of—*See* SURVEY AWARD, 1 Hay 495.

Hypothecation of property without possession—Incomplete—*See* TRANSFER OF PROPERTY, 1 Agra 286.

Nature of enquiry into—Duty of transferee —*See* TRANSFER OF PROPERTY, 5 L.B.R. 125.

Damages for breach of covenant for quiet enjoyment—*See* TRANSFER OF PROPERTY ACT, 1882, ss. 55 and 88, 5 O.C. 78.

See VALUATION OF SUIT, Marsh. 165=1 Ind. Jur. O.S. 103=1 Hay 370.

Suit for exclusive possession—Joint ownership proved but not exclusive—Decree cannot be for exclusive possession—*See* VARIANCE BETWEEN PLEADING AND PROOF, 20 B. 569= P.J. 1895, 161.

When good, bad or doubtful—*See* VENDOR AND PURCHASER—GENERAL, 11 Bom. L. R. 545=6 M.L.T. 200.

Sale on condition of purchaser taking such title as vendor can give—Absence of any title whatever in vendor—Purchaser whether could be compelled to complete purchase—*See* VENDOR AND PURCHASER—BREACH OF WARRANTY, 12 B. 1.

Of joint purchasers on failure of one of them to pay his share of the purchase-money—*See* VENDOR AND PURCHASER—LIEN, L.B.R. 1872—1892, 498.

See VENDOR AND PURCHASER— NOTICE, 9 W.R. 86.

Application for probate—Question of title—*See* WILL—MISCELLANEOUS, 2 P.L.R. 1902 =7 P.R. 1902.

See WRONGFUL POSSESSION, 25 W.R. 131.

Title-deeds.

See DEPOSIT OF TITLE-DEEDS.

See EQUITABLE MORTGAGE.

See DECLARATORY DECREE, SUIT FOR— ENFORCING OR REMOVING LIEN OR ATTACHMENT, 5 B.H.C.O.C. 152.

Issued by Inam Commissioner in ignorance of previous grants—*See* INAM, 14 M. 431.

Inam title-deeds granted by Government— Inam settlement—Construction of deed—Mad. Reg. XXV of 1802—*See* INAM, 27 M. 465, Note.

Suit to recover—When time begins to run— *See* LIMITATION ACT, 1908, art. 49, 15 M. 157 =2 M.L.J. 54.

Equitable mortgage created by deposit of title-deeds—*See* MORTGAGE—FORM OF MORTGAGES, 9 M.I.A. 303.

Title-deeds—*concluded.*

See MORTGAGE—SALE OF MORTGAGED PROPERTY, 4 M.H.C. 369.

See MORTGAGE—MISCELLANEOUS, 12 M. L.J. 63.

See REGISTRATION, 18 B. 444.

Evidence Act I of 1872, s. 114—Failure to produce—Resumption—*See* RIGHT OF WAY, 15 A. 270=A.W.N. 1893, 151.

See SPECIFIC PERFORMANCE, 15 B. 657.

Suit for possession—Title-deeds in plaintiff's name—*Onus* of proof—*See* TITLE, 6 B.L.R. 144.

Possession of—Prior incumbrancer— Gross negligence—*See* TRANSFER OF PROPERTY ACT, 1882, s. 78, 7 Ind. Cas. 810=20 M.L.J. 979.

Titles to rent Free Estates, Bombay.

See BOM. ACT XI OF 1852.

Tiyars.

See HINDU LAW- CUSTOM, 22 M. 297.

See MALABAR LAW—INHERITANCE, 15 M. 281, 19 M. 1, 19 M. 440.

See MALABAR LAW—PARTITION, 17 M. 184.

Tobacco.

Right to dry tobacco on adjacent land—*See* CUSTOMS—PUNJAB—EASEMENTS, 14 P.R. 1897.

Toda Giras Allowances.

See BOM. ACT VII OF 1887.

Toda-Giras-Hak.

(1)—*Its origin and history—Nature of such* haks—*Such* haks *if founded on contract with Government.*—*Toda-giras-hak* had their origin in arbitrary exactions made by strong and powerful persons, who obtained the name of *girasias*, upon the village community. These arbitrary exactions were in some way commuted into fixed payments by the villagers, in consideration of which the *girasias* gave up their claim to make arbitrary exactions, and also undertook to defend the villagers against the exactions of others. Such annual payments, although originally exacted by the *girasias* from the village community in certain territories in the west of India by violence and wrong in the nature of black-mail, had, when those territories fell under British Rule, acquired by long usage a *quasi* legal character as customary annual payments. They were, as such, recognised by the British Government, which took upon itself the payment of such of them as were previously payable by villages paying revenue, and left the liability to pay such of them as were payable by the inam villages to fall on the inamdar. It will thus be seen that these *haks* have acquired the

character of a right and have been recognised as a species of property, however unlawful their origin may have been. As to the contention that the present action was founded on contract, and that, if it was embraced by the Pensions Act, then all contracts for the payment of money by the Government must be held to be included by it, it was held that the Act applied only to grants of money in respect of, or in substitution for some right, privilege, perquisite or office, and that although, in some sense, it may be said that the arrangement made between the Government and the *girasias* were in the nature of contract, yet as that contract, if it were one, resulted in the abandonment, on the part of the *girasias* of their claim to make collection from the villagers, and in the allowance of money by the Government in lieu of them, such allowance fell within the operation of the Pensions Act. MAHARAVAL MOHAN SINGHJI v. THE GOVERNMENT OF BOMBAY, **5 B. 408, P.C.=8 I. A. 77=4 Sar. 230.**

(2)—Toda garas—*Collection by Government from villagers—Liability of Government to pay to original* garasia *or his representative.*—Where the Government collected *toda garas* from the villages, it was bound to pay it back to the original *garasia* or his representative, if the *hak* was perpetual. Where the Government has been paying the *toda garas* collected by it to a *garasia* for a very long time continuously, it would be presumed, in the absence of evidence to the contrary, that the *hak* was perpetual. UMEDSANGJI v. THE COLLECTOR OF SURAT, **7 B. H.C.A.C. 50.**

(3)—Tora garas hak *payable by Government, sale of, in satisfaction of decree—Inalienability of allowance,* onus *on Government to prove.*—This was an appeal from a decree of the Sudder Dewany Adawlut of Bombay, by which it had been decided that a certain annual payment, called a *tora garas huk*, was not by law capable of alienation and that the purchaser of such an interest at a judicial sale was not entitled either to have the sale enforced or to have his purchase money refunded to him by the individual who had received it. The appellant had presented a petition to the Judge of the Sudder Adawlut praying that the Collector might be ordered to enter his name in the registers as purchaser of the *tora garas huk* and to pay him the huk regularly or that the purchase money which he had already paid into Court might be refunded to him with interest. Order was made by which the petitioner, was left to file a suit in the Civil Court, and, under the circumstances, appellant instituted the present suit against the Collector and the present respondent. As against the Collector it prayed that the *tora garas* in question might be entered in the name of appellant, and as against the respondent, it prayed that in case the sale of the *tora garas* by the respondent be found improperly made; he might be ordered to refund the purchase money. The Judges of the zillah Court decided that the *tora garas* in question could not be enjoyed by

any *garasias*, and that no decree could be made, either against the Collector or against the respondent. On appeal, the Sudder Court reversed the decree and decided in favour of the appellant and against the Collector. An application for review of the decree presented by the Collector had been granted. And the Court finally decided that the *tora garas* was not alienable, that the purchaser of it took nothing by his purchase, that the claim against the respondent must be thrown out, and that as the respondent could not be deemed to have guaranteed anything, appellant could not come upon him to reimburse the purchase money. It was the propriety of the above decree that the Judicial Committee had to consider. They were of opinion that it was not consistent with justice that the Government should be allowed to insist and that the Court should decide that the purchaser took nothing by his conveyance, and that he should not only lose all his purchase money, but pay all the costs which had been incurred in his attempt to obtain redress. The Government had full and distinct notice of all the proceedings which took place in this particular sale. The purchase-money was paid into Court and paid out to the creditor, and a conveyance of the property executed by the Judge of the Court to the appellant; the Collector, that is, the officer of the Government, standing by and acquiescing in the proceedings with full knowledge of the objection to the sale, if any objection existed. Their Lordships were also of opinion that the *onus* lay upon the Government to prove that there was something in the nature of thie payment, which made it incapable of alienation, and that the Government had failed to give such proof. SUMBHOOLOLL GIRDHURLOLL v. THE COLLECTOR OF SURAT, **4 W.R.P.C. 55=8 M.I.A. 1=1 Suther. 387=1 Sar. 713** [*R.*, 4 B.H.C. 114, 7 B.H.C. 50, 21 W.R. 178=10 B H.C. 281, 5 B. 408, 15 C. 89, 13 M. 60, 28 B. 276.]

(4)—*Execution of decree—Attachment and the sale of allowance — What interest in the allowance is attachcable—Civ. Pro. Code (Act* XIV *of* 1882), *s.* 266—*Bombay Act* (VII *of* 1887), *s.* 5—*Likely to become due—Interpretion.*—A decree-holder in execution of his decree applied for the attachment and sale of a *toda giras* allowance which the judgment-debtor was entitled to receive periodically from the Government treasury, and which was to become payable to him during the twenty years following the application. The lower Courts held that the life-interest of the holder, computed at its valuation for twenty years, could be attached and sold in execution of the decree. *Held*, reversing the order, that it is clear from the language of s. 5, Bombay Act VII of 1887, that it is not the life-interest of the judgment-debtor in a *toda giras* allowance but something short of it that is allowed by the Act to be attached. The words "money likely to become due" must be restricted to the case where, for instanee, during the life time of the judgment-debtor, a

Toda-Giras-Hak—*continued.*

sum of money is directed by the Collector to be paid to him on account of a *toda giras* allowance not immediately but on a date subsequent to the date of the order of direction, and the judgment-debtor dies before that date, and to other cases of a similar character. Under what circumstances money is likely to become due on account of a *toda giras* allowance is a question which cannot be answered exhaustively and must depend on the facts of each case as it arises. AMARASANG v. JETHALAL, 10 Bom. L. R. 1201=33 B. 258.

(5)—Tora garas hak—*Alienabillity—Burden of proof—Bom. Act* VII *of* 1863—"*Lands*".—The burden lies on the Government of proving that there is something in the nature of a *tora garas* payment which makes it incapable of alienation, and without such proof, Government receiving such sums is not entitled to say that it will not pay them to the alience of the person to whom, but for the alienation, they would be paid. A *tora garas* payment does not come within technical definition of "lands" given in s. 32 of Bom. Act VII of 1863, inasmuch as it is not a share of the revenue derivable by Government from the lands of a village. Whatever may have been the origin of these *tora garas* payments respecting which there has been a great variety of opinion, it seems certain that they formed no portion of the revenue realized by the British, or any previous Government from the occupants of lands, but that they were sums paid by the village communities and collected by the *garasia* by colour and on the strength of their own independent authority, and were wholly distinct from, and in addition to, the revenues due by the villagers to Government. And the fact that by an arrangement with the *garasias*, the Government has agreed to satisfy their claims from the public treasury, on the condition of their abstaining from making a direct levy on the villagers, does not alter the character of these payments, or transform them into a share of the Government revenue. A suit to recover sums due out of a *tora garas hak*, is not affected by s. 27 of Bom. Act VII of 1868. COLLECTOR, SURAT v. HEIRESSES OF KUVARBAI, 2 B.H.C. 239.

See ACT XXIII OF 1871, s. 6, 1 B. 203.

Arrears of, falling due in person's lifetime—Right of his heirs—*See* ACT XXIII OF 1871, ss. 6, 8, 11, 11 Bom. L. R. 1369=34 B. 154=4 Ind. Cas. 842.

See ATTACHMENT—SUBJECTS OF ATTACHMENT, 4 B. 443, Note.

Whether exempt from attachment as pension—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 4 B. 432.

Agreement by Government to pay money in lieu of—Act XXIII of 1871, s. 4—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 4 B. 437, Note, *on appeal*, 5 B. 408=6 I.A. 77.

See LIMITATION—GENERAL, 1 I.A. 34.

Toda-Giras-Hak—*concluded.*

See LIMITATION ACT, 1908, art. 144, 13 B. L. R. 254, P. C.=21 W.R. 178=10 B.H.C. 281=1 I. A. 34.

Toddy.

Agreement of partnership between licensee to vend toddy and licensee to vend arrack—Rule prohibiting such agreement—Legality of agreement—*See* MAD. ACT 1 OF 1886, 24 M. 401.

Tolls.

(1)—*Lease of tolls—Non-payment of arrears of rent by lessee, no criminal offence—Lessee, not manager under Act* VIII *of* 1851—*Reg.* VI *of* 1819, *not applicable to farmer of tolls—Stipulation reserving to lessor remedy not provided by law, effect of.*—A lessee of the tolls to be collected at a certain toll-gate, who did not pay arrears of rent payable under the lease, was summoned by a Magistrate to appear before him to answer the charge of not paying the arrears. The lessee did not appear in person but sent a *Kyfuet* accounting for non-payment, whereupon the Magistrate issued a warrant for his arrest for disobedience to the order of the Court in not appearing pursuant to the summons. *Held* that non-payment of the rent due under the lease was not a criminal offence, and that the Magistrate had no power under the Crim. Pro. Code to arrest the prisoner for not appearing to the summons. A lessee of tolls is not a person employed in the management and collection of the tolls within the meaning of Act VIII of 1851; he is not liable to pay over the tolls when collected and to the punishment for embezzlement if he should appropriate them to his own use; he collects the tolls for his own use and pays the rent in consideration of which the tolls are made over to him for the term of his lease. However analogous the position of a farmer of tolls and a farmer of a ferry may be, Reg. VI of 1819 which applies to the former does not extend to the farmer of the tolls. A stipulation in a lease of tolls, to the effect that if the rent be not paid, it might be recovered in the mode prescribed for the recovery of money embezzled by native ministerial officers, is illegal and cannot be given effect to; and a Magistrate, as a lessor of tolls, has no right to reserve a remedy other than that provided by law. *In the matter of* BUNKOBEHARRY GHOSE, 11 W.R. 26.

Illegal exaction of—Suit for refund of money—Notice of action—*See* BEN. ACT IX OF 1871, s. 27, 15 C. 259.

Lease to levy—Condition against sub-lease—Admission of partner not prohibited—*See* BOM. ACT III OF 1875, s. 7, 20 B. 668.

Farming of—*See* MAD. ACT III OF 1871, 2 M. 104.

Collection of unauthorised, in markets—Penalty—*See* MAD. ACT V OF 1884, ss. 162 and 165, 17 M.L.J. 537=2 M.L.T. 461=31 M. 54.

Tolls—*concluded.*

An agreement to sublet—*See* CONTRACT ACT, 1872, s. 23, 2 Bom.L.R. 483=24 B. 622.

Breach of contract for—Measure of damages—*See* CONTRACT ACT, 1872, s. 73, 2 M.L.T. 194=17 M.L.J. 390.

See RENT, SUIT FOR, Marsh 504=2 Hay 598.

Toll contractor, coming to losses owing to plague regulations—*See* RIGHT OF SUIT—MISCELLANEOUS, 4 Bom. L R. 874.

Toll-gates.

Erection by Municipality of toll-gates on certain land—Suit by owner—Limitation—*See* MAD. ACT IV OF 1884, ss. 92, 261, 1 M.L.J. 301.

Tolls on Roads and Bridges.

See BOM. ACT III OF 1875.

Tomb.

Dedication for ceremonies at private tomb, validity of—*See* MAHOMEDAN LAW—WAKF, 18 M. 201=5 M.L.J. 40.

Tonnage.

Contract--Charter party — Shipping—Misrepresentation as to tonnage of ship—Substantial part of contract—Condition precedent—*See* CHARTER PARTY, 15 B. 389.

Tort.

See COMPENSATION.

See CONTRIBUTION, SUIT FOR — JOINT TORT-FEASORS.

See DAMAGES.

See MALICIOUS PROSECUTION.

See RIGHT OF SUIT—INJURIES BY REPRESENTATIVES OF DECEASED.

See RIGHT OF SUIT—INJURY TO ENJOYMENT OF PROPERTY.

See RIGHT OF SUIT—TORTS.

(1)—Injuria sino damno—*Failure to prove special damage.*—If there be a right, and if there be an infringement of that right, it is not necessary to show that there has been any subsequent injury; and if the plaintiff's undoubted right has been invaded, he would be entitled to a remedy, whether any damage has accrued to him or not. The principle ordinarily applied to actions of tort is that the plaintiff is never precluded from recovering ordinary damages, by reason of his failing to prove the special damage he has laid, unless a special damage is the gist of the action. NGA MYAT HMWE v. NGA YI, **U.B.R. 1906, Tort, 9.** (10 M.I.A. 563, 11 M.I.A. 7, 6 I.A. 190, 11 W.R. 143, 25 W.R. 547, 20 C. 1, U.B.R. 1897--1901, II, 231, *R.*) [*R.* & *F.*, 14 Bur. L.R. 218=U.B.R. 1907, 3rd Qr., Tort 1.]

(2)—*Obstruction to view of* curusady—*No special damage—Right of suit to worshipper*—

Tort—*continued.*

Possible obstruction, no special damage.—Plaintiffs, certain worshippers of St. Jacob's Church, sued for the removal of certain constructions made by the defendants, who represent the Church of the Holy Ghost, on a part of the public road in front of their church, on the ground that the new construction will obstruct the plaintiff's view of a *curusady* and their procession on the public roadway round the *curusady*. *Held*, that no special damage was proved and that the plaintiffs had no right of action. A possible obstruction to a procession would not be a special damage. KURUSU KOSTHA v. THOMMAI SAVARIMUTHU FERNAND SUTHAKI, **20 M.L.J. 367=6 Ind. Cas. 780=8 M.L.T. 131.**

(3)—*Action for defamation—Proof of special damage, whether necessary.*—Appellant sued defendant-respondent for defamation alleging that the latter accused him in the hearing of other persons of stealing palm-leaves and firewood. The first Court decreed the suit awarding damages to appellant but the lower appellate Court reversed the decree on the ground that the question whether the plaintiff's feelings might have been hurt is not to the point, and before she could succeed it was for her to show that the conduct of defendant had affected her socially. *Held*, reversing the decree of the District Court and restoring that of the Township Court, though mere abusive and insulting language not amounting to defamation is not actionable yet where the insult is such as would cause substantial pain and annoyance to the person insulted an action for defamation lies and without proof of special damage. The true test of the right to maintain the suit should be whether the defamatory expressions were used at a time and under such circumstances as to induce in the person defamed reasonable apprehension that his reputation had been injured and to inflict on him the pain consequent on such a belief. MA PAN YE v. MAUNG PAN AUNG, **U.B.R. 1905, Tort (defamation)**, 18 M. 175 *F.*; 12 C. 424, *R.*; 28 C. 452, *Diss.*; (26 C. 653, F.B., *D.* & *Expl.*)

(4)—*Abusive language—No special damage—Not an actionable wrong.*—The mere use of abusive and insulting language, apart from defamation, is not actionable, irrespective of any special damage. The remedy of the person aggrieved in the majority of such cases lies in the Criminal Courts. MAUNG KYAW v. THA DUN U, **4 L.B.R. 50,** (26 C. 653, *F.*)

(5)—*Whether action for libel or slander will lie against accused persons defending themselves—Whether reply to notices of action are privileged—Libel—Defamation.*—No action of libel or slander lies whether against Judges (17 M. 87, *R.*) counsel (10 M. 28, *R.*), witnesses (30 M. 222, *R.*), or parties for words written or spoken in the ordinary course of any proceeding before any Court or tribunal recognized by law. The principle on which this rule is based would seem to apply also to an accused person, as it is essential to the administration of justice that

Tort—*continued.*

those who are protecting their own interests should be under no apprehension of any proceedings from the opposite party. A reply to a notice of action will be privileged, so long as it is confined to the matter in hand, is relevant, and is not published. A. P. PACHAIPERUMAL CHETTIAR v. DASI THANGAM, **18 M.L.J. 383 =4 M.L.T. 222=31 M. 400.**

(6)—*Injury to property—Test of contributory act.*—As in the case of contributory negligence, so an act of one party can only be contributory to the injury he complains of, if by the exercise of ordinary care, the other party could not have avoided causing the injury. MADHAVA RAO v. P. M. FERNANDES, **17 M. 368.**

(7)—*Tort—Negligence—Damages—Contributory negligence.*—Where, in a suit for damages for injury to the plaintiff's wall, the lower Court found that the immediate cause of injury to the plaintiff's wall was not the flowing of water into the drain, but the stagnation of the water and sewage let into it by the plaintiff himself, *held* that the plaintiff was not entitled to any relief, as the damage was contributed to by his own acts and was not caused solely by any acts or omissions on the part of the defendants. KARUR MUNICIPAL COUNCIL v. K. SRINIVASA AIYANGAR, **14 M.L.J. 466.**

(8)—*Rule of speed limit in navigable channels—Contributing negligence—Bad right.*—Where a speed limit has been fixed by notification for steam vessels navigating a navigable channel, the speed limit rule must be observed under all conditions of the tide. Before a vessel can be held in fault for a collision, negligence contributing to the accident, and not negligence merely, must be shown. Thus where a collision occurred and the vessel that was struck had not a proper and good light showing, and the collision would have been less likely if the vessel struck had a proper and good light showing, there is no contributory negligence, if the vessel in fault was not going at a rate within the speed limit and on a course which a cautions man would have taken. LUCHMAN CHETTY v. IRRAWADDY FLOTILLA AND CO., LD., **8 Ind. Cas. 611.**

(9)—*Action of tort against Secretary of State—What should ptaintiff prove—Liability of Government of India—Master and servant.*—In an action of tort against the Secretary of State for India, the plaintiff to succeed must establish that the liability was one incurred on account of the Government of India; such liability, however, can be incurred by those alone in whom the governing of the country is vested. Before it can be said that a liability on account of the Government of India has been incurred by the Bombay Government as the result of the act or omission of the Chief Constable so as to be chargeable on the revenues, it is necessary to exclude those conditions which would afford a principal exemption from liability for the act of an agent. And it is settled law that where the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong

Tort—*continued.*

done by the agent in such employment. Hence, where a Chief Constable causes damage by an act done not in obedience to an order of the executive Government but in the performance of a statutory power vested in him by the Legislature (the Chief Constable being appointed not by the Bombay Government but by an officer clothed by the legislature in that behalf), when his action is not in any sense productive of benefit to the revenues or the Bombay Government nor is it a transaction out of which profit can be derived, and when there is no ratification or adoption of the act, no suit can lie against the Secretary of State to recover damages arising from such Act. SHIVABHAJAN v. SECRETARY OF STATE, **6 Bom. L.R. 65=28 B. 314.**

(10)—*Money made over by Magistrate acting under s. 517, Crim. Pro. Code—Suit to recover money—Liability of Government to pay—Provincial Small Cause Courts Act, sch. II. Excs. 2 and 3—Suit of small cause nature—Civ. Pro. Code, s. 586—Second appeal, maintainability of.*—Two suits of a small cause nature were instituted, against the Government, to recover certain monies alleged to have been wrongly made over by a Magistrate purporting to act under s. 517, Crim. Pro. Code. The Munsif gave a decree for plaintiffs, but, on appeal by the Government, the District Judge reversed the decree of the Munsif and dismissed the plaintiff's suit. The plaintiffs, thereupon appealed to the High Court. *Held*, having regard to s. 586. Civ. Pro. Code, no second appeal lies in this case. For, the complaint is of the act of a Judicial Officer himself and, in consequence, does not fall within the exceptions to the second schedule to the Provincial Small Cause Courts Act. *Held*, further, on the merits of the case, that the Government is not liable. The Magistrate was in such a position that, for all practical purposes, the Government had no control over him, did not authorize or adopt the tort complained of and gained no profit from it. The person to be sued is the person who has actually done the alleged wrongful act, who may or may not have a statutory or other defence. There is no reason why the Government should be made liable and not the man who actully got the money. MOTI LAL GHOSE v. SECRETARY OF STATE FOR INDIA, **9 C.W.N. 495=1 C.L.J. 355.** (4 M. 344, 17 C. 290, *R.*) [*R.*, 36 C. 647 =13 C.W.N. 619.]

(11)—*Tort—Liability of agent.*—Whoever commits a wrong is liable for it himself, it being no excuse that he was acting as an agent or servant on behalf and for the benefit of another. When such latter person is also liable, the party wronged has his remedy against both the tort-feasors or either of them at his (the injured party's) choice. SRI RAJAH BOUNNADEVARA v. PUTMAN, **8 M.L.J. 185.**

(12)—*Misfeasance by deceased naib, cause of action giving Civil remedy to party injured.*—Plaintiff alleged that her naib had collected a sum of Rs. 1,000 from her estates and had transmitted it to her by a hundi which was, on

Tort—*continued.*

presentation, accepted, but finally dishonoured. She impleaded in this suit not only the drawer and acceptor of the hundee, but also the widow of the Naib who had since died and the Naib's sureties. The first Court found that the hundi was a forgery but decreed the claim against the widow only, absolving the other defendants. The Judge of the lower appellate Court held that either the hundi was a genuine instrument in which case only the drawer and acceptor were responsible, or the deceased Naib was guilty of embezzlement and his representative after his death could not be held civilly liable for loss accruing through that offence, unless it had been established against him in a criminal prosecution, and that therefore, on the action as brought by him, plaintiff could not succeed at all. The High Court however held that the plaintiff had a cause of action. She had, if she could prove her case, suffered a direct injury to the extent she alleged and was therefore entitled to redress. Plaintiff's Naib was dead and she was no longer bound to suspend her action for a civil remedy until she brought a complaint on the criminal charge. RANEE SURNOMOYEE v. DWARKANATH GHOSE, **2 W.R. 178.**

(13)—*Tort—Damages—Liability of abettors.*—In actions of wrong, not only are those who commit the wrong liable, but those who abet the tortious acts are equally liable. KASHEE NATH KOOER v. DEB KRISTO RAMANOOJ DOSS, **16 W.R. 240.**

(14)—*Master and servant—Tort committed by servant—Liability of master—Government of India Act* (21 *and* 22 *Vict. c.* 106), *s.* 42—"*Liabilities lawfully incurred*" *meaning of—Tort committed by Government servant—Liability of Secretary of State in Council.*—The Secretary of State for India in Council can be held liable for the torts of Government servants in India (5 B.H.C. 1, *F*; 1 C. 11, 24 W.R. 309, 12 C. 445, 20 C. 51, 3 A. 829, 5 M. 273, 7 M. 466, 27 B. 189, 6 Bom. L. R. 131, 28 B. 314, *R.*) The words "expenses, debts and liabilities lawfully contracted and incurred" in s. 42 of the Government of India Act must be construed as "debts lawfully contracted and expenses or liabilities incurred." If the words "liabilities incurred" were to be read in connection with the word "lawfully," the sense would not be materially altered, for liabilities cannot be incurred by Government by means of acts done by their officers or servants, unless such officers or servants were lawfully engaged in business. The words "liabilities lawfully incurred" cannot mean liabilities incurred by acts authorized by law, but must mean liabilities incurred by servants or agents in the course of undertakings in which they are lawfully engaged. MATHRADAS v. SECRETARY OF STATE, **11 Ind. Cas. 58.** (5 B.H.C. *R.*)

(15)—*Servant delegating his authority—Damage caused by act of the delegate—Liability of master.*—Ordinarily a master is not liable for the negligent acts of his servant, except when the servant is acting within the scope of his

Tort—*continued.*

authority. So, where a driver of a tonga entrusted it to a boy, having no authority so to delegate his powers, and having no emergency which necessitated such a delegation, and the tonga, owing to the boy's negligence, caused damage to the plaintiff's horse, *held*, that the master is not liable for the boy's negligence, the case being governed by the rule embodied in s. 190 of the Contract Act, that a servant cannot ordinarily delegate his authority. *Obiter.*—"There is nothing to prevent prospective damages being assessed in an action on tort," SARDOR KHAN v. W. G. GILMORE, **3 N.L.R. 101.**

(16)—*Trespass—Servant aiding master in committing trespass—Liability of servant.*—Where a servant took an active part in committing a trespass upon the property of another, and where the latter brought a suit to eject both the master and servant as trespassers: *Held*, that the servant also was liable for the wrong and that he cannot be excused on the ground that he was a servant acting for the benefit of the master. DAJI v. MT. RUKHMA, **8 N.L.R. 159.** (16 P.R. 458, 29 L.J. Ex. 224, *R.*)

(17)—*Tort—Dog biting, damages for—Scienter—Master and servant—Liability of master—Provocation*—Quantum *of damages*—Solatium—*Expenses of treatment.*—The defendant's sweeper had taken his dogs near a portion of the Ballygunge maidan, a recreation ground for numerous children; the defendant was held to be liable to bear the consequences, if the dogs got loose and bit the plaintiff, provided the defendant or his servant was aware that the dogs were likely to bite mankind without provocation. PROKASH KAMAR MOOKERJEE v. A.D.F. HARVEY, **13 C.W.N. 1123=36 C. 1021=3 Ind. Cas. 785.**

(18)—*Damages—Injury done by one animal to another—Proof required—Ferocity—Scienter.*—In a country like this where there is no positive enactment on the subject and no authoritative ruling on the point which must be held necessarily to be binding, it is a question for consideration whether the principle which has been introduced into England by legislation in respect to sheep and cattle should not be adopted by the Courts as the rule of decision in cases of the present kind. The plaintiff-appellant's mare, while tethered out on the village common, was alleged to have been killed by the defendant-respondent's stallion biting and kicking it. The Court of first Instance, finding on the facts in favour of plaintiff-appellant, gave him a decree. In first appeal, the lower appellate Court, reversed this decree on the grounds that there was no proof that the stallion was ferocious and known as such to the owner. In second appeal, which lies where the original decree has been reversed, it was found that the proof that the defendant-respondent was the owner of the animal which caused the injury had broken down, so that the appeal had to be dismissed. MAUNG GYI v. MAUNG PO TO, **U. B. R. 1897—1901, Vol. II, 566.** [*Not F.*, U.B.R. 1897—1901 Vol. II, 567; *R.*, U.B.R. 1897—1901, Vol. II., 570.]

Tort—*continued.*

(19)—*Damage done by animal—Proof of negligence on part of owner required.*—Where the plaintiff-appellant sued to recover damages on account of the death of his elephant, which died from the effect of wounds inflicted by the respondent's elephant, *held*, that it was for the plaintiff to prove that the damage done to his elephant was caused or rendered possible by the defendant's negligence. MAUNG KYA DAN v. MA KYIN, **U.B.R. 1897—1901. Vol. II. 570.** (U.B.R. 1897—1901, Vol. II, 565, 567, *R.*)

(20)—*Tort—Damages—Injury done by one animal to another—Proof required—Ferocity—Negligence.*—A buffalo belonging to the plaintiff was gored to death in the cattle pastures by one alleged to belong to the defendant. The following were indicated by the Chief Court on appeal as among the principal points upon which enquiry and findings were probably needed in order to determine the questions of the defendant's asserted negligence and responsibility for its consequences :—(1) Was the place where the grazing occurred a place in which the parties had a common right of grazing? (2) Was the defendant's buffalo which (as alleged) did the mischief to the bull, and was it properly and according to recognized custom allowed to graze with the cattle of other people in such place? or ought it to have been kept tethered, as apparently it was at first? (3) Was there any special reason, such as a ferocious or quarrelsome disposition, or the particular season of the year, or such like, why the animal in question should not have been left at liberty to graze untethered? (4) Did the custom of the country and of cattlekeepers, or the circumstances of the case, require either party or both to take the precaution of having a herd in charge of their buffaloes, and was such precaution wrongly neglected in either instance. If so, what was the effect of such neglect? (5) Is there any rule of law, or custom of the country having the effect of law, which makes the owner of an animal doing injury to another liable only in case the animal causing the mischief is dangerous to his knowledge. MAUNG SAW v. MAUNG KYAW, **U.B.R. 1897—1901, Vol. II, 567.** (U.B.R. 1897—1901, Vol. II, 565, *R.*) [*R.*, U.B.R. 1897—1901, Vol. II, 570.]

(21)—*Suit for damages done by domestic animal - Trespass.*—In a suit for damages done by a domestic animal, it is for the plaintiff to prove that the damage done was caused or rendered possible by the defendants' negligence (U.B.R. 1900, Tort 7, *R.*) The owner of an animal which is trespassing is liable only for the ordinary consequences of such trespass, that is, for such damage as the animal may from its nature be expected to do, and he is not liable for the vicious acts of any animal of an ordinary quiet nature, unless he knows that it was vicious. MA SHWE MI v. KAPILA MISTRY, **U.B.R. 1902—1903, Vol. II, Civil, Tort, 1.** [*R.*, U.B.R. 1904, 4th Qr., Tort 1.]

(22)—*Owner of animal, liability of, for mischief caused by animal.*—Where A's buffalo attacked and killed B's buffalo in the course of a fight, B could not claim compensation from A unless it is shown that A was guilty of neglect or carelessness in keeping the animal or that he knew the animal to be savage and inclined to fight. MUNGUL SINGH v. LEHNA SINGH, **72 P.R. 1870.**

(23)—*Apprehension of injury to person and property by kicks and attacks of a horse—Infliction of spear wound in exercise of right of defence—Death of animal from effects of wound—Liability of defendant to pay damages for loss of animal.*—A suit was brought to recover damages for the loss of a horse caused by a spear-wound inflicted by the defendant. The defence was, that the wound was caused in the exercise of the right of defence of person and property against the kicks and attacks of the animal. *Held*, if a horse attacks a man, the person attacked is fully justified in protecting himself or his property by such means "as he might, reasonably, in the circumstances, think necessary for the prevention of harm which he was not bound to suffer." The force used must not be out of proportion to the apparent exigencies of the occasion. The right of defence must not be abused as it so readily may be; but, if a person, who is acting on the defensive, uses only such force as he reasonably believes to be necessary, he is protected. In this case, the act of the defendant was such as any reasonably-minded man might have considered necessary under the circumstances, and he was fully justified in using the spear as he did in the protection of his person and property. There is no ground whatever for supposing that he acted with any other intention than to drive away the horse, or that he used any more force than he believed to be necessary to avert impending injury. Owners of vicious and dangerous animals are bound to keep such animals under restraint. If they neglect to do so, they must take the consequences. *Held*, the defence must prevail. TURNER v. JAGMOHAN SINGH, **A.W.N. 1905, 77 = 2 A.L.J. 297 = 27 A. 531.**

(24)—*Tort—Wild animals—Elephant*—Feræ naturæ—*Damage caused—Custodian and owner—Liability.*—Where A borrowed two elephants, both of them tuskers, one from B and the other from C, and where B's elephant gored to death C's elephant : *Held*, that C was entitled to recover the damage caused by his elephant's death both from A and B. Elephants belong to that class of animals which are dangerous and if a person keeps an animal belonging to a class which is dangerous, he takes the risk of any damage it may do. Such person must prevent it from doing injury, and it is immaterial whether he knows it to be dangerous or not. The absolute liability of a person for any harm done by his animal, independently of any intent or negligence on his part, does not depend on the manner in, or extent to, which such animals are employed, but upon the nature of the class o which such a nimals belong or the particular

Tort—*continued.*

kind of mischief committed. VEDAPURATTI v. KOPPAN NAIR, **21 M L.J. 434=9 M.L.T. 496.** (2 U.B.R. 1897—1902, 570, *Expl. & D.*)

(25)—*Trespass to goods—Wrongful seizure—Liability of creditor in damages for—Attachment of property belonging to third person—Damages—Provincial Small Cause Court* (*Act* IX *of* 1887), *sch.* II, *art.* 35 (*j*).—Crops were attached by the defendant in execution of his decree. Upon the plaintiff's objection, the attachment was withdrawn. The crops, while under attachment and in the custody of the *shana* (temporary bailiff), disappeared, and the bailiff was found guilty of theft and convicted. In a suit by the plaintiff to recover from the defendant the value of the crops and compensation for his wrongful act, *held*, that the defendant was liable for both. The plaintiff had a complete cause of action at the date of the wrongful attachment and his right to the relief he has entitled to was not impaired by the subsequent occurrences. The plaintiff was entitled to be restored to the *status quo ante*, the illegal act of the defendant (3 B. 74, *F.*; 3 B.L.R. 412, *Not F.*; 7 C. 436, *R.*) *Held*, further, that a suit of this description, although the amount of the claim was below Rs. 500, was not cognizable by a Court of Small Causes, it being within the purview of art. 35 (*j*). sch. II of the Provincial Small Cause Courts Act. BISHAMBER NATH v. GADDAR, **8 A.L.J. 92=9 Ind. Cas. 317.**

(26)—*Moveable property not belonging to judgment-debtor sold in execution of decree—Liability of decree-holder.*—Where a decree-holder causes moveable property not belonging to his debtor to be sold in execution, he is liable to make good the value of such property to its rightful owner, although he had acted in perfect good faith. KANAYE PERSHAD BOSE v. HURCHAND MANOO, **14 W.R. 120.** (9 W.R. 119, 11 W.R. 528, *D.*; 12 W.R. 329, *F.*) [*R.*, 5 L.B.R. 58=3 Ind. Cas. 272.]

(27)—*Execution of decree for rent due—Third person's property sold in execution—Third person suing decree-holder for damages—Decree-holder liable, not for negligence, but for wrongful act—Whether third person concluded by estoppel.*—H rented a *serai* from B, the defendant, for storing his machinery. He rented the *serai* for four months, paying one month's rent in advance. The plaintiff, with the permission of H, stored his turbine in the same place. Subsequently, H removed his machinery, but the plaintiff's turbine remained in the *serai*. The defendant sued H, for rent unpaid and got an *ex parte* decree against H, in execution of which he sold up the plaintiff's turbine. The plaintiff then sued the defendant for the value of the turbine: *Held* that the suit could not be considered as an action for tort on account of negligence, but that the defendant was accountable to plaintiff in damages, though his wrong-doing was unintentional, as on an action for conversion. The question of contributory negligence could only arise in the case

Tort—*continued.*

of an action based on negligence. The plaintiff's neglect, in so far as it excused the defendant's wrong-doing, could only be taken into account in assessing damages, by requiring the plaintiff to prove strictly the damage suffered by him. On the question whether the plaintiff was estopped by his conduct from alleging the turbine to be his and whether he should be held to have represented it to belong to H, *held* that there was no representation by the plaintiff on which any reasonable man could hold that the turbine belonged to H, and that the plaintiff by omitting to notify the goods to be his could not be held to have intentionally permitted the defendant to believe the turbine to be H's, and that he was not, therefore, estopped from alleging it to be his. PARMESHARI DAS v. BISHESHAR NATH, **129 P.R. 1908.** (5 B.L.R. App. 71, 3 B. 74, 3 B.L.R. 413, 11 B. H.C. 46, *R.*; 20 C. 296, P.C, *F.*)

(28)—*Lease of ferry—Suit against Government for disturbance of ferry rights—What constitutes disturbance—Cause of action—Tort or breach of contract.*—The plaintiffs who had purchased from the Government the ferry lease of two rivers at a certain place, were by the terms of the lease, exclusively entitled to levy tolls on those rivers for three years. The Government in constructing a railway bridge over one of the rivers, conveyed the materials, trucks, etc., across the river by means other than the ferry leased to the plaintiffs, and, thereby, as averred by the plaintiffs, caused injury and loss to the plaintiffs. *Held* (1) that the suit must be considered as an action of tort and not a suit for a breach of contract, nor as a suit in the nature of a breach of contract; (2) also, that a grant of ferry is ordinarily from the point where the highway reaches the waters edge to the opposite bank; that, to create a disturbance of the rights of an ancient ferry-owner, there must be a carrying of passengers and merchandise from point to point in the line of the ancient ferry; and as the Government had not so carried passengers and merchandise on or near the line of way over which the plaintiffs had the right to convey men, merchandise, etc., there was no invasion of the plaintiff's right, and the plaintiff could have no right of action merely because the Government found it necessary to make a railway bridge across the river and near the line of way of the ferry of the plaintiff and for that purpose deposited its materials and workmen in the bed of the river by the most convenient way. MAKAN SINGH AND SUJAN SINGH v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **30 P.R. 1877.**

(29)—*Right of owner of land to enjoyment of water of natural stream—Substantial tenerference with such enjoyment constitutes tort—Easement—Definition of s. 7 of Easements Act, 1882—Acquisition of easement otherwise than under s. 26 of Limitation Act.*—The language of s. 7, ill. (*h*), Easements Act, is similar to

Tort—*continued.*

that of the English law. In Book II, Ch. XXIII, Paragraph 3, of Stephen's Commentaries on Blackstone, it is said, in defining a watercourse as the right which a man may have to the benefit of the flow of a river or stream, that "it consists in having the course of the stream kept free from any interruption or disturbance to the prejudice of the proprietor, by the acts of persons from without and in parts not within his own territory,—whether consisting in a diversion of the water, or its obstruction, or pollution by offensive commixture." And in the Chapter on Torts to property in Broom's Commentaries, terms of the same kind are quoted from various cases, among the propositions quoted being the one that "a substantial interference with the bed of a stream, so as to increase or diminish the flow of water to the detriment of other riparian owners, is a thing actionable in itself." S. 26 of the Limitation Act speaks of the enjoyment of a water course, but it is obvious that it is enjoyment as an easement that is intended, for the section says "any other easement" and speaks of the enjoyment being "as an easement and as of right." S. 26, Limitation Act, 1877, does not apply to a suit io remove a dam across a natural stream as it is not one to establish an easement. MA HNIN NYO v. MAUNG KYIN THU, **U.B.R. 1892—1896, Vol. II, 642.** (6 C. 394 and 812, 7 C. 132, *R.*)

(30)—*Tort—Overflow of water into plaintiff's land from tank belonging to stranger caused by defendant lowering level of his own land to make it culturable—Plaintiff's right to injunction and damages.*—Where the defendants, with a view to make their land culturable, lowered its level, with the consequence that water in a tank belonging to a third party passed to that land and subsequently overflowed into lands belonging to the plaintiff: *Held*—that no right of the plaintiff had been infringed by the act, and the plaintiff was not entitled to a mandatory injunction to compel the defendant to raise an embankment in order to prevent this overflow, or to damages for harm caused by such overflow. Where the owner of land without wilfulness or negligence uses his land in the ordinary manner, though mischief thereby accrues to his neighbour, he is not liable for damages, but if with a view to use the land in an unusual manner he brings upon the land water which would not naturally have come upon it, he will be liable for damages for the escape of the water into the land of his neighbour. KENARAM AKHULI v. SRISTIDHAR CHATTERJEE, **16 C.W.N. 875.**

(31)—*Injury done to plaintiff's land by retention of water on defendant's land—Such water not brought by any act of defendant.*—Water was not brought on defendant's land by any act of his; but water which flowed on one portion of his land for the purpose of protecting another portion of his land, was retained by him, and as a result of such retention, damage was caused to the land of the plaintiffs which adjoined. *Held*, under the circumstances, that the retention of water on defendant's land in

Tort—*continued.*

order that it might not flow to another part, is not an act done in the natural and ordinary course of the enjoyment of property which would protect him from being liable in damages to the plaintiffs, if injury had been done to his land. RAMANUJA CHARIAR v. KRISHNASWAMI MUDALI, **3 M.L.T. 368=31 M. 169.** (28 B. 472, *D.*)

(32)—*Wrong-doer—Contribution.*—Although one of several joint wrong-doers has discharged the whole decree which was passed against all of them for the wrong committed, he is not entitled to recover contribution from the rest. HARNATH v. HAREE SINGH, **4 N.W.P. 116.**

(33)—*Suit against joint tort-feasors—Compromise between plaintiff and one defendant—Such compromise no bar to a decree against the other defendants.*—The plaintiff sued several defendants jointly to recover damages in respect of an alleged assault committed on him by the defendants, but entered into a compromise with one of the defendants. *Held* that this compromise did not preclude the plaintiff from recovering damages against the other defendants. RAM KUNWAR v. SHAIKH ALI HUSAIN, **A.W.N. 1908, 190.**

(34)—*Joint tort-feasors or wrong-doers—Liability, joint and several—Limitation—Limitation Act* (XV *of* 1877), *ss.* 7 *and* 8—*Hindu Law—Mitakshara—Joint family, Manager or karta of—Discharge, right to give a valid, for minor brother—Survivorship—Property inherited from maternal uncle—Certificated guardian, concurrence of—Mesne profits, suit for—Co-owners, right of.*—*Per Brett, J.*—The liability of joint wrong-doers is joint and several, and the person to whom the wrong is done is entitled to sue them jointly or severally at his choice. The factor that the claim is barred by limitation as against one will not in itself free the others from liability. Nephews inheriting property of their maternal uncle take the property as co-owners without benefit of survivorship, and they cannot be held, under the Mitakshara Law, to have formed, in respect of that property, a joint family separate from their father, of which the eldest brother, on attaining his majority, became the manager or *karta*; and the eldest brother has no power to grant a valid discharge in respect of debts due to his minor brother without the concurrence of the guardian, much less of a certificated guardian appointed by Court, of the property of such minor. When persons inheriting as co-owners have each of them distinct rights to a share, the concurrence of the others is not necessary to enable one of them to give a valid discharge for his special share. (27 M. 300, *R.*) *Per Mookerjee, J.*—Where several persons join in committing a tort, each is responsible for the injury sustained by their common act, and their liability is joint and several at the will of him to whom the wrong is done. He can sue any one or more of them at his election, and those who are sued cannot insist on having the others joined as defendants (3 C. 353, *R.*)

Tort—*continued.*

The rule that in actions for wrongs independent of contract, where several persons are entitled to sue in respect of a wrong done to them jointly, as for instance, in cases of injury to their joint property by trespass, conversion or negligence, they should in general all join as plaintiffs in the action, is not inflexible. (25 C. 285, 2 C. L J. 496, *R.*) When two persons have been damnified by the same tortuous act, and have, therefore, a joint cause of action, one is entitled to enforce his claim for damages, so far as he has been injuriously affected by the tort, although the claim of the other is barred by limitation. (25 C. 285, *R.*) In the case of a joint Mitakshara family, where a right is vested in all the members jointly, the managing member may, within the meaning of s. 8 of the Limitation Act (XV of 1877), give a discharge without the concurrence of the minor members of the family, and time may, therefore, run against all the members of the undivided family including the minor members thereof. (4 A. 512, 16 M. 436, 58 P.R. 1882, *R.*) Where on the death of a maternal uncle, his estate devolves by inheritance on his sister's sons, who at the time are undivided members of a Hindu family governed by the Mitakshara Law, they take it as co-owners or tenants-in-common without benefit of survivorship. (27 M. 300, *R.*; 29 I.A. 156, 25 M. 678, *Expl. & D.*) As a general rule, where a joint right to sue arises out of a tort, one or some of the holders of such right cannot give a discharge without the concurrence of the others, unless they are all partners or executors or members of a joint Hindu family, the manager of which has implied authority to bind all the members by a discharge given by him. The test to be applied is whether it is the intention of the parties that each of the persons in whose favour the obligation is created is a creditor for the whole; if so, a payment to one liberates the debtors against all the creditors; if not, each is a creditor for his own share and cannot give a discharge for the whole obligation. (7 A. 313, 5 C.L.J. 270 = 34 C. 305, 25 A. 155, 1 N.L.R. 24, *R.*) The powers of a guardian appointed by the Court to take care of a minor's property cannot be nullified, and the minor's elder brother cannot give a discharge as regards the minor's share without the concurrence of such guardian. (1888 Bom. P.J. 141, 14 C. 50, *R.*) S. 8 of the Limitation Act applies only to cases where the joint creditors or claimants are persons whose substantive right is joint, that is, where more than one individual possesses the same identical substantive right; the section does not apply to persons whose rights are distinct and different, but who are permitted to enforce such separate rights by one judicial procees. HARIHAR PERSHAD v. BHOLI PARSHAD, **6 C.L.J. 383.** (28 M. 479, 14 C. 50, 25 A. 155, *R.*) [*R.*, 11 C.L.J. 503; *Rel. on*, 13 C.W.N. 815 = 1 Ind. Cas. 670.]

(35)—*Suit for compensation—Damage for assault—Criminal prosecution.*—A person who is assaulted can pursue his civil in addition to his criminal remedy; but if punishment in person has been resorted to, that must always be an important element in mitigation in subsequently estimating the amount of penalty to be inflicted in pocket. MISR RAMJI v. JIWAN RAMAND KIDAR NATH v. MISR RAMJI, **A.W.N. 1881, 131.**

(36)—*Assault—Suit for damages—Exemption of one of several joint tort-feasors—Whether release of all.*—Where the plaintiff, in an action for damages against several persons convicted of having beaten him, compromised with one of them to the extent of the liability of that particular tort-feasor, *held*, that the others remained liable and were not exonerated from liability by reason of one man admitting his own guilt and agreeing to pay his quota of damages. RAMA KUMAR SINGH v. SHAIK ALI HUSSAIN, **6 A L.J. 135 = 31 A. 173 = 1 Ind. Cas. 884.**

(37)—*Suit for injunction—Substantial annoyance*, s. 384, *Civ. Pro. Code*, 1859—*Relief not claimed, not to be decreed.*—When the land on which a temple was built belonged to the defendant, *held*, that he was at liberty to build what structure he pleased and the Courts could not by anticipation grant a decree prohibiting him against annoying the plaintiff. [*R.*, 10 A. 358.] The Court is not at liberty to decree to the plaintiff relief he has not claimed. KASIM ALI KHAN v. BIRJ KISHORE, **2 N.W.P. 182.**

(38)—*Malicious prosecution — Damages — Malice — Reasonable and probable cause.*—A zemindar who was being examined by a Tahsildar in the course of an enquiry, made an observation which implied a serious imputation on the latter's honesty and official character. The Collector to whom the complaint of the Tahsildar had been addressed, inflicted on the zemindar in his capacity as Magistrate a punishment which was harsh and out of all proportion to the offence committed. *Held*, in a suit for damages by the zemindar against the Tahsildar, that the latter was not liable for injury or loss sustained by the former as the prosecution was neither malicious nor groundless. KISHOREE LALL v. ENAETH HOSSEIN KHAN, **1 N.W.P. 71.**

(39)—*Attachment wrongful—Malice—Not necessary for damages—Tort—By Government servant—No cause of action against Government.*—When an act *prima facie* wrongful is committed, and actual damages are thereby sustained, no malice need be proved to recover damages. Where the tort is committed by the servant of Government carelessly, there is no cause of action against the Government. RAMASWAMI AYENGAR v. RAJA MUTHUSWAMI AIYER, **M.W.N. 1912, 142.**

(40)—*Damages—Wrongful attachment*—Bona fide *mistake, no defence.*—In a case of wrongful attachment, the decree-holder who moves the Court is responsible for what follows and must make good any loss suffered by the person whose goods have been wrongfully seized. He

Tort—*continued*.

is a trespasser and a wrong-doer and is responsible for all damages, however innocently and mistakenly he may have acted. MURUGAPPA CHETTY v. KARANATH, **12 Ind. Cas. 26.** (3 B. 74, 17 I.A. 17, 17 C. 436, *R.*)

(41)—*Action for tort to wife—Suit by husband alone—Non-joinder of wife—Act* VIII *of* 1859, s. 350—*Defect cured.*—Where a Hindu husband brought an action founded in his plaint on a personal wrong done to his wife, *viz.*, assault committed and abuse given, but it appeared in evidence that the abuse complained of had been given both to himself and to his wife, the non-joinder of the wife was held to have been cured, under the circumstances of the case, by s. 350 of the Civ. Pro. Code of 1859. MUSSAMUT GOOGREE v. RUTTUN CHUND PUREE, **3 P.R. 1869.**

(42)—*Act* X *of* 1859, s. 106—*Failure to appear as a third party in rent suit.*—A person who did not appear as third party in a rent suit is not without a remedy if he is wronged. It is a general rule of law that any man being aggrieved shall have some means of redress. FUKEER CHAND AYAH v. ROKEEMUNISSA, **5 W.R. Act X, Rul. 50.**

Exercise of powers given by statute—Liability to be sued in tort—*See* BOM. ACT III OF 1901, s. 54 (1) (*c*), 4 S.L.R. 65=8 Ind. Cas. 208.

Wrongful collection of cess by Collector—Acting in excess of statutory authority—Liability in damages—*See* MAD. ACT V OF 1884, s. 75, 8 M.L.T. 201=20 M.L.J. 771=7 Ind. Cas. 799.

'Actio personalis moritur cum persona'—*See* ACTIO PERSONALIS, 3 Bom. L.R. 167=25 B. 574.

See ACTIO PERSONALIS, 4 Bom. L.R. 325=26 B. 597.

Actions sounding in—S. 80, Civ. Pro. Code (1908)—*See* CIV. PRO. CODE, 1908, ss. 2 (17), 80, 12 Bom. L.R. 615.

Damage to two persons caused by same tortious act—Right to sue as joint plaintiffs—*See* CIV. PRO. CODE, 1908, s. 99, 1 S.L.R. 181.

Malicioualy procuring breach of a contract—*See* CONTRACT—BREACH OF CONTRACT, 8 Bom. L.R. 610=30 B. 598.

Procuring breach of promise to marry--Malice—Effect—*See* CONTRACT—BREACH OF CONTRACT, 7 M.L.T. 394=5 Ind. Cas. 475=20 M.L.J. 734=33 M. 417.

Breach of contract—Tort—*See* CONTRACT—BREACH OF CONTRACT, 8 M.L.J. 185.

Corporation's liability for nonfeasance—*See* CORPORATION, 6 Bom. L.R. 75=28 B. 340.

Right to vote, action to recover damages for refusing to receive a nomination paper—*See* ELECTION, 8 Bom. L.R. 838=31 B. 37.

Tort—*concluded*.

Merger of tort in felony—*See* EVIDENCE—MISCELLANEOUS, 13 C.W.N. 501=4 Ind. Cas. 523.

Hindu Law—Tort by father, liability of sons under Hindu law to pay damages—*See* HINDU LAW—DEBTS, 10 Bom. L.R. 297=32 B. 348.

Action in—Non-joinder of parties—Joinder when too late—*See* LIMITATION ACT, 1908, s. 22, 25 C. 285.

False imprisonment—*See* LIMITATION ACT, 1908, art. 19, 5 Bom. L.R. 490.

Limitation—Suit based on—*See* LIMITATION ACT, 1908, art. 30, 3 M. 240.

Loss by collision of ships, suit to recover damages for, an action in tort—*See* LIMITATION ACT, 1908, arts. 36 and 49, 11 B. 133.

Injury to servant owing to neglect of another servant—Common employment—Liability of master—*See* MASTER AND SERVANT, 9 A.L.J. 173.

See MASTER AND SERVANT, 11 W.R. 101.

See MAXIMS, 12 Bom. L.R. 769.

Doctor, action by a doctor to recover his fees, negligence as a defence—*See* MEDICAL PRACTITIONER, 8 Bom. L.R. 93.

See MESNE PROFITS—RIGHT TO MESNE PROFITS, 9 C.L.R. 1.

Joint tort-feasors—Liability of—Release of one—Effect—*See* MESNE PROFITS—SUIT FOR MESNE PROFITS AND ASSESSMENT IN EXECUTION, 11 C.L.J. 503=6 Ind. Cas. 69=14 C.W.N. 849=37 C. 559.

See MINOR—TORTS BY MINORS, 3 N.W.P. 191.

Wrongful act done in respect of land—Melvaramdar and Kudivaramdar, right of both to jointly see in respect of wrong—No misjoinder—*See* MISJOINDER—OF CAUSES OF ACTION, 6 M.L.J. 136.

Wrongful attachment of partnership property—Right of individual member to sue for damages—*See* PARTNERSHIP—GENERAL, 2 S.L.R. 26.

Action against one joint tort-feaser bars another action against others—*See* RES JUDICATA—GENERAL, 14 Bom. L.R. 9.

Riparian rights, action to recover damages for diverting the course of a river—*See* RIPARIAN RIGHTS, 8 Bom. L.R. 87.

Secretary of State, action against—*See* ST. 21 & 22 VIC., C. 106, ss. 42, 65, 6 Bom. L.R. 65=28 B. 314.

Natural water-course—*See* WATER-COURSE, 9 Bom. L.R. 864.

Tort-feasors.

See CONTRIBUTION, SUIT FOR—JOINT TORT-FEASORS.

Tort-feasors—*concluded.*

See CONTRIBUTION, SUIT FOR—GENERAL, 6 C.W.N. 88.

Joint—Extent of liability—*See* MESNE PROFITS—MODE OF ASSESSMENT, 15 C.W.N. 825.

Several joint wrong-doers, if judgment obtained against one a bar to action against the others—*See* RES JUDICATA—PARTIES, 14 B. 408.

Total Loss.

See INSURANCE, 3 B.H.C. A.C. 1, 6 B.L.R. 218.

Touching the Pen.

Execution of document by marksman—*See* DEED—EXECUTION OF DEEDS, 6 M. L. J. 209.

Tout.

(1)—*Tout—Evidence—Interference by the Chief Court—Ss.* 3 *and* 36 *of Act* XVIII *of* 1879, *as amended by Act* XI *of* 1896 *and s.* 13 *of the Punjab Courts Act* XVIII *of* 1884.—*Held*, that, a person cannot be declared a habitual tout, when evidence of his being so is vague and general, while there is the testimony of apparently respectable witnesses to the contrary. NIZAM DIN v. THE CROWN, **26 P.W.R. 1909, Cr.**

(2)—*Tout—Evidence—Power of Chief Court to interfere—Ss.* 3 *and* 36 *of Act* XVIII *of* 1879, *as amended by Act* XI *of* 1896 *and s.* 13 *of the Punjab Courts Act* XVIII *of* 1884.—*Held*, that the evidence of an ordinary witness to the effect that a Barrister pays a person commission on any case brought to him while the Barrister himself denies, it is not sufficient to declare that person a habitual tout. BAISAKHIP RAM v. THE CROWN, **27 P.W.R. 1909, Cr.**

Tout, declaration of—*See* ACT XVIII OF 1879, ss. 3, 4, 5 Bom. L.R. 728.

District Magistrate declaring a person to be a tout—Procedure—Personal inquiry necessary—Opportunity to show cause—*See* ACT XVIII OF 1879, ss. 3, 36, 12 C.W.N. 842.

List of persons "proved to the satisfaction of the Court habitually to act as touts"—*See* ACT XVIII OF 1879, ss. 3, 36, A.W.N. 1896, 107.

See ACT XVIII OF 1879, ss. 13, 14, 31 P.W.R. 1909, Cr.

Order declaring a person to be a—Revision—*See* ACT XVIII OF 1879, s. 36, 115 P.L.R. 1909 =11 P.R. 1909, Cr. =3 Ind. Cas. 977=10 Cr. L.J. 443=28 P.W.R. 1909, Cr.

See ACT XVIII OF 1879, s. 36, 21 A. 181= A.W.N. 1899, 15, 108 P.L.R. 1904=22 P.R. 1904.

Enquiry before officer empowered to make list—Delegation of authority—*See* ACT XVIII OF 1879, s. 36, 6 C.W.N. 289.

Order declaring certain persons to be touts—Application to High Court under s. 15, 24 and 25 Vic., Cap. 104—Application to

Tout—*concluded.*

Division Bench—Whether Bench competent to dispose of application—*See* ACT XVIII OF 1879, s. 36, A.W.N. 1908, 279=6 A.L.J. 22 =31 A. 59=1 Ind. Cas. 143.

Declaring a person to be tout—District Judge to take evidence himself—Power to direct Munsif to take it—Opportunity to show cause—Procedure when Munsif suspects a person to be a tout—*See* ACT XVIII OF 1879, s. 36, 12 C.W.N. 843, Note.

Application to District Court for declaring certain persons as touts—Disposal on affidavits—Validity—Examination of witnesses—Jurisdiction of District Judge—*See* ACT XVIII OF 1879, s. 36, 26 M. 596.

Procedure—Misjoinder or multifariousness—*See* ACT XVIII OF 1879, s. 36, 11 C.L.J. 513=6 Ind. Cas. 327=11 Cr. L.J. 320.

See CIV. PRO. CODE, 1908, O. XVI, r. 20, 2 N.W.P. 67.

Towage.

(1)—*Towage—Services—Towage or salvage.*—The question whether services are "towage" or "salvage" is a question of law for the Court to decide. CLAN SHAW v. CASHMERE, **1 Bom. L.R. 570.**

Towage contract—Vice-Admiralty—Action in rem—Owner indirectly impleaded—Protection clause in—*See* ACTION IN REM, 10 C. 865.

Ship—Bottomry bond—Maritime lien—Master's lien for wages and disbursements—Priority of lien—*See* JURISDICTION—ADMIRALTY AND VICE-ADMIRALTY JURISDICTION, 6 B.L.R. 323.

Salvage and—Distinction between—*See* SALVAGE, 27 C. 860.

Tower of Silence.

Grant of land for, within cantonment limits—*See* NATIVE STATE, 12 C.W.N. 465, P.C.=35 C. 478=35 I.A. 79=3 M.L.T. 339=4 N.L.R. 65=14 Bur. L.R. 102= 18 M.L.J. 199=10 Bom. L.R. 287=7 C.L.J. 401.

Towing.

Stay of Proceedings—Regulation as to tugs—River navigation—Towing.—A party having two tugs, A and B, undertakes to supply tugs to two vessels, P and Q, in the order of their engagements as soon as the tugs are free. A is first free, and tows P, which has the prior claim, to Diamond Harbour, where she becomes disabled. B subsequently tows Q, and, finding A disabled at Diamond Harbour, leaves Q and tows P out to sea, returning subsequently for Q. *Held* that B was not justified in leaving Q but that she ought to have towed her out to sea without interruption. NOWRJEE NUSSERWANJEE v. JOHANNES, **1 Hyde 293.**

Town.

When a village becomes a—*See* VILLAGE, 26 P. R. 1910=32 P.W.R. 1910=5 Ind. Cas. 909=152 P.W.R. 1910.

Town and Village Lands, Lower Burma.

See BUR. ACT IV OF 1898.

Town Duties, etc., Abolition of, Bombay.

See BOM. ACT XIX OF 1844.

Towns Improvements.

See MAD. ACT X OF 1865.

See MAD. ACT III OF 1871.

Towns, Improvements in.

See ACT XXVI OF 1850.

Track-rent.

Payable by the Bombay Tramways Company to the Corporation of Bombay after purchase—Duration of payment—*Ses* BOM. ACT I OF 1874, s. 30, 9 C.W.N. 337, P.C.=28 B. 502=31 I. A. 169=6 Bom.L.R. 739.

Trade.

(1)—*Taxes on trades in Ancient India—Muhtaraſa—Trade-tax—Zemindar's right to collect—Reg.* XXV *of* 1802, *s.* 4—*Reg.* XXV of 1832.—The right of the sovereign power to collect taxes on trades and professions is of extreme antiquity in India, but these dues, though farmed out, were not exigible by the owners of land, as such, but by the sovereign. The zemindar of Karvetnagar has not the right of collecting the *muhtaraſa* or trade-tax from artizans in his Zemindari, delegated to him by Government, and the assigness of the Zemindar cannot legally exercise this right. *Quære*—Whether it was competent to Government to commit the collection of this branch of the revenue to Zemindars for their own benefit. VEDANTA v. KANNIYAPPA, **9 M. 14, F.B.** [*R.*, 16 M. 34.]

(2)—*Will—Executor—Trade of testator carried on by the executor — Directions of the testator to carry on the trade—Debts incurred in carrying on the trade—Liability of the executor is personal — Testator's trade assets also liable.*—A testator by his will directed an executor of his to continue his business in cotton, cottonseed and cotton ginning, in order to perpetuate his name, so long as it could be carried on at a good profit; but if it appeared that the trade would suffer so as to destroy his (testator's) reputation, the executor was enjoined to stop it. The trust-trader, in conjunction with his co-executrix, carried on the business and employed therein the trade assets. The management resulted in heavy losses, to pay off which the executor obtained money by a mortgage executed by the co-executrix, to the defendant, of the ginning factory used in the business. The plaintiffs, the beneficiaries of the testator, who were also the executor's sons, sued the defendant for a declaration that the factory was not liable to be sold under the mortgage decree. *Held*, dismissing the suit, that the mortgage was by one member of the firm with the consent and informal co-operation of the undisclosed partner—the executor, who had the implied authority of the testator to deal with the factory in

Trade—*concluded.*

the ordinary course of business; and that therefore the mortgage was valid and binding on the executor or as principal. *Held*, also, that a mortgage by a trader under a testamentary trust, of the testator as factory, was referable to his implied authority as a trustee, and not to his position as executor. An executor carrying on the trade of his testator under a testamentary trust is liable personally to the trade creditors, and is entitled to use, as a trader, the trade assets of the testator. He does not violate his trust by carrying on the trade in conjunction with his executor who is not named as trade trustee. The trustee, though personally liable for the debts which he contracts in the course of the business, has a right to be paid out of the specific assets appropriated for that purpose and the trade creditors are not to be disappointed of payment so far as the assets so appropriated are concerned. JETHABHAI KEVALBHAI v. CHOTALAL CHUNILAL, **12 Bom. L. R. 1=34 B. 209=5 Ind. Cas. 594.**

See CONTRACT ACT, 1872, s. 27, 7 Bom. L. R. 107=29 B. 107.

Contract in restraint of—*See* CONTRACT ACT, 1872, s. 27, 7 Bom. L.R 107=29 B. 107.

Agreement in restraint of—Unreasonable restraint—Attempt to monopolise trade—Illegality—*See* CONTRACT ACT. 1872, s. 27, 13 C. W.N. 388=9 C.L.J. 216=1 Ind. Cas. 94.

Ancestral—and ordinary partnership, distinction between—*See* HINDU LAW—JOINT FAMILY, 5 B. 38.

Rights and liabilities of co-parcener's joint family trading firm—*See* HINDU LAW—JOINT FAMILY, 11 Bom. L.R. 255=2 Ind. Cas. 173=34 B. 72.

Ancestral trade on Hindu minor's behalf—Liability of minor—*See* HINDU LAW—JOINT FAMILY, 3 C. 738=2 C. L.R. 440.

Family without ancestral property—Property acquired by trade in which members were jointly engaged—Presumption as to property being joint—Survivorship—*See* HINDU LAW—JOINT FAMILY, 27 M. 32.

Trade protective society's business, if conducive to public welfare—*See* LIBEL, 12 C.W. N. 1053, P.C.=19 M.L.J. 20=14 Bur. L.R. 225=4 M.L.T. 21=1 Ind. Cas. 348.

Rule of the Cotton Trade Association, construction of—*See* RULES—CONSTRUCTION OF, 7 Bom. L.R. 805.

Trade Debts.

Properly incurred by a Hindu widow on the credit of the assets of the business to which she has succeeded, are recoverable after her death out of the assets in the hands of the reversioners—*See* HINDU LAW—DEBTS, 3 Bom. L.R. 738=26 B. 206.

Trade Libel.

See LIBEL, 13 C.W.N. 1165=36 C. 907=3 Ind. Cas. 831.

Trade-mark.

(1)—*Trade-mark, acquisition of—Use—Duration—Particular class of goods to which the trade mark is applied.*—It is the adoption and use of a trade-mark which gives a title to it. As soon a trade-mark has been so employed in the market as to indicate to purchasers that the goods to which it is attached are the manufacture of a particular firm, it becomes to that extent the property of the firm. The actual length of time, it has been employed is not an important ingredient provided it has been used long enough to render it probable that a reputation in the market had been acquired. The acquisition of an exclusive right to a mark or name in connection with a particular article of commerce cannot entitle the owner of that right to prohibit the use by others of such mark or name in connection with goods of a totally different character. BADISCHE ANILINE, ETC. v. TEJPALL, **5 Bom. L.R. 1025.**

(2)—*Right to restrain another from using a particular name.*—A dealer in, or a manufacturer of, a particular article, who adopts a name for that article, whether the name be a purely fancy name, or a descriptive name, cannot restrain another dealer from using the same name, simply on the ground that the article so named has acquired a reputation, even though it may be that the public have grown accustomed to buy the article in question only relying on the name and without examining the quality of the article. For a man to be entitled to restrain another from using a particular name with reference to a commodity, he must be in a position to show that the public have grown to associate that particular name with himself as the manufacturer of, or dealer in the article. MAHOMED ESUF v. RAJARATNAM PILLAI, **7 M.L.T. 55=5 Ind. Cas. 712=33 M. 402.** (24 C. 364, 35 C. 311, 15 M.L.J. 45, *R.*)

(3)—*Infringement of—Rights of manufacturer and importer of an article regarding a trade-mark.*—Plaintiff sought a perpetual injunction to restrain defendants from importing or selling any watches similar in appearance to the watches imported by himself or having any design or mark, whatsoever, which may be calculated to deceive purchasers into the belief that such watches were the watches imported and sold by the plaintiff. The trade-mark on the watches was the trade-mark of the manufacturers, the exporters, and the plaintiff's connection with the watches was that of an importer and seller under a contract for exclusive supply in India. *Held*, that, as the plaintiff had failed to show that the value of the trade, which he carried on, was due to the reputation acquired by, and attaching to, the trade-mark, as a guarantee of importation by him, and not merely as a guarantee of manufacture by somebody else, and that the limitation of that trade-mark was an infringement of an exclusive right of his own, entitling him to ask for protection, he was not entitled to the injunction asked for. An importer can only protect a trade mark representing his own reputation and the advantages accruing therefrom

Trade-mark—*continued.*

but not the trade-mark of another, a manufacturer or producer. He is not in the legal sense aggrieved at any use of the trade-mark which belongs not to himself but to the producer. Importers can only protect marks indicating importation by them. If their importation is not indicated by the marks but otherwise, as for instance by the style and name under which they trade as importers, they could not use to restrain the use of the marks, and could only sue if their trade name and style were deceitfully assumed by a rival. A trade-mark, which represents not the importer's reputation but the manufacturer's, is under the control and protection of the latter, not of the former. HEINIGER v. DROZ, **3 Bom. L.R. 1=25 B. 433.**

(4)—*Infringement of—Colourable imitation—Fraud.*—To entitle the owner of a trade-mark to redress, although fraud is necessary, the fraud does not necessarily consist in an intention to deceive on the part of the defendants, but in an actual deception or in the creation of a probability of deception independently of any fraudulent intention. It is not necessary for relief in equity that proof should be given of persons having been actually deceived, and having bought goods with the defendants' mark, under the belief that they were of the manufacture of the plaintiffs provided that the Court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other. What one has to look at, in cases of colourable imitation of trade-marks, is not whether a critical and astute purchaser seeing the two labels side by side would be able to detect the difference, but whether the distinctive and characteristic symbol is the same in both cases so that one is likely to be taken for the other. It is immaterial whether there are slight differences which could be detected on a close scrutiny. Trade-marks appeal for the most part to the illiterate classes who are unable to read or would be unlikely to spell out the descriptions round the border. E. D. SASSOON v. D. L. MILLS COMPANY, **1 Bom. L. R. 291.**

(5)—*Infringement of—Colourable imitation misleading the public—Ignorant and unwary up-country purchaser—Likelihood of deception.*—A trader has a right to use any marks he pleases, so long as they are not calculatad to mislead the public or infringe anybody's trade-mark. In order to ascertain whether a trade-mark is calculated to deceive purchasers into the belief that they are buying goods of one manufacturer, when they are not his goods, the Court may look at the two marks in question, with its own power of forming an opinion, accompanied by the evidence given in the case. In India, if the goods are despatched and sold up-country, the Court must also consider if the marks are calculated to deceive the incautious, ignorant or unwary up-country purchaser. The question in these cases is, not whether the mark complained of has deceived, but whether it is calculated to deceive. *Per Sale, J.*—A counterfeit trade-mark may be defined

Trade-mark—*continued.*

as a trade-mark, which is either designed and used with the intention of deceiving, or which, by reason of its resemblance to another pre-existing and already established mark, is calculated to deceive, apart from any dishonest intention. It lies upon the plaintiff to establish affirmatively that the marks of resemblance were accidental and not designed. If the plaintiff, having the opportunity, deliberately abstains from showing that the resemblance adopted by him was accidental and innocent, it necessarily follows that it was the result and out come of deliberate design and intention. If the Court, on the facts before it, must presume that the resemblance is not accidental, but intentional and designed, then, the imitation must have been designed with the object of deceiving. If the object was to deceive, then, the Court will presume as against the wrong doer, that the means employed to cause deception were calculated to effect that purpose. This is the effect of the ruling in *John Smidt* v. *Reddaway.* (32 C. 401, *R.*) It is only if the fraudulent design is negatived that it becomes material to enquire whether the resemblance between the two combinations of marks was calculated to deceive. Evidence of experts or men in the trade cannot be given to show whether or not a combination is such as is calculated to deceive the purchaser. It is a question entirely for the Judge. Evidence of facts, which may assist the Judge to come to a conclusion whether one mark is a colourable imitation of another, may be given. In a suit for slander of title, malice in law is not sufficient, *i.e.*, it is not sufficient to show that the mark or combination of the plaintiff was falsely charged as a colourable imitation, without legal justification or excuse. Malice in fact must be proved. NEMI CHAND v. C. W. WALLACE, **11 C.W.N. 537 = 34 C. 495 = On appeal from 4 C.L. J. 268 = 10 C.W.N. 107.** [*Affirmed*, 34 C. 511.]

(6)—*Injunction—Plaintiff's label a colourable imitation of other's lables—Plaintiff's right of action.*—A person who uses a label which is a deliberate combination of other registered labels with a view to represent and sell his wares as the wares of others, cannot be allowed to take out an injunction restraining some other person from imitating his label. ABDUL v. MAHAMADALI, **3 Bom. L.R. 220.**

(7)—*Trade-mark—Imitation of—Injunction—Compensation.*—The plaintiff alleged that he had acquired by registration and also by use the ownership of the trade-mark "Scissors," and that he had used it for many years upon packets of thread which he sold in the open market, the device being a picture of an ordinary pair of scissors; that the defendant is using a device including a picture of a pair of what he calls trimmers but which, to the ordinary eye of the man, uneducated in pictures and possessed of no abnormal powers of observation, is a pair of scissors. The plaintiff prayed for an injunction against the defendant and for compensation. *Held*, that the plaintiff was entitled to the injunction asked for. No actual damage

Trade-mark—*continued.*

having been proved, a decree for compensation was refused. KARM ELAHI AND CO. v. ABDUL AZIZ, **127 P.L.R. 1909 = 116 P.W.R. 1909 = 4 Ind. Cas. 963.**

(8)—*Counterfeit, resemblance, intentional or accidental — Expert-evidence, if admissible—Malice in law, not sufficient—Malice in fact to be proved—Sea Customs Act* (VIII *of* 1878)—*Merchandise Marks Act* (IV *of* 1889), *s.* 19 (*a*) *Collector of Customs, power to make enquiry—Detention of goods by Collector — Documents tendered* de-bene-esse *— Witness, refreshing memory by document, effect of.*—A counterfeit trade-mark may be defined as a trade-mark which is either designed and used with the intention of deceiving or which, by reason of its resemblance to another pre-existing and already established mark, is calculated to deceive, apart from any dishonest intention. It lies upon the plaintiff to establish affirmatively that the marks of resemblance were accidental and not designed. If the plaintiff, having the opportunity, deliberately abstains from showing that the resemblance adopted by him was accidental and innocent, it necessarily follows that it was the result and outcome of deliberate design and intention. If the Court, on the facts before it, must presume that the resemblance is not accidental, but intentional and designed, then the imitation must have been designed with the object of deceiving. If the object was to deceive, then the Court will presume as against the wrong-doer, that the means employed to cause deception, were calculated to effect that purpose. This is the effect of the ruling in *John Smidt v. Reddaway* (32 C. 401, *R.*) It is only if the fraudulent design is negatived, that it becomes material to enquire whether the resemblance between the two combinations of marks, was calculated to deceive. Evidence of experts or men in the trade cannot be given to show whether or not a combination is such as is calculated to deceive the purchaser. It is a question entirely for the Judge. Evidence of facts, which may assist the Judge to come to a conclusion whether one mark is a colourable imitation of another, may be given. Malice in law is not sufficient, *i.e.*, it is not sufficient to show that the mark or combination of the plaintiff was falsely charged as a colourable imitation, without legal justification or excuse. Malice in fact must be proved. The provisions of the Sea Customs Act (VIII of 1878) as amended by the Merchandise Marks Act (IV of 1889), make it quite clear that the Collector had no power to deal with the question raised by the defendants, when once it became apparent that the plaintiff desired to contest the defendant's claim. It was his duty then to have held his hand and to have obtained the goods on being properly indemnified, until the question was properly disposed of in a competent Civil Court. The enquiry which the Collector of Customs is to make under s. 19 of the Act must necessarily be of a most limited character, for, the Act does not empower him to summon witnesses or to take evidence. Documents tendered in an

Trade-mark—*continued.*

examination *de bene esse* are not required to be tendered again during the hearing. Where a witness during cross-examination is asked to refresh his memory by referring to a privileged document, he may be told that the consequence of his so referring to the document, would be to allow the other side to have a look at the document. NEMI CHAND v. WALLACE, **4 C. L.J. 268=10 C.W.N. 107.**

(9)—*Trade-mark—Infringement—Limitation (Act IX of 1908), s. 23—Continuing wrong—Registration of mark—Right to sue—Cause of action—Actual deception not necessary—Imitation of mark when an infringement of trade-mark—Third person allowed to use a similar mark—Damages—Actual damage not necessary to be proved.*—The infringement of a trade-mark is a continuing wrong, and so long as the infringement continues, a fresh cause of action arises *de die in diem*. In India, a plaintiff can maintain a suit for infringement of trade-mark, even if he has not proved registration of his trade-mark. In a suit for infringement of trade-mark, it is not necessary to prove that any one has been actually deceived. It is sufficient if it is proved that the defendant contemplates committing or has threatened to commit an infringement. The question is not whether a purchaser has been deceived, but whether he is *likely* to be deceived. (34 C. 495=11 C.W.N. 537, 24 C. 364=1 C.W.N 281, *R.*; 55 P.R. 1902, *D.*) In deciding whether there has been an infringement of plaintiff's trade mark, the Court has to see whether the device used by the defendant is such a colourable imitation of the plaintiff's mark as would be calculated to deceive the *ultimate* purchaser. The question is not what would be the effect on brokers or large dealers, but whether the mark is calculated to deceive incautious, ignorant or unwary purchasers. (34 C. 495=11 C.W N. 537, 7 B. 584, *F.*) If, as the result of an arbitration, another trader has been allowed to use a trade-mark more closely resembling plaintiff's mark than that of defendant, that is not the reason why the defendant should not be restrained from using other marks calculated to deceive the public. For damages to be recovered for infringement of trade-mark, it is not necessary that special damage should be proved. It is sufficient to show that plaintiff's right has been invaded, in which case some damages, even if only nominal, will be given. ABDUL SALAM v. HAMID ULLAH, **166 P.W.R. 1912.**

(10)—*Property in—Remedy against infringement of—Registration of trade mark in England—Imitation—Addition of devices—Want of patent for speciality.*—A trade-mark in India is a species of property in respect of which an injunction may issue, and although there is no special law regarding trade-marks as in England, plaintiff has his remedy under the Specific Relief Act. The provisions of s. 103 of the English Patents Designs and Trade Marks Act of 1883 (46 and 47 Vic., chap. 37), not having been extended to India, the registration of a trade-mark in England does not place the

Trade mark—*continued.*

plaintiff in a better position than the defendant, unless possibly as regards long user. The colour and size of a label cannot be regarded as any constituent part of trade-mark. MUHAMMAD ISHAQ v. ALIF KHAN, **98 P.L.R. 1902=55 P. R. 1902.**

(11)—*Trade-mark—No system of registration in India—English law to be applied—Assignment of trade-mark, how effected—Good will also to be transferred.*—In India there is no system of registration, nor is there any provision for a statutory title to a trade-mark; so the rights of the parties must be determined in accordance with the principles of the English Common Law. A trade-mark cannot be transferred in gross; that is, no trade-mark can be assigned except in connection with the good will of the business in which it has been used, or, in other words an assignment of good will must accompany or follow the transfer of a trade-mark. Consequently where a person merely takes an assignment of the trade-mark without an assignment of the good will, he acquires no title to the trade-mark. BRITISH AMERICAN TOBACCO CO., LD. v. MABOOB BUX, **7 Ind. Cas. 279.**

(12)—*Meaning of—Registration in India—Effect—Proof—Vendor of goods—Right to bring an action for infringement of.*—A trade-mark means a mark used to denote that goods are the manufacture or merchandize of a particular individual Since there is no system of registration in India which gives a person a statutory title, it is necessary for a person, who brings an action for the infringement of a trade-mark, to establish that the mark, in respect of which he makes the claim, has acquired a reputation in connection with the goods that he sells. An action for the infringement of a trade-mark is maintainable, even though the person who brings the suit is not the manufacturer or selector of the goods, but is merely a vendee of them. Though no specific objection was taken on appeal to the form of the injunction ordered in the lower Court, which proceeded on the erroneous assumption that the goods sold by the plaintiff were prepared or manufactured by him, a variation must be introduced into the terms of the injunction, so as to fit in with the facts as they actually are established. JAWLA PRASAD v. MUNNA LAL SEROWJEE, **37 C. 204=5 Ind. Cas. 1000.**

(13)—*Suit for exclusive right to make use of certain trade description and for injunction—'Facing' similarity of—Evidence Act, s. 65—Opinion evidence, admissibility of—Registration of trade-marks in India.*—The plaintiffs and the defendant were carrying on business as piece goods merchants at Madras. The plaintiffs complained that the defendant infringed their trade-mark on grey shirtings which they (plaintiffs) were importing from England. The plaintiffs claimed the exclusive right to the user of a combination of certain words, designs, letters and numbers, which constituted the 'facing' imprinted on

Trade-mark —*continued.*

their grey shirtings. It was proved that the plaintiffs were using this facing continuously, and without alteration since 1889. It was also proved that in, and prior to, 1889, there was no similar 'facing.' in use in Madras and that the goods bearing this 'facing' and sold by the plaintiffs, had acquired a large reputation and were known in the market as '*tulwa*' or '*kuttee*' shirting, the word '*kuttee*' meaning sword. Plaintiffs claimed that their trade-mark consisted of the whole combination forming the facing on their grey shirtings. It was found that, since 1898, the defendant was, with the object of overthrowing the plaintiffs, effecting some change or other, in his facing from time to time with the result that, in the end, his facing came to be almost exactly similar to that of the plaintiffs, in the words, letters and figures, &c., except that the defendant had imprinted on his facing, scent bottles lying horizontally instead of swords lying in the same position on plaintiffs' facing. In short, the various marks used by the defendant constituted a colourable imitation of the plaintiffs' marks in every respect apart from the swords. The defendant's contention was that the plaintiffs' goods had been known as '*kuttee*' or sword shirtings. This being so, he (defendant) could copy every portion of the plaintiffs' trade-mark except that which gave the special name to the cloth (*i.e.*) that he could copy every part of the combination of the plaintiffs' trade-mark, except the swords, from the use of which the plaintiffs' shirting had acquired the reputation of the 'sword' or '*kuttee*' shirting and that as he (defendant) used scent bottles instead of swords on his facing, there was no infringement of the plaintiffs' trade-mark and therefore plaintiffs could not get the reliefs by way of injunction, &c., which they sought. *Held*, that the plaintiffs were entitled to the injunction prayed for (*Davies, J.—dissenting*). *Held* unanimously, that evidence of opinion as to the probability of the purchaser being deceived or otherwise was not admissible. *Per Davies, J.*—The action was not upon a 'trade-mark' properly so called as there is no registration of trade mark in this country but that it was upon the right of an exclusive user of what might be more appropriately styled a 'trade description' which is recognised and protected under ss. 2, 4 and 6 of the Indian Merchandize Marks Act, 1889. To establish the user of a trade-mark, it is necessary for the claimant to show that it is by that particular marking his goods are known or recognized in the market or by the public. He must also show that the marks, as arranged by him, indicate origin of property as well as quality. This the plaintiffs failed to prove. Except as to four items, the plaintiffs did not make out their right of exclusive user and the defendant did not imitate any of those marks. Further, what the defendant copied, he was at liberty to copy and no one was likely to be deceived thereby into taking his goods as plaintiffs.' *Benson, J.*—There is no system of registering trade-marks in India. Every one

Trade-mark—*continued.*

may use any mark or combination of marks or symbols that he likes, unless some other person has, by user, acquired a reputation, which couples his name with the mark or combination of marks or symbols. In that case, the user acquires a property in the mark or combination, which the law will protect just as much as it were a registered trade-mark. To that extent, it becomes his exclusive property and 'no one else has a right to copy it, or even to appropriate any part of it, if, by such appropriation, unwary purchasers may be induced to believe that they are getting goods which were made by the firm, to whom the trade-mark belongs.' For several years previously, the plaintiffs had acquired by user a property in their facing. *Moore, J.*—The principle of law applicable to a case like the present is "that no man may canvass for custom falsely holding out his goods or business, whether by misleading description or by colourable imitation of known marks, packages, &c, as being the goods of or business of another. Its application is not excluded by showing that the style or words appropriated by the defendant are in themselves not false as he uses them or that the plaintiffs, if they succeed, will have a virtual monopoly in an exclusive designation which is not capable of registration as a trade-mark. The question is whether the defendant's action naturally tends to cause an ordinary dealer or purchaser to think he is dealing with the plaintiffs or buying the plaintiffs' goods. In the present case, there could be no doubt that the facing of the defendant would appear to the purchaser as virtually identical with that of the plaintiffs. Thre object of the defendant in adopting the facing he did must have been to cause an ordinary illiterate purchaser to think that he was buying the plaintiffs' goods. (6 M. 108, *R.*) *Per Davies, Benson and Bhashyam Ayyangar, JJ.*—No provision has been made by law for the registration of trade-marks in India and no order in Council has been issued under s. 104 of the Patents of Designs Trade Marks Act, 1883 (46 and 47 Vic., C. 57) applying to British India the provisions of s. 103 of the Act. So there is no system of registering trade marks in India. NOOROODEN SAHIB v. CHARLES SOWDEN, **15 M.L.J. 45, F.B.** [*R.*, 33 M. 402 =7 M.L.T. 55=5 Ind. Cas. 712.]

(14)—*Exclusive user in India by importer—Infringement by importation and sale of articles with similar device—Effect of prior user of mark outside India.*—Plaintiff, the importer of umbrellas with a certain trade mark, sued for an injunction restraining the defendant from importing and selling umbrellas with a trade mark having a similar device. The plaintiff contended that the trade-mark of the defendant was likely to deceive the public into a belief that the umbrellas sold by the defendant were those of the plaintiff. The defendant, while denying that the plaintiff had any right to the trade-mark claimed by him, contended that his trade-mark had been long used in Scotland,

Trade-mark—*continued.*

and that the public were not likely to be deceived. For the purpose of the suit it was taken for granted that the mark in question was used by the firm in Scotland before it was used by the plaintiff in India and that it had not been used in India by the Scotch firm before. *Held*, that the prior use in Scotland did not justify the Scotch firm and the defendant in saying that the plaintiff's user of the trade-mark was illegal or otherwise than an exclusive user. The protection which the law affords to traders using a trade-mark in this country would be seriously diminished if immunity from action were secured to rival traders who were able to prove that in some other quarter of the globe, some other trader had been in the habit of using the mark for a period longer than that alleged by the plaintiff. EBRAHIM CURRIM v. ESSA ABBA SAIT, **24 M. 163.**

(15)—*Importer— Violation of right.*—If an importer have, from the mark or device he has used, become known in the market by a particular name, the adoption, by a rival trader, of any mark, which will cause his goods to bear the same name in the market, is a violation of the rights of the former. TAYLOR v. VIRASAMI, **6 M. 108.** [*Cons.*, 25 B. 433; *R.*, 55 P.R. 1902 15 M.L.J. 45=4 M.L.T. 366.]

(16)—*Use in foreign market—What constitutes—Right to a trade-mark—Abandonment.*—Such possession and use of a trade-mark in one market as to constitute a right in it establishes in the proprietor an exclusive right to that trade-mark in any other market, though he may not have employed it in such other market. [*Expl.*, 24 M. 163.] To constitute the ornaments employed, trade-marks, they must have been adopted as symbols devised to distinguish a particular class of goods as the goods of that class manufactured or selected by a particular manufacturer or merchant. As the right to a trade-mark may be acquired, so it may be abandoned. LAVERGNE v. HOOPER, **8 M. 149.** [*D.*, 25 B. 433.]

(17)—*Proper and quasi trade-mark—Exclusive right to marks on imported goods—Distinction between them.*—Where, under the circumstances, the use or the imitation of the plaintiff's marks, on goods imported by him, by the defendants, would be calculated to deceive or mislead the public into the belief that they were purchasing goods imported by the plaintiff, the defendants ought to be restrained from such use or imitation - *Per Garth, C.J.* [*R.*, 6 Bom. L R. 407.] No trader can complain against a rival trader in regard to any announcement he makes, concerning the goods he sells, so long as no statement is made which is untrue or calculated to mislead—*Per Markby, J.* When a trader specially selects and appropriates to himself, for the purpose of distinguishing his goods, any device, it is his *trade-mark proper* and no one else is allowed to use it. But if, without any such selection and appropriation, the trader's goods happen to bear some mark which has come to be associated by the public with the trader's name so that all goods with the mark are supposed to come from him, then also the law will not allow any one else to use it—*Per Markby, J.* [*R.*, 24 C. 364=1 C. W. N. 281, 55 P. R. 1902=98 P. L. R. 1902, 15 M L. J. 45.] Both the above marks are usually called trade-marks and the distinction between them is not one of principle but it is one which is convenient, when examining the evidence by which it is sought to prove the infringement *Per Markby, J.* It is only an extension of the general law of trade-marks that the right to the exclusive use of a trade-mark may be claimed as well by a trader who only imports goods as by one who manufactures goods—*Per Markby, J.* RALLI v. FLEMING, **3 C. 417 =2 C. L. R. 93.** [*D.*, 25 B. 433=3 Bom. L. R 1; R., 6 M. 108.]

(18)—*Partner's right to use the trade-mark—Rights of seller of goods to trade-mark—Manufacturer.*—A trade-mark belonging to a firm would, in the absence of express provisions to the contrary, as part of the partnership assets, be available for any partner of that firm carrying on that business. In the absence of contract, a seller of goods has no exclusive right to a mark which merely denotes goods which he sells even though he may have designed the mark himself. Such a mark may be a mere quality-mark, indicating the reputation of the goods irrespective of the reputation of the seller. Obviously every trader being entitled, if not bound, to state truthfully the quality of the goods he sells, no one trader can restrain any other from exercising that right by a mark truthfully indicating quality. For neither of the two grounds for protection exist in such a case. His reputation is not injured and no deception is practised on the public. To give an exclusive right there must be something further. The mark must amount to a representation that the quality is wholly or in part due to and guaranteed by some person or persons concerned in, or connected with, the origin or history of the goods. In such cases the public are invited to rely on the reputation of the persons denoted, and no other person can without their authority, make such representation. And it is a question of evidence in each case whether there is false representation or not. VADILAL v. BURDITT & CO., **7 Bom.L. R.272 =30 B. 61.**

(19)—*Right of exclusive user, largely a question of fact—Its existence depending on evidence—Breach of right of exclusive user of name and number of trade-mark—Question of infringement—Combination of marks—Comparison not conclusive—Dissimilarity.*—The question of the right to the exclusive user of a trade name, or trade number is largely, if not entirely, a question of fact, and the question whether it exists in any given case must depend upon whether the evidence in that case is sufficient to show such a connection or association between the name or the number and the firm which uses it, as to indicate to the ordinary purchasers in the market into whose hands the goods marked with the name or number may come that the goods are the goods of that particular firm. To

Trade-mark—*continued.*

entitle a person to an injunction, restraining the defendant from using any name or number as a trade-mark, he must possess the right of exclusive user of that name and number. Such a right, however, will not always entitle the owner to prevent others from using it under all circumstances. It is only when the use of that name or number deceives, or is reasonably likely to deceive the public, that it can be interfered with or prevented, and it is not sufficient to show that the number has acquired such a reputation that the people buy the goods by that number without examination of quality. To constitute an infringement it is not enough to show a mere possibility of deception. There must be a reasonable probability of purchasers being deceived. (3 C. 417, *R.*) [*R.*, 25 B. 433 = 3 Bom. L.R. 1, 15 M L.J. 45.] A comparison of different combinations of marks side by side is not conclusive on the question of infringement, but the general dissimilarity of the marks is a matter which cannot be disregarded. BARLOW v. GOBIND RAM, **24 C. 364 = 1 C.W.N. 281.** [*R.*, 15 M.L. J. 45.]

(20)—*Restraining use of trade-mark—Evidence of fraud.*—The ground upon which a person is restrained from using another's trade mark is that he is gaining an advantage by the use of a particular trade-mark which is the property of another. It is not necessary to prove intentional fraud, or to show that persons have been actually deceived. It is sufficient if the Court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other. EWING v. GRANT, SMITH & CO., **2 Hyde 185.** *See also* BALFOUR & CO. v. KILBURN & CO., **1 Hyde 270.**

(21)—"*Camel hair belting*" — *Secondary signification, acquisition by—Use of—Remedy—Injunction—Burden of proof—Special damage or deception, no necessity to prove.*—Where the name, under which an article is sold, though not a fanciful term, has acquired in the market a secondary signification as being the article manufactured by a particular person, it is not competent for any one else to pass off, under that name, an article, though of the same description, in such a way and under such circumstances as is likely to mislead the purchasing public into a belief that they are purchasing the article manufactured by that particular person; and an injunction may be issued restraining him from making use of that name. It is immaterial to prove that any special damage was caused to that person or that any purchaser was deceived. [*R.*, 4 C.L.J. 268 = 10 C.W.N. 107, 34 C. 495 = 11 C.W.N. 537.] The burden of proving that particular words have acquired a secondary signification, lies on the person alleging it. JOHN SMIDT v. F. REDDAWAY & CO., **9 C.W.N. 281 = 32 C. 401.**

(22)—*Trade-mark — Infringement — Watches bearing trade-mark designed by sole importers in India—Abandonment of trade-mark by importers—Manufacturers subsequently selling watches*

Trade-mark—*continued.*

with the trade-mark—Issues, raising of—Practice and procedure.—The plaintiffs, trading under the name and style of the West End Watch Co., imported watches into India as sole agents of a factory in Switzerland, established at St. Imier. Those watches had printed on their dials a device and the words "Berna" and "West End Watch Company." and they came to be known in the Indian market as the Berna watches. The factory at St. Imier subsequently passed into the hands of the defendants. A dispute having arisen between the plaintiffs and the defendants as to the quality of watches manufactured by the latter, the plaintiffs discontinued to send orders to the defendants, and began to import watches made at other factories. In the advertisements issued by the plaintiffs since that time as well as in answer to letters received by them from their constituents, they declared that, owing to deterioration in the making of the Berna Watches, they had discontinued to import them, and had substituted instead a new quality styled the Secular or the Railway Service. The defendants, who had incorporated themselves under the name and style of the Berna Watch Co., opened an office in Bombay, and issued a circular in which they referred to the plaintiffs as their agents who had sold six hundred thousand watches made at the St. Imier factory, and proclaimed that Berna & Co.'s watches would no longer be sold by the plaintiffs as their sole agents, as they had decided to deal directly themselves. The plaintiffs filed this suit to restrain the defendants from using and imitating various trade symbols alleged to belong to the plaintiffs, and from representing that the defendant's business was the business carried on by the plaintiffs: *Held*, on evidence, that, as the plaintiffs had, for three years preceding the suit, both in their dealings with the new factories and with their customers, evinced the intention to abandon the name 'Berna' as a quality mark for their watches, they could not claim any exclusive title to the use of that name either alone or in a trade-mark with a symbol. *Held*, further, that the plaintiffs were entitled to an injunction restraining the defendants from representing that they were carrying on business of which the plaintiffs were the sole agents or were the successors in business of the plaintiffs. Where a trade-mark has up to the date of the suit been associated in the minds of the buyers in a particular country with a particular kind of commodity sold by the plaintiff, then, unless there is abandonment of the trade-mark by him, he is entitled to an injunction against any other person importing and selling the commodity under that name, notwithstanding that the plaintiff's name has, in addition to the word or trade-mark, always appeared on the article sold and is well-known to all dealers. The importer, who, by advertising and pushing the sale of goods under a particular mark, secures a wide popularity in relation to the goods sold by him, is entitled to the protection of the Court for that mark in the country of importation, even against the producer of the

Trade-mark—*continued.*

goods. The fact that the user of a word or mark always uses it in conjunction with his own name is not conclusive to show that the word or mark cannot be claimed as a trade-mark or that the user has waived his rights in it as a trade mark. There can be no property in a trade-mark in gross, apart from the goods of which it has become the symbol. Issues raised at a trial should be confined to questions of law arising on the pleadings and such questions of fact as it would be necessary for the Judge to frame for decision by the jury in a jury trial at *nisi prius* in England. The practice of raising a number of issues which do not state the main questions in the suit but only various subsidiary matters of fact upon which there is not agreement between the parties, *deprecated* THE WEST END WATCH CO. v. THE BERNA WATCH CO., **13 Bom. L R. 212**

(23)—*Passing off goods—Admissibility of evidence of intent—Intend to deceive.*—The general principle applicable to passing off cases is that "nobody has the right to represent his goods as the goods of somebody else." In an action for an injunction to restrain the trade-mark, or mark if the defendant's goods on the face of them and having regard to the surrounding circumstances are calculated to deceive, evidence to prove the intention to deceive is inadmissible as being unnecessary the "rule being that a man must be taken to have intended the reasonable and natural consequences of his own acts." Where the defendant adopted a trade-mark identical with that of the plaintiff, which trade-mark was calculated to deceive and there was evidence to show, that some person was actually deceived, *held*, the plaintiff, was entitled to succeed without a necessity for him to prove an intention to deceive and to obtain an injunction. MUNNA LAL SEROWJEE v. JAWALA PRASAD, **35 C. 311.**

(24)—*Limitation Act*, 1908, *art.* 120.—The period of limitation in a suit for an injunction to restrain from the infringement of a trade-mark is prescribed by art. 120 of sch. II of the Indian Limitation Act (13 M. 445, *R.*) In the case of an infringement of a trade-mark the owner of the mark has a right to sue for every infringement of the mark until the mark becomes *publ ci juris*, that is to say, until the proprietor of it has in effect thrown open the use of it to the public by allowing his right to be so habitually infringed that the trade-mark no longer conveys to those who see it the impression that the goods to which it is attached are the manufacture of one manufacturer, or the goods of one person or firm who originally adopted the mark. AGA MAHMOOD v. EDWARD PELTZER, **2 L B.R. 113.**

(25)—*Breach—Right of manufacturer to sue—Title of assignee of trade mark without business—Pleadings—Statement by plaintiff not admitted by defendant—Proof.*—It is trite law that an assignment of trade-mark, without the business, confers no effective right. An action for breach of trade-mark does not lie at the instance of the manufacturer who supplies

Trade-mark—*concluded.*

articles, when another firm carries on the actual business with the articles supplied. The manufacturer may be interested in the success of the firm which *de facto* carries on the business, but this cannot put him in the shoes of the latter in vindicating the latter's right against wrong-doers. Where a statement by a plaintiff is not admitted by the defendant, the plaintiff, if he ignores the point, does so at his peril, for the defence puts him to prove his title. J. ULLMAN & CO. v. CESAR LEUBA, **13 C.W.N. 82=4 Ind. Cas, 318.**

Defendant infringing certain combination of letters, designs, and numerals as forming plaintiffs' trade description—Exclusive right of plaintiffs by user and reputation—Imitation, whether likely to mislead ordinary purchasers —*See* ACT IV OF 1889, ss. 2, 4 and 6, 4 M.L. T. 366=15 M.L.J. 45.

Action for injunction against infringement of —Appeal to Privy Council—Valuation of appeal —*See* APPEAL TO PRIVY COUNCIL—PRACTICE AND PROCEDURE, 10 C.W.N. 7, P.C.= 15 M.L.J. 461, P.C.

Infringement of trade-mark—Loss sustained not by way of diminution of profits but by way of enhancement of loss—Liability of defendants—Reduction in price of goods, measure of damages—*See* DAMAGES — MEASURE AND ASSESSMENT, 10 B. 617.

See ESTOPPEL—ESTOPPEL BY CONDUCT, 8 M. 149.

See INJUNCTION—SPECIAL CASES, 8 C.W. N. 151.

Injunction to restrain use of—Fraudulent intention—*See* INJUNCTION—SPECIAL CASES, 3 B.L.R. App. 4 (*a*).

Infringement of — Colourable imitation —Injunction—*See* INJUNCTION — SPECIAL CASES, 17 B. 584.

Restraining use of — *See* INJUNCTION—SPECIAL CASES, Cor. 150.

Whether—forms assets of partnership—*See* LIMITATION ACT, 1908, ss. 6, 8, 17, art. 106, 9 C.W.N. 537.

Trade-name.

(1)—*Device—Injunction — Fraud upon the public.*—In cases where the plaintiff charges the defendants with palming off their own goods on the unwary public the foundation of the suit is misrepresentation to the public or deception of the public. There is no monopoly or exclusive right to the use of any words, letters, animals or devices such as exist in copyright or patents. There is no monopoly in names, etc., which merely indicate the quality or description of goods. Although no protection can be granted, if the devices merely indicate quality or description, yet such protection will be granted to the plaintiffs if they establish that the particular device indicates not merely the quality or description, but the plaintiff's manufacture. Words and

Trade-name—*concluded.*

devices which may indicate quality and description, may at the same time also indicate the plaintiff's manufacture. If once plaintiffs establish, that the particular device, be it words or letters or animals,—whatever that device may be—if the plaintiffs once establish that the device indicates the plaintiffs' manufacture, so that any one seeing that device upon the article would be justified in concluding that he is purchasing goods of the plaintiffs' manufacture, then this Court will protect the plaintiffs against not only the use of the particular device, but against any imitation of that device, which imitation is likely to cause deception to the public. BADISCHE ANILINE v. FARBENFABRICKEN, **6 Bom. L.R. 407.**

(2)—*Partnership—Dissolution—Right of a member to carry on the firm under the old name—Injunction.*—Where two partners carry on business in partnership in some shops under the personal name of one of the partners, and at the dissolution of the partnership, one partner buys one shop and its good-will and the other partner buys the other shops and good-will thereof, nothing being said about the trade-name of the firm, the partner in whose name the shops were conducted before the dissolution, can restrain the other partner from carrying on business in the old name provided by so doing the latter exposes his former partner to any risk of liability Whether there will be any such risk is a matter to be decided having regard to the circumstances of each case. MORARJI v. MADONJI, **5 Bom. L.R. 545.**

(3)—*Dissolution of partnership—Good-will of the firm—Partner's right to use the name of the firm.*—The *prima facie* rights of every man to use his own name in his trade cannot be questioned; and before restraining him in this, the Court should be clearly satisfied that the similarity to the assigned trade-name was such as its use would be under the peculiar circumstances a derogation from the grant. Where the partners at the time of dissolving the partnership make no stipulation about good-will, every one of the partners has a right to carry on the trade in the identical name under which the firm had traded prior to the dissolution; because the good-will of the business is an asset of the partnership, to which one member of the firm has no higher right than the other. MANCHERJI v. FRAMJI, **2 Bom. L.R. 1026.**

Trader.

(1)—"*Trader,*" *who is a—Mad. Act* IV *of* 1884.—A person who makes it his business to sell for profit is a "trader" within the meaning of the Municipal Act IV of 1884, and the fact of what he sells being the produce of his own land does not make him the less a trader, provided the sales are conducted in a shop or place of business. VENKATA REDDI v. TAYLOR, **17 M. 100=3 M.L.J. 259.** [*R.*, 25 M. 747.]

Trader—*concluded.*

Defendant describing himself in the instrument sued on as a—No estoppel by conduct—*See* BOM. ACT XVII OF 1879, 17 B. 227.

See ST. 11 AND 12 VIC., C. 21, 7 B.H.C. O.C. 22.

Non-resident trader carrying on business through resident gomashta—How the conduct of gomashta may amount to an act of insolvency by the principal—*See* ST. 11 AND 12 VIC., C. 21, 23 C. 26, P.C.=22 I.A. 162.

See ST. 11 AND 12 VIC, C. 21, 2 Hyde 177.

Non-resident—carrying on business through resident gomashta—"Departure"—Intent to depart must be proved—Insolvency not committed by act of agent unauthorized by the principal and of which principal had no cognisance—*See* ST. 11 AND 12 VIC., C. 21, s. 9, 20 C. 771.

See ST. 11 AND 12 VIC., C. 21, s. 60, 21 C. 1018.

See ST. 11 AND 12 VIC., C. 21, s. 60, 2 Hyde 1.

See ST. 11 AND 12 VIC., C. 21, s. 60, 5 B. 1.

Traders, Bombay Insolvent.

See BOM. ACT XXVIII OF 1865.

Tradesman.

Injunction — Specific performance— Discretion of Court—Agreement not to work for rival—*See* SPECIFIC RELIEF ACT, 1877, ss. 22, 56, 57, 19 B. 764.

Trading.

In reckless manner—*See* ST. 11 AND 12 VIC., C. 21, Bourke Ins. 5.

Trading Firm.

See PARTNERSHIP—GENERAL, 25 A. 38=A.W.N. 1902, 178.

Trading, Supreme Courts' Officers.

See ACT XV OF 1848.

Traffic Manager.

See ACT IX OF 1890, s. 77, 24 C. 306.

Notice to Railway administration—Service on Traffic Manager—*See* ACT IX OF 1890, ss. 77, 140, 22 M. 137.

Traffic Superintendent.

See ACT IX OF 1890, s. 77, 24 C. 306.

Trailer Cars.

Whether vehicles with springs "propelled by electricity," within the meaning of sch. VI, cl. 1 of the Madras City Municipal Act, 1904—*See* MAD. ACT III OF 1904, sch. VI, cl. 1, 18 M.L.J. 149.

Tram Car.

Attempting to board a, in motion—Injury to passenger—Liability for damages—*See* CARRIERS, 13 Bom. L.R. 345.

Tramway Company.

Of Bombay—Purchase of the tramways by the Corporation—Date of purchase—Agreement by Corporation with third persons for funds to effect purchase and for working the tramways after purchase, validity of—'Track.rent,' after purchase, duration of payment of—*See* BOM. ACT I OF 1874, s. 30, 9 C.W.N. 337, P.C.=28 B. 502=31 I.A. 169=6 Bom. L.R. 739.

Tramways Act, Bombay.

See BOM. ACT I OF 1874.

Transfer.

See TRANSFER OF PROPERTY.

Transferee.

From auction-purchaser—Recovery of possession by—*See* CIV. PRO. CODE, 1908, s. 47, 2 Ind. Cas. 454.

See CIV. PRO. CODE, 1908, O. XXI, r. 16, s. 47, 27 C. 670.

Transfer of Briefs.

See LEGAL PRACTITIONERS—GENERAL, A.W.N. 1899, 18.

Transfer of certain Suits to Civil Courts.

See BEN. ACT III OF 1870.

Transfer of Civil Cases.

See CIV. PRO. CODE, 1908, s. 22.

See CIV. PRO. CODE, 1908, s. 24.

(1) - *Cl. 13, Letters Patent*, 1865—*Transfer-grounds of—Jurisdiction—Practice.*—The High Court has ample power to remove cases from any Court subject to its superintendence for trial, in the exercise of its extraordinary jurisdiction, whenever it thinks fit to do so for purposes of justice. That purpose is to be determined on various considerations; *e.g.*, when important or difficult questions are involved, or when the balance of convenience or cheapness of trial requires it. HARENDRA LALL ROY v. SARVAMANGALA DABEE, **24 C 183.** (10 B.L.R. 168, 2 C. 233, P.C., 20 C. 843, P.C., 15 A. 352, P.C., *R.*).

(2)—*Cl.* 13, *Letters Patent—Transfer—Grounds—Jurisdiction.*—The High Court has ample powers under cl. 13 to remove cases from any Court subject to its superintendence for trial in the exercise of its extraordinary jurisdiction, whenever it thinks fit to do so for the purposes of justice, which is to be determined upon various considerations, as for instance, when important or difficult questions are involved, or when the balance of convenience or cheapness of trial requires it. SM. SURVOMONGOLA DEBI v. HARENDRA LAL ROY, **1 C.W.N. 109.** (10 B.L.R. 168, *R.*)

(3)—*Letters Patent, High Court, cl.* 13—*Ground for transfer—Difficult questions of English law in case.*—The Court will order a suit to be removed from the mofussil, and tried in the High Court, when difficult points of English law arise, and when generally it appears to be an unfit case to be tried in the mofussil. DOUCETT v. WISE, **1 Ind. Jur. N.S. 94.**

Transfer of Civil Cases—*continued.*

(4)—*Letters Patent High Court, cl.* 13—*Ground for transfer—Questions of English law—Parties—British subjects and residents of Calcutta.*—Where a case was originally tried by a Zillah Judge, and on appeal to the High Court on its appellate side, the Judges of that Court remanded it to the Court below for a fresh trial, intimating that it was a proper case to be transferred under cl. 13 of the Letters Patent constituting the High Court; and where it appeared that questions of English law were involved in the case, that the witnesses and parties were chiefly British subjects, and the plaintiff, an officer of the High Court and resident in Calcutta, the Court ordered the case to be transferred for trial to the High Court's original jurisdiction. DOUCETT v. WISE, **1 Ind. Jur. N.S. 227.**

(5)—*Letters Patent, High Court, cl.* 13—*Power to transfer—Grounds for transfer—Inconvenience—Expense.*—The 13th section of the Letters Patent (1865) of the High Court at Fort William gives the Court power to order a suit to be transferred for trial only where the transfer is agreed on by the parties, or for the purposes of justice; and in the absence of agreement, it must be made out that there will be inconvenience amounting to this, that, if the case be tried in the Court in which it was originally laid, the trial will be unsatisfactory. The mere fact that it would be less expensive to try the case in the High Court is not sufficient of itself for the Court to act upon and order the case to be transferred. OJOODERAM KHAN v. NOBINMONEY DOSSEE, **1 Ind. Jur. N.S. 396.**

(6,—*Letters Patent, High Court, cl.* 13—*Ground for transfer—Prejudice to interests of party.*—A suit will not be removed from a Zillah Court in which it was instituted. to the ordinary original jurisdiction of the High Court, unless it be clearly shown that the interests of the party petitioning for such removal will be prejudiced by a non-removal. BORRODAILE v. GREGORY, **Bourke, Ex. O.C. 1.**

(7)—*Letters Patent, cl.* 13—*Jurisdiction of High Court.*—The words "to remove and try and determine any suit being or falling within the jurisdiction of any Court," have a wide signification. The Legislature did not mean them to be limited to any particular period or stage of the suit, conceived as a regular series of steps in procedure. After the commencement of the suit between parties, as long as the proceedings in the Court of first instance are in such a condition that one party is entitled to ask that Court to raise and judicially determine any question material to the final result of the suit, as between himself and the other party, so long is the suit in existence in the first Court and capable of being removed under cl. 13, in order that such question may be determined in the High Court. *In the matter of* THE DECREE NUMBERED SUITS 228, etc., IN THE COURT OF THE MUNSIFF OF DEBROGHUR, **7 B.L.R. 305.**

Transfer of Civil Cases—*continued.*

(8)—*Letters Patent, cl.* 13—*Transfer of suits.*—In the absence of agreement of the parties, it must be made out that there will be inconvenience amounting to this, that if the case be tried in the Court in which it was originally laid the trial will be unsatisfactory; the mere fact that it would be less expensive to try the case in the High Court is not sufficient of itself for the Court to act upon and order the case to be transferred. INHABITANTS OF MAHALINGPORE v. ANDERSON, **7 B.L.R. 452**, *Note.*

(9)—*Letters Patent, cl.* 15—*Ganjam and Vizagapatam Agency Courts Act (XXIV of* 1839)—*Suit pending in Agent's Court, High Court not competent to transfer to District Court—Agency Rule No. XXII, not* ultra vires.—An order made by a single Judge of the High Court transferring a case from the file of the Agent to that of the District Judge of Vizagapatam and an order dismissing an application for review presented thereon are both appealable as "judgments" under art. 15 of the Letters Patent. The High Courts Act has no application to the Special Courts established by Act XXIV of 1839, and it, therefore, cannot be taken to authorize the High Court to transfer suits away from the Agency Court to the District Court. Even if the above article is applicable, there is yet the question whether a District Court can be said to be a Court "of equal or superior jurisdiction" to that of an Agent under Act XXIV of 1839, so as to justify a transfer to the District Court. The reservation of appellate power to the Governor-in-Council under Agency Rule XXII framed under the powers conferred by the Act is not *ultra vires*, and, even assuming it to be otherwise, it is rendered valid by s. 25 of the Indian Councils Act (24 and 25 Vict., Cap. 67). MAHARAJAH OF JEYPORE v. PAPAYYAMMA, **23 M. 329**. [*R.*, 24 M. 345, 25 M. 555, 28 M. 42=7 Bom. L.R. 97=9 C.W.N. 257=2 A.L.J. 135; *D.*, 24 M. 358.]

(10)—*Transfer of suit—Power of District Judge—Transfer after remand—Failure to state reasons—Effect—Transfer to Judge's file—Issues—Amendment, if allowed—Commission—Examination of witness—Notice to opposite party—Necessity—Practice—Interest—Government promissory note—Interest on interest withheld.*—The mere transfer of a suit for the convenience of the public or for the accelaration of business from one subordinate Court to another does in no way affect the authority of the Judge of the District Court, either to transfer it to his own file or to another Court or to re-transfer it, if he sees sufficient cause for so doing. Nor would the circumstance that a case had been up in appeal on a preliminary point, and been remanded for a trial on the merits, limit the authority of the District Court to bring it on to his own file or to transfer it to the file of a Court other than that in which it was instituted. An omission on the part of the Judge to assign any reason for so transferring does not in any manner vitiate his proceedings. Where a Judge transfers a case to his own file, it is open to him

Transfer of Civil Cases—*continued.*

to record new issues, and to call for further evidence as if the case had been originally instituted before him, and he is at liberty to go into the whole case except upon any question upon which there had been a judicial finding. It is objectionable to issue a commission for the examination of an absent witness without notice to the opposite party even though the wording of the law admit of a commission being issued without such notice. Where the defendant received the interest on Government promissory notes for the plaintiff and retained it for his own purposes, the plaintiff was entitled to claim interest on the interest received. TARUCKNATH MOOKERJEE v. GOUREE CHURN MOOKERJRE, **3 W.R. 147**.

(11)—*Act* VIII *of* 1859, *ss.* 5, 6—*Application for transfer of case—Special powers of High Court.*—Where the defendant in a case instituted in a District Court which had jurisdiction to try it under s. 5 of Act VIII of 1859, applied to the High Court under s. 6 for transfer of the case to another district, the High Court rejected the application holding that, as no application was made to the Judge, nor was any communication made with the plaintiff with a view to transfer, it was not a fit case for the exercise of any special power by the High Court. *In the matter of* KRISTO DASS KOONDOO v. ISSUR CHUNDER CHOWDHRY, **11 W.R. 189**.

(12)—*Civ. Pro. Code*, 1882, s. 25 (=s. 24, *new Code*)—*Transfer by District Judge to himself of suit in Sub-Court—Application to High Court for transfer from District Judge—Grounds.*—Where a District Judge, on the application of the plaintiff in a suit pending before a Subordinate Judge, transferred the case to his own file, and the defendants applied to the High Court to have the same case transferred from the District Judge to some native Subordinate Judge, on the ground that the District Judge was not sufficiently acquainted with the character in which the disputed signatures were written, *held* that the application for transfer could not be granted, as to do so would be to review on order passed by the District Judge under s. 25, which the High Court is incompetent to do; and that the ground adduced for the necessity for transfer did not amount to sufficient cause, because it will be open to the defendants to call the evidence of experts. MUHAMMAD SAFDAR HUSAN v. PURAN CHAND, **20 A. 395=A.W.N. 1898, 89.** (6 A. 233, *R.*) [*Expl.*, 11 C.L.J. 218.]

(13)—*Practice—Prejudice against party—Transfer of suit—Evidence improperly admitted—Appeal.*—Where the general feeling of a district seems to be strongly against a party to a suit and if he feels that he is not likely to have a fair trial before the local Judge with that feeling in the District against him, his proper course is to petition the European Judge to remove the case into his Court, and to try it in the first instance. Where evidence which

Transfer of Civil Cases—*continued.*

ought not to have been admitted has been improperly admitted, it is the duty of the Judicial Committee who are Judges of the fact in such a case to consider whether, throwing aside such evidence, there still remains sufficient evidence to support the decrees. The improper reception of evidence is always to be deprecated, if only from its tendency to provoke an appeal. MOHURSINGH v. GHURIBA, **6 B.L.R. 495=15 W.R.P.C. 8=6 M.J. 193=2 Sar. 379.**

(14)—*Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 25—*Transfer of case—Grounds for.*—A case may be transferred from one Court to another on the ground that the petitioner apprehends that justice might not be done by the Court in which his case is pending. But it is not every apprehension of the litigant that the superior Court has to take into consideration. The apprehension must be reasonable, *i.e.*, such as a man of sound sense would regard as legitimately raising the inference of bias in the mind of the presiding Judge. SHER SINGH v. THAKAR DAS, **17 P.L.R. 1904=88 P.R. 1903.** (20 C. 857, 11 Bom. L.R. 755, 23 C. 495, 19 A. 64, 25 C. 727, *R.*).

(15) *Civ. Pro. Code*, 1882, *ss.* 20, 23—*Transfer—Grounds on which the High Court will transfer a civil case.*—An application for transfer under s. 20 of the Civ. Pro. Code cannot be allowed, where it is made solely on the ground of convenience and where no question arises as to whether or not justice is more likely to be done between the parties if the application is granted. AMJAD ALI v. HABIB ULLAH, **A.W.N. 1893, 58.**

(16)—*Transfer of case from one city to another—Balance of convenience — Sufficient cause.*—An application to transfer a case from one city to another should not be granted, where there is no balance of convenience on the side of a trial in the other city, nor are there grounds to suppose that greater justice would be done by a trial there. A plaintiff should not, without sufficient cause, be deprived of the right given him by law to select the Court in which he will sue. BOHITRAM v. CHIMUNBUX BHOWSINGHA, **8 Ind. Cas. 449.** (5 A. 60, 9 C. 980, 13 C.L.R. 182, 13 B. 178, *Appr.*)

(17)—*High Court—Transfer of suit for trial in its extraordinary original jurisdiction—Grounds of transfer.*—A suit relating to immoveable property situate beyond the High Court's ordinary original jurisdiction was ordered by the High Court to be transferred to itself and tried in its extraordinary original jurisdiction on the grounds that the parties and witnesses resided in Calcutta, that it would be cheaper to try it there and that all the parties appearing on the motion desired the transfer. PAYAN v. THE ADMINISTRATOR-GENERAL OF BENGAL, **5 C. 766=5 C.L.R. 221.**

(18)—*Transfer of case—Difficult questions of law—Insufficient ground for transfer.*—The fact that the case will involve difficult questions

Transfer of Civil Cases—*continued.*

of law is not alone a sufficient ground for the transfer of a case. MA THAW v. MCKENZIE, **8 Ind. Cas. 444.**

(19)—*Grounds of transfer--Procedure--Civ. Pro. Code, s.* 25.—Parties, who desire to have a case transferred from one forum to another, ought clearly to explain to the Court by petition and affidavit what is the nature of the claim and defence, and what the issues are ; they should state what evidence will be required, and then satisfy the Court that, either on the ground of expense or convenience or otherwise, the place of trial ought to be changed. KHATIJA BIBI v. TARUK CHANDER DUTT, **9 C. 980=13 C.L.R. 182.** [*R.*, 10 C.L.J. 414=14 C.W.N. 153.]

(20)—*Application for transfer— Civ. Pro. Code, Act* X *of* 1877, *s.* 23—*Procedure.*—The fact that a portion of the property, the whole of which is sued for in a Munsif's Court, is of less value than the remaining portion which is within the jurisdiction of another Munsif, is no sufficient ground for an application under the Civ. Pro. Code, s. 23, for a transfer to the latter Court. A party, applying under s. 23, Act X of 1877, must first of all give notice to the other side ; the application should then be received by the Munsif and transmitted to the High Court through the District Court. MUSSAMUT PURRUN JOTE v. DEON PANDAY, **2 C.L.R. 352.**

(21)—*Transfer of suil—Application for transfor by next friend of minor in the absence of guardian* ad litem—*Grounds of transfer.*—In the absence of a duly appointed guardian *ad litem*, the next friend of a minor can apply for the transfer of a partition suit from a mofussil Court to the High Court. The transfer of the suit to the Original Side of the High Court was ordered in this case, as the major portion of the property was in Calcutta and the remaining portion in the immediate vicinity of that city, and as the suit could be tried more expeditiously and cheaply in the High Court than in the mofussil, and also with a view to avoid the inconvenience of introducing a mofussil *ameen* to partition Calcutta property in the event of a decree being made. JOTENDRONATH MITTER v. RAJ KRISTO MITTER, **16 C. 771.**

(22)—*Civ. Pro. Code*, 1877, *s.* 24—*Transfer of suit to jurisdiction of different High Court.*—S. 24 of the Civ. Pro. Code does not empower a High Court to transfer a suit instituted within its jurisdiction, to the jurisdiction of another High Court, but only to declare in which Court a suit shall proceed, and to stay further proceedings within its own jurisdiction. TULA RAM v. HARJIWAN DAS, **5 A. 60=A.W.N. 1882, 164.**

(23)—*Civ. Pro. Code*, 1882, *s.* 24—*Transfer of case—High Court's power—Jurisdiction—District Judge determining question of jurisdiction after High Court had disposed of application for transfer—Return of plaint for presentation to proper Court.*—Under s. 24 of the Code of 1882, High Court is not empowered to order that a

Transfer of Civil Cases—*continued.*

suit instituted within its jurisdiction should proceed in the jurisdiction of another High Court. (5 A. 60, *F*). On an application for transfer under s. 24 of Act XIV of 1882, the High Court ordered that the case should proceed in a certain Court within its jurisdiction. The suit was accordingly heard and decided by that Court. On appeal, the District Judge held that the cause of action did not arise within the jurisdiction of the first Court, and returned the plaint for presentation to the proper Court: *Held*, that the order of the District Judge was right. **Thulsi Ram v. Shiam Sunder, 5 Ind. Cas. 588.**

(24)—*Civ.Pro.Code*, 1882, *ss.* 25,191(2)--*Settlement of issues in District Court--Suit subsequently transferred to Sub-Court by High Court – Appeal to District Court from decision of Sub-Court—Maintainability.*—A suit instituted in a District Court was transferred to a Sub-Court after the settlement of issues. From the decision of that Court, an appeal was preferred to the District Court. From the decision of the District Court, a second appeal was preferred to the High Court. *Held* that the District Judge who heard the appeal not being the Judge who settled the issues, s. 17 of the Civil Courts Act had no application and the District Court had jurisdiction to hear the appeal. *Held* also that s. 191 (2) of Act XIV of 1882 clearly contemplated the transfer of a suit under s. 25 of the same Code after it had been part heard. Consequently, the High Court had power under s. 25 of the Code to transfer a pending suit even after the settlement of issues. PALANISAMI GOWNDAN v. THONDAMA GOWNDAN, **26 M. 595**. [*R.*, 10 C.W.N. 12.]

(25)—*Transfer of appeal from one Court to another by High Court—S. 25 of the Civ. Pro. Code.*—The High Court could, under s. 25 of the Civ. Pro. Code, direct the transfer of an appeal only from a Court having jurisdiction to receive and try it. PEARY LALL MOZOOMDAR v. KOMAL KISHORE DASSIA, **6 C. 30**. [*F.*, 10 B. 274; *Appr.*, 9 A. 191=13 I.A. 134, P.C.; *Appl.*, 25 C. 39; *R.*, 2 L.B.R. 117.]

(26)—*High Court—Mamlatdar's Court.*—The High Court has jurisdiction to transfer a suit under the Mamlatdar's Court Act, from the Court of one Mamlatdar to another, BHAGWANDAS v. JEDU, **4 Bom. L.R. 970**.

(27)—*S.* 24, *Civ.Pro.Code*, 1908—*Transfer of suit—High Court—Subordinate Court—Concurrent jurisdiction—Position of Munsif's Court.*—Under s. 24 of the Code of 1908, the High Court and the District Court have concurrent jurisdiction to direct the transfer of a suit. The High Court can direct a transfer even after the application for the same purpose has been refused by the District Court. The Court of a Munsif is subordinate to the High Court within the meaning of s. 24. HARI NATH BISWAS v. DEBENDRA NATH BISWAS, **11 C.L.J. 218=5 Ind. Cas. 771.**

(28)—*District Judge—Jurisdiction—Transfer of case remanded by the High Court—Bengal and North-Western Prov. Civil Courts Act* (XII *of* 1887), *s.*22.—The District Judge has power to transfer an appeal for hearing by a Subordinate Judge,even after such appeal had been previously heard by him and has been remanded by the High Court for a fresh hearing. PRANKRISHNA SHAINI v KUNJA BEHARI DAS. **9 C.L J. 572**. (13 W.R. 574, 23 M. 314, *D* ; 21 A. 230, *Diss.*)

(29)—*Court of additional District Judge—Transfer of appeal.—Per Curiam*—The Court of an Additional District Judge is a Court under the District Judge's administrative control and the District Judge is competent to make over to the Additional District Judge an appeal which he had withdrawn from a Subordinate Judge to whose file it had at first been transferred. RAKHAL CHANDRA TEWARY v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL, **10 C.W.N. 841=8 C L.J. 34.** (9 C. W.N. 705= 32 C. 875, *commented on.*)

(30)—*S.* 24, *Civ. Pro. Code*, 1908—*Transfer of case—District Judge—Assistant Judge—Order of transfer of a claim upwards of Rs.* 10,000 *from the Court of first Class Subordinate Judge to the District Court—Order passed by Assistant Judge — Bombay Civil Courts Act* (XIV *of* 1869).—A suit, wherein the plaintiff claimed Rs. 18,197-13-0 from the defendant, was filed in the Court of the First Class Subordinate Judge at Poona. After the suit had been heard by that Judge for some days, the defendant applied to the Court of the District Judge for transfer of the suit to another Court. The District Judge transferred the application to the Assistant Judge for disposal. The latter heard the application and ordered that the suit be transferred to the District Court of Poona for trial. The plaintiff objected that this order was without jurisdiction. *Held* (1) that it appeared from the Bombay Civil Courts Act (XIV of 1869) that an Assistant Judge was not a Judge having jurisdiction co-ordinate with that of the District Judge. He was, therefore, not a Judge of the District Court, which alone had jurisdiction to transfer the case under s. 24, Civ. Pro. Code, 1908. (2) That, under s. 24 of the Code, the District Court might withdraw any suit *and* try and dispose of it. Here the suit withdrawn was for a sum exceeding the pecuniary jurisdiction of the Assistant Judge, and he therefore could not try and dispose of it. He, therefore, was not a Judge of a District Court as contemplated by the section, which must be a Court of unlimited pecuniary jurisdiction. HAJI UMAR ABDUL RAHIMAN v. GUSTADJI MANCHERJI COOPER, **12 Bom. L.R. 354 = 6 Ind. Cas. 518=34 B. 411.**

(31) *S.* 25, *Civ. Pro. Code*, 1882—*Order of transfer of a suit—Jurisdiction ta try suit in the Court from which transfer is sought, essential for.*—Plaintiff instituted this suit in the Sub-Divisional Court at M. Defendant applied to the District Court to transfer the case to the Court at T on the ground that he resided at T and also that the cause of action arose at T. The

Transfer of Civil Cases—*continued*.

District Court held that the Court at M had no jurisdiction but refused to transfer the case. *Held*, on revision, that the lower Court was right in refusing the transfer because under s. 25 of the Code, a superior Court cannot make an order of a transfer of a case unless the Court, from which the transfer is sought to be made, has jurisdiction to try it (13 I.A. 134, *F.*) and, further, an order made under s. 25 was not open to revision. J. N. NANDI v. G. N. DASS. **U.B.R. 1905, Civ. Pro. Code, 28.** (16 A. 223, 18 B. 61, *R.*)

(32)—*Bengal, N.W.P. and Assam Civil Courts Act* XII *of* 1887, *s.* 11—*Civ. Pro. Code, Act XIV of* 1882, *s.* 25—*Jurisdiction to transfer suit.*—Where a temporary Sub-Court to which a suit had been transferred from the permanent Court was abolished, and the District Judge took the case to his own file and registered it by an order as a suit in his own Court, and, after taking some proceedings in it, transferred it again to the permanent Sub-Court, *held* that under clauses 1 and 3 of s. 11 of Act XII of 1887, the Judge had jurisdiction to make the transfer. S. 25 of the Civ. Pro. Code did not apply to the case. GAPPU LAL v. MATHURA DAS, **25 A. 183=A. W.N. 1903, 4.** (24 A. 304, 13 B. 654, *D.*)

(33)—*Civ.Pro.Code*, 1882, *s.* 25—*Suit pending on file of District Court—Transfer—Jurisdiction.* S. 25 of the Civ. Pro. Code (1882), only enables a District Court to transfer a suit pending in a Court of first instance subordinate to itself, and not to transfer a suit which is pending in its own Court. A certain suit having been transferred from the Court of a Subordinate Judge to the District Court, was pending in the latter Court, when the defendant made an application to have the suit re-transferred to the Court of the Subordinate Judge. The District Judge granted the application. On appeal to the High Court, *held*, that the order of re-transfer must be discharged as having been made without jurisdiction. SAKHARAM v. GANGARAM, **13 B. 654.** [*F.*, 24 A. 304, 10 C.W.N. 902; *R.*, 32 C. 875=9 C.W.N. 705, 5 C.L.J. 611=36 C. 193=1 Ind. Cas. 913; *D.*, 5 A. 183.]

(34)—*S.* 25, *Civ.Pro.Code*, 1882—*Transfer, by District Judge, of case heard by him to Additional Judge, validity of—Jurisdiction of Additional Judge to hear the case — Civil Courts Act* (XII *of* 1887), *s.* 21 —'*Functions*,' *assignment of his, by District Judge*, — A District Judge heard an appeal and, after the conclusion of the argument, reserved judgment. Subsequently, the appellant presented a petition to the District Judge asking that an amin—not the one sent by the lower Court—might be sent to the locality in dispute for a fresh local investigation. An amin was then appointed, who held a local investigation and submitted a report. Several months after, the District Judge transferred the case to the Additional District Judge for disposal. The latter Officer heard the appeal and delivered judgment nearly a year later. The chief point that was urged in the High Court, on appellant's behalf, was that the District Judge had no jurisdiction to transfer the case for trial to the Additional District Judge, especially at the stage he did. *Held*, a District Judge has no inherent power to transfer a case either from his own file or from the file of an Officer under his administrative control. The power must be one conferred by the statute. Under s. 25, he is entitled to transfer a case, pending in a Court subordinate to him, to his own Court, but not to transfer a case pending in his own Court to some other Court subordinate to him. Nor does the Civil Courts Act entitle him to assign any particular case pending before him to an Additional Judge for disposal. He is authorized, under s. 21 of the Act, to assign to the Additional Judge the 'function' of receiving appeals. And he may perhaps assign to him the function of hearing any particular class of cases. But he cannot transfer a case which has been heard by him. Further, under the circumstances of the case, when fresh materials were afforded by the second amin's investigation, the District Judge should have determined the appeal one way or the other. Consequently, the order of transfer and the judgment of the Additional Judge were without jurisdiction. The result was that the judgment of the Additional Judge was set aside and the case remanded to the District Judge for being heard and decided by him, according to law. BIDYAMOYEE DEBYA CHOWDHRANI v. MAHARAJA SURYA KHANT ACHARYA BAHADUR, **9 C.W.N. 705=32 C. 875.** (13 B. 655, 13 W.R. 398, 23 W.R. 15 C. 177, 23 M. 314, 21 A. 230, *R.*) [*R.*, 10 C.W.N. 12; *Commented on*, 10 C.W.N. 841; *D.*, 8 C.L.J. 34; *Expl. and D.*, 36 C. 193=5 C.L.J. 611.].

(35)—*Civ. Pro. Code*, 1882, *ss.* 25, 582—*Transfer of appeals—Power of appellate Courts.*—A District Court having heard an appeal in part and remanded issues for trial, it cannot transfer the appeal to the Subordinate Court. CHINNATHAYAMMAL v. CHIKKANNA CHETTY, **8 M.L.T. 347=8 Ind. Cas. 492.** (23 M. 314, *F.*)

(36)—*District Judge—Transfer of part heard appeal to Sub-Judge—Jurisdiction.*—A District Judge is not authorized to transfer to the Subordinate Judge an appeal which has been part heard by the District Judge. VENKATARAMANA BHATTA v. BADARAYAN BHATTA, **11 M.L.J. 433.** (23 M. 14, *R.*)

(37)—*Appeal—Power of District Judge to transfer part heard appeal to Sub-Judge—Legality of disposal of appeal by Sub-Judge.*—A District Judge not having jurisdiction to transfer a part-heard appeal pending before him to a Subordinate Judge, the latter has no jurisdiction to hear the appeal so transferred and pass judgment therein. SRIRAMAMOORTHY CHETTY v. PANDARA GOUNDEN, **12 M.L.J. 117.**

(38)—*Transfer of suit by High Court to District Judge for trial—District Judge bound to dispose of suit himself.*—Where under the orders of the High Court, the trial of a suit is transferred from the Court of a Subordinate Judge

Transfer of Civil Cases—*continued.*

to that of a District Judge, it is the duty of the latter to obey the law and the orders of the High Court by himself disposing of the case transferred to him. Consequently, any order by the District Judge sending the case back to the Court of the Subordinate Judge would be illegal as *ultra vires* and could confer no jurisdiction on the latter. FATIMA BIBI v. ABDUL MAJID, **14 A. 531=A.W.N. 1892, 164.** [*R.*, 26 A. 623=A.W.N. 1904, 146.]

(39)—*Civ. Pro. Code*, 1882, *s.* 25—*Power of District Court to transfer to Subordinate Court—Suit remanded to it by High Court.*—Under s. 25 of the Code, a District Judge was not entitled to transfer a suit pending before him to a Subordinate Court even before the trial had commenced. A District Judge having dismissed a suit as barred by limitation, the High Court on appeal set aside the finding and remanded the suit for trial by the District Judge. The latter referred certain matters to a Commissioner and, on receipt of the Commissioner's report, transferred the suit to the Subordinate Judge for disposal. The Subordinate Judge tried the case, and a first appeal having been preferred to the District Judge, the suit came on before the High Court on second appeal. *Held* that these proceedings were throughout most irregular. The effect of the irregular procedure was that, while the High Court decided one issue as a Court of first appeal and was able to interfere on points of fact as well as of law, it was now called upon to decide the remaining issue in second appeal. Everything that had been done in connection with the trial of the suit from the time that the report of the Commissioner was submitted to the District Judge was null and void as having been done without jurisdiction. RAMANNA v. SITAMMA, **10 M.L.J. 238.**

(40)—*Civ. Pro. Code, ss.* 25, 562—*Suit transferred from Subordinate Court to District Judge's file—Remand to District Judge by High Court on appeal—Suit not transferable again by District Judge to Subordinate Court.*—When a case is remanded under s. 562 of the Civ. Pro. Code, that section provides that the remand shall be to the Court against whose order the appeal was made. It then is the duty of that Court to re-admit the suit and proceed to hear it on the merits. There is no power given to the Judge to transfer the case to any other Court. Even assuming that s. 25 of the Civ. Pro. Code is applicable to a case remanded under s. 562 (which it is not), there is nothing in that section to empower a District Judge to whom the High Court has, on appeal, remanded a case, to re-transfer such suit, after the remand order, to the Subordinate Court from which he had originally got it transferred to his own file. The District Judge's power of transfer under s. 25 had been exhausted when the suit was originally withdrawn from the file of the Subordinate Court. SITA RAM v. NAUNI DULAIYA, **21 A. 230=A.W.N. 1899, 38.** [*Diss.*, 12 C.W.N. cxxxi, 9 C.L.J. 572; *Appr.*, 24 A. 304; *R.*, 5 C.L.J. 311, 32 C. 875=9 C.W.N. 705, 36 C. 193.]

Transfer of Civil Cases—*continued.*

(41)—*Ss.* 25 *and* 562, *Civ. Pro. Code*, 1882—*Jurisdiction, question of, if may be taken for the first time in appeal—Re-transfer of case withdrawn by District Judge after remand—Code, if exhaustive—Court, inherent powers of—Court, duty of, to set right wrong done to suitor—Jurisdiction, what constitutes—Jurisdiction, waiver of, by consent or conduct.*—An objection that a Court has no jurisdiction to adjudicate upon a matter, raises a question of jurisdiction, and, as such, it may be allowed to be taken for the first time in appeal, although it was not suggested at any earlier stage of the proceedings. When once a District Judge withdraws a suit to his own file for trial, he is not competent, under s. 25 of the Code of Civil Procedure, to re-transfer it to the Court from which the case had been withdrawn, but, he has inherent power to do so, when the interests of justice require it. (10 C.W.N. 902, 13 B. 654, 24 A. 304, 24 A. 356, *R.*) *Quære*: Whether s. 25 of the Code of Civil Procedure has application to a case remanded under s. 562 of the Code. (21 A. 230, *R.*) The Code of Civil Procedure was not intended to be, and is not, exhaustive. (3 C.L.J. 29, 3 C.L.J. 67=33 C. 957, *R.*) The Courts in this country have, in matters of procedure, powers beyond those which are expressly given by the Code of Civil Procedure, which binds Courts only in so far as it goes; the powers of the Court are not rigidly circumscribed by the provisions of the Code, and the Court has inherent power to make a particular order, which is essential in the interests of justice, even where no section of the Code can be pointed out as a direct authority for it, when its decision is based on sound general principles and is not in conflict with them, or the intention of the Legislature (4 C.L.J. 306 =33 C. 1094, *R.*; 32 C. 875, *Expl. and D.*) To proceed to recall and cancel an invalid order is not simply permitted to, but it is the duty of, a Judge who should always be vigilant not to allow the act of the Court itself to do wrong to the suitor. (14 M.I.A. 40, 2 C.L.J. 306, *R.*) Jurisdiction is the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation thereto. (2 C.L.J. 241=33 C. 68, *R.*) It is only when a Judge or Court has no jurisdiction over the subject-matter of the proceeding or action in which an order is made or a judgment rendered, that such order or judgment is wholly void, and that the maxim applies that consent cannot give jurisdiction; in all other cases, the objection to the exercise of the jurisdiction may be waived, and is waived, when not taken at the time the exercise of the jurisdiction is first claimed. (13 I.A. 134=9 A. 191, 14 I.A. 160=11 M. 26, 2 C.L.J. 259=33 C. 352, 11 B. 153, 2 C.L.J. 384=9 C.W.N. 956, *R.*) GURDEO SINGH v. CHANDRIKAH SINGH, and CHANDRIKAH SINGH v. RASH BEHARY SINGH, **5 C.L.J. 611=36 C. 193=1 Ind. Cas. 913.** [*F.*, 10 C.L.J. 91=1 Ind. Cas. 677; *R.*, 7 C.L.J. 152, 6 C.L.J. 320, F.B.=11 C.W.N. 1011=35 C. 61; *D.*, 6 C.L.J. 547=12 C.W.N. 590.]

(42)—*Ss.* 25, 191 (2), *Civ. Pro. Code*, 1882—

Transfer of Civil Cases—*continued.*

Transfer by Dt. Judge to his own file of case partly heard by Subordinate Judge—Jurisdiction.—A Dt. Judge has jurisdiction, under s. 25 and s. 191, sub-s. (2) of the Code, to transfer, to his own file, a case pending in the Court of a Subordinate Judge, which the latter has already heard in part. MAHADEO PRASAD SAHU v GAJADHAR PERSAD SAHA, **10 C.W.N. 12.** (15 C. 177, 26 M. 595, 9 C.W.N. 705, *R.*)

(43)—*Jurisdiction—Prosecution for false evidence—Crim. Pro. Code, s.* 169—*False statements to be specified Charge—Evidence—Act VIII of* 1859, *s* 6—*Transfer of part heard case.*—There is nothing in s. 169 of the Code of Criminal Procedure which gives a Judge, not sitting in appeal, any original jurisdiction to entertain a charge of giving false evidence before another Court. The only Court that can direct a prosecution for false evidence is the Court before which such evidence is given. A prosecution for false evidence must be on some specific charge of making some particular and specific false statements; and there must be some direct and distinct evidence that each specific statement is false. It is doubtful whether a case can be transferred from one Court to another under s. 6, Act VIII of 1859, after evidence has actually been taken in the former Court. RANEE ASMEDH KOONWAR v. MR. W. TAYLOR, **W. R. 1864, 14.** [*R.*, 13 W.R. 398.]

(44)—*Purchase of decree,* benamee *for one of the judgment-debtors— Fraud— Collusion — Remedy— Subordinate Judge— Jurisdiction— Act* VI *of* 1871.—The purchase of a decree by one of the judgment-debtors has the effect of extinguishing the whole debt, and if, to avoid this effect, he effects the purchase *benamee* in the name of his wife, he commits a fraud upon the other judgment-debtors by keeping alive his, as also the other judgment-debtors' liability under the decree. In a suit to establish the husband's purchase against the wife, the latter cannot succeed on the plea of fraud committed by the husband, as she was herself a party to the fraud, and as the recognition of the husband's purchase would expose the fraud, and afford the only means of doing justice to the other judgment-debtors who were the parties really defrauded by the result of the execution proceedings instituted by the wife as purchaser of the decree. If the subject-matter of a suit is below Rs. 1,000, a Subordinate Judge may send it for trial to the Munsif, or may try it himself as he has jurisdiction to hear suits of any value under s. 19 of Act VI of 1871. SUFEEOLLAH SIRCAR v. BEGUM BIBEE, **25 W R. 219.** [*Appr.*, 7 A. 230=A.W.N. 1885, 1.]

(45)—*Transfer of suits from one Sudder Court's jurisdiction to another—Civ. Pro. Code,* 1859, *s.* 13.—Although s. 13 of the Civ. Pro. Code, 1859, empowers a Sudder Court to give authority to a Subordinate Court, with the concurrence of another Sudder Court to proceed with a suit for immoveable property, situate in districts within the jurisdiction of both, there is no power given by the Act authorizing a

Transfer of Civil Cases—*continued.*

Sudder Court to transfer a suit brought in a Court subordinate to it, to a Court subordinate to another Sudder Court. *Quære*—Have two Sudder Courts acting in concurrence power to make such a transfer? STUART SKINNER *alias* NAWAB MIRZA v. WILLIAM ORDE, **2 A. 241, P.C.=4 C.L.R. 331=6 I.A. 126=4 Sar. 31.**

(46)—*Civ. Pro. Code, Act VIII of* 1859, *ss.* 5, 6—*Jurisdiction—Transfer of suits—Powers of Courts.*—The defendant who had been sued in the Court of the Principal Sudder Ameen of M, had a suit against the plaintiff on the same cause of action pending in the Court of the Munsif of C. The Sudder Court directed that both suits should be tried by the Principal Sudder Ameen of M. On the disposal of the present suit on the merits, the Judge on appeal reversed his decree for want of jurisdiction. *Held* that, on the assumption that both suits were properly cognizable at C, the practical effect of the order of the Sudder Court was to transfer both suits from C to M by giving jurisdiction to the P.S A. at the latter place to try both; and that the Sudder Court was competent under the Civ. Pro. Code, s. 6, to transfer the cognizance of any suit from any one to any other Subordinate Court competent in respect of its value to try it. RAM BUX v. GIRDHAREE LALL, **1 Agra 178.**

(47)—*Jurisdiction—Transfer of cases—District Court—Small Cause Court.*—District Courts and Small Cause Courts have no jurisdiction to transfer cases from one to the other, Where a suit lies in the Small Cause Court, the District Court must return a plaint wrongly presented to it for presentation in the proper Court. And in a suit in which the Small Cause Court had already refused jurisdiction, the proper course for the District Court to take would be to refer the point to the Chief Court. SUNT LALL v. RAGHUNATH RAE, **74 P. R. 1868.** [*F.*, 172 P.R. 1888.]

(48)—*Transfer of Ssmall Cause suit.*—A suit within the cognizance of a Court of Small Causes cannot be lawfully transferred for trial to the Court of the Munsif; and, if any necessity existed for the transfer, the suit will have to be transferred to another Court of Small Causes, JOBRAJ CHOWKEEDAR v. MISS WHELAN, **13 W.R. 399.**

(49)—*Provincial Small Cause Courts Act* (IX *of* 1887), *s.* 25—*Suit filed on original side—Subsequent investment with Small Cause powers—Power to transfer suit to Small Cause side.*—A suit filed on the original side of a Court cannot be transferred by the Court to the Small Cause side on its being invested with Small Cause powers subsequent to the filing of the suit. SANKARACHARIAR v. MURUGESA MUDALIAR, **13 M.L J. 438.**

(50)—*Civ. Pro. Code,* 1882, *s.* 25—*Transfer of case.*—*Held*, that a District Judge has power under s. 25, Civ. Pro. Code, to transfer a case remanded by the Chief Court for the determination of issues to a Small Cause Court, from

Transfer of Civil Cases—*continued.*

that Court to the Court of Subordinate Judge, when the Judge of the Small Cause Court who originally tried the suit has been replaced by a Judge whose pecuniary jurisdiction does not extend to the value of the suit. BARU v. KIRPA RAM, **69 P.R. 1899.**

(51)—*Civ. Pro. Code (Act* XIV *of* 1882), *s.* 25—*Transfer of case from Civil Court exercising Small Cause Court powers—Appeal.*—A plaint in a suit cognizable by a Small Cause Court was presented to the District Judge, with a note that the *Munsif* invested with the powers of a Small Cause Court, who should try the case, was related to one of the parties, and it should be sent to another *Munsif*. The case was sent to a *Munsif*, who was not invested with Small Cause Court powers. Against the decision of the *Munsif*, appeal was heard by the District Judge. It was contended in the Chief Court that the decree passed by the *Munsif* was not appealable, as under s. 25 of the Civ. Pro. Code the *Munsif* who tried the case acted *qua* the case as a Small Cause Court. *Held*, that the contention was right. RALLIA RAM v. GOKAL CHAND, **154 P.L.R. 1903=83 P.R. 1903.** (23 B. 382, *Diss.*; 13 A. 324, 5 A. 274, 80 P.R. 1887, 74 P.R. 1896, 58 P.R. 1897, *R.*) [*R.*, 121 P.R. 1907=51 P.W.R. 1907.]

(52)—*District Munsif, not competent to transfer Small Cause suit to regular side.*—A District Munsif, is not, of his own accord or on the representation of the parties, competent to transfer a small cause suit to the regular side of the Court, even though it appears that the ends of justice will be better met by such transfer. BODI RAMAYYA v. PERMA JANAKIRAMUDU, **5 M.H.C. 172.**

(53)—*Civ. Pro. Code* (XIV *of* 1882), *s.* 25—*Jurisdiction of High Court, Appellate side, to transfer suit from Court of Small Causes at Calcutta.*—The High Court, in the exercise of its appellate jurisdiction, has power to transfer any suit or appeal from any Court which may be subject to its appellate jurisdiction, including the Presidency Small Cause Court, to any other Court, having equal or superior jurisdiction. The section extends to suits or proceedings in the Court of Small Causes at Calcutta. KADAMBINI BAIJI v. MADAN MOHAN BASAK, **3 C.W.N. 247.** [*D.*, 29 C. 498.]

(54)—*Provincial Small Cause Courts Act* (IX *of* 1887), *s.* 35, *cl.* 1—*Civ. Pro. Code*, 1882, s. 25 (=*s.* 24, *new Code*)—*Suit pending under Subordinate Judge invested with Small Cause powers—Transfer of suit to Munsif's Court.*—S. 35 of Act IX of 1887, must be read in the same sense as the concluding paragraph of s. 25, Civ.Pro. Code. Therefore, when, by reason of a Small Cause Court ceasing to exist, a suit is transferred to another Court, the proceedings still continue to be Small Cause Court proceedings, and, for this purpose, the Court to which the transfer is made must be treated as if it was a Court of Small Causes having jurisdiction to hear the suit transferred to it. A suit was filed as a Small Cause suit in the Court of a Subordinate Judge invested with Small Cause powers. While the suit was pending, the Judge went on leave, and the Judge who was appointed to officiate for him had no Small Cause powers conferred on him. The District Judge made an order transferring this suit along with some others to the Court of the Munsif of the place, to be tried as a Munsif's case. The Munsif had Small Cause powers only up to Rs. 50, while the suit was for Rs. 69. The case was tried and decided by the Munsif, and the plaintiff appealed against his decree to the District Judge who transferred it to the same Subordinate Court where it was originally filed. *Held*, assuming that the suit was a Small Cause suit, that it would remain so throughout and be subject to the incidents of such suit, whether s. 25, Civ. Pro. Code, or s. 35 of Act IX of 1887, was applicable. MANGAL SEN v. RUP CHAND, **13 A. 324=A.W.N. 1891, 96.** [*Diss.*, 23 B. 382, 6 O.C. 81, 31 C. 1057; *F.*, 2 O.C. 143, 154 P.L.R. 1903=83 P.R. 1903.]

(55)—*Application to set aside* ex parte *decree—Transfer of jurisdiction—Small Cause powers—Madras Act* IV *of* 1863, *ss.* 4, 5.—An *ex parte* decree was passed by the District Munsif of M in February 1870. On the 14th March following, the defendants preferred an application to the Munsif praying that the decree may be set aside under s. 119 of the Civ. Pro. Code. On the 3rd March 1870, the Madras Government issued a Notification under ss. 4 and 5 of Madras Act IV of 1863 investing the additional Principal Sadr Amin of M with exclusive special jurisdiction to try Small Cause suits for sums below 500 Rupees within the jurisdiction of District Munsif. Under orders from the Civil Judge, the District Munsif sent to the Additional Principal Sadr Amin the records of all suits cognizable by a Court of Small Causes if one had been in existence at the date of their institution, although they had been filed before the Notification. The above mentioned application to set aside the *ex parte* decree was sent along with other records. *Held*, that the Principal Sadar Amin had no jurisdiction to entertain the application. NARAYANA MALYA v. GOVIND SHETTY, **6 M.H.C. 18.** [*F.*, 6 M.H.C. 191.]

(56)—*Act* XVI *of* 1868—*Transfer of execution proceedings—Jurisdiction.*—A Judge has no authority under Act XVI of 1868 to order the trial by a Subordinate Judge of proceedings in execution of a decree which are a portion of the original Civil suit tried by himself. MOONSHEE AFTABOODDEEN AHMED v. MOHINEE MOHUN DOSS, **15 W.R. 48.**

(57)—*Civ. Pro. Code*, 1882, s. 25—*Applicability of, to execution proceedings—Application for declaration of insolvency, transferable under s.* 25—*Right of opposing creditor to move for transfer.*—Under the combined effect of s. 25 and s. 647, execution proceedings may be transferred for sufficient cause from one Court to another. An application to be declared an insolvent under the Civ. Pro. Code, is a proceeding in execution; it is, therefore, a proceeding

Transfer of Civil Cases—*continued.*

in a suit, and as such can be made the subject of an order under s. 25 of the Civ. Pro. Code. A creditor who has been served with notice of the insolvency petition and whose name is entered on the record as an opposing creditor, is a party within the meaning of s. 25 of the Civ. Pro. Code and may apply for a transfer of the proceedings. NASSERVANJI v. KHARSEDJI, **22 B. 778.** [*D.*, 10 O. C. 139.]

(58)—*Civ. Pro. Code*, 1882, s. 25—*Transfer of execution proceedings*—*Act* VI *of* 1892, *s.* 4—"*Suit*", *meaning of, in s.* 25, *Civ. Pro. Code*—*Jurisdiction*—The pecuniary jurisdiction of the Munsif who passed a decree in favour of the applicant in a suit, the value of the subject-matter of which was Rs.1,690, and before whom execution proceedings were instituted, extended to all suits of value not exceeding Rs.2,000. He was succeeded, pending the said proceedings, by another Munsif whose pecuniary jurisdiction was limited to suits of value not exceeding Rs. 1,000. *Held*, that s. 25, Civ. Pro. Code, applies of its own force to execution proceedings; and that proceedings in execution, whether pending in a Court of first instance, or in a Court of appeal, may be withdrawn or transferred under the provisions of that section. *Held*, further, that the fact that the execution proceedings which were properly instituted before the Munsif who had pecuniary jurisdiction to deal with them were pending when he was succeeded by another Munsif whose pecuniary jurisdiction was limited to Rs. 1,000, would not prevent an order of transfer being made under s. 25, Civil Procedure Code. MAN SINGH v. JANG BAHADUR, **1 O.C. 117.**

(59)—*Appeal*—*Remand to District Judge for local enquiry*—*Transfer by District Judge to Sub-Judge*—*Execution of decree*—*Transfer by District Judge from his own file*—*Jurisdiction*—*Act* XVI *of* 1868, *s.* 19—*Act* VIII *of* 1859, *s.* 362.—Where a case has been previously heard by the High Court in appeal from an order passed by the District Judge, and that order having been found to be erroneous, the High Court directed him to make a local inquiry for the purpose of ascertaining the amount of the mesne profits due to the decree-holder, it is the duty of the Judge to take up the case and dispose of it himself, in accordance with the instructions contained in the order of the High Court, and not to transfer it to a subordinate tribunal. Looking at the terms of s. 19 of Act XVI of 1868, and reading them with the provisions of s. 362 of Act VIII of 1859, it appears that it was not the intention of the Legislature to enable a District Judge to transfer from his own file cases of execution of decrees which had been passed by his Court, to the file of the Subordinate Judge for disposal, even though the sanction of the High Court is obtained for the transfer, inasmuch as that sanction cannot give jurisdiction in such a case to the Subordinate Judge. CHOWDHRY HAMEDOOLLAH v. MUTEEOONISSA BIBEE, **15 W.R. 574.** [*D.*, 9 C.L.J. 572.]

Transfer of Civil Cases—*continued.*

(60)—*Attachment*—*Lease pending attachment*—*Transfer of decree.*—A lease of property pending attachment in execution of a decree is invalid, and the lessee cannot, in a suit by the auction-purchaser for possession of the property, be allowed to contend for the first time in appeal, that the transfer of the decree from the Court which passed it to the Court which made the attachment, was irregular, when no such allegation was made in the written statement. MUSST. BIBEE HOSSEINA v. JHAMUN SINGH, **25 W.R. 323.**

(61)—*S.* 24, *O.* XXXIX, *r.* 2, *cl.* 3, *Civ. Pro. Code*, 1908—*Application to District Munsif for disobedience of* ad interim *injunction*—*Transfer of application by District Judge*—*Jurisdiction*—*Extent of powers of transfer under s.* 24—*Notice of transfer to party.*—An interlocutory application pending before the District Munsif to punish the defendant for disobedience of an *ad interim* injunction granted by the Munsif connot be transferred from his file to the file of some other Court by the District Judge or the High Court. S. 24 of the C.P.C., does not apply to such cases. When the District Judge transfers a case under s. 24, on the application of a party, he should, before passing the order of transfer, give notice to the opposite party. If, however, the applicant invites the District Judge to transfer the case of his own motion, and the Judge orders the transfer without giving notice to the opposite party, the order of transfer is not liable to be set aside on the mere ground of want of notice, the irregularity not being material but only a defect of form. BELLARY PRESS CO., LTD. v. VENKATA ROW, **8 M.L.T. 374=8 Ind. Cas. 7.** (20 M, 378, *R.*)

(62)—*Act* VIII *of* 1859, *s.* 6—*Power of Zillah Judge*—*Bond under seal*—*Consideration*—Purdahnusheen—*Burden of proof.*—The powers given to the Zillah Judge by s. 6 of the Civ. Pro. Code, for the withdrawal of suits from subordinate Courts when the Judge sees sufficient cause for so doing, should be exercised only upon cause shown, and not without opportunity given to the parties to suit to be heard upon the question. Further, the terms of the section are inapplicable to a suit which the subordinate Court has received by an order of remand from a Court to which the District Court is itself subordinate. But where the suit, although in form remanded by the High Court to the Subordinate Court, was in substance, as the order of the Privy Council shows, a new suit—as the direction therein given allowed the plaintiff to amend his plaint and the defendant was permitted to make any defence, and as, in accordance with these directions, an amended plaint and a further written statement were filed and fresh issues were framed. *Held* that, under these circumstances, the Judge was justified in regarding this as a new suit, and any irregularity in its transfer to his own Court must be regarded as waived by the subsequent proceedings of the parties themselves. A bond made under seal does not in India of

Transfer of Civil Cases—*continued.*

itself import that there has been sufficient consideration, and where the bond was given by a *purdahnusheen*, an aged woman, to the plaintiff, a relation under whose influence she was, and who, in his dealings, exercised an undue influence over her proceedings, the burden of proving payment of consideration should be cast on the plaintiff who comes into Court to enforce the bond. MAHOMED ZAHOOR ALIKHAN v. THAKOORANEE RUTTA KUNWOOR, **2 N.W.P. 481.**

(63)—*Case on the file of the District Court, application to High Court for transfer and trial of, in its extraordinary original jurisdiction—Application to be made to Judge on original side.*—An application to the High Court praying for the removal of a case from the file of a District Court and for the trial of it by the High Court in its extraordinary original jurisdiction, is to be made to a Judge sitting on the original side of the High Court who would determine whether the case was one that should be called up from the District Court or not. Such an application should not be made to Judges sitting on the appellate side of the Court who have no authority to pass orders under s 13 of the Charter. THOMAS ROBERT DOUCETT v. JOSIAH PATRICK WISE, **4 W.R. Mis. 7.** [*R*, 22 M.L.J. 187=11 M.L.T. 159=1912 M.W.N. 150.]

(64)—*Transfer of a batch of suits—Separate application necessary in respect of each suit.*—The defendants in this case objected that a separate application for the transfer ought to have been put in with respect to each of the plaintiff's suits, which were in no way connected with each other; and, accepting this objection as valid, the High Court rejected the present application of the plaintiffs for obtaining the transfer of the several suits together. KISHOREE LAL v. LUCHMUN DOSS, **2 N.W.P. 147.**

(65)—*Transfer of suit--Civ. Pro. Code, s.* 647.--Under the provisions of s. 647 of the Civ. Pro. Code, a claim registered as a suit may, for sufficient cause, be transferred by a superior Court to a Subordinate Court for trial. SITHALAKSHMI v. VYTHILINGA, **8 M. 548, F.B.**

(66—*Institution of suit in wrong Court—Transfer to proper Court—Civ. Pro. Code*, 1877, *s.* 25--*Act* XV *of* 1859 (*Patent Act*), *s* 22.--Where a suit instituted in a Court which, but for some special law (as for instance, s. 22 of Act XV of 1859) would have jurisdiction under the Civ. Pro. Code, to entertain it, is transferred, by consent of parties, to the proper Court, the error in the original institution of the suit would be cured and the suit may be regarded as instituted in the proper Court to which it has been transferred. PEAMAN v. BULL, **5 A. 371=A.W.N. 1883, 62.**

(67)—*Ss.* 25, 28, 492 *and* 493--*Civ. Pro. Code*, 1882—*Injunction—Suit for—Temporary injunction—Appeal—Transfer of suit—Re-transfer.*—The plaintiff, a share-holder in a Brewery Company, Limited, sued in the District Court of Rawalpindi, three out of the four Directors

Transfer of Civil Cases—*continued.*

of the Company, in their individual capacity and the Head Brewer, for an injunction to restrain the defendants from entering into certain transactions by way of purchase, or agreement to purchase, a certain business, or to invest money of the Company amounting to 2 or 3 lakhs of rupees in shares of the said business, when formed into a limited liability Company, and from disposing of the money or funds of the Company in pursuance of such transaction. A declaration that these transactions were *ultra vires* and not binding on the Company or its share-holders was also prayed for. Pending the hearing of the suit, the counsel for the plaintiff obtained an *ad interim* injunction from Court to restrain the defendants from further proceeding in the matter. The defendants appealed to the Chief Court against the grant of the temporary injunction. On the date fixed for the hearing of the appeal, it was seemingly agreed to, by the counsel of the parties, on the suggestion of the Court, that the original suit should be transferred to the Chief Court, so that the motion for the temporary injunction should be treated as the hearing of the suit, and the matter could be decided once for all by the Chief Court. The suit was accordingly transferred to the Chief Court. On the date of hearing of the case, the counsel did not agree to the hearing of the appeal and the suit together, as was suggested by Court; and the Court decided to deal with each separately, and in the ordinary course to dispose of the appeal in the first instance. It was contended for the appellants that the order granting the temporary injunction was bad in law, for, (1) it was passed without any affidavits and without the Court satisfying itself as to the correctness or otherwise of the facts put forward in the plaint, (2) notice should have been issued to the appellants against the grant of the injunction, and (3) the Company not being made a party to the suit, and the three Directors of the Company being impleaded as defendants in their individual capacity and not as Directors, the grant of injunction would be entirely futile. *Held* the contentions were valid. The appeal of the Head Brewer was granted on the ground that, in the capacity of a Head Brewer, he had, or could have had nothing to do with the transactions in question. The suit was retransferred to the District Court of Rawalpindi; for, the object of its transfer to the Chief Court was not attained. In the case of a suit for an injunction, it is practically impossible to grant a temporary injunction, without, to some extent, forming an opinion on the merits of the case, since it is the duty of the Judge to satisfy himself that the plaintiff has made out a *prima facie* case. E. W. PARKER v. KHAN BAHADUR SETH DHANJI ROY, **53 P.L.R. 1907.**

(68)—*Transfer of suit--Trial—Decision on evidence taken by previous Court—Civ. Pro. Code, s.* 25—Where a District Judge transferred to his own file from a Subordinate Judge, a suit of which

Transfer of Civil Cases—*continued.*

the trial was commenced, and in which evidence had been taken by the latter, and decided it on such evidence, the decision was liable to be set aside, as he could not be said to have *tried* the case. BANDHU NAIK v. LAKHI KUAR, **7 A. 342 = A.W.N. 1885, 33.** [*Expl.*, 23 M. 314 = 10 M.L.J. 51 ; *R.*, 8 C.P.L.R. 86.]

(69) – *Transfer of suit by Judge to his own file - Evidence to be taken de novo* – This suit was filed originally before the Principal Sudder Ameen, who fixed the issues and recorded the evidence of the witnesses. Before, however, the case was decided, the Judge transferred it to his own file, and, without examining the witnesses, contented himself with the evidence as recorded by the Principal Sudder Ameen. The High Court observed that this mode of proceeding was objectionable, and that, as the Judge's Court was the Court of original jurisdiction, it ought to have had the witnesses before it, and taken their evidence *de novo*. MUSSAMUT UNNOPOORNA v. HURBULLUB SING, **6 W. R. 465.**

(70)—*Civ. Pro. Code*, 1882, *ss.* 25, 483—*Conditional order of attachment—Transfer of suit—Power of Court to deal with attachment.* —Where a conditional order of attachment, before judgment, of certain property within its jurisdiction, is passed by a Court, and before the final order is passed, the suit is transferred to another Court, the Court to which it is transferred acquires by implication jurisdiction to pass further orders regarding the attachment. ARUNACHALA NADAN v. KANDASAMI PILLAI, **6 Ind. Cas. 746 = 20 M.L.J. 980.**

(71)—*Case withdrawn by Judge from lower Court—Reference to arbitration in lower Court—Judge competent to decide without reference to arbitration.*—Defendant appealing specially urged that the lower appellate Court was wrong in having decided a case which had already been referred to arbitration. This plea was *held* by the High Court to be untenable. The Judge had withdrawn the case from the Court of the Principal Sudder Ameen before decision for trial in his own Court. The case having thus come before him, it was quite competent for him to decide it himself and he was not necessarily bound also to refer it to arbitration. ABOO MAHOMED v. KISHEN MOHUN SURMAH, **6 W.R. 290.**

(72)—*Civ. Pro. Code*, *s.* 25—*Application to transfer suit—Rejection with costs—Appeal.*—There is no appeal given by law from an order passed under s. 25 of the Code. AJODHA PRASAD v. RAMSARUP, **A.W.N. 1883, 88.**

(73)—*Civ. Pro. Code*, *ss* 25, 622—*Transfer of suit—Revision.*—Where the decree in a suit would be appealable, an order under s. 25, Civ. Pro. Code, transferring such suit, is not subject to revision by the High Court. FARID AHMED v. DULARI BIBI, **6 A. 233 = A.W.N. 1884, 45.** [*Diss.*, 14 C. 768 ; *Appr.*, 20 A. 395 ; *R.*, 19 A.W.N. 210, 22 P.L.R. 1900, 76 P.R. 1903 = 170 P.L.R. 1903.]

Transfer of Civil Cases—*continued.*

(74)—*Transfer of case from undefended to defended board—Practice.*—The costs of the transfer of a case from the undefended to the defended board must be borne by the party making the application. BINDOO MADHUB MITTER v. WOOMES CHUNDER PAUL, **2 Hyde, 86.** *See also* BHOYRUB CHUNDER DOSS v. CHUNDI CHURN MITTER, **Bourke 238.**

(75)—*Suit for money secured by mortgage of immoveable property situate partly in the Family Domains of the Maharaja of Benares—Act* VIII *of* 1859 (*Civ. Pro. Code*), *s.* 13.—The Family Domains do not constitute a district within the meaning of s. 13 of the Civ. Pro. Code, 1859, which is therefore inapplicable in a case in which a portion of the immoveable property in suit is situate within such domains. The High Court, therefore, cannot, in concurrence with the Sudder Board of Revenue, authorize under that section, a Subordinate Court to proceed with a case in which a portion of the immoveable preperty in suit is situate within the Family Domains. RAGHU NATH DAS v. KARKAN MAL, **3 A. 568.** (S. A. No. 969 of 1877, decided the 14th Dec. 1877, *Concurred in.*) [*R.*, 34 C. 576.]

(76)—*Ss.* 26,53. *Civ. Pro Code* 1882—*Plaint, amendment of, under what circumstances, may be allowed—Mis-joinder of parties and causes of action* —The claim, in this suit, was for the recovery of property, by right of survivorship of the plaintiffs, four members of an alleged Hindu undivided family, from the 1st defendant, the widow of a 5th undivided member deceased. In the plaint, the 4th plaintiff was alleged to have been adopted, by the 1st defendant, as son to her deceased husband but it contained no distinct prayer in favour of the adopted son alone as such. First defendant denied the adoption and contended that her husband had become divided from the plaintiffs. The lower Court, finding that the adoption was true, gave a decree in favour of the fourth plaintiff alone, without deciding the question of division or non-division and treating the plaint in effect, as amended into one by the fourth plaintiff only. On appeal, it was contended that this procedure was opposed to s. 53 of the Code and illegal. Approving of the course adopted by the lower Court, it was held that the procedure of the lower Court did not contravene s. 53 (*c*) of the Code, as the proviso to that section is intended only to prevent such amendments as might result in a new case being raised, involving the trial of issues essentially different from those arising under the pleadings as originally framed. Further, the omission to try the issue as to non-division could not, in any way, affect the first defendant, as the parties really interested in agitating that question were plaintiffs Nos. 1 to 3, and as, by reason of the finding on the issue as to adoption, first defendant had no manner of right to retain possession of the properties in dispute on the case set up by her. If, in this case, the plaint had been framed in the alternative,

Transfer of Civil Cases—*continued.*

that is to say, praying for a decree in favour of plaintiffs 1 to 4, as undivided members, or should the Court find that they were not undivided members, then a decree in favour of the fourth plaintiff only; *Semble*:—Such a plaint would have been admissible under s. 26 of the Code, as not contravening its provisions. LAKSHMAKKA v. NAGI REDDI, **28 M. 500.** (26 M. 627, F.B., *F.*)

Winding up proceedings under Companies Act transferable to High Court under ss. 25, 647, Civ. Pro. Code—*See* ACT VI OF 1882, s. 219, 9 A. 180=A.W.N. 1887, 7.

Resident's Court, Aden—The High Court can transfer a civil case from the Court of Resident at Aden to the High Court—*See* BOM. ACT II OF 1864, 5 Bom. L.R. 562=27 B. 575.

Village Police Patel's Court—Transfer of case from a village Police Patel can be ordered by High Court and not by District Magistrate—*See* BOM. ACT VIII OF 1867, ss. 6, 14, 10 Bom. L.R. 630.

See MAD. ACT III OF 1873, s. 13, 23 M. 314.

See U P. ACT XIX OF 1868, ss. 124 B and 124-C, 6 O.C. 104.

Powers of Subordinate Judge on transfer of rent suit—*See* U. P. ACT XII OF 1881, ss. 93, 206 to 208, 16 A. 363 F.B.=A.W.N. 1894, 113.

See U. P. ACT XII OF 1881, ss. 189, 206, 207, 208, 6 A. 36=A.W N. 1883, 185.

See U. P. ACT XII OF 1881, ss. 206, 207, 208, 6 A. 295=A.W.N. 1884, 90.

See U. P. ACT III OF 1901, ss. 191 and 192, 7 O.C. 142.

Small Cause Court suit— Institution in Court of Subordinate Judge invested with Small Cause powers—Trial by Judge without such powers—Transfer—Suit whether appealable—*See* APPEAL—GENERAL, 5 A. 274.

See APPEAL—PRACTICE AND PROCEDURE, 9 M.L.J. 297.

See CHAMPERTY, 4 B.L.R. O.C. 1=12 W. R.O.C. 13.

Reference of issues for determination—Transfer of suit meanwhile illegal—*See* CIV. PRO. CODE, 1908, O. XLI, r. 25, 15 A. 315=A.W.N. 1893, 108.

District Judge—Remand of appeal by High Court.—Transfer of appeal to Sub-Judge—Legality—*See* JURISDICTION—QUESTION OF JURISDICTION, 6 Ind. Cas. 384.

Institution of suit in wrong Court—Transfer of suit to another Court—Return of plaint by such Court—*See* JURISDICTION—QUESTION OF JURISDICTION, 4 A. 478=A.W. N. 1882, 113.

Transfer of Civil Cases—*concluded.*

Transfer of suit possible only from Court having jurisdiction—Consent of parties, effect of, on jurisdiction—*See* JURISDICTION—QUESTION OF JURISDICTION, 9 A. 191, P.C =13 I.A. 134.

See JURISDICTION OF CIVIL COURTS, 4 M.H.C. 227.

Small Causes Courts, Bombay—Transfer of case from the Small Cause Court, Bombay to the High Court of Bombay—*See* LETTERS PATENT, HIGH COURT, 1865, cl. 13, 7 Bom. L.R. 143.

Powers relating to—Under s. 15 of the Charter Act dependent on the exercise of appellate jurisdiction — *See* LETTERS PATENT, HIGH COURT, 1865—BOMBAY cl. 13, 3 C.L.J. 5=3 A L.J. 53=10 C.W.N. 185=8 Bom L.R. 4= A M.L.T. 1=16 M L.J. 73, P.C. =30 B. 246.

See LETTERS PATENT 1865, HIGH COURT —CALCUTTA, s. 13, 10 B.L.R. 169.

Transfer of suit—From Presidency Small Cause Court to High Court—Application where to be made—*See* LETTERS PATENT, HIGH COURT, 1865—MADRAS, s. 13, M.W.N. 1912, 150=11 M.L.T. 159.

See PARTNERSHIP—RIGHTS AND LIABILITIES OF PARTNERS, 4 A. 437=1 A.W.N. 1882, 87.

From undefended to defended board—Cost —*See* PRACTICE AND PROCEDURE, Bourke O.C. 238, 2 Hyde, 86.

See PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 35 (1), 127 P.L.R. 1903.

Village Munsiff—Power to transfer suits—*See* MAD. REG. IV OF 1816, 8 M. 500.

See REVIEW—REVIEW BY JUDGE OTHER THAN JUDGE IN ORIGINAL CASE, 2 N.W.P. 230.

Transfer of appeal by the District Judge to subordinate Judge after remand—Objection as to jurisdiction—*See* REVISION—GENERAL, P.L.R. 1900, p. 354.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION—GENERAL, 2 O C. 143.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—PRACTICE AND PROCEDURE, 74 P. R. 1876.

Transfer of Decree.

See EXECUTION OF DECREE.

(1)—*Order refusing to recognize the transfer of a decree—Appeal.*—An appeal lies against an order refusing to recognize the transfer of a decree for the purpose of appeal, the order must be regarded as one made under s. 244, Civ. Pro. Code. VIRASAMI ROWTH v. BODI NAIKAN, **25 M. 384.** (21 M. 388, 16 A. 483, 26 C. 250, *F.*) [*R.*, 25 M. 383.]

(2)—*Civ. Pro. Code (Act XIV of 1882, s. 246 — Order for set-off—Transfer of decree.*—An order for set-off made under s. 246, Civ. Pro.

Transfer of Decree—*continued.*

Code, is binding upon a transferee of the decree sought to be executed, when the transfer is subsequent to the order for set-off. VEERABHADRA RAZU v. JAGANNADHA RAZU, **3 M. L.J. 220.**

(3)—*Act* VIII *of* 1859, *ss.* 207, 208—*Cross-decrees—Set off—Execution of decree in parts—Transfer of decree.*—Where an order of Court is made with the consent of the holders (S and B) of two cross-decrees fixing the mode in which a set off should be made, and its effect is to prevent S executing his decree without giving credit for B's decree, it would be most inequitable to allow B to execute his decree against s. 207, Act VIII of 1859, applies to the execution of the entire decree, not to splitting it up and executing it in portions. S. 205 also applies to the transfer or assignment of a decree in its entirety, and does not intend its assignment in as many portions as the decree-holder may think fit. Although one of two holders of the same decree may take out execution of the whole decree, he cannot be allowed to take out execution of a part of it to the extent only of his own interest. Application may be made for the extension of part of a decree if the applicant admits that the remainder has been satisfied; and where a decree is perfect for execution in certain respects only execution may be taken out for the portion which is perfect But after a decree is perfect for execution in its entirety, the execution-creditor cannot take out one execution for one part (*e.g. wassilatt*) and another for another (*e.g.* costs or interests on costs) nor can by assignment split it up, and subject the judgment-debtor to a plurality of executions. HARO SANKER SANDYAL v. TARAK CHANDRA BHUTTACHARJEE. **3 B.L.R.A.C. 114=11 W. R. 488.** [*F*, 7 C. L. R. 117, 5 A. 27=A. W.N. 1882, 140; *R*, 15 B. 242.]

To another Court caused by false representation—Sale by such Court cannot be impeached—*See* CIV. PRO. CODE, 1908, ss. 38, 39, 41, O. XXI, rr. 4, 5, 8 M.L.J. 1.

Cross decrees between same parties in different suits—Transfer of decree for smaller amount—Notice of assignment—Validity of transfer as against cross-decree-holder—Right of transferee to execute—Equities—*See* CIV. PRO. CODE, 1908, s. 49, O. XXI, r. 18, 26 M. 428=12 M. L.J. 398.

See CIV. PRO. CODE, 1908, ss. 63, 73, 2 C. W.N. 126.

To Collector—Power of Court—*See* CIV. PRO. CODE, 1908, ss. 68, 70, 71, A.W.N. 1883, 164.

Execution of decree—Transfer of decree to Collector for execution—Nature of the powers exercisable by Collector under s. 320 of the Civ. Pro. Code in cases of transferred decree—*See* CIV. PRO. CODE, 1908, ss. 68, 70, 71, O. XXIII, r. 1, A.W.N. 1891, 189.

Application for mere recognition—Application for execution—*See* CIV. PRO. CODE, 1908, O. XXI, r. 16, 14 M.L.J. 393.

Transfer of Decree—*concluded.*

Transfer of decree—Execution by transferee—Validity of decree questioned by judgment-debtor—Fraud—*See* CIV. PRO. CODE, 1908, O. XXI. r. 16, 15 B. 307.

See CIV. PRO. CODE, 1908, O. XXI, r. 16, 20 C. 388.

Transfer of decree—Ground for refusing execution—*See* CIV. PRO. CODE, 1908, O. XXI, r. 16, 8 M. 455.

See DAMAGES—DAMAGES, SUITS FOR, 20 M. 157.

To one of several judgment-debtors, effect of—*See* EXECUTION OF DECREE — JOINT DECREES, EXECUTION OF, 5 A. 27=A.W.N. 1882, 40.

Transfer of decree to Collector for execution—Jurisdiction of Civil Court to interfere with proceedings before Collector—Nature of powers and duties of Collector in execution-proceedings—*See* JURISDICTION OF CIVIL COURTS, 11 B. 478.

See LIMITATION ACT, 1908, ART. 182—STEP IN AID OF EXECUTION, 8 C.W.N. 575, 4 O. C. 333.

Transfer of District.

From one Province to another—Jurisdiction to hear appeal—*See* JURISDICTION—GENERAL, 5 C.L.J. 550=34 C. 636, *on review from*, 34 C. 232=5 C.L.J. 192.

Jurisdiction to hear second appeals from transferred area—*See* SPECIAL OR SECOND APPEAL—GENERAL, 11 C.W.N. 956=6 C.L.J. 233=34 C. 853.

Transfer of Judicial Officers.

This circular draws attention to a previous Circular, and states that an application from a Judicial Officer for transfer must be sent through the Judge of his District. Civ. Cir. No. 8 dated 26th July 1869, **12 W.R. Civ. Cir. 1.**

Transfer of Judge.

Validity of judgment written after transfer of Judge—*See* CIV PRO. CODE, 1908, O. XXI, r. 2, 12 C.W.N. 682, F.B.=7 C.L.J. 666=4 M.L.T. 33=35 C. 756.

Transfer of Judge who had given decision on some question only—Successor's giving judgment contrary to predecessor's not proper, though not illegal, especially where appeal lies—Successor to re-open decided question only when error is obvious and patent—*See* MORTGAGE—REDEMPTION, 41 P.L.R. 1908=42 P. W.R. 1908.

Transfer of License.

(1)—*Arms Act* (XI *of* 1878), *ss.* 5, 19 (*a*), 18 *and* 22—*Rules—License to sell arms—Transfer of license.*— Cl. (*a*) of s. 19 being penal must be strictly construed. The way the public security is protected is by such requirements as ss. 17, 18, which impose liabilities

Transfer of License—*concluded*.

from which the licensee cannot escape and by the following penal sections. An agreement authorizing a person named to sell arms under a license granted to and in the name of a certain licensee was not illegal though amounting to a virtual transfer of the license. EUGENE BADELIER v. REBECCA CHILL, **L.B.R. 1872—1892, 168.**

Transfer of license—Suit against the Commissioner of Police of Bombay to grant a transfer of license of an eating house—*See* SPECIFIC RELIEF ACT, 1877, s. 45, 3 Bom. L. R. 653.

Transfer in Fraud of Creditors.

See TRANSFER OF PROPERTY ACT, 1882, S. 53.

(1) *Insolvency--Conveyance in fraud of creditors —Protection to* bona fide *transferee—Effect of want of due care in transferee.*--Though s. 26 of Punjab Act IV of 1872, which avoids transfers in fraud of creditors and fraudulent preference of creditors by person in insolvent circumstances, makes no exception in favour of any class of transferees, that section must not be taken to operate to deprive innocent transferees of such protection as they may be equitably entitled to receive from a Court acting upon sound legal principles. Thus a transfer, which would otherwise be set aside as fraudulent, is entitled to protection, if it has been made *bona fide* and for valuable consideration to a person not having at the time of the transfer any notice that the transfer is fraudulent; to claim the benefit of the rule, valuable consideration, honesty, and due caution are necessary on the part of the transferee; if any one of them be wanting, he fails to establish a title to protection. B., who was in embarrassed circumstances, executed a deed of gift of certain houses to one Mrs. T. whom he afterwards married. Soon after, they both obtained a loan from a Bank of Rs. 8,000 on the following securities:—(1) a pro-note by B. payable in 12 months, (2) a usufructuary mortgage of the houses executed by B and Mrs. T., and (3) a fixed deposit of Rs. 8,000 in the name of Mrs. B. to be retained by the Bank until the loan of Rs. 8,000 was repaid. The Bank parted with no money, the money held in deposit being merely the money lent to Mrs. T. Within a year after this transaction, B was adjudged an insolvent, and a creditor applied to have the deed of mortgage in favour of the Bank to be set aside as invalid against creditors. *Held* that the deed was executed by B. and Mrs. T. fraudulently, and although the Bank manager had no actual knowledge that B. was insolvent or that his object was to defeat his creditors, the conduct of the Bank as represented by the manager was incautious and careless to the degree of recklessness, and not such as to give the Bank as between it and the creditors an equitable title to protection and preference. BATES v. BERTOLA, **1 P.R. 1877.**

Transfer of Property.

(1)—*Building erected for school—Entry of managers of school as trespassers—Acquiescence*

Transfer of Property—*continued*.

in possession by the managers, whether amounts to conveyance of transfer.—In this case, the manager of the defendant, partly with defendant's funds and partly with the money subscribed by the village, erected the building in question for the purposes of a school. He, however, never gave the property to the school, nor even acquiesced in the managers of the school entering upon it. They entered upon it as trespassers and, although he acquiesced in their having taken possession, he did not thereby convey any property in the school to the subscribers. It was *held* that, under the circumstances, the defendant was not bound to re-pay that portion of the money which he expended himself in building the house, nor was he bound to do anything more than return that portion of the funds which was subscribed by the village. SREEHURRY ROY v. MR. JAMES HILLS, **7 W.R. 476.**

(2)—*Sale—Vendor out of possession—Suit by vendee for possession—Maintainability.*—It has been the practice of the Courts in this country to give effect to sales made by persons out of possession, and to recognise the title of the purchaser to maintain a suit. RUNNOO PANDEY v. SHEIKH BUKHSH ALI, **3 N.W.P. 2.**

(3)—*Conveyance of property by person not in possession, validity of.*—Persons having a right of possession may dispose of property, though it is not actually in their possession at the time of disposition. KUMUROODDEEN SHAIKH v. SHAIKH BHADOO, **11 W.R. 131.** [*F.*, 22 W.R. 99, 25 W.R. 223.]

(4)—*Vendor out of possession at time of sale—Purchaser's right to sue.*—The purchaser, who purchases from the vendor property that is out of his possession at the time of sale, is entitled to bring a suit for the recovery of the property. AULOCK MONEE DOSSIA v. AULOCK MONEE DEBIA, **25 W.R. 48** [*R.*, 25 W.R. 223.]

(5)—*Sale—Consideration not paid—Vendor not in possession—Suit by vendee, if maintainable.*—A purchaser of property, who pays nothing as consideration therefor, cannot maintain a suit for possession, where the vendor was not himself in possession. It would be against public policy to allow such a suit to be maintained BISHONATH DEY ROY v CHUNDER MOHUN DUTT BISWAS, **23 W.R. 165.** [*F.*, 25 W.R. 223; *R*, 2 B. 293.]

(6)—*Vendor out of possession at time of sale—Purchaser's right to sue—Current of decisions—Reference to Full Bench.*—There is no necessity to refer a question for the authoritative ruling of a Full Bench, when it is already concluded by a current of previous decisions according to which a purchaser who purchases property from a vendor who is out of possession at the time of sale, is entitled to bring a suit for the recovery of such property. BISSESSUR DOSS v. JOY KISHORE DOSS, **25 W.R. 223.**

(7)—*Vendor and purchaser—Vendor not in possession at time of sale—Right of vendee to sue for possession—Second appeal—Interference by High Court.*—Where the person, who had been

in possession and quiet enjoyment of property sold it to another, the latter was entitled to sue for the immediate possession of the property, though the vendor had not at the time of sale possession thereof. [*Not F.*, 6 B. 380. F.B.; *F.*, 23 W R. 163, 1 C. 297, 25 W.R. 223 ; *R.*, 2 B. 299.] The High Court would not, in special appeal, give effect to an objection made against the decision of the lower Court, unless the objection be of such a kind as to satisfy the Court that there had been a failure of justice consequent upon the decision passed by the lower Court. BIKAN SINGH v. MUSSAMUT PARBUTY KOOR, **22 W.R. 99.**

(8)—*Conveyance by person out of possession—Lease.*—A lease or a transfer of property by a person out of possession is not *ipso facto* void. LOKENATH GHOSE v. JUGHOBUNDOO ROY, **1 C. 297.** [*R.*, 2 B. 299 ; *Not F.*, 6 B. 380, F.B.]

(9)—*Purchase of property—Disturbance of vendor's possession—Cause of action to vendee—Limitation.*—Purchasers of property have a good right of suit where their vendors had been at one time in peaceable possession of the disputed property and were disturbed and possession taken from them within the period of limitation. NITTYANUND GOSSAIN v. SHAMA CHURN CHATTERJEE, **23 W.R. 163.** [*F.*, 25 W.R. 223.]

(10)—*Contract—Champerty—Right to recover property based upon champertous transaction—Maintainability of suit—Assignment of property—Assignor not in possession—Right of assignee to recover possession from third party.*—As champertous contracts are pernicious and detrimental to the best interests of the society, and contrary to public policy, an assignee cannot maintain a suit to recover possession of property under a contract of a highly champertous character. [*R.*, 11 A. 57 = A.W.N. 1888, 296, 2 O.C. 149.] An assignee of property, whose assignor was not in possession of the property at the time when the assignment was made, can recover the property from the hands even of third persons, if he first shows that he would have a right to enforce specific performance of his contract against his assignor in case the property comes back to his hands BOODHUN SINGH v. MUSSAMUT LUTTEFUN, **22 W.R. 535.** [*D.*, 1 C. 297.]

(11)—*Sale in execution—Rent decree—Sale of judgment-debtor's interest.*—Where, in execution of a decree for rent, the Court advisedly only sold the right, and interest of one proprietor of certain property, then that right and interest alone was conveyed by the sale and not the right and interest of the other proprietors, notwithstanding the fact that the right and interest of these also was as much liable for the arrears of rent. LALLA SABIL CHAND v. GOODUR KHAN. **22 W. R., 187.**

(12)—*Execution-sale—Sale certificate—Right of suit.*—Where, in an execution sale under a decree against K and D upon a debt due by D's father, only the rights and interests of K

appeared to have been expressly passed, and the judgment-creditor took possession of the entire property without complaint from D, and, many years after D's death, her heirs sold a share of the property to the plaintiffs who sued for possession, *held* that the plaintiffs obtained no immediate right to the property by the conveyance from D's heirs. *Quære.*—Can the plaintiffs set up a right of suit? MUSSAMUT BOODHUN v. BOODHUN SINGH, **21 W.R. 156.** [*Expl.*, 22 W.R. 187.]

(13)—*Sale in execution—Assignment—Possession.*—Upon a sale in execution of a decree, the property in the thing sold passes to the purchaser, and there is nothing either in Hindu or English law which debars a third person from taking an assignment of such property from the auction-purchaser, albeit it had not been reduced into possession, GOBIND RAGUNATH v. GOBIND JAGOJI, **1 B. 500.** [*R.*, 2 B. 299, 6 B. 168, F.B.]

(14)—*Agreement by father not to alienate ancestral property without son's consent—Sale of property in execution of decree against father, validity of.*—The holder of a money decree obtained against a Mahomedan was held entitled to proceed in execution against ancestral property inherited by the judgment-debtor, notwithstanding a previous agreement entered into between the judgment-debtor and his son that the property could not be alienated without the son's consent. ELAHI BAKSH v. MUSSUMMAT JHANDI, **50 P.R. 1877.**

(15)—*Trees not cut passing with land—Sale of house and compound—Property in trees thereon transferred.*—So long as trees standing on land have not been severed or cut, they are *prima facie* to be taken as passing with the the land on which they grow. A sale of a house or compound would comprise the trees therein, unless it could be shown that they had been specially exempted from the sale, or that they were the property of some person other than the seller. In the present case, the rights and interests of the owner of the house and ground, who was also the owner of the trees, were brought to sale on auction and sold without any express exception of the trees, and the High Court ruled that the sale transferred to the purchaser the rights and interests of the former owner in the said trees standing on the ground. FAQUEER SOONRA v. MUSSUMAT KHUDERSON. **2 N.W.P. 251.** [*R.*, 5 A. 616 = A.W.N. 1883, 169.]

(16)—*Hypothecation of property without possession-Incomplete title.*—*Held* that the hypothecation of property to which a judgment-debtor had not acquired title was incomplete and insufficient to create a valid and perfect lien in favour of the mortgagee enforceable by law against the actual possessor. HERCHUND SINGH v. RAM SINGH, **1 Agra 286.**

(17)—*Easement—Alterations in property—Alienation of portion—Continuous easement—severance of tenements.*—If the alterations

Transfer of Property—*continued.*

which a man makes in his property before alienation of any part of it are palpable and manifest, and in their nature permanent changes in the disposition of the property, so that one part thereof becomes dependent on another, the purchaser of either part must take the land either burthened or benefited as the case may be by the qualities which the previous owner had undoubtedly the right to attach to it. On a severance of tenements, an easement, in its nature continuous, would pass by implication of law without any words of grant. AMUTOOL RUSSOOL v. JHOOMUCH SINGH. **24 W.R. 343.** [*F.*, 14 B. 452; *Cited.*, 26 C. 516]

(18)—*Debt—Secret transfer of family property.*—The heir and managing member of a family cannot pass off the property of the debtor, his father, to one member of the family, unknown to the creditor, and thus protect the estate by placing it in the hands of another member of the same family. MUSSAMUT GHUSEETUM v. MAHARANEE INDERJEET KOONWAR, **W.R. 1864. 383.**

(19)—*Incumbrance—Priority—Estoppel.*—In Upper Burma, before the extension of the Registration Regulation, a transfer of property to be binding upon persons not parties to the transaction must, probably, be accompanied with delivery, or change of possession, or made with publicity, or to the knowledge of the parties sought to be affected by it. The presumption from possession of property is *prima facie* ownership, and when a stranger sets up a claim to the ownership against persons professing to have been led to act upon the strength of that presumption, it would appear that the question is, whether there has been such conduct with respect to the ostensible ownership as to preclude the attempt to establish the existence of a different state of things, or whether the circumstances are such as to rebut the usual presumption and to show that the persons concerned must have known, or that they had the means, with the exercise of ordinary prudence of knowing the true position of affairs. In such matters the law operates by interposing the bar of estoppel for the protection of innocent persons, induced by the conduct of others to do or forbear what they would not otherwise have done or forborne. MAUNG LAW SAN v. MAUNG KA SIN, **U B.R. 1897—1907, Vol. II, 573.** (14 B.L.R. 307, 3 A. 706, 7 A. 257, 1 B. 581, 2 B. 326, 333, 6 B. 175, 193, 380, 387, 493, 9 B. 324, 12 B. 569, 1 C. 297, 8 C. 597, 10 C. 315, 11 C. 121, 135, 13 C. 297, 16 C. 622, 19 C. 623, 22 C. 179, 5 M. 6, 6 M. 404, 11 M.I.A. 218, 219, 2 M.H.C. 51, 3 M.H.C. 38, *R.*)

(20) — *Transfer of immoveable property — Enquiry into title by transferee, nature of.*—A filed a suit in 1907, for a declaration that he was the absolute owner of certain lands mortgaged by B to C. The lands were purchased by A in 1885, but they stood in the revenue registers in the name of B. C advanced money to B on the strength of the entry in the revenue register and of enquiries made in the Land Records Office, which showed that the land had stood in B's name for many years. He also acted on the recommendation of a *Thugyi* who was not the *Thugyi* for the circle in which the land was situate. *Held* that, in view of the provisions of s. 110 of the Evidence Act, and of the Limitation Act allowing twelve years for even an adult person entitled to property to bring a suit to recover possession of it, an enquiry into title which does not extend to enquiry as to actual possession of the property for at least twelve years cannot be said to be such an enquiry as a reasonable and prudent man should or would make. A mortgagee as well as any other transferee of immoveable property cannot safely take a transfer of such property, unless he enquires into the title of the person or persons who propose to transfer to him. RAMAN CHETTY v. PO SON, **5 L.B.R. 125.** (11 B.L.R.P.C. 46, R.)

(21)—*Decree with option of purchase—Right of pre-emption—Hypothecation by pre-emptor—Defective title.*—The property hypothecated to the plaintiff was not at the time of hypothecation the absolute property of the judgment-debtor, at her disposal, or under her control, or possessed by her under an indefeasible title. She had merely obtained a conditional decree declaring her right of pre-emption and giving her the option of purchase within a certain time, but she did not enforce her right. She allowed the appeal in the pre emption suit to go against her; the sale and transfer consequently of the property to her was never perfected and her title never actually vested in it. The hypothecation was, therefore, incomplete and insufficient to create a valid and perfect lien in the plaintiff's favour enforceable in law against the actual possessor. HERCHUND SINGH v. RAM SINGH, **1 Agra 286.**

(22)—*Transfer and re-transfer of tenant right in Sambalpur District - Family arrangement—Right of gaontia to interfere.*—Where with the consent of a gaontia a tenant transferred his holding to his son-in-law and subsequently the latter re-transferred it to his father-in-law without such consent, neither of them losing touch with the land, the gaontia could not be permitted to interfere with such family arrangements. BOOTOO PADHAN v. KRISHNA GAONTIA, **12 C P.L.R. 152.**

(23)—*Sale—Documentary evidence whether necessary.*—Two persons who had originally purchased a house admitted a third party (the defendant) to an equal share of the premises on payment of a third of the original sale price. The house was afterwards divided into three shares one of which was assigned to the defendant. The plaintiff who was one of the two original purchasers sued for a moiety of the premises, but his suit was dismissed by the Court of first instance. The Zillah Judge reversed the decision on appeal, holding that in the absence of a deed of sale or some written agreement, it must be concluded that the defendant continued in occupation of a part of the premises with

Transfer of Property—*continued.*

the assent of the two original joint purchasers. *Held* on second appeal that the opinion of the lower appellate Court that a sale cannot be made or proved without documentary evidence, was erroneous. MUSSUMAT ROOKHO v. MADHO DASS BYRAGEE, **1 N.W.P. 59.**

(24)—*Restrictions on transfers imposed by Legislature, effect of — Restrictions against transfer imposed by settlement decree, effect of—Restrictions for benefit of superior proprietor—Transferor's right to plead that the transfer is void.*—There is an essential difference between restrictions on transfers imposed by the Legislature and those imposed by a Court or decree. The general policy of the Law is to promote the free alienation and circulation of property and to discourage the introduction of restrictions calculated to interfere with the fulfilment of these objects. But there are cases in which, for the protection of particular interests, it is deemed expedient to depart from this general principle and to fetter the privilege of free alienation. In such cases the prohibition against transfer, being founded upon considerations of public interest, must be treated as absolute. But no such force can be attributed to a restriction which has its origin in an agreement of parties or a decree of Court. *Held* that, in settlement decrees, where a condition against alienation is inserted, it is for the benefit of the superior proprietor only, and it is therefore not competent to the transferor of an interest conferred by such a decree, in a suit between himself and the transferee, to raise the plea that the transfer is void. WAZIR MOHAMMAD v. HAR PERSHAD, **15 O.C. 67.** (2 O.C. 255, 14 O.C. 144, *R.*)

(25)—*Transfer for illegal purpose—Illegal purpose never carried out—Right of vendor or his heirs to recover property transferred—Condition for exercise of right—Burden of proof in such a case—Trusts Act*, 1882.—Where certain owners of property transferred it for the illegal purpose of defeating creditors, which purpose was never carried into execution: *Held* that the vendor could not recover the property from the vendee in possession, without proving that the fraudulent purpose of the parties to the sale was never carried out; and that the vendor's heirs were in no better position than the vendor. The words of s. 84 of the Trusts Act, 1882, clearly indicate that it is for the plaintiffs to make out that the fraud never got beyond the state of intention, and, in the present case, the defendant having the benefit of possession, the maxim "*in pari delicto potior est conditio possidentis*" applies. RAGHO ATMARAM v. PURSHOTAM JAIRAM. **4 N.L.R. 26.** (20 M. 323, 23 C. 460, *R.*) [*R.*, 5 N.L.R. 146.]

(26)—*Transfer to defraud creditors made before attachment—Validity of transfer.*—Where a transfer is made by a debtor of his property before attachment thereof, the transfer would be valid even though it has been made to defraud his creditors. JUGRAJ HEMRAJ v. KISSAN SINGH, **3 C.P.L.R. 147.**

Transfer of Property—*continued.*

(27)—*Fraudulent transfer—Transfer to defraud creditors—No change of possession—No creditors defrauded—Right of transferor to obtain declaration of his right as owner.*—Where a transfer of property was a mere device to shield the property from creditors and the transferor successfully defeated his creditors thereby, he could not be permitted to come and ask the assistance of the Court to recover his property. But if, on the other hand, there was no change of possession in pursuance of the fraudulent transfer and no creditors were in fact defeated there is nothing to prevent the transferor from obtaining a declaratory decree to that effect that he is the real owner of the property and his rights have not been effected by the transfer deed. BAJI RAO v. HARPAL, **1 C.P.L.R. 165.** (21 W.R. 423, 1 A. 403). [*R.*, 7 C.P.L.R. 50; *Agreed*, 15 N.L.R. 146.]

(28)—*Sale before T. P. Act came into force—No covenant for title—Eviction of purchaser—Right of purchaser to claim refund of purchase money.*—As the provisions of the Transfer of Property Act cannot apply to sales executed before the Act came into force in the absence of a covenant for title the purchaser of a property under a sale executed before the Act came into force cannot recover the purchase money on being evicted from the property. Further a purchaser, who was for some years in possession of the property purchased by him, cannot, on being evicted from the property thereafter claim a refund of the purchase money as money had and received to his use as on a total failure of consideration. RAMLAL MOHANLAL v. JAWAHARAMAL, 1 **C P.L.R, 178.**

(29)—*Assignment of Indigo factory—Liability of assignee—Debt—Dena Pawna contract to take over—Remand.*—If a trader or other person in this country assigns his stock-in-trade or effects to another, and such other person enters into a contract with the former to pay the debts of the concern or a certain portion of such debts, the contract and assignment create a liability to the creditors, in whose favour the assignment is made, which they may enforce by suit. An assignment of the stock-in-trade under such circumstances cannot be defeated by the creditors, nor can anything that takes place between the assignor and the assignee affect the right of the creditors as against the original debtor. The creditors cannot compel the assignee to pay any debt, which, as between himself and the assignor, he is not bound to pay, and the creditor is not bound to elect between the original debtor and assignee, but may look to either or both for payment, the assignee being sued as a co-defendant with the original debtor, there being nothing to prevent the joinder of parties as co-defendants whose liability is not strictly joint. A person covenanting can obtain relief from the express terms of his contract, if he can show that it was a mistake, and that the actual contract was to pay something less than was expressed in the writing. Ordinarily the purchaser of a factory will not

Transfer of Property—*continued.*

be liable for the debt unless by express agreement. Where any debt is a lien against particular property, it must be enforced by a suit to declare such property liable, and to obtain payment for it, and not by an ordinary action for debt against the person who has taken the property subject to the debt. The case was remanded by a majority of the Court to try the nature of the real agreement between the assignor and assignee with reference to the debt. *Steer, J., and Seton-Karr, J.*, dissenting objected to the remand on the ground that, in contracting to take over the *dena-powna* of the factory and publishing the same by the act of registry, the assignee made himself liable for all the *bona fide* debts of the factory, and that the private agreement between the assignor and the assignee was of no force. KEARNES v. BHAWANI CHARAN MITTER, **B.L.R. Sup. Vol. 54=W.R F.B. 167.** [*Appr.*, W.R. 1864, 266, 6 W.R. Act X, 89, 2 C.L.R. 283.]

Transfer of moveables—Grantee under contract having no right to soil obtains right to fell trees—No stipulation for beneficial use of soil—License to enter and take trees away—*See* BEN. ACT VIII OF 1885, ss. 144, 184, and 193, sch. III, art. 2, 7 C.L.J. 152.

For illegal purpose not carried into execution—Contract to sell by transferee—Suit for specific performance of contract—Right of the transferor to resist suit on the ground that transfer was benami—*See* BENAMI TRANSACTIONS—GENERAL, 3 M.L.T. 244=18 M.L.J. 151=31 M. 97.

Husband's debts—Wife satisfying them in his life-time—Voluntary payment—Transfer of husband's property after his death—Transfer not for payment of debts and not binding on heirs—Equity—Liability to pay the consideration money—*See* HINDU LAW—DEBTS, 5 A.L.J. 339=A.W.N. 1908, 143=30 A. 352.

Validity and effect of transfer of inam land—Reg. VI of 1881—Subsequent enfranchisement, effect of—*See* INAMS, 3 M.L.T.243=18 M.L.J. 247.

Plea in defence that transfer is invalid whether avails in subsequent suit by defendant—*See* LIMITATION ACT, 1908, s. 28, arts. 10, 12, 44, 111, 136, 137, 138, 147, 165, 166, 167, 172, 17 M L.J. 220=2 M.L.T. 350=30 M. 393.

See MORTGAGE—MISCELLANEOUS, 65 P. R. 1871.

Transfer of promissory note otherwise than by endorsement—Right of transferee to sue on note—*See* NEGOTIABLE INSTRUMENTS ACT, 1881, s. 51, 24 M. 657, note.

See PRE-EMPTION — CONSTRUCTION OF WAJIB UL-ARZ, 7 A. 343=A.W.N. 1885, 46.

See PRE-EMPTION—SUBJECTS OF PRE-EMPTION, 7 A. 291=A.W.N. 1885, 47.

Execution by duly authorised agent—No special power necessary for purposes of registration—Transfer of Property by execution and registration by agent—*See* REGISTRATION, 1 C.P.L.R. 87.

Transfer of Property—*concluded.*

Transfer of occupancy holding, not transferable by local custom or usage, not void—Binding on the parties and persons claiming through them—Voidable only at landlord's option.—*See* RIGHT OF OCCUPANCY—TRANSFER OF RIGHT, 12 C.W.N. 1086=8 C.L.J. 261.

See RIGHT OF OCCUPANCY—TRANSFER OF RIGHT, A.W.N. 1889, 145.

See SPECIFIC RELIEF ACT, 1877, ss. 18, 22, 13 P.R. 1899.

Transfer of chance of an heir-apparent, validity of—Mutation of names or transfer of possession cannot pass title, where registered deed is required—*See* TRANSFER OF PROPERTY ACT, 1882, s. 6 (*a*), 11 O.C. 301.

Question of transferability of holding when can be raised—*See* TRESPASSER, 2 Ind. Cas. 96.

Transfer of Property Act (IV of 1882).

[AM., ACT III OF 1885. REP. IN PT. AND AM. ACT II OF 1900, SS. 1, 59, 69, 107, 117 AM. ACT VI OF 1904. SS. 85 TO 90, 92 TO 94, 96, 97, 99 REP. S. 100 REP. IN PT., ACT V OF 1908. APPLICATION OF CERTAIN SS. EXT., ACT XIII OF 1889. S. 32. (1) REP. AS TO CROWN GRANTS, ACT XV OF 1895.]

See LEASE.

See LIMITATION ACT, 1908, arts. 132 and 135.

See MORTGAGE.

See SALE.

See TRANSFER OF PROPERTY.

(1)—*Provisions of—Applicability to Upper Burma.*—*Held*, that, in Upper Burma, where the Transfer of Property Act is not in force, the general rules contained in that Act may be applied as representing principles of justice, equity and good conscience, without adhering to the letter of the Act, and having regard to the circumstances of the particular case. **MI NAN MYA v. NGA HMI, U.B.R. (1909), 1st Quarter, Mortgage, 5.**

(2)—*Applicability of Transfer of Property Act to Punjab.*—Although the Transfer of Property Act is not in force in the Punjab, the Punjab Courts when deciding cases in which principles of law dealt with by the provision of that Act are involved may adopt those provisions as embodying the law applicable to the case, especially where the law enunciated therein coincides with the principles of equity, good conscience and justice, and for which there is no statutory law applicable to the Punjab. **BHAGWAN DEVI v. BUNYADI KHANUM, 88 P. R. 1902=124 P.L.R. 1902.**

(3)—*Policy of Act with reference to restraint on anticipation.*—The policy of law as to restraints on alienation considered with reference to the provisions of the Transfer of Property Act. **VANKATRAYA v. SHIVRAMBHAT, 7 B. 256.**

Transfer of Property Act (IV of 1882) —*continued.*

(4)—*Agricultural and non-agricultural holding—State of law before the Act.*—Before the Transfer of Property Act was passed, there was no distinction drawn between agricultural and non-agricultural tenants, and there was no law under which, before the Transfer of Property Act, agricultural holdings could be transferred against the will of the landlord or sub-divided without his consent. MADHAB CHANDRA PAL v. REJOY CHAND MAHTAB BAHADUR, **4 C.W.N. 574.** [*R.*, 7 C.L.J. 107=10 C.W.N. 437.]

(5)—*Application of the Act to mortgages before the Act.*—*Held*, by the *Full Bench* that the Act applied, as regards procedure, to mortgages executed before as well as those executed after the coming into force of the Act. MATA DIN KASODHAN v. KAZIM HUSAIN, **13 A. 432, F. B.** (6 A. 262, 12 C. 583, *R.*) [*R.*, 17 A. 537.]

(6)—*Whether Transfer of Property Act governs a case brought after the Act, on a mortgage executed before the Act.*—In a suit to enforce a simple mortgage brought after the passing of Transfer of Property Act, but the legal relations of creditor and debtor having arisen before it, it was doubted whether the above fact would prevent the application of the Act. RAMESWAR KOER v. MAHOMED MEHADI HUSSEIN KHAN, **26 C. 39, P.C.=25 I.A. 179=2 C.W.N. 633=7 Sar. 413.** [*Expl.*, 3 N.L.R. 72; *F.*, 5 N.L.R. 37.]

(7)—*Procedure as to enforcement of mortgages executed prior to Transfer of Property Act.*—Although a mortgage may be anterior to the passing of the Act, yet when a person comes into Court and claims remedy under a mortgage the new procedure of the enactment would apply. UMDA v. UMRAO BEGAM, **11 A. 367 =A.W.N. 1889, 140.** (6 A. 262, 12 C. 583, *F.*)

(8)—"*Mortgage*" *and* "*Charge*"—*Transfer of Property Act*, 1882.—The distinction, clearly drawn for the first time between "mortgage" and "charge" in the Transfer of Property Act is absent in the Limitation Act. GIRWAR SIHGH v. THAKUR NARAIN SINGH, **14 C. 730, F.B.**

(9)—"*Damdupat*" *Rule—Applicability to cases of mortgage governed by Transfer of Property Act.*—The *Damdupat* rule is inapplicable to cases of mortgage governed by the Transfer of Property Act. MADHWA SIDHANTA ONAHINI NIDHI v. VENKATARAMANJULU NAIDU, **26 M. 662.** [*R.*, 33 C. 1269=10 A.W.N. 884.]

(10)—*Right of puisne mortgagee of a part of the mortgaged property—Right of redemption—When the right arises and how long it lasts.*—Conceding that a puisne mortgagee of a part only of the property originally mortgaged can redeem the whole property, his right of redemption does not arise at the moment of the creation of the puisne mortgage but when he (the puisne mortgagee) asserts his right of redemption by suit and exists only so long as the prior mortgage on that portion of the security, which

Transfer of Property Act (IV of 1882) —*continued.*

is common to the two mortgages subsists and can be redeemed. BAIKANTHA NATH ROY CHOWDHURY v. MOHENDRA NATH ROY, **1 C.L J. 65.**

(11)—*Incomplete transfer—Recitals in mortgage deeds—Effect of—Onus of proving valid transfer—Implement of contract to transfer—Pleadings—Question not raised in first Court.*—After the Transfer of Property Act came into force, a transfer of immoveable property cannot be effected in any manner not prescribed by the Act. [*R.*, 29 M. 336=16 M. L. J. 395= 1 M. L. T. 153, 32 M. 429=19 M. L. J. 401, 26 M. 339.] Recitals in mortgage deeds and in petitions sent to officials that certain property has been transferred, could not effect a transfer of such property. [*R.*, 26 M. 339, 32 M. 429= 19 M.L J. 401.] The onus of proving a transfer is upon the party who relies upon it. The defendant who had not raised the issue in the first Court that there was a valid contract to transfer, could not, on failing to prove the actual transfer set up by him, be allowed to raise it in the appellate Court, and to call upon the plaintiff to implement that contract. [*Expl.*, 16 M.L J. 395=29 M. 336.] *Quære*: Whether if the documents on record contained on their face clear evidence of a valuable consideration for the alleged transfer, it is not open to the defendant to ask for implement of contract on appeal? INMADIPATTAM THIRUGNANA v. PERIYA DORASAMI, **24 M. 377= 5 C.W.N. 217=28 I.A. 46 (P.C.=7 Sar. 811.)**

(12)—*Sale of land—Registration of sale-deed—Non-payment of consideration—Delivery of a sale-deed—Passing of title—Intention of parties.*—Mere registration of a deed of sale does not necessarily pass the title, if the parties intend that no title shall pass upon registration till the consideration-money has been paid in full and the deed delivered to the vendee. SARAT CHANDRA CHATTERJEE v. RAKHA HARI MUKHOPADHYA, **3 Ind. Cas. 177.** (2 C.W.N. 207=27 C. 7, *F.*; 17 M. 146, *R.*)

(13)—*Part of the consideration paid—Colourable transaction.*—Ordinarily a transaction may be described as colourable when it is not what it purports to be; but when, as a matter of fact, a substantial part of the consideration appears to have been paid, the transaction cannot be described as colourable. YEDU v. KESARBAI, **8 Bom. LR. 110.**

(14)—Applicability of—*See* AGRICULTURAL LEASE, 5 M.L.T. 222.

(15)—*See* APPELLATE COURT—POWER OF APPELLATE COURT, L.B.R. 1893-1900, 420.

(16)— Suit for redemption — Proceedings under, necessary to extinguish title of mortgagor—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 23, 25, 9 Ind. Cas. 431.

(17)—Scope of—Jurisdiction of Courts, in the absence of specific provision.—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 53, 16, s. 16, OXXI, r. 64, 5 M.L.T. 278=1 Ind. Cas. 535.

Transfer of Property Act (IV of 1882) —*continued.*

(18)—Whether gives authority to landlord to enhance the rent of his tenant during term of lease—*See* COMPENSATION, 7 C.L.J. 284.

(19)—*See* COVENANT, 16 C. 330.

(20)—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 23 M. 521=10 M.L.J. 145.

(21)—Oral gift in favour of daughter of part of taluka by talukdar—Oral gift of land before —Presumption as to nature of estate taken by female under oral gift, Act I of 1869, ss. 13, cl. (1) and 22—Hindu law—*See* GIFT, 5 O.C. 345.

(22)—*See* LANDLORD AND TENANT- EJECTMENT, 13 C.W.N. 949=2 Ind. Cas. 656=36 C. 927, 4 C.W.N. 572.

(23)—*See* LANDLORD AND TENANT—FORFEITURE, 15 M.L.J. 210.

(24)—Applicability of the Act—*See* LANDLORD AND TENANT—PROPERTY IN TREES, ETC., ON LEASED PREMISES, 7 M.L.T. 231= 5 Ind. Cas. 437=33 M. 253.

(25)—Holding created before the—Transferability—Proof of usage.—*See* LANDLORD AND TENANT TRANSFER OF TENANT'S INTEREST, 13 C W.N. 541=10 C.L J. 110=1 Ind. Cas. 362.

(26)—Mortgage by conditional sale executed before Act came into force—Suit on mortgage after passing of Act—Limitation applicable—*See* LIMITATION ACT, 1908, ss. 135, 147, 8 C. P.L.R. 65.

(27)—No revival of right that has become barred by passing of Act—*See* LIMITATION ACT, 1908, arts. 135, 147, 8 C.P.L.R. 83.

(28) *See* REGISTRATION ACT, 1908, s. 48, 13 M. 324.

(29, 30)—*See* BEN. REGULATION XVII OF 1806, A. W.N. 1894, 2.

(31)—Ss. 1, 12—*See* LEASE—GENERAL, 6 Ind. Cas. 685=12 C.L.J. 126.

(32)—*S.* 2—*Rights arising out of legal relation constituted before Transfer of Property Act, 1882, unaffected.*—Where a legal relation was constituted, before the Transfer of Property Act came into force, by means of a decree passed in 1880, s. 2 of the Act would secure the enforcement of the right of the decree-holder, notwithstanding the provisions of the Transfer of Property Act. 5 A. 262 distinguished on the ground that the question therein involved was one of procedure, whereas the question in the above case is one of substantive right. DINENDRA NATH SANNYAL v. CHANDRA KISHORE MUNSHI, **12 C. 436.** [*F.*, 19 M. 382; *R.*, 10 M. 129; *D.*, 21 C. 34.]

(33)—*S.* 2—*Partition need not be effected by instrument in writing.*—The law does not require a partition to be effected by an instrument in writing, and the right of partition being an incident of property, held as the property was, the right is not, according to s 2, affected by any of the provisions of T. P. Act, GYANNESSA v. MOBARAKANNESSA, **25 C. 210 =2 C. W. N. 91.** [*R.*, 10 C.L.J. 503=3 Ind. Cas. 247.]

(34)—*S.* 2—*Mortgages executed before Act came in to force.*-S. 2 of the Transfer of Property Act did not save from its operation *bai-bil-wafa* mortgages (or mortgages by conditional sale) or any other kind of mortgage executed before that Act came into force. GOLABI v. RAGHONATH DAS, **A.W.N. 1884, 269.** (6 A. 262, *F.*)

(35)—*S.* 2—*Mortgage by conditional sale—Notice under Regulation* XVII *of* 1806—*Expiry of time limited—Passing of T P. Act—General Clauses Act*, s 6—*Foreclosure of mortgage.*—Where a notice of foreclosure was issued under s. 8, Regulation XVII of 1806 in respect of a mortgage by conditional sale executed before T.P. Act came into force and the mortgage money was not paid before the time limited, the mortgage became foreclosed, notwithstanding the passing of the T.P. Act before the expiration of the year of grace. For, s. 6 of the General Clauses Act saved proceedings commenced under the Regulation. Further, the effect of the notice under the Regulation was to vest a right in the mortgagee which was saved by the provisions of s. 2, T.P. Act. GIRDHARI v. MUSST. JUGRU, **2 C.P.L.R. 130.**

(36)—S. 2—Whether applies to tenancy created before the Act came into force—Non-permanent tenure created before the passing of the Act, whether transferable—*See* EJECTMENT, SUIT FOR, 7 C.L.J. 553.

(37)—S 2—*See* BEN. REG. XXXIV OF 1803, ss. 9, 10, 8 A. 402=A.W.N. 1886, 139.

(38)—S. 2—*See* BEN. REG. XVII OF 1806, s. 8, 14 C. 451.

(38-*a*)—S. 2—*See* No. 147, *infra.*

(39)—S. 2 (*d*)—*Transfer by sale in execution of decree-Necessity for registration of conveyance.*—S. 2 (*d*) of the Act exempts transfers in execution of a decree from the operation of chapter III of the Act. Therefore a transfer by sale in execution of a decree need not be made by a registered instrument. BALAJI v. DAJIBA, **2 C.P.L.R. 137.**

(40) S. 2 (*d*)—*See* SETTLEMENT-GENERAL, 6 Bom, L.P. 263.

(41)—*Ss.* 2, 10—*Transfer of property—Condition restraining alienation—Bengal Civil Courts Acts*, s. 24.—Where property was transferred to a Hindu by a deed which recited that it should be enjoyed by him as a proprietor from generation to generation, but that he should have no power of transferring it in any shape, and that it should not be sold in auction for any debt payable by him, that any transfer or sale made in violation of such condition should be invalid and entitle the transferor to claim possession of the property.—*Held* by *Oldfield*,

Transfer of Property Act (IV of 1882) —*continued.*

J., that the deed conferred an absolute estate heritable according to law, to which the law annexes a power of transfer, and that the stipulation against alienation by the transferee, or against sale in execution of decrees against him, was void with reference to the provisions of s. 10 of the Transfer of Property Act, and that the property could be sold in execution of a decree obtained against the transferee's heirs on a mortgage executed by him. *Per Mahmood, J.* —S. 10 of the Transfer of Property Act had no application to the case, which was one of succession or inheritance governed by s. 24 of the Bengal Civil Courts Act; and the case had to be decided with reference to the principles of justice, equity and good conscience, to which, in the matter of transfer of property, effect was given by s. 10 of Act IV of 1882. And as the restraints on the alienation of the absolute estate which the deed conferred, were against the policy of the law, they could not be given effect to. BHAIRO v. PARMESHRI DAYAL, **7 A. 516 = A.W.N. 1885, 136.** (9 B.L.R. 377, *R.*) [*F.*, 3 A.L.J. 621 = A.W.N. 1906, 214.]

(42)—*Ss. 2, cl. (b), and 36—Execution sale —Rent.*—By s. 2, cl. (*b*) of the Transfer of Property Act, s. 36 does not apply to execution-sale; the apportionment of rent that *that* section contemplates is one following the transfer of the interest of the person entitled to receive the rent and not the transfer of the interest of the person bound to pay it. SATYENDRA NATH THAKUR v. NILKANTHA SINGH, **21 C. 383.** [*R.*, 33 C. 786.]

(43)—*Ss. 2 (d), 36—Landlord and tenant—Apportionment of rent—Property demised passing over to a person, other than the original lessor, by operation of law.*—When the plaintiff succeeded the second defendant as *hakim* of a certain *purgannah* and claimed refund of rent for fifty-five days up to the end of a *Fasli* year, from the first defendant, who, as mortgagee in possession of certain *mauzas*, held under the second defendant, had previously collected, from the tenants of the *mauzas*, the entire rent for that *Fasli* year, *held*, that, having regard to s. 2 (*d*) of the Transfer of Property Act, s. 36 of that Act, which is the only statutory provision in India dealing with the question of apportionment, does not apply, and that, except upon the principle of apportionment, the claim was unsustainable. (26 M. 540, *D.*) *Obiter.* —It may be that the tenants were wrong in paying the first defendant the rents in advance, and that the plaintiff has a claim against the tenants for that overpayment, and that the latter may be entliled to be recouped by the first defendant. MATHEWSON v. SHYAM SUNDER SINHA, **33 C. 786.** (21 C. 383, *R.*)

(44)—*Ss. 2, 52—Purchase* pendente lite—*Mortgage decree—Purchase after mortgage—Decree but before sale—Purchase in execution—Priority of title.*—The word "herein" in s. 2 of the Transfer of Property Act means "in that section" and not "in the Transfer of Property Act." Therefore s. 52 of the Act applies to execution sales. A purchase of mortgaged property after the passing of a mortgage-decree and before sale of the property in execution of decree, is a purchase *pendent lite*. (26 C. 966, 4 C.W.N. 317, *F.*) The property in suit was mortgaged to the plaintiff and he obtained a decree on his mortgage in 1893. In execution he put the property to sale and purchased it himself in 1900. In 1897 the defendant purchased the property in execution of a money-decree against the mortgagors: *Held* that the plaintiff's title would relate back to the date of the mortgage and the plaintiff is entitled to preference over the defendant. NABA KRISHNA PAL v. MOHIT KALI DEBI, **9 Ind. Cas. 840.** (32 C. 891, 9 C.W.N. 728, 1 C.L.J. 371, *Rel. on.*)

(45)—Ss. 2 (*c*), 59—Usufructuary mortgage of right to worship—Whether attestation necessary—Turn of worship whether immoveable property—Whether mortgagee is a shebait—*See* SHEBAIT. 14 C.L.J. 369.

(46)—*Ss. 2 (c), 67, 86—Mortgage—Suit for foreclosure—Procedure—Reg. XVII of 1806, ss. 7, 8—General Clauses Act, 1868, s. 6—Procedure whether a right.*—A suit brought, after the Transfer of Property Act came into force, for the foreclosure of a conditional mortgage executed previous to the Act, will be governed by the procedure prescribed by the Act; the procedure prescribed by Reg. XVII of 1806 not having been saved by s. 2 (*c*) of the Act which repealed the Regulation. [*Appr.*, 12 C. 583, F.B.; *R.*, 11 C. 582, 11 A. 367, 3 N.L.R. 97; *D.*, 12 C. 436, 14 C. 451, 15 C. 357, 14 C. 599.] The procedure, by which a right or liability may be determined or enforced, or a relief may be obtained, is not a right, liability or relief within the meaning of s. 2 (*c*) of the Transfer of Property Act. GANGA SAHAI v. KISHEN SAHAI, **6 A. 262, F.B. = A.W.N. 1884. 79.** [*F.*, 16 A. 259, F.B.; *Appr.*, 13 A. 432, F.B.]

(47)—*Ss. 2, 67, 99—Mortgage—Suit pending when Act came into force.*—It was not the intention of s. 99 of the Transfer of Property Act to render ineffectual suits instituted and decree made under the procedure in force before the Act was passed. The plaintiff in this case instituted a suit for sale on his mortgage on the 21st June, 1881, and after its institution and while it was pending, the T.P. Act came into force. He obtained a decree for sale of the mortgaged property. In execution of the decree, the judgment-debtor objected that, with reference to the terms of s. 99 of the T.P. Act, the decree-holder was not entitled to bring the mortgaged property to sale otherwise than by instituting a suit under s. 67 of the Act. *Held* that the objection was not valid, as the decree-holder had acquired under the decree rights, which are, under s. 2 of the Act, not affected by the provisions of s. 99. MAKUND RAM v. RAM SARUP, **A.W.N. 1884, 274.**

Transfer of Property Act (IV of 1882) —continued.

(48)—*Ss.* 2, 67, 99—*Attachment of property mortgaged in* 1879.—The right to enforce a decree is a substantive right, but the mode of enforcing it is a matter of procedure. Therefore, the holder of a decree obtained in 1884 for arrears of rent due under a mortgage bond of 1879, cannot, though the operation of s. 99 of the Transfer of Property Act, gain a right to have the property sold in satisfaction of the decree, and so his procedure must be governed by s. 67 KAVERI v. ANANTHAYYA, **10 M. 129.** [*R.*, 4 O C 231, 35 C. 61=6 C.L.J. 320=11 C. W.N. 1011, F.B ; *D.*, 14 M. 74.]

(49)—*Ss.* 2, 86—*Suit for foreclosure—Mortgage before the Transfer of Property Act—Procedure.* —In a suit brought after the Transfer of Property Act, for foreclosure of a mortgage executed before the Act, the procedure to be followed is that in the Act and not that of Reg. XVII of 1806. BHOBO SUNDARI DEBI v. RAKHAL CHANDER BOSE, **12 C. 583, F. B.** (6 A. 262, *Appr.*) [*Expl.*, 11 A. 367 ; *D.*, 14 C. 451, 15 C. 357 ; *R.*, 10 M. 129, 14 C. 599, 13 A. 432, F.B.]

(50)—*Ss.* 2, 99—*Retrospective effect.*—The Transfer of Property Act (ss. 2, 99) had no retrospective effect, so as to invalidate an order for sale which constituted a legal relation between the parties prior to that Act, coming into force. NARANAPPA v. SAMACHARLU, **19 M. 382=6 M.L.J. 88.** [*R.*, 30 M. 362=17 M.L.J. 325.]

(51)—Ss. 2, 108 (*h*)—Tenant of homestead land—Right to cut and appropriate trees—*See* TREES, 6 Ind. Cas. 796=14 C.W.N. 952=12 C.L.J. 246=37 C. 815.

(52)—Ss. 2 (*b*) and (*c*), and III (*g*)—*See* LANDLORD AND TENANT—FORFEITURE, 2 C.W.N. 292.

(53)—Ss. 2 (*c*), III (*g*), 112—Applicability of Act to leases created prior to the Act—*See* LEASE—GENERAL, 6 Ind. Cas. 447=8 M.L.T. 110=20 M.L.J. 930.

(54)—*Ss.* 2, *cl.* (*d*), 111 (*d*), (117)—Putni *interest created after passing of Transfer of Property Act, merging in Zamindar purchasing it—Putni lease not a lease for agricultural purposes.*—A *putni* interest, created after the Transfer of Property Act came into operation, is determined, when the same is purchased by the Zamindar, even at an execution sale. [*R.*, 1 N.L.R. 103.] A *putni* lease is not a lease for agricultural purposes. Such lease is not outside the scope of s. 117, Transfer of Property Act. PROMOTHO NATH MITTER v. KALI PRASANNA CHOWDHRY, **28 C. 744.**

(55)—S. 3—*Immoveable property—Fruit trees—Growing timber.*—Certain fruit-bearing trees were mortgaged along with other immoveable property. *Held* that they fall within the definition of immoveable property as defined in the Transfer of Property Act and are liable for sale as such. KATWARU CHAMAR v. RAM ADHIN UPADHIA, **10 A.L.J. 516.**

Transfer of Property Act (IV of 1882) —continued.

(56)—*S.* 3—*Notice, registration when amounts to.*—Having regard to the statutes applicable in this country, the question, whether or not registration is notice, is to be treated as not one of law, but of fact, and, as each case arises, it should be determined whether, in that individual case, the omission to search the registry taken together with the other facts, amounts to such gross negligence as to attract the consequence which results from notice. MONINDRA CHUNDRA NANDY v. TROYLUCKHO NATH BURAT, **2 C.W.N. 750.**

(57)—*S.* 3—*Assignability of executory contract.*—The rule in this country as to the assignability of an executory contract for the purchase and sale of goods is that the benefit of such a contract can be assigned, understanding, by benefit the beneficial interest under the contract and the right to enforce it. This rule is subject to certain qualifications, *viz.*, (1) that the benefit is not coupled with a liability, and (2) that the nature of the contract has not been affected by personal considerations. Such a contract falls within the rule which is in existence and in force in this country as to assignment of contracts. Such a contract though perhaps contingent in character, comes within the definition of actionable claim in the Transfer of Property Act, s. 3. An assignment made under such circumstances as to amount to fraud of the Bankruptcy Law falls clearly within s. 6, cl. (*h*) of the Transfer of Property Act and is void. JAFFER MEHER ALI v. THE BUDGE BUDGE JUTE MILLS CO., LD., **10 C.W.N. 755 = 33 C. 702.** [*Affirmed*, 34 C. 289=11 C.W.N. 566.]

(58)—S. 3—*See* U.P. ACT XXII OF 1886, 25 A. 1=29 I.A. 203, P.C.

(59)—S. 3—*See* CONTRACT ACT, 1872, s. 229, 4 Bom. L.R. 832.

(60)—S. 3—Fixtures, meaning of—Liability of assignee of lease to keep the premises in a state of repair—Ownership of fixtures erected by tenant—*See* LANDLORD AND TENANT—MISCELLANEOUS, 29 B. 323.

(61)—S 3—*See* LEASE—MISCELLANEOUS, 6 Bom. L.R. 1073=29 B. 323.

(62)—S. 3—*See* PRE-EMPTION—RIGHT TO PRE-EMPT, 16 M. 301.

(63)—S. 3—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 5 A. 564, F.B.=A.W.N. 1883, 148.

(64)—S. 3—*See* VENDOR AND PURCHASER —LIEN, 10 Bom. L.R. 403=33 B. 53.

(64-*a*)—S. 3—*See* No. 818, *infra.*

(65)—*Ss.* 3, 4, 123—*Gift, if must be registered by the donor himself—Gift to wife—Death of donor—Registration at the instance of the widow, effect of.*—It is not necessary for the validity of a deed of gift that it should be registered by the donor himself. Where a Hindu executed a deed of gift in favour of his wife and died

Transfer of Property Act (IV of 1882) —*continued.*

and the deed was subsequently registered at the instance of the widow *held*, that it was a valid deed of gift within the provisions of s. 123 of the Act. BHABATOSH BANERJEE v. SHAIKH SOLEMAN, **10 C.W.N. 717=33 C. 584 =4 C.L.J. 340.** (20 A. 392, *R.*)

(66)—*Ss. 3, 6—Benefit of an executory contract if actionable claim—Insolvent Act* (11 *and* 12 *Vict. c.* 21), *s.* 7—*Benefit of executory contract if vest in Official Assignee under s.* 7.—The benefit of an executory contract is an actionable claim within the meaning of s. 3 of the Transfer of Property Act. It is such property as would vest in the Official Assignee under s. 7 of the Indian Insolvent Act. JAFFER MEHER ALI v. THE BUDGE BUDGE JUTE MILLS AND CO., **11 C.W.N. 566=34 C. 289**, *on appeal from*, **10 C.W.N. 755=33 C. 702.** [*R.*, 13 C.W.N. 384.]

(67)—*Ss. 3, 6 (e) and* 130—"*Actionable claim*," *what is—Breach of contract, damages for—Right to recover, transfer of—*"*Mere right to sue*," *if transferable—Cause of action.*—The right of a person to recover damages for the breach of a contract is (*Fletcher, J., doubtful*), "merely a right to sue" within the meaning of s. 6 of the Transfer of property Act, and is not capable of being transferred and the assignee thereof cannot maintain an action to recover such damages. ABU MAHOMED v. S.C. CHUNDER, **13 C.W.N. 384=36 C. 345=1 Ind. Cas. 827.**

(68)—Ss. 3, 54—Immoveable property—Standing timber—Trees for cutting and converting into charcoal—Moveable property—*See* CIV. PRO. CODE, 1908, sch. I, O II, r. 2, 13 Bom. L.R. 874.

(69)—Ss 3, 58 and 59—Mofussil property—Mortgage by doposit of title-deeds with creditor's Agent in Calcutta—Sub-mortgage by deposit of the mortgage deed, validity of—*See* EQUITABLE MORTGAGE, 10 C.W.N. 276=33 C. 410=4 C.L.J. 102.

(70)—Ss. 3 (*a*), 59—Standing trees—Moveable or immoveable property—Mortgage—*See* TREES, 9 Ind. Cas. 478.

(71)—*Ss.* 3, 85—"*Property*," *meaning of*—*Notice—Registration.*—The word "property" in the chapter means the actual immoveable property mortgaged, and does not include mere rights and interests in such property as distinguished and separated from the actual physical property itself. The property, therefore, which might effectively be brought to sale under a decree for sale in a mortgage suit is the specific immoveable property, and not merely the rights and interests of the plaintiff and his mortgagor in such property. [*Diss.*, 33 C. 425=3 C.L.J. 205, 29 A. 385, F.B.=A.W.N. 1907, 97=4 A.L.J. 273=2 M.L.T. 248; *N. F.*, 22 C. 33, 20 M. 35, 5 O.C. 335; *R.*, 20 A. 322, 29 C. 1, F.B., 25 A. 46, 22 A.W.N. 216, 27 A. 472=A.W.N. 1905, 58=2 A.L.J. 162; *D.*, 29 A. 205=A.W.N. 1907, 18=3 A.L.J. 848.] Having regard to the definition of "notice" in s. 3, a mortgagee must, for the purpose of s. 85, be deemed

Transfer of Property Act (IV of 1882) —*continued.*

to have notice of a prior or subsequent *registered* mortgage. *N.B.*—All the cases bearing on the points mentioned above, are discussed in detail both in the judgment of *Edge, C.J.*, and the dissentient judgment of *Mahmood, J.*) MATADIN KASODHAN v. KAZIM HUSAIN, **13 A. 432, F.B.** (6 B. 11, 10 B. 88, *R.*)

(72)—*Ss.* 3, 85—*Registration of subsequent mortgage, how far notice to prior mortgagee.*—Where the subsequent mortgage happens to have been registered, the registration must be taken to constitute notice to the prior mortgagee of the interest created by the subsequent mortgage, whether the failure to search the registry has been owing to wilful abstention or omission on the part of the prior mortgagee. If he had ascertained that that mortgage had been made, it would have put him on further inquiry, which he was bound to have made, as to who was the person who was at the time of the suit interested in the property. The prior mortgagee, therefore, having constructive notice by reason of the registration of the subsequent incumbrance, he should comply with the provisions of s. 85 of the Transfer of Property Act, which makes it compulsory that in a suit relating to a mortgage, all persons, of whose interest in the property mortgaged the plaintiff has had notice, should be joined as parties. The object and effect of the section is to compel a person suing on a mortgage to bring into one suit, so far as he has notice of their interests, all persons interested in the property, so that the rights and interests of the different persons interested in the mortgaged property might be ascertained protected and dealt with, in a single suit instead of in several suits. JANKI PRASAD v. KISHEN DAT, **16 A. 478, F.B.=A.W.N. 1894. 151.** [*Diss.*, 7 C.W.N. 11; *F.*, 22 A. 212, 21 A.W.N. 22, 1 S.L.R. 68; *R.*, 17 A. 537, 18 A. 109, 20 A. 110, 1 O.C. 53, 13 C.P.L.R. 43, 26 B. 538, 64 P.R. 1908=132 P.W.R. 1908, 11 O.C. 206, 1 Ind. Cas. 227; *D.*, 23 A. 25.]

(73)—*Ss.* 3 *and* 85—*Omission to make a puisne mortgagee party to a suit—Registration—Notice—Civ. Pro. Code* (*Act* V *of* 1908), *O.* 11, *r.* 1.—Where, in a suit on his mortgage, the prior mortgagee did not join the puisne mortgagees, whose mortgage was registered, as defendants: *Held*, that it would be a hardship to construe the mere fact of registration as notice, seeing that the provisions of law requiring mortgages to be effected by registered assurances had only very lately been applied to the District. SUBRAMANIAN CHETTY v. SUBRAMANIAN CHETTY, **8 Ind. Cas. 1199.** (16 A. 478, *Not F.*; 7 C.W.N. 11, 13 M. 383, *Cons.*; 26 B. 538, 4 Bom. L.R. 253, *R.*)

(74)—S. 4—*See* PRE EMPTION—GENERAL, 1 O.C. 75.

(75)—S. 4—*See* REGISTRATION ACT, 1908, ss. 2, 17, 49, 8 Ind. Cas. 520.

(76)—S. 4—*See* No. 65, *supra*.

Transfer of Property Act (IV of 1882) —*continued.*

(77)—*Ss.* 4, 105, 107—*Lease—Agreement to lease—Registration Act* (III *of* 1877), *s* 17, *cl.* (*d*)—*Evidence Act* (I *of* 1872), *s.* 91—*Parol agreement to lease out land for five years—Doctrine of part performance—Entry upon land by lessee—Ejectment.*—The plaintiff sued to eject the defendant, alleging that the land was leased for one year. It was found that the agreement between the parties was that the defendant was to remain upon the land for five years on payment of a certain rent. The defendant entered upon the land upon that contract, laid out money and commenced certain works. *Held*, that, there being a special definition of the word "lease" in the Transfer of Property Act, s. 105, the word "lease" in s. 107 must be read as speaking of leases as defined in s. 105, that it did not include an agreement to lease, and that, even in the absence of a registered lease, the contract is valid: *Held*, further, that, as there was an agreement to lease and a part performance of that agreement by allowing the defendant to enter upon the land, it would be inequitable to allow the plaintiff to resile from his contract, and to turn the defendant out before the expiry of the term for which he had been taken in. NANDA LAL GHOSE v. SARAT CHANDRA BANERJI, **5 Ind. Cas. 562.** (2 C.L.J. 343, 1 C.W.N. 248, 8 C.W.N. 434, *R.*)

(78)—*Ss.* 4, 107—*Provisions of the Act Supplemental to Registration Act.*—Under the provisions of s. 4 of the Act, s. 107 has to be construed as supplemental to the Indian Registration Act. Consequently, a lease of moveable property does not require registration. ORR v. KUMARASAMY, **5 M.L.J. 27.**

(79)—Ss. 4 and 107—An undertaking by the tenant to hold on certain conditions is not a lease within the meaning of s. 107, Tr. P. Act. *See* LEASE—GENERAL, 6 M.L.T. 175.

(80)—*S.* 5—"*Transfer of Property*"—*Deed of appointment.*—The term "Transfer of Property Act" is a general one and is not confined to transfers of a contractual and literal character. Besides including a conveyance or assignment of a contractual character, it appears, from the definition of "Transfer of Property" given in s. 5, to include the exercise of a power of appointment under a settlement JOSHUA v. ALLIANCE BANK OF SIMLA, **22 C. 185.** [*R.*, 6 P.R. 1901.]

(81)—*Ss.* 5, 6 *to* 37—*Limitation Act* (XV *of* 1877), *sch* II, *art.* 11—*One year's limitation does not apply to a person who was no party to proceedings in which the order was made—Transfer of Property Act*, IV *of* 1882, *s.* 6 (*a*)—*Hindu Law—Transfer of reversionary interest in moveable property is invalid.*—Art. 11 of the Limitation Act does not apply as against a person, who was not a party to the proceedings in which the order sought to be set aside was made. A reversioner cannot validly transfer his rights of an expectant heir in moveable or immoveable property. Chap. II, sub-head A, of Transfer of Property Act, covering ss. 5 to 37, applies to property whether moveable or immoveable. Therefore, where a reversioner transferred his interest in certain promissory notes to a female, who had at the time of transfer a life-estate in the notes: *Held*, that the transfer was invalid, and the female did not get any absolute interest in the promissory notes by virtue of such transfer. HARGAWAN MAGAN v. BAIJ NATH DAS, **4 Ind. Cas. 144=7 A.L.J. 11.** (21 A. 71, P.C. =25 I.A. 183, 2 C.W.N. 729, *F.*)

(82)—Ss. 5, 54—Deposit in wife's name—Right of wife to the money—*See* TRUSTS ACT, 1882, ss. 5 and 6, 13 Bom. L.R. 564.

(83)—*S.* 6—*Actionable claim—Property.*—Under the Transfer of Property Act, property includes an actionable claim. RUDRA PERKASH MISSER v. KRISHNA MOHUN GHATUCK, **14 C. 241.** [*R.*, 16 A. 315, F.B.]

(84)—*S.* 6 (*a*)—*Scope of the section*—It was not intended by s. 6 (*a*) of the Transfer of Property Act, 1882, to establish and perpetuate the distinction between that which according to the phraseology of English lawyers is assignable in law and that which is assignable in equity. The exception in cl. (*a*) cannot be by reason of the future character of the chance; it must be because it was thought undesirable that it should be capable of transfer. SUMSUDDIN v. ABDUL, **8 Bom. L.R. 781=31 B. 165.**

(85)—*S.* 6—*Right of a reversionary heir, inalienability of the.*—The right of a presumptive reversionary heir under the Hindu Law is no more than a *spes successionis* or expectancy of succeeding to property (24 A. 90, *F.*) and such a mere expectancy cannot be made the subject of a transfer. MANICKAM PILLAI v. RAMALINGA PILIAI, **29 M. 120** (13 M.L.J. 323, *F.*) [*F.*, 17 M.L.J. 505=30 M. 486; *Appr.*, 19 M.L.J. 88=5 M.L.T. 122=32 M. 206; *R.*, 8 Bom. L. R. 781=31 B. 165, 31 M. 366=18 M. L. J. 309=3 M.L.T. 355, 31 M. 446, 2 Ind. Cas. 865.]

(86)—*S.* 6—*Reversionary interest, transfer of, invalid—Unregistered document, validity of, where value of property not specified in the deed, but exceeds Rs.* 100.—*Held*, that the transfer of a merely reversionary interest is invalid under s. 6 of the Transfer of Property Act. (29 C. 355, 21 A. 71, P.C., 24 A. 94, *R.*) *Held*, further, that a document by which property exceeding Rs. 100 in value is transferred is invalid if not registered, although the value of property is not specified in the deed. SRI GOVIND v. BALBHADDAR, **10 O. C. 277.**

(87)—*S.* 6—*Hindu Law—Transfer by a Hindu reversioner of his reversionary interest.*—*Held*, that it is not competent to a Hindu reversioner to transfer his reversionary interest expectant on the death of a Hindu widow. JAGAN NATH v. DIBBO, **A.W.N. 1908, 284.** (25 I. A. 183=21 A. 71, *F.*)

(88)—*S.* 6—*Hindu reversioner's contingent right—Assignment of such right—Possibility of succession—Interest of reversioner—Valuation.*—

Transfer of Property Act (IV of 1882) —*continued.*

Thepr ovisions of s. 6, Tr.P. Act, are only intended to apply to cases of a mere hope or chance of succession which may be defeated by the act of some person having the present disposal of the property. It can scarcely be said that a right of a Hindu reversioner is a mere possibility. It is an interest which is capable of being protected by Court. So, the interest of such a person expectant on the death of a Hindu widow does not fall within the purview of cl. (*a*) s. 6 of the Act. Law sanctions the assignment of such interest. [*Overrul-d*, 29 C. 355; *R.*, 30 B. 304 =7 Bom. L.R. 742, 9 C.L.J. 50, 10 C.L.J. 263=3 Ind. Cas. 178.] Mere possibilities of succession are solely incapable of valuation, whereas with the aid of an actuary it is not difficult to put a money value upon the interest of a reversioner. BRAHMADEO NARAYAN v. HARJAN SINGH, **25 C. 778**. [*Overruled*, 29 C. 355; *Appr.*, 30 B. 304=7 Bom. L R. 742.]

(89)—*S.* 6—*Expectancy, sale of—Hindu Law—Power of guardian.*—Whether a mere expectancy can be the subject of a sale, and if so, of a sale by a guardian acting or purporting to act on behalf of an infant. DOOLI CHAND v. BIRJ BHOOKUN LAL AWASTI, **6 C.L R. 528, P.C.** [*R.*, 8 C. 12, 8 C. 138, 10 C.P.L. R. 1.]

(90)—*S.* 6 — *Compromise between Hindu brothers that property of one brother was to be divided between them in case other died without male issue—Hindu Law*—Dayabhaga—*Transfer of expectancy—Surviving brothers—Legal representatives — Whether possession of assets necessary—Limitation Act* (IX *of* 1908), *suit against sureties—Date of accrual of cause of action.*—A provision in a family settlement, whereby certain Hindu brothers divided the family property belonging to them among themselves. and agreed that, upon any of them dying without male issue, his share would pass to the surviving brothers, was neither in contravention of Hindu law nor obnoxious to the provisions of the Tr. P. Act, s. 6 (*a*) as being transfer of an expectant interest in property. A representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of a deceased person. Hence, a creditor has a right to sue the representatives of his deceased debtor and of obtaining a decree against them, if he can prove that there are assets of which they may become possessed, even though it is not proved that assets have come into their hands. Where an executor obtained probate for administration of the estate of a deceased person, and executed an administration bond with two sureties, whereby an inventory was to be exhibited within a certain time, but died within six years of the date of a suit against the sureties, *held*, that the suit was not time-barred, as time did not begin to run against the plaintiff until the death of the executor KANTEE CHANDRA MUKERJI v. ALI NABI, **8 A.L.J. 199.**

(91)—*S.* 6—*Reversionary right, transfer of—Agreement to give share in property to be recovered by litigation, validity of — Transfer in præsenti—Specific performance of an agreement to give share in subject-matter of litigation—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 113—*Performance by plaintiff of his part of contract—Burden of proof.*—Where, in lieu of the funds advanced to him for the prosecution of litigation, a reversioner executed a deed of agreement, by which he agreed to give a share in the property on the estate falling into possession, the deed could not be considered as void under s. 6 of the Transfer of Property Act, inasmuch as the deed was not a transfer *in præsenti* of the reversionary right, but was only an agreement to convey the property in future, and as such, it is valid. In a suit brought to specifically enforce the agreement, the burden of proving that the plaintiff was ready to perform his part of the contract, lies upon him. Limitation applicable to a suit for specific performance is governed by art. 113, Limitation Act. GAJADHAR SINGH v. KANDHAYA BUKSH, **9 Ind. Cas. 243.**

(92)—*S.* 6 (*a*)—*Reversioner—Transfer of expectancy, validity of.*—A Hindu widow mortgaged certain property in which she had only a life-interest. A reversioner sued for a declaration that the mortgage would not affect his rights in respect of the property after the widow's death. This suit was withdrawn in consequence of a compromise, whereby it was agreed that, during her life-time, the widow would get from the mortgagee a certain sum as her maintenance, while the rest of the profits of the property would be divided between the reversioner and the mortgagee, and that, after the death of the widow, the reversioner and the mortgagee would divide the property in equal shares: *Held*, that the effect of the agreement was to transfer to the mortgagee one half of the mortgage-property on the widow's death, and that this amounted to a transfer of an expectancy by the reversioner and was, therefore, invalid under the provisions of s. 6 (*a*) of the Transfer of Property Act. BHAGAN v. MUNNU, **13 Ind. Cas. 495=15 O. C. 122.**

(93)—*S.* 6, *cl.* (*a*)—*Reversionary interest—Promissory notes, release of—Validity of.*—Ch. 2 of IV of 1882, refers to transfers of property whether moveable or immoveable. Hence, the release of reversionary right in certain promissory notes is invalid as being the transfer of the chance of an heir—apparent succeeding to property within the meaning of clause of s. 6 of that Act. HARGAWAN MAGAN v. BAIJNATH DASS, **7 A.L J. 11=4 Ind. Cas. 144=32 A. 88.** (21 A. 71, *Rel. on.*)

(94)—*S.* 6—*Will—Construction of document—Adverse possession of joint Hindu family property—Contracts to make testamentary dispositions, validity of—Transfer of the chance of relation obtaining property on the death of a kinsman, suit by transferee for declaration of right on the basis of—Rights derived under a contract to make*

Transfer of Property Act (IV of 1882) —continued.

testamentary disposition, not transferable. — On the 27th July, 1882, C executed and registered a document, which he called a 'Will' in which, after reciting that he was about 57 years of age and that it was desirable to arrange for the succession of his property after his death, be agreed (*ikrar kartahun*) and recorded that R, his nephew, who was a half sharer, should own and possess all his property (8 annas share in two villages) after his death, with full powers of sale and transfer, but without any power to interfere with it during his lifetime. It also declared that if C's wife survived him, R should maintain and obey her and if he failed to do so, she would retain all the property and the document would become null and void. On the same date, R executed and registered a deed by which in consideration of C's deed he agreed to make no claim to C's property and to obey him and his wife, but that if he failed to comply with this condition, he would have no right to the property. On the 6th November, 1903, C and his wife transferred, by a deed of gift, the greater part of one of the two villages in favour of their sons-in-law and grandson. On the 9th September, 1903, R executed a deed by which he sold to P a 4 annas out of 8-annas share in both the villages and also the half of whatever property they might recover in a suit instituted by them jointly on the deed executed by C on the 27th July, 1882. R and P accordingly instituted a suit for a declaration that C had no power, to transfer the property specified in the deed of 27th July, 1882, and for the cancellation of the deed of gift in favour of C's relatives, or in the alternative for a decree for actual possession of 8-annas share in the villages. R's son was also made a defendant on his alleging that he and his father were members of a joint Hindu family. The principal pleas of the defendants were that the suit was barred by limitation and that R having dealt with the property in contravention of the condition of C's deed of the 27th July, 1882, that deed became null and void. The suit was dismissed and P appealed to the extent of his share. *Held* (*per Scott, C.J.*) that the property in suit was not the joint property of C and R after the 27th July, 1882, and that C having been in adverse possession of the property in suit since 1882, the suit was barred by limitation. A document does not necessarily become a will because the person executing it calls it one and in order to determine the effect of that document its terms must be considered. *Held* therefore, that having regard to the terms of the deed executed by C on the 27th July, 1882, it must be *held* to be a will and that C had power to revoke it. *Held* (*per Chamier, A. J. C.*) that contracts to make testamentary disposition are valid; but under s. 6 of the Transfer of Property Act the person in whose favour such a contract exists cannot transfer his supposed rights under the contract to a third person and such a third person cannot, on the strength of such transfer sue for a declaration of those rights. PRAG DAT v. CHOTE SINGH, **9 O.C. 55 (B).**

Transfer of Property Act (IV of 1882) —continued.

(95)—*S. 6 (a)—Widow suing for declaration of her absolute ownership under husband's will —Alleged reversioners entering into razinamah acknowledging her absolute rights—Subsequent release by such reversioners—Whether release anything more than agreement not to disturb—Whether compromise a transfer of a* spes successionis.—As a right must always be on the one side or the other, the fact that the right is on his side is not by itself sufficient for a party to set aside a compromise entered into by him on the supposition of a doubtful right. There is nothing illegal in a Hindu widow acquiring full ownership in any property under a will; and a *razinamah* or decree recognizing the right is, therefore, not illegal. A Hindu widow brought a suit, as the sole owner of her husband's property under his will, against her husband's brother and some others, who were executors under the will, for a declaration that she had become solely entitled to the possession of the property and for other reliefs. A *razinamah* was entered into by which the suit property was acknowledged to be the absolute property of the widow in accordance with the terms of the will. A decree was passed in accordance with the terms of the *razinamah*, and a deed of release was executed by the reversioners. A suit was brought to recover these properties by the son of the testator's brother, as reversioner, alleging that the *razinamah* was invalid for misrepresentaton and coercion. *Held*, that the acceptance of the release deed was not an acknowledgment of the existence of any right in the releasor, but amounted only to an agreement (30 M. 256, 24 M. 265, 26 M. 31, 28 M. 84, *D.*) not to disturb the widow in the enjoyment of the property absolutely and that there was nothing to countenance the view that the *razinamah* and the release should be treated as effecting a transfer of only a chance of succession or *spes successionis* to the widow, which was incapable of transfer by virtue of s. 6 (*a*), Transfer of Property Act, and, therefore, illegal and invalid. OLATI PULLIAH CHETTY v. E VARADARAJULU CHETTI, **18 M.L.J. 469=31 M. 474.**

(96)—*S. 6 (a)—Estoppel—Recital in a deed, effect of, in an action collateral to it—Promise—Transfer of the chance of an heir-apparent, validity of—Mutation of names—Possession, transfer of—Evidence Act, s. 115.*—*Held*, that a transfer of the chance of an heir-apparent succeeding to an estate is invalid and cannot operate to transfer any interest in the property. (31 B. 165, *F.*; 31 C. 667, 13 C. 262, 10 A. 133, 29 A. 163, *R.*)—*Held* further, that neither mutation of names nor transfer of possession can pass any title where the law requires a registered deed. (26 C. 81, *R.*) Where a distinct statement of a particular fact is made in a recital of a bond and a contract is made with reference to that recital, *held*, that the party making the statement would not be estopped from disputing the fact so admitted in an action not founded on the deed but wholly collateral to it. *Held* also, that a promise not

Transfer of Property Act (IV of 1882) —*continued.*

being a representation as to an existing fact, cannot by itself be the foundation of an estoppel. BAJRANG SINGH v. BHAGWAN BAKHSH SINGH, **11 O.C. 301.**

(97)—*S.* 6, *cl.* (*a*)—*Chance of heir-apparent binding — Mahomedan wife.*—A Mahomedan cannot, any more than a Hindu, bind his chance as an heir-apparent (8 B.L.R. 781=31 B. 165, 21 A. 71=25 I.A. 183, *F*) *Quære*:—Whether the effect of s. 6, cl. (*a*) of the Transfer of Property Act is not merely to except specially the chance of an heir apparent from the category of transferable property, but also to make the principal that equity considers that done which ought to be done entirely inapplicable. REBATI MOHAN DAS v. AHMED KHAN, **9 C.L.J. 50=1 Ind. Cas. 590.** [*R.*, 2 Ind. Cas. 865, 10 C.L.J. 263.]

(98)—*S.* 6—*Right to receive Moggu—Assignment thereof — Valid.*—Moggu is an allowance received by a wargdar from walawargdars holding lands within the warg for which he holds the putta. It is the concession paid to the wargdar for his trouble in collecting the revenue and paying it over to Government. The right to the Moggu allowance can be transferred and s. 6 of the Transfer of Property Act is not opposed to such transfer. The assignee could claim payment of the Moggu only if the wargdar fulfilled his obligation to receive the revenue from the walawargdar and pay it to Government. GANAPATHI BHATTA v. MANI ANANTHA BHATTA, **1 M.W.N. 1911, 233.**

(99)—*S.* 6 (*d*)—*Hindu Law—Priestly office with emoluments, transferability of—Estoppel.*—A priestly office with emoluments attached to it is inalienable (17 W.R. 266, 14 W.R. 409, 15 W.R. 339, 6 B. 298, 1 M. 235, 6 M. 76, *R.*) It would be contrary to public policy to allow offices like this to be transferred either by private sale or by sale in execution of money decree. A person is not precluded from raising the question that his priestly office with emoluments are inalienable, because he mortgaged the same. SRIMATI MALLIKA DASI v. RATANMANI CHAKERVARTI, **1 C.W.N. 493.** (17 W.R. P.C. 41, *R.*)

(100)—*S.* 6, *cl.* (*d*)—*Sale of books*—Jajmani Bahis—*Right to act as hereditary guide, transfer of.*—The sale of *Jajmani Bahis* (books in which lists are kept of pilgrims who have visited the place in past years) is not forbidden by cl. (*d*) of s. 6 of the Transfer of Property Act. A sale, however, of these books will not convey to the purchaser any right of the judgment-debtor to act as the hereditary guide of the pilgrims mentioned therein. GOPI NATH v. JHANDU, **4 A.L.J. 712 = A.W.N. 1907, 282.**

(101)—*S.* 6 (*d*)—*Transfer of right to future maintenance*—*Contract Act* (IX *of* 1872), *ss.* 16. 19-A—*Undue influence—Loan to helpless widow*—"*Dominating the will of the borrower*," *meaning of.*—A right to future maintenance is not an interest in property restricted in its enjoyment to the owner personally, within the meaning of paragraph (*d*) of s. 6 of the Transfer of Property Act. Where the amount of maintenance payable is subsequently fixed by agreement or by decree, a widow's right to maintenance from her late husband's estate is not inalienable. Where Rs. 1,500 was lent to a helpless widow, whose husband died ten years ago and who had no means for maintenance, to enable her to establish her right to maintenance, and the interest stipulated was 10 per cent. and the principal and interest were to be repaid in a year, and, in default of payment, interest on principal and interest at compound rate at 1 per cent. per month was to be paid with six month's rests:—*Held*, that the contract was induced by undue influence, and the circumstances of the case called for equitable relief at the hands of the Court. RANEE ANNAPURANI NACHIAR v. MAR AR. SWAMINATHAN CHETTY, **6 Ind. Cas. 439=8 M.L.T. 108=20 M.L.J. 785.** (16 M. 429, 5 W.R. 111, 5 B. 99, 7 W.R. 311, 23 W. R. 427, *R. & Expl.*; 28 A. 570, 4 C.L.J. 1, 1 M.L.T. 205, 3 A.L.J. 495, 9 O.C. 188, 8 Bom. L.R. 491, 10 C.W.N. 849, 16 M.L.J. 292, 34 C. 150, 4 A.L.J. 109, 11 C.W.N. 249, 5 C.L.J. 106, 17 M.L.J. 43, 9 Bom L.R. 304, 2 M.L.T. 75, 15 A. 352, 20 I.A. 127, 31 A. 386, 10 C.L.J. 76, 6 A.L.J. 707, 13 C.W.N. 1069=11 Bom. L.R. 864, 6 M.L.T. 71, 19 M.L.J. 438, 3 Ind. Cas. 385, *R.*)

(102)—*S.* 6 (*e*)—*Right to sue for damages for breach of contract, not assignable.*—A right to sue for damages for breach of contract is a mere right to sue within the meaning of s. 6 (*e*) of the Tr. P. Act, and so could not be transferred. GOPALA IYER v. RAMASAMI SASTRIGAL, **7 M.L.T. 228=6 Ind. Cas. 290.** (36 C. 345, *F.*)

(103)—*S.* 6 (*e*)—*Transfer of mere right to sue—Right of assignee to recover damages from assignor's agent for negligence—Tort—Breach of contract.*—The purchaser of a *mokhasa inam* land with all rights appertaining thereto, as the right to collect rents, etc., due in respect of the land, cannot sue the sendor's agent for damages for negligence in failing to collect the rents which, by the use of ordinary diligence, he might have realised. Such an assignment is the assignment of a mere right to sue, which is invalid under s. 6 (*e*) of the Transfer of Property Act. If the claim is based in tort, the claim fails because such a claim is not assignable. If the claim is based on contract, it is equally unsustainable as the transfer was after breach, if any, on the part of the vendor's agent. PANSULARI VENKATASWAMI v. MENTANA RAMACHANDRA RAJU, **24 M.L.J. 298=13 M.L.T. 218=18 Ind. Cas. 520=M.W.N. 1913, 285.**

(104)—S. 6—*See* CIV. PRO. CODE, 1908, ss. 60, 58 P.R. 1894.

(105)—S. 6, cl. (*a*)—*See* COMPROMISE—CONSTRUCTION OF, A.W.N. 1887, 84.

(106)—S. 6 (*a*)—Relinquishment by reversioners—*See* HINDU LAW—ADOPTION, 2 M.L.T. 184=30 M. 201.

Transfer of Property Act (IV of 1882) —*continued.*

(107)—S. 6, cl. (*a*)—*See* HINDU LAW—REVERSIONERS, 29 C. 355=6 C.W.N. 395.

(108)—S. 6—Hindu Law—Reversioner—Right of reversioner—*Spes successionis*—Transfer of reversionary interest to widow—Validity—*See* HINDU LAW—REVERSIONERS, 13 M.L.J. 323.

(109)—S. 6—Agreement between divided brothers as regards estate of a deceased divided brother—Widow of deceased brother not a party to the agreement—Validity of the agreement—*See* HINDU LAW—REVERSIONERS, 17 M.L.J. 505=30 M. 486=2 M.L.T. 443.

(110)—S. 6, cl. (*b*)—*See* LANDLORD AND TENANT—FORFEITURE, 15 M. 125.

(111)—S. 6 (1)—*See* LANDLORD AND TENANT—TRANSFER OF TENANT'S INTEREST, 7 O.C. 265.

(112)—S. 6—Chance of heir apparent—Relinquishment—Validity—*See* MAHOMEDAN LAW—ALIENATION, 2 Ind. Cas. 865.

(113)—S. 6 (*a*)—Scope—*See* MAHOMEDAN LAW—DOWER, 8 A.L.J. 275=9 Ind. Cas. 530.

(114)—S. 6 (*d*)—*See* MAHOMEDAN LAW—INHERITANCE, A.W.N. 1907, 221=4 A.L.J. 521=29 A. 640.

(115)—S. 6—Pre-emption—Personal right—Transfer of—*See* PRE-EMPTION—GENERAL, 13 Bom.L.R. 1042.

(116)—S. 6—*See* RENT, SUIT FOR, 3 O.C. 108.

(117)—S. 6—Kabzadari without right of transfer—Mortgage of occupancy holding—*See* RIGHT OF OCCUPANCY—GENERAL, 14 O.C. 144.

(118)—S. 6—*See* Nos. 66, 67, 81, *supra* and No. 214, *infra*.

(119)—*Ss.* 6 (*a*), 19, 21—Spes successionis—*If transferable.*—The right of a son or daughter or other heir of a person to inherit that person's property on his death is not an estate in remainder or in reversion in immoveable property or an estate otherwise deferred in enjoyment. It is neither a vested nor a contingent right. It does not come within the definitions of a "vested interest" in s. 19, or of "a contingent interest" in s. 21 of the Transfer of Property Act, and s. 107 of the Indian Succession Act. So far from being a vested or contingent right, a right in present or in future, it is, in the language of cl. (*a*) of s. 6 of the Transfer of Property Act "the chance of an heir apparent succeeding to an estate" or "a mere possibility of succession which cannot be transferred." ABDOOL v. GOOLAM, 7 Bom. L.R. 742=30 B. 304.

(120)—*Ss.* 6 *and* 43—*Reversionary interest, transfer of—Representation.*—A Hindu reversioner is not competent to transfer his reversionary interest expectant on the death of a Hindu widow. S. 43 of the Transfer of Property Act

Transfer of Property Act (IV of 1882) —*continued.*

does not apply if a deed is executed without consideration. Even if the deed is for consideration it has to be shown that there was an erroneous representation by the reversioner who executed the deed. JAGGANATH v. DIBBO. 6 A.L.J. 49=A.W.N. 1908. 284=31 A. 53=1 Ind. Cas. 818. (25 I.A. 183, 29 C. 355, *F.*)

(121)—*Ss.* 6 *and* 67—*Mortgage of impartible zamindari by holder and members of his family standing in the line of succession to the zamindari—Suit for sale of mortgaged property and appointing receiver pending sale—Consent decree—Spes successionis—Civ. Pro. Code, ss.* 274, 503—*Court's power to appoint receiver.*—In a suit instituted under s. 67, Transfer of Property Act, for sale of the mortgaged property against 5 defendants the then zemindar of Ammayanaikanor and 4 members of his family who stood in the line of succession to the zemindari, the consent decree, which was sought to be executed, provided that the decree-debt should be paid off by instalments, that, in default, defendants Nos. 1 to 5 shall pay the balance outstanding, that the mortgaged property, including the zemindari then in possession of the first defendant and to which the other defendants are entitled, shall stand liable, and that, in default, the plaintiff shall be at liberty to proceed against, and realise, the said amount with interest as provided in the decree by precept of Court from defendants Nos. 1 to 5 and the mortgaged properties. The decree, further, provided that, if the *razinama* amount should not be paid off in the life-time of the first defendant and he should be succeeded by a person, who was not a party to the suit, and such successor should object to pay the balance, the balance with interest should be paid by whichever of defendants Nos. 2 to 5 should succeed to the zemindari, at whatever period, as soon as he should so succeed, and that, in default, the plaintiff should be at liberty to proceed against the remaining defendants in accordance with law and that, until the whole amount is to be realised, the mortgaged properties and defendants Nos. 1 to 5 should stand liable. The first defendant was the zemindar then in possession, but the member of the family next in succession, who subsequently succeeded, had not joined in the mortgage and was not a party to the above suit. The second defendant succeeded the first defendant. The decree-holder filed an execution petition against defendants 2 to 5 in the suit praying for the sale of the mortgaged property and the appointment of a receiver pending sale. *Held*, that the provisions as to the event of the *razinamah* amount not being paid in the life time of the first defendant, were inserted with the object of keeping alive the right to execute the decree against defendants Nos. 2 to 5, in the event of none of them succeeding until further execution would, but for such provisions, have become impossible; and that the words "realise by precept of Court from the mortgaged properties" include a power to sell the zemindari, so far as it might lawfully be sold and,

Transfer of Property Act (IV of 1882) —*continued.*

therefore, clearly a power to sell in default of the life-interest of the first defendant, the zemindar then in possession. As to the succeeding life-interests of the other defendants in the zemindari, it was held that the decree does not give any power to sell such life-interests until they take effect in possession; that the interests, which defendants Nos. 2 to 5 have purported to transfer, would be in the nature of a mere chance of succession within the prohibition in s. 6 (*a*) of the Transfer of Property Act; and that, as s. 6 (*a*) renders such transfers unlawful on grounds of public policy, the Courts cannot allow them to be effected by means of consent decrees. (8 Bom. L.R. 781, *Appr.*; 18 M. 291, 10 A. 272, 8 Bom. L.R 813, 26 M. 31, 8 I. A. 123, 11 B. 537, 28 M. 355, *R.*) *Held*, therefore, that the order of the lower Court directing the sale of the zemindari should be set aside; and that, as the second defendant had the advantage of the advances under the suit mortgage, which were made for protecting his right to succession, he should be made personally liable on the decree and that the decree-holder should, therefore, be allowed to amend the execution petition by inserting a prayer for execution against the second defendant, personally, and that the receiver appointed by the lower Court should be retained. Where a receiver has been validly appointed on the ground that the property was the subject matter of the suit, and it, afterwards, turns out on appeal that the decree only operates against the defendants, personally, the appellate Court has jurisdiction to maintain the receiver as a method of realising the decree amount from the judgment-debtor personally. RAMASAMI NAIK v. RAMASAWMI CHETTY, **2 M.L.T. 167=17 M.L.J. 201=30 M. 258.** (8 W. R. 10, 18 C. 188, 18 M. 437, 25 M. 537, 28 M. 473, *R.*) [*Appr.*, 5 M.L.T. 293; *R.*, 17 M. L. J. 311, 18 M.L.J. 247=3 M.L.T 243, 31 M. 474=18 M.L.J. 469=18 M L. J 309, 32 M. 429=19 M.L.J. 401=2 Ind. Cas. 18, 7 Ind. Cas. 55, 8 Ind. Cas. 22.]

(122)—*Ss* 6 (*a*), 85, 9 (*a*) (*b*)—*Persons entitled to redeem—Heirs of mortgagor—Persons having interest in property—Joinder as parties of all persons interested in property—Under Buddhist law children have no vested interest in parental property during the life-time of either parent—General principle to be followed in mortgage cases.*—Children cannot stop their parents from doing as they choose, with their property, but when they succeed to their parents' rights on the parents' death, they are at liberty to exercise a right of pre-emption for the recovery of the property that may have been alienated without their consent. The mortgagor of certain land died, leaving a widow and seven sons and daughters. One of the daughters against the will of her mother, sued singly for redemption, *held* that she had no status to sue. The Transfer of Property Act is not in force in Burma, but the rules laid down in it, founded as they are upon long experience of English law, may for the most part be taken as safe guides to the general principles of justice and equity which the Courts are bound to administer, and there are standing instructions to that effect. In suits relating to mortgage, the provisions of the Transfer of Property Act on the subject may generally be taken with safety as guides to those principles of justice, equity and good conscience that constitute the law, not contained in specific enactments in force, which the Courts have to administer under s. 4 (2) of the Civil Courts Regulations, and the Courts have been instructed to this effect in Circular No. 24 (Civil of 1892). In accordance with the rule embodied in s. 85 of the Act all persons interested in the mortgaged property ought to be made parties to a redemption suit, and this should be the established practice. On the principle laid down in s. 91 of the Act, among the persons entitled to redeem are the mortgagor and his heirs, and persons having an interest in the property or in the right of redemption; but in this instance none of these descriptions applied to plaintiff, and she could come under no other clause in the section. Hindu law is, of course, not Buddhist law, but the indebtedness of the latter to the former and the light which is thrown by the one on the other, must be acknowledged, and it would take a great deal to persuade any Court in Burma that a Burmese Buddhist widow could, in matters of inheritance, from her husband, be in an inferior position to a Hindu widow. The heir of the deceased husband under Buddhist law is his widow, and not any of his children until the death of the widow, and the children have no such interest in the estate as is contemplated by s. 91 of the Transfer of Property Act. The heir must be the existing heir actually in possession of or in a position to possess the inheritance, and not merely an expectant and possible heir in the future, and the interest must be an immediate subsisting and not merely a future contingent interest. The language of s. 91 and of s. 6 (*a*) implies this. The relative positions of a Hindu widow succeeding as her husband's heir, and of the reversioner, are in some ways analogous to those of a Buddhist widow and her younger children, and at least serve to illustrate the nature and extent of the respective rights of the latter. MA MIN THA v. MA NAW, **U.B.R. 1892—1896, Vol II, 581.** [*R.*, U B.R. 1907, 2nd Qr., Buddhist Law—Inheritance Pre-emption, 1, L.B.R. 1905—1906, 169, 241; *F.*, 14 Bur. L. R 91.]

(123)—Ss. 6, cl. (*e*) and 160—*See* MESNE PROFITS—RIGHT TO MESNE PROFITS, 2 C.W.N. 43.

(123-*a*)—S. 7—*See* No. 81, *supra*.

(124)—*See* EASEMENT, A.W.N. 1893, 151.

(125)—S. 8—*See* No. 81, *supra* and Nos. 374, 636, *infra*.

(126)—*Ss.* 8, 54—*Hypothecation for Rs.* 87—*Registration Act*, III *of* 1877, *ss.* 17 *and* 18.—Under s. 8 of Act IV of 1882, the transfer of a

Transfer of Property Act (IV of 1882) —*continued.*

debt passes to the transferee the securities for the debt; but what is sold is primarily not the charge, but the debt. The assignment, being of a claim for less than Rs.100, falls within the provisions of s. 18 of the Registration Act, and need not be registered. The words "other intangible thing" in s. 54 of Act IV of 1882 might include a charge, but construed with reference to the context should be taken to mean interests of the nature of reversions. The distinction between the two classes of property mentioned in the section was with a view to preserve a similar distinction created by ss. 17 and 18 of the Registration Act. The assignment of a charge for less than Rs. 100 does not require registration. It would be very anomalous if the transfer of a hypothecation should require registration when the original hypothecation did not require it. SUBRAMANIAM v. PERUMAL REDDI, **18 M. 454=5 M.L.J. 92.** [*Diss.*, 24 M. 449; *R.*, 25 M. 396; *D.*, 1 P.R. 1906= 190 P.L.R. 1905.]

(127)—*Ss.* 8, 130, *and* 135 (*before amendment by Act* VI *of* 1900)—*Meaning of actionable claim—Assignment of lessor's right—Suit by assignee against lessee for rent—Prior mortgage of leased property to lessee—Mortgagee's* (*lessee*) *right to set off mortgage amount against lease amount—Trust deed by mortgagor* (*lessor*) *in favour of his son—Principal and surety—Waiver of right to set off—Estoppel by conduct.*—Under s. 130 of Act IV of 1882, before its amendment by Act VI of 1900, a claim has been held to be not actionable unless it is "a claim in respect of a cause of action which has already matured, and which, subject to procedure, may be enforced by suit." (25 M. 610, *R.*; 18 A. 265, *Appr.*) The words "likely to become necessary" in s. 130 seem to point rather to a case in which, after the right of action has accrued, litigation is impending, than to a remote possibility of a suit at some future time, when the right to sue shall have actually matured. The word "debt" in s. 8, cl. (5) is not used in the widest sense, for, if so, it would cover the case of judgment debt which is excepted from the operation of s. 135. The word should be confined to such debts as fall within the general category of actionable claims. Where a person leased out his property for a monthly allowance, and then assigned his right to receive the allowance, and thereupon the assignee sued the lessees for the amount so due, but the lessees having previously taken a mortgage of the same property, claimed to set-off the amount due to them from the lessor in respect of the mortgage on the date of the assignment, *held* that the set-off must be allowed, unless the right has been lost by waiver, estoppel by conduct, etc. But as the mortgagor had, by a deed of trust, executed subsequent to the mortgage, transferred all his property to the trustee in trust for his son after the payment of all his debts including the mortgage debt, and as the mortgagee had, by "postponement deed" executed by him, arranged with the trustee to

Transfer of Property Act (IV of 1882) —*continued.*

place himself in the position of a second mortgagee, with reference to certain other creditors of the mortgagor, and as the mortgagor was a consenting party to the arrangement, it must be held, that neither the mortgagor nor the persons claiming through him, can plead that the above action of the mortgagee disentitled him from relying on the personal remedy against the mortgagor, given to him by the mortgage. The trustee and the mortgagor, in the above case, did not occupy the position of a principal debtor and surety respectively, and the fact that the mortgagee had granted time to the trustee did not entitle loss of the mortgagor's personal liability to the mortgagee. The mortgagor's son had sued to set aside the lease on the ground that it was obtained by undue influence and fraud. The lessees contended that, if that suit should succeed, they would be entitled to a refund of the consideration paid for it by way of the monthly payments and that as that would be an equity to which the lessor would be subject, his assignee would also be bound by it, *held* that under ss. 38 and 41, Specific Relief Act, the award of compensation and the amount thereof, in the event of the lease being so set aside, will depend upon circumstances as they shall exist at the time of the cancellation and that, therefore, any such possible equity in the pending action cannot be relied upon as a defence or even a temporary bar to the present action by the assignee. ARUNACHELLAM CHETTY v. SUBRAMANIA CHETTY, **17 M.L.J. 87=30 M. 235.**

(128)—S. 9—*See* Nos. 81, 122, *supra.*

(129)—*S.* 10—*Scope and effect of.*—S. 10 of the Act merely excepts from the general rule laid down in the section, the particular case of a married woman, and does not give to a restraint upon anticipation any greater force than it had before the passing of the Act; it merely preserves to it the effect it had previously, leaving the Married Women's Property Act of 1874 and the decisions upon it untouched. HIPPOLITE v. STUART, **12 C. 522.**

(130)—*S.* 10—*Condition against alienation—Compromise-decree.*—One of the terms of a compromise embodied in a decree was that the party, to whom a house was conveyed under it, was not at liberty to transfer it without the consent and permission of the other party to that compromise and decree. *Held*, that such a condition was void as being a restraint upon alienation, and the house could be transferred in spite of that condition. KHIALI RAM v. RAGHUNATH PRASAD, **3 A.L.J. 621 = A.W.N. 1906, 214.** (7 A. 516, *F.*)

(131)—*S.* 10—*Lease—Conditions as to pre-emption and pre mortgage in favour of lessor—Whether enforceable specifically.*—A provision in a lease deed that, should necessity for alienation arise by the lessee, who had permanent rights, the property would be surrendered to the lessor, is valid under s. 10 of the Transfer

Transfer of Property Act (IV of 1882) —*continued.*

of Property Act, and it is specifically enforceable against the covenanto r and persons claiming under him. Defendants, who held the lands under a perpetual lease under the plaintiff's *devaswam*, agreed to surrender the land to the *devaswam*, should necessity arise to alienate it. Contrary to the stipulation, the defendaots mortgaged the land to fifth defendant: *Held*, that plaintiffs were entitled to redeem the fifth defendant. MANKOOTHIL CHETHUKUTTI NAIR v. KALYAMBETH KUNHUNNI NAIR, **9 Ind. Cas. 171=9 M.L.T. 484.**

(132)—S. 10, effect of—Restraint upon anticipation—*See* ACT III OF 1874, s. 8, 17 M.L.J. 363=2 M.L.T. 322=30 M. 378.

(133)—S. 10—Condition restraining alienation—Condition that lessor shall not be able to sell land leased to pay debt other than arrears of rent—Effect.—*See* LEASE—GENERAL, 10 Ind. Cas. 374.

(134)—S. 10—Creation of permanent lease before the Act—Essentials—Proof—No right of re-entry reserved—Covenant against alienation—Effect—*See* LEASE—GENERAL, 10 Ind. Cas. 489.

(135)—S. 10—*See* Nos. 41, 81. *supra.*

(136)—*Ss.* 10, 11—*Deed of sale, limitations imposed on, by contemporaneous* ikrarnamah—*Condition restraining alienation, not recognizable by Court.*—When a deed of absolute sale is accompanied by a contemporaneous *ikrarnamah* by a mortgagee or conditional vendee, providing for the re-conveyance of the property to the mortgagor, the two documents should be treated as if they formed one and the same transaction, and should be read together in order to ascertain the intention of the parties. Arrangements of the above description which absolutely debar a person, to whom the proprietary rights have passed, from exercising those rights, impose conditions which no Court ought to recognize or give effect to. Consequently, a covenant, affecting a sale deed, the effect of which is to disable the vendee for ever from either alienating or enjoying the interest conveyed to him, is not only contrary to public policy, but also in violation of the principles enunciated in ss. 10 and 11 of the Transfer of Property Act. MAHRAM DASS v. AJUDHIA, **8 A. 452=A.W.N. 1886, 189,** (10 C. 30, 4 M. 200, 6 M.H.C. 356, 6 B.H.C. 63, *D.*)

(137)—*Ss.* 10, 11—*Restraint on alienation—Conditional limitation limited in time attached to vested interest—Family settlement—Maintenance, charge of.*—A clause for restraint upon alienation by the reversioners, in a deed of family settlement between two Hindu widows and the reversionary heirs, who were two brothers of their husbands, is bad in view of the principle recognised in s. 11 of the Transfer of Property Act. Where the object of the restraint on alienation by the reversioners was the protection of the rights of the widows to receive maintenance from what had been the estate of their husbands, the alienees from the reversioners who have accepted mortgage contrary to the provisions of the deed of settlement, acquire rights subject to the rights of maintenance possessed by the widows (4 A. 518, *R.*) A restraint on alienation qualified as to time may be valid. A condition or conditional limitation upon alienation of a contingent interest before it vests, is good. *Semble.*—Whether a condition or conditional limitation upon alienation limited in time, is not bad when attached to a vested interest? S. 11 of the Transfer of Property Act recognises the elementary principle that a transferee of property who takes an absolute interest, as for instance, a donee or purchaser, cannot be restrained in his enjoyment or disposition of it by any condition inserted in the transfer. Such a condition deprives the property of its legal incidents and is inconsistent or repugnant to the main purpose of the transfer. It is consequently arbitrary and not enforceable in a Court of law. CHAMARU SAHU v. SONA KOER, **14 C.L.J. 303.**

(138)—Ss. 10, 11, 12—*See* ACT VI OF 1882, s. 144 (*e*), 12 A. 192= A.W.N. 1890, 71.

(139)—*Ss.* 10, 12, *and* 126—*Gift subject to a power of revocation—Gift not repugnant to the original transfer.*—Where the defendants made a gift of certain property to the plaintiffs on the condition, that the land would be liable lo be taken back in the event of the plaintiffs' transferring it, *held* that the gift was a gift subject to a power of revocation, and was not repugnant to the original transfer, under ss. 10 and 12 of the Transfer of Property Act. The plaintiffs, therefore, were not the proprietors of the land. MAKUND PRASAD v. RAJRUP SINGH, **4 A L.J. 708=A.W.N. 1907, 278.**

(140)—Ss. 10 and 15—*See* HINDU LAW—REVERSIONERS, 25 C. 869= 2 C.W.N. 463.

(141)—Ss. 10, 110 (*g*)—*See* LEASE—CONSTRUCTION OF LEASE, A.W.N. 1906, 60=3 A. L J. 196=28 A. 400.

(142)—*Ss.* 10, 111 (*g*)—*Execution of lease prior to Act—Applicability of principles of Act to lease.*—Though the provisions of the Transfer of Property Act, may not be applicable to a lease executed before the enactment of the Act, the principle of law governing the case is clearly enunciated in ss. 10, 111 (*g*) thereof. PRAMESHRI v. VITTAPPA SHAMBAGA, **26 M. 157=12 M L J. 189.** [*F.*, 28 A. 400=A.W.N. 1906, 60=3 A.L.J. 196; *R.*, 53 P.R. 1908 =106 P.W.R. 1908, 36 C. 745=10 C.L.J. 49.]

(143)—S. 11—*See* Nos. 81, 136, 137, 138, *supra.*

(144)—S. 12—*See* Nos. 31, 81, 138, 139, *supra.*

(145)—S. 13—*See* No. 81, *supra.*

(146)—S. 14—*See* No. 81, *supra.*

Transfer of Property Act (IV of 1882) —*continued.*

(147) Ss. 14, 15, 2 (*d*) and 123—*See* TRUSTS ACT, 1882. s. 6, 1 M.L.T. 227=29 M. 412.

(148) — *S.* 15—*Party—Prior mortgagee—Suit by subsequent mortgagee.*—Under s. 85, Transfer of Property Act, a prior mortgagee is not a necessary or even a proper party to a suit brought by a subsequent mortgagee. PANCHU MONDAL v. MOHANUND PODDAR, **1 Ind. Cas. 139.** (33 C. 425=3 C.L.J. 205, *F.*)

(149)—S. 15—*See* Nos. 81, 140, 147, *supra.*

(150)—S. 16—*See* No. 81, *supra.*

(151)—S. 17—*See* No. 81, *supra.*

(152)—S. 18—*See* No. 81, *supra.*

(153)—S. 19—*See* Nos. 81, 119, *supra.*

(154)—Ss. 19 and 21—"vested" and "contingent" defined—*See* REGISTRATION ACT, 1908, s. 17, 89 P.R. 1908=145 P.W.R. 1908.

(155)—S. 20—*See* No. 81, *supra.*

(156)—S. 21—*See* Nos. 81, 119, 154, *supra.*

(157)—Ss. 22 to 35—*See* No. 81, *supra.*

(158)—*S.* 36—*Apportionment of rent due in respect of property sold.*—Under this section, in the absence of a contract or local usuage to the contrary, all rents shall, upon the transfer of the interest of the person entitled to collect them, be decreed, as between the transferor and the transferee to accrue due from day to day and to be apportionable accordingly. SINGAI GOPAL SAO v. MEHTAB BI, **9 C.P.L. R. 130.**

(159)—*S.* 36—*Apportionment of profits attaching to share in village.*—The profits attaching to a share in a village cannot be apportioned in the manner provided for in s. 36 of the Act. GOVIND RAO MUKUND BUTI v. BHAGIRATHI BAI, **14 C.P.L R. 84.**

(160)—S. 36—*See* Nos. 42, 43, 81, *supra.*

(161)—S. 37—Applicability of the principles of the section to cases of suits by tenants in common for ejectment and partition making all the co-owners parties—*See* MISJOINDER OF PARTIES, 29 M. 29.

(162)—S. 37—*See* No. 81, *supra.*

(163)—Ss. 37, 109—*See* LANDLORD AND TENANT—MISCELLANEOUS, 29 M. 29.

(164)—S. 39—*See* HINDU LAW—MAINTENANCE, 23 B. 342.

(165)—S 39—Hindu widow—Right of residence or maintenance—Alienation of family property — Necessity — *See* HINDU LAW—MAINTENANCE, 12 Bom. L R, 1075.

(166)—S. 39—*See* HINDU LAW—MAINTENANCE, 10 C.W.N. 1074=4 C.L.J. 475, 22 A. 326=A.W.N 1900, 97.

(167)—S. 39—Intention to defeat right of maintenance-holder —Fraudulent intention—Purchaser with notice of right to maintenance—*See* HINDU LAW—MAINTENANCE, 10 C.W.N. 1074=4 C.L.J. 476.

Transfer of Property Act (IV of 1882) —*continued.*

(168)—S. 39—*See* HINDU LAW—MAINTENANCE, 27 C. 194.

(169)—*Ss.* 39 *and* 40—*Pleadings—Collusive or fraudulent transfer, not set up in the plaint—*s. 39, *inapplicable — Widow — Maintenance, agreement to pay, not annexed to the ownership of property—Effect of subsequent transfer.*—Where a widow left her husband's separate estate (he being divided at his death) in the possession of the other members of his family, in consideration of their agreeing to pay her a periodical maintenance, and at a subsequent division among them of all their property including such separate estate, one of them undertook to pay the maintenance, but afterwards transferred his property to a person with notice of the widow's right of maintenance, *held*, that (1) s. 39 will not apply, as no case of collusive or fraudulent sale was set up in the plaint, and the suit was against the heirs of the transferor; (2) that s. 40 cannot apply, as the obligation to pay maintenance was not annexed to the ownership, and as there was no connection between the land divided and the obligation to pay maintenance. ARUNDAVA AMMAL v. GOPALAKRISHNA PILLAI, **5 M.L.T. 142.**

(170)—*Ss.* 39, 100—*Maintenance—Charge—Decree on compromise creating charge*—Bona fide *transferees for value without notice.*—B instituted a suit to recover certain property from M who was entitled to maintenance. The suit resulted in a decree incorporating a compromise. M sued B and certain transferees for value without notice to recover arrears of maintenance by the sale of certain property charged by the above decree with the payment of the maintenance. *Held*, (*a*) that s. 39 of the Transfer of Property Act had no application; (*b*) that, it being clear upon the construction of the decree that it was the intention of the parties to create a charge on the property for the payment of maintenance within the meaning of s. 100 of the Transfer of Property Act, the charge could be enforced against *bona fide* transferees for value without notice. (3 A.L.J. 220, *D.*) MUSSAMMAT MAINA v. MUSAMMAT BACHCHI, **A.W.N.1903, 165=3 A.L J. 551=28 A. 655.**

(171)—*S* 40—*Constructive notice to mortgagee of agreement to mortgage the lands to another—Postponement of the mortgagee's rights.*—Where a mortgagee was in possession of information, at the time of the mortgage to him, that the title deeds of the mortgaged properties were deposited with a third person as security towards a debt in favour of that person, the mortgagee must be held to have had constructive notice of the agreement to give a mortgage of the land to such third prrson and, in accordance with the principles embodied in the above s. 40 of the Act and s. 91 of the Indian Trusts Act, such mortgagee's interest must be postponed to the equitable right of the third person. KAMESWARAMMA v. SITARAMANUJA CHARLU **29 M. 177.**

Transfer of Property Act (IV of 1882) —*continued.*

(172)—S. 40—Contribution between purchasers—*See* MORTGAGE—GENERAL, 33 M. 211.

(173)—S. 40—Applicable only when there is a contract between vendor and vendee that some other land should bear the burden of the encumbrance—*See* MORTGAGE—GENERAL, 6 M. L.T. 119.

(174)—S. 40—*See* VENDOR AND PURCHASER —MISCELLANEOUS, 6 O.C. 184.

(175)—S. 40—*See* No. 169, *supra*.

(176)—*S.* 41—*Ostensible owner—Right of purchaser acting in good faith.*—Where a person is found in possession of property, is recorded as owner, and the title-deed is in his possession, and he deals with a third person in respect of it, there is nothing to suggest a want of good faith in such third party in dealing with him in respect of that property, and nothing to suggest a want of care in examining the title by reason of the fact that he made no further enquiries as to the title. MUHAMMAD KHAN v. MUHAMMAD IBRAHIM, **1 A.L.J. 214.** (11 B. L R. 46, *R.*)

(177)—*S.* 41—*Ostensible owner—Benamidar —Purchase from the benamidar—Purchaser for value without notice, limits of the doctrine of.*—No purchaser can protect himself against the claim of a real owner merely by saying that he had no notice of the real owner's title. A purchaser is not justified in shutting his eyes and buying recklessly from a vendor without any inquiry, and resisting the real owner on the ground that the real owner did not come forward. He must make some reasonable inquiry into title before he can take advantage of the doctrine of purchaser for value without notice which could protect him against an undiscoverable and hidden equitable interest. When he has taken reasonable care to ascertain his vendor's title then no doubt if there is an equitable interest of which he could by such reasonable care discover no trace, the doctrine of purchaser for value without notice may stand him in good stead. Reasonable care is to be expected from every one who claims to have purchased free from a really existing right, equitable or legal, and when the purchaser has failed to exercise it, he cannot claim that the real owner should be called on to prove his good faith and innocence instead. ZANGABAI v. BHAWANI, **9 Bom. L.R. 388.**

(178)—*S.* 41—*Indian Evidence Act* (I *of* 1872), *s.* 116—*Estoppel—Transfer of immoveable property.*—S. 41 of the Transfer of Property Act, 1882, is the statutory qualification and restriction of the general law of estoppel contained in s. 115 of the Indian Evidence Act, 1872, which is a rule of proof. S. 41 of the Transfer of Property Act, 1882, imposes upon the purchasers of immoveable property the duty of exercising reasonable care and diligence. HOORBAI v. AISHABAI, **12 Bom. L.R. 487=6 Ind. Cas. 898.**

Transfer of Property Act (IV of 1882) —*continued.*

(179)—*S.* 41—*Estoppel—Fictitious sale by husband in favour of wives—Mortgage-deed by wives attested by husband—Private sale by wives to mortgagee—Subsequent sale in execution of decree against husband—Respective of the two purchasers—Evidence Act* (I *of* 1872), s. 115.—One G executed a sale-deed of his property in favour of his wives. The ladies executed a mortgage-deed in respect of the property, which was attested by G and his son. Subsequently the property was sold by the mortgagors to the mortgagee L. After the sale M attached and sold the property in execution of a simple money decree against the heirs of G, and purchased it himself and obtained possession. The plaintiffs, the heirs of the mortgagee purchaser, brought this suit for possession. M defended the suit on the ground that the sale by G in favour of his wives was fictitious and L therefore acquired no rights under it from the wives. *Held* that it was not open to the person, who was the purchaser of the rights of G, to raise the plea against the validity of the sale made by G, in favour of his wives, and that the provisions of s. 41, Transfer of Property Act, were applicable, MUTSADDI LAL v. DALEEP SINGH, **7 A. L.J. 967=7 Ind. Cas. 442.**

(180)—*S.* 41—*Mortgage by ostensible owner.*—A person taking a mortgage from a person found in possession of property recorded as owner and holding the title deeds of the property is not chargeable with want of good faith in such dealing. There is nothing to suggest a want of good faith in him in dealing with the ostensible owner in respect of the property. The case comes under s. 41 of the Transfer of Property Act, and his mortgage cannot be invalidated. KHWAJA MUHAMMAD KHAN v. MUHAMMAD IBRAHIM, **26 A. 490.** (11 B. L. R. 52, *F.*)

(181)—*S.* 41—*Transfer by ostensible owner—Inquiry as to transferor's rights—Reasonable care to be exercised by transferee.*—What is to be deemed "reasonable care" within s. 41 of the Transfer of Property Act so as to entitle the transferee from an ostensible owner to the benefit of that section, depends on the circumstances of each case. In the present case, the only precaution taken by the transferee was that he satisfied himself that the names of his transferors had been recorded in the Government papers as in possession of the property transferred, and it was held that the circumstances of the case were such as would have rendered it incumbent on a man of ordinary prudence not to rest satisfied with merely seeing that his transferor's names were entered in the Government registers, but to go on to enquire further whether the property was really theirs and that, therefore, the transferee had failed to take the necessary amount of reasonable care to ascertain that his transferors had power to make the transfer. PERTAB CHAND v. SAIYIDA BIBI, **23 A. 442=A. W. N. 1901, 137.** [*R.*, 1 L.B.R. 196.]

Transfer of Property Act (IV of 1882) —continued.

(182)—*S* 41—*Ostensible owner—Owners of the property minors at the date of transfer—Agra Tenancy Act* (II *of* 1901), *s.* 201.—One N. K. died possessed of some property, leaving him surviving a widow B and two minor sons. During the minority of the sons, B not only got herself recorded in respect of one-third of the property left by the husband (her proper share being one-eighth and the balance being her son's) but she mortgaged it to one N. N sold his rights to R who brought a suit for sale on foot of his mortgage, and having put the property to sale purchased it himself. He subsequently transferred it to M. M brought a suit for profits against the sons and got an *ex parte* decree. In a suit by the sons for declaration of title to their share in the property excluding the one-eighth belonging to the mother. *Held*, (1) that the suit was not barred by the provisions of s. 41, Transfer of Property Act, inasmuch as the mother could not be the ostensible owner of the property transferred with the consent, express or implied, of the sons who were minors at the date of the transfer; (2) that the proviso to s. 201 of the Tenancy Act protected the present suit. ABDULLAH KHAN v. MUSAMMAT BUNDI, **8 A. L. J. 1084.**

(183)—*S.* 41—*Effect of transfer of ostensible owner--Mortgage of* sir *land prior to N.W.P. Rent Act* (XVIII *of* 1875)—*Execution sale of mortgagor's rights after the passing of the Act, effect of.*—K, the plaintiff appellant, who obtained possession as mortgagee under a deed of 1869, on being dispossessed of the lands comprised in the mortgage, sued to recover possession of them. Among other defendants, he impleaded F and W who had created a mortgage of the properties in 1872 along with one of the mortgagors who executed the sale deed of 1869. F and W repudiated the mortgage of 1869, on which the suit was brought, on the ground that they were not parties to it and that it was not therefore binding on them. It appeared, however, that, at the time when the deed of 1869 was executed, F and W were aware of the transaction, by which K became the mortgagee of the whole property inclusive of their shares, and yet, stood by and allowed it to appear that then the mortgagors had the right to mortgage the entire property. Under these circumstances, the equitable doctrine in s. 41 of the Transfer of Property Act as to the validity of a transfer by an ostensible owner was held applicable in favour of the plaintiff appellant K. (11 B.L.R. 46, *R.*) Further, the proprietary rights of one of the mortgagors of 1869 had been purchased at a Court-sale in 1876 by one of the mortgagees under the deed of 1872, and it was held that, on the execution-sale in 1876, the mortgagor's *sir* rights and interests mortgaged in 1869 assumed a different character unde the operation of the provisions in s. 7 of Act XVIII of 1873, and over that tenure in its altered character of occupancy tenure, although there was still the mortgage charge, the mortgagee had no right to physical possession of the land itself. KARAMAT KHAN v. SAMI-UD-DIN, **8 A. 409=A.W.N. 1886, 85.** (6 A.W.N. 74, *R.*) [*R.*, 24 A. 538.]

Transfer of Property Act (IV of 1882) —continued.

(184)—*S.* 41—*Buddhist Law—Presumption of ownership of house built during coverture on land belonging to wife alone—Joint procerty—Power of one of parties to marriage to deal with joint property—T. P. Act, s.* 41—Bona fide *mortgage without notice for consideration—Acquiescence.*—A piece of Government land was in the possession of the wife many years before her marriage and after her marriage she obtained a lease of it from Government. A house was then built on the land and she mortgaged it to a Chetty without the consent of her husband but for the benefit of her son. The mortgage contained a power of sale. It was proved that her husband came to know of the mortgage and took no steps to set it aside until after the Chetty refused to allow his wife further time to pay off the mortgage-money. He then filed this suit. *Held*, that, in the absence of any evidence to the contrary, the house must be presumed to be the joint property of husband and wife, and that the mortgage of house was under the circumstances not a *bona fide* mortgage without notice for consideration; that the husband must be held to have acquiesced in the mortgage; but that, from his consent to the mortgage, no presumption could be made that he consented to the power of sale. U PO LON v. SOOLIMAN HAJI, **8 Ind. Cas. 606.** (1 L.B.R. 11, *F.*)

(185)—*S.* 41 — *Sale — Purchase—Power of vendor—Reasonable care—Constructive notice.*—The doctrine expressed in s. 41 of the Transfer of Property Act, is of universal applicability. A purchaser from the ostensible owner cannot resist the real owner's claim unless he can show that he took reasonable care to ascertain that the transferring ostensible owner had power to make the transfer, and that he acted in good faith. What is to be deemed reasonable care depends upon the circumstances of each case. Mere reliance upon the entry of the vendor's name in the Government revenue registers is not under all circumstances sufficient to constitute reasonable care in ascertaining whether the vendor has power to make a sale. (23 A. 442, *F.*) Where therefore the information given by the vendor, namely that he derived his title under a registered deed, was such as to put any reasonable man upon enquiry and lead him to ask for production of the original deed, and, if it was not produced, to ask for explanation for its non-production and in any case to require to see a registration copy of it, *held*—that the purchaser must be held to have had constructive notice of the contents of the deed owing to his negligence in not doing what any prudent man would have done. YEW SIT HOCK v. MAUNG DAWOOD, **1 L.B.R. 196.** (23 C. 790, 11 B.L.R. 53, 14 A. 362, *R.*)

(186)—*S.* 41—*Sale by ostensible owner—Purchase* bona fide *for value—No misrepresentation by real owner—Right of real owner to set aside sale.*—On the death of the owner of certain

Transfer of Property Act (IV of 1882) —*continued.*

property, his sister's son entered into possession and dealt with the property as his own. The *sapindas* of the deceased sued to recover possession of the property by setting aside a sale executed by the sister's son. The purchasers relied on s. 41 of the Transfer of Property Act and contended that, as they purchased it from the ostensible owner and the real owners stood by and gave no warning to them, the latter were estopped from questioning the sale. *Held* that, as there was nothing to show that the sister's son was the ostensible owner with the consent of the plaintiffs, they were not precluded from putting forward their title as against the purchasers from the sister's son. The fact that the plaintiffs did not come forward to claim the property or warn the intending purchasers, in the absence of any misrepresentation in act or word, could not prejudice the plaintiffs. ANNAMALAY v. MOONESAMY, **5 M L J. 86.**

(187)—*S.* 41—*Absence of ostensible act of ownership—Representation and conduct of real owner, effect of—Appellate Court, competency of to decide on ground not urged by appellant.*—Where for a long term of years no ostensible act of ownership was exercised by the plaintiff over the house in dispute, but, on the contrary, she allowed her husband's cousin to deal with the house apparently as the ostensible owner thereof, and, in consequence of such conduct, the defendants had been induced to purchase the same, it was *held* that the plaintiff could not successfully sue for recovering a half share in the house. It was urged on second appeal in this case, that as s. 41 of the Transfer of Property Act had not been expressly pleaded by the appellant, the first appellate Court was wrong in having taken it into consideration for the purpose of disposing of the case, but the High Court held that, under the circumstances of the case, it was competent to that Court to have based its decision on the ground not put forward by the parties. Where the Court sees that the rights of one of two innocent parties must be sacrificed, it is entitled to consider whether anything in the conduct of, or in representations made by, the party who comes into Court and seeks relief, has debarred him from asserting his rights. THAKURI v. KUNDEN, **17 A. 280 = A.W.N. 1895, 69.**

(188)—*S.* 41—*Purchase from ostensible owner knowing of existence of real owner but under misconception as to latter's rights—Estoppel.*—Suit by real owner to recover possession from a person who had bought the property from an ostensible owner, knowing of the existence of the real owner but under a misconception as to the real owner's rights. There was no express or implied consent on the part of the real owner to the sale. *Held* that the real owner was not estopped from claiming the property. ANGAMMAL v. VENKATA REDDY, **26 M. 509.**

(189)—*S.* 41—*Evidence Act* (I *of* 1872), *s.* 115—*Consent—Mistake of law—Estoppel.*—*Held*, that the consent referred to in s. 41 of the Transfer of Property Act must be an intelligent consent and not one brought about by misapprehension as to legal rights. *Held*, further, that an admission on a point of law is not an admission of a "thing" within the meaning of s. 115 of the Evidence Act. DUNGARIYA v. NAND LAL, **A.W.N. 1906, 182 = 3 A.L.J. 534.**

(190)—*S.* 41—*Consent by guardian of—Minor owners—Minors not bound—Guardian not 'person' interested.*—Where a transferee from the guardian of certain minor owners is in possession of property with the consent of the guardian, even if that consent is given expressly, it would not be a consent, which would pass the ownership to the purchaser within the meaning of s. 41 of the Transfer of Property Act, inasmuch as the guardian giving the consent is not a person personally interested in the property. Where the property is the property of minors and another person is giving himself out to be the owner, the persons interested could not be said to have given their consent so as to be bound by any transfers which the ostensible owner makes. DAMBAR SINGH v. JAWITRI KUNWAR, **4 A L.J. 181 = A.W.N. 1907, 72 = 29 A. 292.**

(191) S 41—Purchase from ostensible owner—*See* ADMINISTRATOR, 1 Ind. Cas. 525.

(192)— S. 41—Ostensible owner—Creditor making no enquiry—*Bona fide* transferee—*See* CIV. PRO. CODE, 1908, s. 11, 8 A.L.J. 358.

(193)—S. 41—'Reasonable care,' etc., meaning of—*See* CIV. PRO. CODE, 1908, s. 66, 12 Bom L.R. 1044 = 8 Ind. Cas. 752.

(194)—S. 41—*See* PARTIES TO SUIT—GENERAL, 10 Ind. Cas. 779.

(195)—S. 41—Suit for pre-emption—Decree for foreclosure on a mortgage by ostensible owner—Effect on right of pre-emption—*See* PRE-EMPTION, MISCELLANEOUS, 11 O.C. 26.

(195-*a*) -S. 41—*See* No 215, *infra.*

(196)—*Ss.* 41, 43—*Mortgagor entitled only to a third share—Mortgage of half-share—Mortgagee having knowledge—Mortgagor subsequently becoming entitled to a half—Erroneous representation—Ostensible owner — Applicability of s.* 43—*Requisites of s.* 41—*Difference between ss.* 41 *and* 43.—S. 41 requires a person, who has obtained a transfer from the ostensible owner, to have done so in good faith and after due enquiry, in order to become entitled to the interest purported to be transferred. Though, under s. 43, mere belief in, and acting upon, the representation, may be sufficient to pass the subsequently acquired interest, mere belief would be insufficient under s. 41. The principle of s. 43 is the acting by the transferee on the erroneous representation of the transferor. (34 B. 175, 7 C.L.J. 381, *Rel*; 18 M.L.J. 247, *R.*) The well-known maxim of law to which effect is given in s. 41 is "interest feeds the estoppel." PANDIRI BENGARAM v. KARUMOORY SUBBARAJU, **8 M.L.T. 285 = 8 Ind. Cas. 388.**

Transfer of Property Act (IV of 1882) —*continued.*

(197)—*Ss.* 41, 123—*Registration compulsory for a gift to be valid—Ostensible owner—Inquiry to be made by the mortgagee.*—Where one of four brothers mortgages a house which is the joint property of all the brothers, the mortgage is valid only in respect of the share of the mortgagor, who has the power to mortgage only his share in the property. S. 41 of the Transfer of Property Act cannot apply in a case, such as this, where the mortgagees could have ascertained, on the slightest inquiry, that the property belonged to the mortgagor as well as to his other brothers. MAUNG PO THAN v. MA ON BWIN, **12 Ind. Cas. 838.** (2 L.B.R. 167, *F.*)

(198)—*S.* 43—*Application to service Inam sales—Subsequent enfranchisement.*—S. 43 of the Transfer of Property Act can have no application, when the alienation is forbidden by law on grounds of public policy. NARAHARI SAHU v. SIVA KORICHAN NAIDU, **M.W.N. 1913, 415 =24 M.L.J. 462.**

(199)— *S.* 43—*Estoppel — Representation — Transferor—Subsequent acquisition of rights.*—The rule of law underlying s. 43 of the Transfer of Property Act is that, as between the transferor, and the transferee, the transferor cannot plead subsequent title to the land transferred, if he had induced the transferee to pay money for the transfer. The principle is an extension of the rule of estoppel. Where a person who had merely a *ghatwali* interest in certain land mortgaged it on the representation that it was his *jagir*, and he subsequently got a *mokarari* title to it: *Held*, that on a decree for sale upon the mortgage, the *mokarari* interest of the mortgagor passed to the mortgagee. MOKHODA DEBI v. UMESH CHUNDRA BANERJEE, **7 C.L. J. 381.**

(200)—*S.* 43—*Mortgage—Decree for sale—Portion of property comprised in a mortgage acquired by mortgagor subsequently to decree.*—The whole of a certain house was mortgaged, the mortgagor having at the time an interest in only a fractional share in it. The mortgagee sued, and obtained a decree for the sale of the whole house. After that decree was passed and partially executed, the mortgagor in virtue of a partition acquired the remaining interest in the house. *Held*, that s. 43 of the Transfer of Property Act applied and that the decree-holder was competent to continue execution of his decree against the mortgagor's after-acquired interest. DURGA DAS v. MUHAMMAD ISMAIL, **A.W.N. 1908, 155.** (18 M. 492, *F.*)

(201)—*S.* 43—*Subsequently acquired interest of mortgagor in mortgaged property—Right of mortgagee to lien on such interest.*—Where, subsequent to a mortgage, the mortgagor acquires in the mortgaged property some interest which he did not possess at the time of the mortgage, under s. 43 of Transfer of Property Act the mortgagee is entitled to a lien on such subsequently acquired interest in the property. GANPAT RAO v. RAMCHAND, **2 C.P.L.R. 90.**

Transfer of Property Act (IV of 1882) —*continued.*

(202)—*S.* 43—*Mortgage by unauthorized person—Sale upon that mortgage—Acquisition by transfer of ownership in the property subsequent to the sale upon the mortgage, effect of—Contract of transfer must subsist at the time of acquisition.*—S. 43 of the Transfer of Property Act applies to a case in which the contract of transfers subsist at the time when the property comprised in the transfer was subsequently acquired by the transferor, but the section cannot be applicable when the contract of transfer had come to an end before the acquisition of the property. (A.W.N. 1908, 155, *D.*) S mortgaged own share as well as the share of his brother B to D. D brought a suit on the mortgage and obtained a decree in execution of which he himself purchased the mortgaged property. Subsequent to the purchase, B died, and S inherited his share in the property: *Held*, that D was not entitled to take that portion of the property which belonged to B and which S acquired after the contract of mortgage had ceased to exist. JADU BANS UPADHIYA v. SHEOJIT SINGH, **10 Ind. Cas. 443.**

(203)—*S.* 43—*Sale under a prior mortgage, mortgagor acquiring mortgaged property sold on, effect of—Right of mortgagor, on such acquisition, against his subsequent mortgagees.*—The mortgage relied on by the plaintiff in this case was executed after a decree had been obtained against the mortgagor under a previous mortgage by him. A sale took place under that decree and the mortgaged property was purchased by the mortgagee at such sale. But the right acquired by such purchase eventually devolved upon the mortgagor. *Held*, on the principle embodied in s. 43 of the Act, the mortgagor cannot use his subsequently acquired interest to invalidate his own mortgages to the plaintiff. The effect of such purchases by the mortgagor will be so far as regards himself and those who claimed under him, simply to extinguish the prior mortgage and to allow the right of the subsequent incumbrancers to be determined on the footing that such prior mortgage has ceased to exist. MANJAPPA ROI v. KRISHNAYYA, **29 M. 113.**

(204)—*S.* 43—*Transfer of property by Mahomedan to his wife in lieu of dower—Subsequent mortgage of same property by him—Foreclosure of mortgage—Death of wife—Right of mortgagor to claim property as heir to his wife.*—A Mahomedan, after making a transfer of certain property to his wife in lieu of dower, mortgaged the same to another. The mortgage money not having been paid the mortgagee sued for and obtained a decree for foreclosure. After the decree became absolute the wife of the mortgagor died. Thereupon the mortgagor claimed the property as heir to his wife. He alleged that as the mortgage was made at a time when he had no right to the property, it could not affect him as heir to his wife. *Held*, that s. 43 of the Act applied and the mortgagor could not be permitted to defeat the mortgagee by showing

Transfer of Property Act (IV of 1882) —*continued.*

that at the time when the mortgage was executed, he had no right to the property. *Held*, also that even if the mortgagee had notice of wife's rights it did not matter. He was in equity entited to claim from the mortgagor the fulfilment of his agreement and to give him what he could. D. SINCLAIR v. SITABKHAN, **3 C. P. L. R. 72.**

(205)—S. 43—Mortgage by Muhammadan woman and her eldest son of entire estate—Suit on mortgage—Exoneration of other children—Subsequent death of one of them—Increase in the share of mortgagors—Liability of such increased share to mortgage-debt.—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 18 M. 492.

(206)—S. 43—Mortgage by a co-parcener of his undivided interest—Mortgagee's equitable rights—Rights of transferee *bona fide* without notice—*See* HINDU LAW—ALIENATION, 14 O. C. 295.

(207)—S. 43—Transfer by mother during minority of son—Right of reversioner—*See* HINDU LAW—ALIENATION, 6 Ind. Cas. 37.

(208)—S. 43—*See* HINDU LAW—GIFT, 14 M. 459.

(209)—S. 43—Transfer by person having no right—Property subsequently vesting in him—Effect—*See* MORTGAGE—GENERAL, 9 Ind. Cas. 298=8 A.L.J. 184.

(210)—S. 43—Acquisition of larger interest by the mortgagor after the date of the mortgage—Rights of mortgagee—*See* MORTGAGE—GENERAL, 12 Bom. L. R. 143=34 B. 175=5 Ind. Cas. 866.

(211)—S. 43—*See* PRE-EMPTION—SUBJECTS OF PRE-EMPTION, 7 O.C. 98.

(212)—S. 43—Contract for sale by mother as guardian of infant son—Death of son and succession of mother as heiress of son—Suit for specific performance against mother, maintainability of—*See* SPECIFIC PERFORMANCE, 2 C.L.J. 6=9 C.W.N. 1019=32 C. 832.

(213)—S. 43—*See* Nos. 120, 196, *supra*.

(214)—*Ss.* 43, 6—*Applicability to sales prohibited by law—Sale of service* inam *land—Subsequent enfranchisement of inam—Invalidity of sale—Madras Act* VI *of* 1895, *s.* 5.—S. 43 of the Transfer of Property Act can have no application, when the alienation is forbidden by law on grounds of public policy. A purchaser of *inam* land from the holder of a service *inam*, who was prohibited by law (s. 5 of Act VI of 1895) from alienating the property, cannot claim a valid title to it on the ground that it was subsequently enfranchised and a patta for the land was granted to the alienor. NARAHARI SHAHU v SIRA KORITHAN NAIDU, **24 M.L.J. 462=M.W.N. 1913, 415.**

(215)—*Ss.* 43 *and* 41—*Rights of sub-mortgagee—Whether sub-mortgage is transfer of immoveable property—Equitable mortgage—Preference over legal mortgage, where latter is not taken with notice of prior charge—Notice, actual or constructive.*—A sub-mortgagee has not merely the rights against the mortgage debt. A sub-mortgage comprises, (*a*) the personal covenant of the sub-mortgagor, (*b*) the transfer of the original mortgage debt and mortgaged property with the benefit of all powers and remedial clauses contained in the original mortgage, and (*c*) in English mortgages a power of sale. *Held*, therefore, that a man, who assigns a mortgage or sub-mortgages, does transfer immoveable property within the meaning of s. 43 of the Act. The mere fact of a person depositing certain title-deeds with another is sufficient evidence of a representation that he was authorised to transfer the property to which the deeds refer. S. 43 protects a purchaser or transferee for value without notice, and there is no such provision in it as is found in s. 41, requiring the transferee to take reasonable care to ascertain the power of his transferor to give a clear title. There is no authority for the proposition that a transferee is to be imputed with notice under s. 43, if he has not exercised the utmost care in investigating his transferor's title. Equitable mortgages are not entitled to preference over legal mortgages, unless the latter be taken with notice of the prior charge, and such notice may be either actual or constructive. And a person must be held to have had constructive notice of a prior mortgage, if such mortgage would have come to his knowledge, had he exercised the diligence of an ordinarily prudent man, and if the facts show that he did not exercise such diligence. MAUNG BA TIN v. MAUNG PO KIN, **14 Bur. L.R. 329.**

(216)—Ss. 43, 85, 86 and 92—*See* MORTGAGE—REDEMPTION, 5 O.C. 335.

(217)—*S.* 44—*Lessee of a house—Partition suit maintainable—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 34—*Objection to want of parties waived.*—A lessee of an undivided portion of a house can maintain a suit for partition if partition necessary to give effect to his transfer. A lessee of a house is a transferee within the meaning of s. 44 of the Transfer of Property Act. Where objection to want of parties was not raised by the defendant, it must be deemed to have been waived, but the Court could add any one as a party if it thought it necessary. MUHAMMAD JAFAR KHAN v. MAZHAR-UL-HASAN, **3 A.L J. 474=A.W.N. 1906, 199.**

(218)—*S.* 44—*Transfer of rights in a bazar by some only of the co-parcenary body to which the bazar belonged.*—The sale of rights in a bazar belonging to the coparcenary body of owners in a patti is not necessarily invalid because all the co-parceners do not join in the sale. ASHIQ HUSAIN v. TILAK SINGH, **A. W.N. 1900, 81.**

(219)—S. 44—*See* HINDU LAW—PARTITION, 13 M. 275.

(220)—*Ss.* 45 *and* 67—*Transfer of Property Act—Mortgage—Joint-mortgage, suit by mortgagee for his share of money advanced on—*

Transfer of Property Act (IV of 1882) —*continued.*

Right to sale of the whole mortgaged property. —L mortgaged his village to the plaintiff's father and the defendant in lieu of Rs. 21,000, each of the mortgagees advancing Rs. 10,500, as a detail given at the foot of the mortgage-deed showed The defendant sued L for Rs. 10,500 and in default of payment prayed that half the property mortgaged might be put up to sale. The plaintiff's father was not made a party to that litigation. The defendant obtained a decree in accordance with the plaint. The plaintiff as the legal representative of his father brought a suit against the defendant and L to recover Rs. 10 500, and in default of payment prayed that the whole of the mortgaged property might be put up to sale. *Held*, that on a proper construction of the mortgage-deed there was one mortgage and not two. The whole of the property was clearly mortgaged as security for the whole of the debt. The detail at the foot of the deed was intended to protect the rights of the mortgages *inter se*, and did not affect the relation of the mortgagor with the mortgagee. *Held*, therefore, that the whole of the mortgaged property was liable to be sold in satisfaction of the plaintiff's claim. GOPAL LAL v. LACHMAN PARSHAD, **3 O.C. 8.**

(221)—S. 48—*See* BENAMI TRANSACTIONS —GENERAL, 7 Ind. Cas. 218.

(222)—S. 48—*See* MORTGAGE—REDEMPTION, 2 N.L.R. 62.

(222-*a*)—S. 48—*See* No. 461, *infra*.

(223)—S. 50—*Lessor and lessee—Payment of rent by lessee in good faith—Liability of the lessee to pay rent to the rightful owner.*—On the 14th December 1895, Subraya went into possession of certain property as mortgagee; and on the same day he let the property to the defendant for twelve years. Subraya after some years died, and his interest as mortgagee survived to his younger brother Ramkrishna. Thereafter Ramkrishna died; and since then Subraya's widow Gowri took possession of the property and managed the same, and got her name placed on the *Khata* as the owner of the property. She also recovered rent from the defendant for the years 1902 and 1903. The person who was really entitled to the property at Ramkrishna's death was his sister, the plaintiff. She sued to recover rent for the years 1902 and 1903 from the defendant on the ground that Gowri had no authority to receive rent and give a discharge for the same. It was found that the defendant in making the payment to Gowri had acted in good faith and had no notice of the plaintiff's interest in the property. *Held*, that the defendant was not chargeable with the rent sued for, as s. 50 of the Transfer of Property Act, 1882, applied to the case. The language of s. 50 is general. It applies even to cases where there has not been an assignment by the lessor during the tenancy. KAVERIAMMA v. LINGAPPA, **10 Bom. L.R. 1190=33 B. 96.**

Transfer of Property Act (IV of 1882) —*continued.*

(224)—S. 50—*See* LAMBARDAR, A.W.N. 1888, 45.

(225)—*S* 51—*Cost of improvements—Purchaser's right to—Purchaser from a Hindu widow—Extent of equity.*—The defendant purchased property from certain Hindu females having a limited power of disposition under Hindu Law. In a suit by the reversioner, the defendant set up legal necessity, but it was found that there was no necessity and that the defendant was fully aware of the family affairs of the two women. It was also found that he knew that the persons who sold it could only sell it under certain circumstances, and that he wilfully abstained from making any enquiries on the subject. *Held*, that the defendant was not entitled to the cost of improvements, as it could not be said that he believed and in good faith that the vendor conveyed a good title. Good faith within the meaning of s. 51, T.P. Act, is not necessarily precluded by facts showing negligence in investigating the title. NANJAPPA GOUNDAN v. PERENNA GOUNDAN, **6 M.L.T. 284=19 M.L.J. 454=4 Ind. Cas. 18=32 M. 530.**

(226)—*S.* 51—Bona fide *improvements by a stranger on another's property—Equitable rights in him before eviction—Compensation for improvements.*—Under the law in England, to raise an equity in favour of a stranger building on another's land, two things are required, first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner, at the time of the expenditure, knows that the land belongs to him, and not to the person expending the money in the belief that he is the owner. The law as laid down in s. 51 of the Act, however, does not, in all respects, follow the law of England. The section requires merely that the transferee mentioned therein shall have made the improvements believing, in good faith, that he is absolutely entitled to the property. There is nothing in the wording of the section to justify the contention that the real owner must, at the time of expenditure, know that the land belongs to him. Under the section the transferee who, after having made the improvements on the property, is subsequently evicted by any person having a better title, has a right to require the person causing the eviction either to have value of the improvement estimated and paid to him or to sell to him such person's interest in the property at the market-value thereof irrespective of the value of such improvements. MR. COLLIER v. MRS. L. BARON, **2 N.L.R. 34.**

(227)—*S.* 51—*Application of, to Mahomedans —Sale by* de facto *guardian of Mahomedan minor—Effect on the minor.*—The sale by the mother, though made by her as *de facto* guardian of the minor, the parties being Mahomedans, is not binding on the minor. (26 M. 734, 29 C. 473, 20 B. 199, *Appr.* and *F.*) There is no rule of Mahomedan Law, which precludes

Transfer of Property Act (IV of 1882) —*continued.*

persons from claiming the benefit of the principle of equity embodied in s. 51. S. 51 does not cease to apply, on the ground that Chapter II of the Act is not to be deemed to affect any rule of Mahomedan Law A party, who acts under a mistake of law, may still act in good faith within the meaning of the section, and the question, whether the transferor of immoveable property believes in good faith that he is absolutely entitled thereto, is a question of fact. DURGOZI ROW v. FAKIR SAHIB, **1 M.L.T. 433=17 M.L.J. 9=30 M. 197.**

(228)—S. 51—*See* EJECTMENT, SUIT FOR, 29 C. 871.

(229)—S. 51—Vendee compelled to give up land, purchased by him, belonging to widow owning life estate—Value of improvements effected by him in good faith to be given to him—*See* HINDU LAW, ALIENATION, 17 M.L.J. 622.

(230)—S. 51— Meaning of "belief in good faith" —Effect of absence of enquiry by purchaser —Effect of Crown as landlord — *See* HINDU LAW, WIDOW, 13 C.W.N. 931=3 Ind. Cas. 415.

(231)—S. 51—Claim to improvements made by a person in occupation of land—*See* LANDLORD AND TENANT—COMPENSATION FOR IMPROVEMENTS, 8 O.C. 13.

(232)—S. 51—*See* 'PRE-EMPTION'—RIGHT TO PRE-EMPT, 65 P.R. 1898.

(233)—S 51—Inapplicability to Court sales—*See* SALE—SALE IN EXECUTION OF DECREE, GENERAL, 21 M.L.J. 969.

(234)—Ss. 51, 83, 84—*See* MORTGAGE—REDEMPTION, 8 A. 502=A.W.N. 1886, 149.

(235) Ss. 51, 108—*See* LANDLORD AND TENANT—COMPENSATION FOR IMPROVEMENTS, 27 C. 570=4 C.W.N. 212.

(236)—*Ss.* 51, 108 (*h*)—*Tenant's right to improvements.*—*Per Chief Justice*:—In cases to which the Transfer of Property Act applies, the rights of the tenant are defined by s. 108 (*h*) of that enactment, and the extent of the right is the same in cases not governed by the Act. S. 51 of the Act does not apply in terms as between landlord and tenant. Both under theHindu and the Mahomedan Law as well as under the common law of India, a tenant who erects a building on land let to him can only remove the building and cannot claim compensation in eviction. (27 M. 211, *R.*) Mere knowledge on the part of the plaintiff that improvements are made on his land is not enough to estop him in a suit for possession. If there is no express contract, unless the lessor is estopped from suing for possession, the lessee cannot claim compensation. (21 A. 496, 17 B. 736, 29 C. 871, 29 B. 580. *R.*; 6 M.H.C. 245, *Doubted.*) *Per Abdur Rahim, J.*—The doctrine of equitable estoppel has not been or should not be extended as between a landlord and his tenant, to a case where all that can be alleged against the former is that he did not interfere and merely remained passive, with the knowledge that the tenant was making improvements under a mistaken belief that he had a more stable interest in the land than that of a tenant at will or of a tenant from year to year. The tenant should know under what terms he has been let into possession, and the law lays no duty upon the landlord to remind his tenant of his title under which he holds the land. If a tenant, knowing the extent of his interest in the land in his possession, chooses to expend money upon a title which he must know would soon come to an end, that is his own folly, and he cannot ask the owner of the land to recoup him for such expenditure. (21 A. 496. *R.*) RAJA OF VENKATAGIRI v. MUKKU NARASAYYA, **8 M.L.T. 258=7 Ind. Cas. 202.** (27 C. 570, *R.*)

See LIS PENDENS.

(237)—*S.* 52—*Conveyance pending a suit—Effect of alienation--Transfer of Property Act* (IV *of* 1882), *s.* 52.—The doctrine of *lis pendens* is not based on the equitable doctrine of notice, but on the ground that it is necessary to the administration of justice that the decision of the Court in a suit should be binding not only on the litigant parties but onthose who derived title from the *pendente lite* whether with notice of the suit or not. The effect of the doctrine of *lis pendens* is not to annul the conveyance made in contravention of it, but only to render it subservient to the rights of the parties to the litigation. The doctrine is not applied so as to affect the title of the alienee of a defendant by virtue of a claim not interfering with the title of the plaintiff in the pending litigation. NATHAJI ANANDRAV v. NANA, **9 Bom. L. R. 1173.**

(238)—*S.* 52—Lis pendens, *doctrine of—Mortgage effected during the pendency of a suit, validity of—Sub-mortgagee, rights of.*—In 1880, one C mortgaged a certain share to R and S with possession. Three deeds of further charges were also subsequently executed. One B became entitled to a one-fourth of the interest of the mortgage executed by C. In 1896 the father and guardian of B sub-mortgaged that one-fourth share to the appellant, undertaking to put him in possession if the money was not paid within one year. B ratified the deed when he came of age. In 1905 the appellant sued for possession of the property mortgaged to him impleading B his original mortgagor, and other persons representing the original mortgagees R and S. The summons to C in that suit was served on January 22nd, 1905. During the pendency of that case, that is, on February 16th, 1905, C mortgaged his share to the respondents. Subsequently, the respondents redeemed the four mortgages made by C. The appellant's suit in the meantime proceeded and he got a decree for possession of the one-fourth share as a sub-mortgagee. The respondent brought the present suit for possession of the said share against

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Transfer of Property Act (IV of 1882) —*continued.*

the appellant. *Held*, that, under s. 52 of the Transfer of Property Act, the respondent could not take a valid mortgage, and in order to take possession of the share mortgaged to him he must pay to the appellant one-fourth of the money due on the basis of the four mortgages. DEBI DIN v. MANNU SINGH, **10 Ind. Cas. 16.**

(239)—*S.* 52—Lis pendens—*Application of the rule to a suit for money-decree.*—In a suit for money-decree against the representatives of a deceased person, the whole estate of that person is not "directly and specifically in question" within the meaning of s. 52 of the Transfer of Property Act. That section was not intended to tie up the immoveable property of a deceased person in the hands of his legal representatives and to prohibit them from alienating any part of it, while ordinary money claims against the deceased were being prosecuted in Court. MAUNG TA PAN v. MAUNG PO THAW, **8 Ind. Cas. 1208.** (4 C. 402, 5 I. A. 211, *Cons.*; 9 C. 406, 11 C.L R. 565, *Appr.*)

(240)—*S.* 52—*Right to immoveable property directly and specifically in question—Money decree in a suit based on mortgage.*—A suit, which is based on a mortgage but in which a money-decree only is given, is not, as long as the decree therein stands unreversed, one in which "a right to immoveable property is directly and specifically in question" within the meaning of this section. CHUTTERPUT SINGH v. MAHARAJ BAHADOOR SINGH, **9 C.W.N. 225, P.C.=32 C. 198=2 A.L.J. 190.** (5 C.W.N. 10=27 I.A. 216, P. C., 1. A. 66, 16 B. 91, 17 B. 375, 21 C. 85, 24 I. C. 170, *R.*)

(241)—*S.* 52—*Suits for sale and redemption are subject to the rule of* lis pendens—*Transferee* pendente lite *cannot question the correctness of the decree.*—*Held*, that a right to immoveable property is directly and specifically in question both in a suit for sale by a mortgagee and in a suit for redemption by a mortgagor, and s. 52 of Act IV of 1882 applies to both classes of cases. *Held*, further, that an alienee of property, which is the subject of a suit to which s. 52 of Act IV of 1882 applies, cannot question the decree passed therein by showing that it was for any reason wrong. SAIYAD ZAHID ALI v. MUSAMMAT SADAR BEGAM, **13 O. C 50=5 Ind. Cas. 800.** (10 O. C. 314, 10 O. C. 356, 12 O. C. 133, *R.*)

(242)—*S.* 52—Lis pendens—*Sale during the pendency of suit—Service of summons not effected —Effect of.*—When, after the institution of a suit for pre-emption, the vendee sells the property, the sale cannot, having regard to the provisions of s. 52, Transfer of Property Act, affect the right of the plaintiff, to the decree which he might have obtained in the suit, as the purchaser takes the property subject to the result of the suit. (27 A.544, *D.*) The fact that the vendee sells the property before service of summons does not make s. 52 inapplicable.

Transfer of Property Act (IV of 1882) —*continued.*

GHASITEY v. GOBIND DAS, **5 A.L.J. 477=A. W.N 1908, 221=30 A. 467.** (29 A. 339, *R.*) [*R.*, 5 N.L.R. 136, 31 A. 530=6 A.L.J. 699=3 Ind. Cas. 42.]

(243)—*S.* 52—*Hindu Law—Transfer of an undivided share after the institution of a partition suit*—Lis pendens—*Contentious suit.*—Where after the filing of a suit for partition by a member of an undivided Hindu family, governed by the Bengal School, consisting of six sons and their mother, one of the sons transferred his undivided share to a stranger, *held*, that, the mother's inchoate right to a share having ripened into an absolute right on a partition taking place between the sons,—which did take place here—, the transferor was only entitled to a one-seventh share, and the transferee could not take more than that so as to affect the mother's right to a share. (1 I.A. 206, *Appl.*) [*F.*, 27 C. 551.] A suit may be held to be contentious before summons is actually served on the defendant. S. 52, Transfer of Property Act, applies though the summons has not been served. [*Appr.*, 31 B. 393=9 Bom. L.R. 530; *R.*, 80 P.R. 1903=19 P.L.R. 1904, F.B., 124 P.L.R. 1904; *Cons*; 31 C. 745; *D.*, 31 C. 658.] In the case of a transfer by a member of an undivided Hindu family of his share after the institution of a suit for partition, but before the issue of summons, both parties to the transfer, being fully aware of the suit, had notice. JOGENDRA CHUNDER GHOSE v. FULKUMARI DASSI, **27 C. 77=4 C.W.N. 254.**

(244)—*S.* 52—Lis pendens—*Partition between defendants* inter se *during pendency of suit—Partition void against plaintiff as having been* pendente lite—*Plaintiff's negligence in omitting to bring the partition to the notice of the Court—Plaintiff not to be damnified for omission—Practice—Pleading—Array of parties—Change in composition of parties by act of parties.*—The plaintiff obtained a redemption decree against his four mortgagees (defendants), and paid the redemption money into Court, but after the time fixed in the decree for payment. The Subordinate Judge treated this payment as valid and ordered the defendants to deliver up possession of the mortgaged property to the plaintiff. On the 7th January, 1902, the District Judge reversed the order. The defendants next on the 10th January, 1902, arrived at a partition between themselves as the result of which the mortgaged property went to the share of defendant 1. The defendant No. 1 died on the 15th January, 1902. On the 14th January, 1902, the plaintiff appealed to the High Court against the order passed by the District Judge. At the hearing the death of defendant No. 1 was brought to the notice of the High Court, but the fact of partition was not mentioned. The High Court held that the cause of action survived to the three remaining defendants, reversed the order passed by the District Judge and remanded the case

Transfer of Property Act (IV of 1882) —*continued.*

to his Court for determining if any good cause existed for extending the time. When the case went back to the District Judge, defendant No. 1's name was omitted from the array of parties ; time for payment was extended and payment having been duly made, the property was ordered to be delivered to the plaintiff. Defendant No. 1's widow intervened on the ground that, as she was not a party to the order passed by the District Judge, she was not liable to be dispossessed under the order. The Subordinate Judge granted her application. The plaintiff thereupon brought a suit to establish his right to the possession of the property. The Subordinate Judge decreed the plaintiff's claim, but on appeal, his suit was dismissed on the ground that the plaintiff's rights were affected by his own negligence in omitting to bring upon the record the representatives of defendant No. 1 ; though they were not affected by the partition between the defendants which did not contravene the rule of law embodied in s. 52 of the Transfer of Property Act, 1882. *Batchelor, J.*, confirmed the decree on second appeal. On appeal, under the Letters Patent: *Held*, that the partition in question was a " transfer or other dealing with the property in suit" within the meaning of s. 52 of the Transfer of Property Act ; and being *pendente lite* was void against the plaintiff. *Held*, further, that the plaintiff could not be defeated on the ground of his negligence in not drawing the attention of the Court to the partition between the defendants, of which he did not know anything. When a suit is once rightly launched, the array of parties is virtually stereotyped and cannot be changed *pendente lite* by mere act of parties. It is part of every litigant's right, so far as the subject matter and conduct of the suit are concerned, to know precisely where he stands. He is entitled to know who his opponents are, and when that has been definitely and finally ascertained, to insist that no dealing on their parts, with the property in suit, shall compel him to go further afield, and bring in new parties, who but for such dealing could have had no *locus standi* at all. A complete right needs a person of incidence as well as a person of inherence. No party during the conduct of a suit has any power by dealing with the property to change the person of incidence or inherence to the detriment of the other. ISHWAR v. DATTU, **15 Bom. L.R. 366.**

(245)—*S.* 52—Lis pendens—*Contentious suit.* —Where there are several defendants to a suit, the suit does not become " contentious" within the meaning of s. 52 of the Transfer of Property Act, 1882, only when all the defendants are served with summonses in the suit, nor can a suit be contentious as regards some of the defendants and not contentious as regards others. CHATURBHUJ v. LACHMAN SINGH, **A.W.N. 1905, 250=28 A. 196.** (21 A. 408, *Disc. and Doubted.*)

Transfer of Property Act (IV of 1882) —*continued.*

(246)—*S.*52—*'Contentious,' meaning and scope of—Suit to enforce mortgage of immoveable property-Consent or compromise decree--Contentious suit*—Lis pendens-*Applicability after decree* nisi *and before order absolute—Lease of waste land, subject of suit--Absence of Court's sanction--Incident of prudential management-Validity.*—The word"contentious" in s 52, Transfer of Property Act, is used in distinction to such non-contentious proceedings as unopposed applications for probate. A suit to enforce a mortgage lien on immoveable property is, in this sense, clearly, a contentious suit, and does not cease to be so because the decree actually passed in it is the result of a compromise, or is consented to by the defendant. (29 M. 426, F.B., *F.*; 12 M. 439, *Not F.*; 18 C. 188, *Expl.*; 27 C. 77, *R*) The doctrine of *lis pendens* is applicable also to conveyances made between the decree *nisi* passed in a mortgage suit and the institution of proceedings for bringing the property to sale. The protection given to the plaintiff under s. 52, Transfer of Property Act, extends up to the final satisfaction of the conditional decree, since it might be otherwise rendered nugatory by the judgment-debtor's dealing with the mortgaged property during the six months grace necessarily allowed him by the conditional decree, during which time the decree-holder cannot apply for a decree absolute. (29 M. 426, F.B., *Rel. on* ; 20 A. 349, *Concurred in* ; 22 B. 939, *R*) Although a fresh lease to avoid loss of rent of a holding that had been abandoned by a tenant might possibly be regarded as an " ordinary and reasonable incident of interim beneficial enjoyment, " a lease, without the sanction of the Court, of waste land with the option of either cultivating or keeping it under grass, is not such an incident nor necessary, but an act materially curtailing the lessor's rights in the village which the mortgagee was entitled to bring to sale intact. DHIRAJ SINGH v. DINANATH, **6 N.L.R. 140=8 Ind.Cas. 288.** (15 C.P.L.R. 6, *D.*; 7 M. 96, *R*).

(247)—*S.* 52—*When suit becomes contentious*—Lis pendens—*Equity of redemption when extinguished on a sale under a mortgagee's decree.*—N. K., the mortgagee, brought a suit on his mortgage against the mortgagors, one of whom H.H. subsequently, but before the summons in the suit was served upon him, mortgaged the property in dispute to M.B.N.K. then obtained a decree in his suit in his favour. Subsequently M.B. brought a suit on his mortgage without making N.K. a party thereto and obtained a decree in his favour. On a sale under M.B.'s decree a sale certificate was given to F.H. who obtained possession of the property. Subsequently on a sale under N.K.'s decree a sale certificate was given to P.N., who failing to obtain possession of the property instituted the present suit against H.H., F.H. and M.B. for possession of the same: *Held*, that under s. 52 of the Transfer of Property Act (IV of 1882) the mortgage to M.B. did not affect the rights of N.K. under the decree made

Transfer of Property Act (IV of 1882) —*continued.*

in his suit. Their Lordships were unable to agree in the view which seems to have obtained in India that a suit contentious in its origin and nature was contentious within the meaning of that section until a summons was served upon the opposite party. *Held*, that the doctrine of *lis pendens* is that "*pendente lite* neither party to the litigation can alienate the property in dispute so as to affect his opponent." F.H. made for the first time an application to the Court of the Judicial Commissioner to allow him to redeem N.K's mortgage and repeated the same at the hearing of this appeal before their Lordships. *Held*, that on the sale being confirmed the equity of redemption was extinguished. FAIYAZ HUSAIN v. MUNSHI PRAG NARAIN, **9 Bom. L.R. 656=11 C.W.N. 561=4 A L.J. 344=5 C.L.J. 563=17 M.L J. 263 =29 A. 339=34 I A. 102, P.C.**

(248)—S. 52 — Lis pendens — *Alienation after the institution of suit but before service of summons—Contentious suit—Active prosecution of the suit.*—An alienation of property after the institution of the suit but before the summons could be served upon the defendant is affected by the rule of *lis pendens*. *Per Jenkins, C.J.* —S. 52 of the Transfer of Property Act, 1882, imposes two conditions, (*a*) the existence of a contentious suit, and (*b*) that the transfer should be during its active prosecution in a Court of the kind described in the section. The word "contentious" in s. 52 is used to introduce into the section a condition that the suit must be real and not collusive. It is impossible to think that it indicates a quality that cannot belong to a suit until service of summons or that a suit in other respects contentious is not so, because the plaintiff may have been unable to serve the summons on the defendant. *Semble.*—It is worthy of consideration whether the risk of the hardship to the purchaser could be diminished by requiring a *lis pendens* to be registered before it can bind transferees for value. *Per Beaman, J.*—The word "contentious" in s. 52 of the Transfer of Property Act, 1882, qualifies the whole doctrine of *lis pendens*, that is to say, that there can be no *lis pendens* without a contentious suit. The expression, "during the active prosecution," in the section, subject to that qualification defines the point of time at which the rule comes into operation. The former conditions the existence of *lis pendens*, the latter fixes the commencement and continuance of its existence. From the moment a suit of any sort whatever, except only collusive suits, is filed it is potentially contentious. And for the purpose of bringing the rule of *lis pendens* into operation, there must be an active prosecution of that suit. What is or what is not an active prosecution must be, from the very nature of terms employed, always in some degree a question of fact. KRISHNAPPA v. SHIWAPPA, **9 Bom. L. R. 530=31 B. 393.**

(249 to 259)—*S.* 52—Lis pendens—*Contentious suit Compromise decree—Sale pending suit—Purchaser bound by the decree.*—An honest compromise, incorporated into a decree under the provisions of the Code of Civil Procedure, is just as effectual for purposes of s. 52 of the Transfer of Property Act as a decree passed by the Court. S transferred a portion of the property which formed the subject-matter of a partition suit to which she was a party. After the transfer, S died. Her reversioners were already on the record as parties. Subsequently the suit terminated in a compromise decree: *Held*, that the purchasers from S were bound by the compromise decree. MUSAMMAT JHUNA v. MUNSHI TARA CHAND, **6 Ind. Cas. 168.**

(260)—*S.* 52—*Decree passed upon a compromise.*—*Held*, that, if the other conditions of the section are satisfied, s. 52 of the Transfer of Property Act applies to a case in which a decree is passed upon a compromise. RAGHUBAR DAYAL v. GHASITE, **13 O.C. 98=6 Ind. Cas. 750.** (6 O C. 294, *Diss.*; 12 M. 439, *Not F.*; 18 C. 188, *D*; 8 B.L.R. 474, 8 C. 79, 7 W.R. 133, 21 W.R 349, 34 I.A. 102, 29 A. 339, *R.*; 29 M. 426, *F.*)

(261)—*S.* 52—Lis pendens—*Suit to enforce simple mortgage, ending in compromise—Execution sale pending suit—Purchaser, if bound by compromise—"Contentious" suit—"Immoveable property" suit respecting.*—The mere fact that a suit is terminated by a consent decree does not take the suit out of the operation of the doctrine of *lis pendens* as enunciated in s. 52 of the Transfer of Property Act. A suit to be "contentious" within the meaning of s. 52 need not be contested in all its stages. A contentious suit is one in which a party having difference with another puts the law in motion as against the other The doctrine of *lis pendens* applies to a suit to enforce a simple mortgage. The doctrine applies to a purchase at an execution sale pending the suit. TINOODHAN CHATTERJEE v. TRAILOKHYA CHARAN SANYAL, **17 C.W.N. 413.**

(262)—*S.* 52—Lis pendens—*Review application, effect of—Laches.*—On 19th May, 1905, appellant sued A and B his mortgagors, for a mortgage decree on certain lands. On 13th June, 1905, the Court, through an oversight, granted a money decree only. On 24th July, 1905, appellant applied for a review, and on 7th September, 1905, the Court amended the decree by changing the money-decree into a mortgage-decree. In the interval, on 3rd August, 1905, A and B, appellant's mortgagors, sold the lands to the respondent. Appellant sued the respondent to have this sale set aside under s. 52 of the Transfer of Property Act: *Held*, that, though s. 52 had not been extended to the Pegu District, the equitable principles contained in it might be followed as the basis for a decision in accordance with justice, equity and good conscience. *Held*, that, even if the application for review were held to reopen the *lis pendens*, the applicant was not entitled to the benefit of the right, as he was

Transfer of Property Act (IV of 1882) —*continued.*

clearly guilty of laches in not prosecuting his proceedings actively and without remission. It was open to him to apply for a review as soon as he knew that a money decree was passed or to file an appeal within one month, but he did nothing from 13th June to 24th July, 1905. NAGAPPA CHETTY v. MAUNG PO GWE, **12 Ind. Cas. 849.**

(263)—*S.* 52—*Transfer after decree and before appeal filed*—Lis pendens *Appeal—Final decree.*—The function of an appellate Court is not under the Code of Civil Procedure (1882), the final decree in the case ; and the proceedings in the appellate Court must therefore be treated as a continuation of the proceedings in the lower Court. It is not open to a defeated suitor to file an appeal immediately as he has to obtain copies of the decree and judgment and he ought not to suffer for the delay imposed by law. There is no reason why this delay should prejudice him in this respect any more than the delays due to adjournments or stay of proceedings. The law of *lis pendens* in this country is founded on the necessity, if possible, of a final adjudication, and it is unjust that a plaintiff should be prejudiced by any acts of the defendant subsequent to the institution of the suit and with notice thereof. SETTA GOUNDAN v. MUTHAI GOUNDAN, **4 M.L.T. 77=31 M. 268.** (20 W.R. 205, 28 C. 23, *F.*)

(264)—*S.* 52—Lis pendens—*Transfer after decree but before appeal.*—A transfer of property made after the decree of the first Court and before the appeal was filed from the decree is a transfer made during the active prosecution of the suit within the meaning of s. 52 of the Act. DANDILAL v. DAVLATRAM, **1. C.P.L.R. 19.**

(265)—*S.* 52—Lis pendens—*Suit "actively prosecuted" in wrong Court, returned to proper Court and decreed by latter on compromise—Civ. Pro. Code (Act XIV of 1882), s. 15—Suit to be instituted in Munsif's Court filed in Subordinate Judge's—Decree against minors not duly represented, void or voidable—Strangers if may challenge.*—A decree obtained against persons who, though minors, were not represented by guardians *ad litem*, stands good against the whole world as a final order of the Court, until set aside at the instance of those persons and at their instance only. It cannot be challenged or questioned by third parties. The rule of *lis pendens* will operate in favour of a plaintiff, who at the time of the transfer was erroneously prosecuting his suit in a Court, which from defect of jurisdiction was unable to entertain it, and in consequence returned it for presentation to the proper Court, which Court ultimately decreed the suit on the basis of a lawful compromise. S. 15, Civ. Pro. Code (1882), referred to procedure only and did not affect the jurisdiction of Courts of higher grade. TANGOR MAJHI v. JALADHARI DEARI, **14 C.W.N. 322 =5 Ind. Cas. 691.**

(266)—S. 52—*See* CIV. PRO. CODE, 1908, O. XXI, r. 63, 26 A. 89=A.W.N. 1903, 209.

Transfer of Property Act (IV of 1882 —*continued.*

(267)—S. 52—*See* COMPROMISE—EFFECT OF, 12 M. 439.

(268)—S. 52—*See* HINDU LAW—WIDOW, 4 A. L. J. 795=A. W. N. 1908, 29=2 M. L. T. 514=30 A. 95.

(269)—S. 52—*See* MORTGAGE—SALE OF MORTGAGED PROPERTY, 2 A.L.J. 294.

(270)—S. 52—Re-sale after institution of pre-emption suit—Effect—*See* PRE-EMPTION—GENERAL, 11 Ind. Cas. 645.

(270-*a*)—S. 52—*See* No. 44, *supra.*

(271)—Ss, 52, 82—*See* LIS PENDENS, 13 A. 371=A W.N. 1891, 133.

(272)—Ss. 52, 86, 87—*See* LIS PENDENS, 3 A. L. J. 675=A.W.N. 1906, 283=29 A. 76.

(273) Ss. 52, 88—*See* LIS PENDENS, 20 A. 349=A.W.N. 1898, 63.

(274)—*Ss.* 52, 88, 89—Lis pendens, *applicability of, to mortgage suit heard* ex parte—*"Contentious suit"—Mortgage decree* nisi, *mortgagor selling the mortgaged property after, but before decree absolute—Duty of the purchaser to apply to be made party—Subsequent purchaser in execution of the mortgage decree—Priority.*—Where, after the passing of an *ex parte* preliminary mortgage decree under s. 88 of the Transfer of Property Act but before that decree was made absolute under s. 89, the mortgagor sold his interest in the property, *held*, that after the passing of the decree under s. 88 all that the mortgagor could convey was his equity of redemption as bound by that decree and therefore all that the purchasers got by the sale was that equity of redemption which could not entitle them to prevent the sale of the mortgaged property in execution of the mortgage decree without redeeming the mortgage. That it was not incumbent upon the mortgagee decree-holder to make the purchasers parties to the proceedings, even if the decree-holder was aware of the sale. But it was the duty of the purchasers to apply to be made parties to the proceedings and, in those proceedings to claim under their purchase the right to redeem the mortgage. That not having done so, their purchase did not confer on them any right in the mortgaged properties as against the mortgagee decree-holder who subsequently purchased the properties in execution of the mortgage decree. *Semble* :—The doctrine of *lis pendens* applies to *ex parte* decrees and in mortgage suits. BROJO KISHOREE BASHNAVI v. MEJAN BISWAS, **13 C.W.N. 138=3 Ind. Cas. 791.**

(273-*a*) S. 53—*See* FRAUDULENT TRANSFER.

(275)—*S.* 53—*Creditor—Decree-holder—Fraudulent conveyance.*—A person can sue under s 53 of the Transfer of Property Act before he has obtained a decree on the debt by virtue of which he claims to be a creditor of the transferor ; this capacity, however, is to be determined by reference to the facts of each case.

Transfer of Property Act (IV of 1882) —*continued.*

The decree is the evidence, and valuable evidence, that he who complains is a creditor but it is not the only evidence. The plaintiff's position may be proved otherwise, and proved as against the debtor where he is a party to the suit. The absence of a decree is not fatal; it may have the result that the proof required of the creditor becomes more complicated and the standard more exacting to prove the conditions requisite to success. ISHWAR v. DEVAR, **5 Bom. L.R. 19=27 B. 146.**

(276)—*S.* 53—*Necessity of intent to defeat creditors generally.*—Every transfer of immoveable property, made with intent to defeat or delay the creditors of the transferor, is voidable, at the option of any person so defeated or delayed but the party claiming to have the transfer avoided must establish an intent to defeat or delay his creditors, generally, and, if there has been good consideration and the transaction is not a mere sham, a transfer by a debtor, even if made with intent to defeat and delay one particular creditor, is not impugnable by that creditor. SAN DUN v. MEIN GALE, **3 L.B.R. 188.** (25 B. 222, *F.*)

(277)—*S.* 53—*Transfer in fraud of creditors. —Proof of intention to defraud.*—Because a transfer has the effect of delaying one particular creditor, it cannot be said that the transaction was entered into with the intention of defeating or delaying creditors within the meaning of s. 53 of the Transfer of Property Act, where it appears that the transfer was not made gratuitously or for a grossly inadequate consideration. NARAIN SINGH v. MATA PRASAD SINGH, **A.W.N. 1887, 52.**

(278)—*S.* 53—*Sale—Placing property out of reach of creditors—Device to shield property.*—There is no fraud in a person selling his own property even though he knows that by doing so he will place that property out of reach of creditors. In such a case, the question to be decided is whether there was real sale actually transferring the property or whether the transaction was a mere device intended to shield the property. MUSST. JANKI MATA v. THAKUR PRASAD, **1 C.P.L.R. 63.**

(279)—*S.* 53—*Fraudulent transfer—Necessity for affirmative proof of fraud.*—Where fraud is alleged it is not necessary that there should be direct affirmative proof thereof; but it may be apparent from the circumstances and the conduct of the parties. A fraudulent and colourable transfer can be challenged otherwise than under s. 53 of the Act. LALCHAND HIRALAL MARWADI v. HASTO BAI, **7 C.P.L.R. 73.** [*R.*, 1 N.L.R. 150.]

(280)—*S.* 53—*Law of transferers as it existed in India prior to Transfer of Property Act, 1882—Voluntary transfers—"May be presumed to have been made with such intent as aforesaid," meaning of—27 Eliz, c. 4—"Wilful abstention from enquiry and search", meaning--Is registration notice? -Presumption as to fraud.*—

Transfer of Property Act (IV of 1882) —*continued.*

Before the Transfer of Property Act came into force, the principles of English cases were adopted in considering Indian cases. A voluntary deed of transfer or conveyance, would have no effect as against a subsequent purchaser for consideration, the question of notice or no notice to the subsequent purchaser of the existence of the prior voluntary conveyance, being considered to be immaterial by the legal presumption of fraud, which a Court is empowered to make on the suits decided on the Statute 27 Eliz., Ch. 4. (*Deo d. Otley* v. *Manning*. 9 East 59; *Doe d. Newman* v. *Rusham*, 17 Q.B. 724 and *Godfrey* v. *Poole*, 13 Ap. Cas.497, *R*). (22 W.R. 60 *R.*) [*R.*, P.L.R. 1900, 513, 25 B. 202.] *Held*, on a consideration of the language of s. 53, Transfer of Property Act, that it has not altered in any respect the law as it existed in this country at the time the Act was passed. [*R.*, 25 B. 202.] The words "may be presumed to have been made with such intent as aforesaid." in s. 53 of the Transfer of Property Act, should be construed in accordance with the cases decided under the Statute 27 Eliz., c. 4, [*R.*, 25 B. 202. 17 C. P.L.R. 24, 7 Bom. L. R. 267; *D.*, 7 Bom. L. R. 267.] The doctrine of notice, if applied, must be applied in accordance with and subject to the definition of notice given in the Act itself. The words "wilful abstention from enquiry and search" must be taken to mean, such abstention from enquiry or search as would show want of *bona fides*. (*Agra Bank* v. *Barry*, *R.*) [*R.*, 13 C.P.L.R. 43.] The doctrine that registration is notice has no application so far as registered voluntary transfers as against creditors or subsequent transferees for consideration are concerned. If the doctrine be applicable, it can only apply for the purpose of either rebutting the presumption of fraud or preventing the presumption of fraud from arising. [*R.*, 13 C.P.L.R. 43.] According to the terms of s. 53, Transfer of Property Act, the Court is to presume fraud only in accordance with the facts of each particular case. JOSHUA v. ALLIANCE BANK OF SIMLA, **22 C. 185.** [*R.*, 7 Bom. L.R. 267.]

(281) *S.* 53—*Transferee in good faith.—Mere knowledge of an impending execution against a transferor—Transferee not sharing the intention of transferor to defeat creditors.*—The meaning of s. 53, Tr. Pro. Act, is that where a person acquires any property for value and in good faith, that is, without being a party to any design on the part of the transferor to defeat or delay his creditors, his rights shall not be impaired by anything contained in the section, notwithstanding that the transferor may be actuated by such a desire. (*Wood* v. *Dixie*, 7 Q.B.R, 892, *R.*) ISHAN CHUNDER DAS SARKAR v. BISHU SARDAR, **22 W.R. 473.** [*F.*, 7 C.L.J. 586 = 12 C.W.N. 761=35 C. 1051; *Appr.*, 34 C. 999 = 6 C.L.J. 410 = 11 C.W.N. 889; *R.*, 25 B. 202; 13 C.P.L.R. 180; *D.*, P.L.R. 1900, p. 513=6 P.R. 1901.] Mere knowledge of an impending execution against a transferor is not

Transfer of Property Act (IV of 1882) —*continued.*

sufficient to make the transferee a transferee otherwise than in good faith, when he does not share the intention of the transferor to defeat or delay his creditors. ISHAN CHUNDER DAS SARKAR v. BISHU SARDAR, **24 C. 825 = 1 C W.N. 665.** (22 W.R. 473, *Wood* v. *Dixie*, 7 Q.B.R. 892, *R.*

(282)—*S.* 53—*Fraudulent transfer—Alienation for consideration—Alienee acting in good faith—Fraudulent intention of the judgment-debtor alone, not sufficient.*—A charge was created by a debtor on two of his houses in favour of his son's wife to secure her maintenance under an ante-nuptial agreement. The charge was attacked as void under s. 53 of the Transfer of Property Act. The evidence showed a fraudulent intention, on the part of the judgment-debtor, to defeat his creditors, but there was no proof that the son's wife was aware of or participated in the fraudulent intention: *Held*, that, in the circumstances, the deed could not be declared void. HASSAN ABBAS ALI KHAN v. RAZIA BEGAM, **12 Ind Cas. 401.**

(283)—*S.* 53—*Good faith, meaning of.*—A deed is said to be executed not in good faith when it is executed as a mere cloak, the real intention of the parties being that the ostensible grantor should retain the benefit to himself. S. 53 of the Transfer of Property Act cannot be understood and correctly applied without reference to the English cases on which it is founded. (In this case, the lower Court had found the deed to be supported by consideration but executed, with intent to defeat the transferor's creditors.) RAMASAMI PILLAI v. ADINARAYANA PILLAI, **20 M. 465 =7 M.L J. 246.** [*R.*, 13 C.P.L.R. 180, 10 M.L.J. 234, 25 B. 202, 5 Bom. L R. 213, 16 M.L.J. 427=30 M. 6=1 M.L.T 351, 34 C. 999=6 C.L.J. 410=11 C.W.N. 889.]

(284)—*S.* 53—*Good faith, meaning of.*—The meaning of good faith in s. 53 of the Act is that the transfer was not executed as a mere cloak, the real intention of the parties being that the ostensible grantor should retain the benefit to himself. MARDAN SINGH AND PRAN SINGH v. KARANJU, **13 C.P.L.R. 180.** [*Expl.*, 17 C. P.L.R. 24.]

(285)—*S.* 53—*Fraudulent transfer — Good faith.*—Under s. 53 of the Transfer of Property Act, 1882, one of the acknowledged tests of good faith is whether the transfer is a mere cloak for retaining a benefit to the grantor. NATHA v. MAGANCHAND, **3 Bom. L.R. 170=27 B. 322.**

(286)—*S.* 53—*Fraudulent transfer—Good faith, test of*—Under s. 53 of the Transfer of Property Act, the test of good faith is whether it was a genuine or a considerable transaction If a conveyance is made *bona fide* and with a full intention that the porperty should be parted with it will not be fraudulent if made with intent to defeat the execution. Such a motive does not defeat the assignment. MAHAMMAD-UNISSA v. BACHELOR, **7 Bom. L.R. 477=29 B. 428.**

Transfer of Property Act (IV of 1882) —*continued.*

(287)—*S.* 53—*Fraudulent transfer — Good faith—Considerations.*—The effect of cl. 1 of s. 53 of the Transfer of Property Act, 1882, is that where there is an intention to defeat or delay creditors, it is immaterial whether there was consideration for the transaction, and if there was, whether it was adequate. The cl. 2 of the section amounts to a rule of evidence. It is applicable to the conditions stated in it, but cannot be treated as modifying the substantive law declared in the first and third paragraphs of the section. All it says is that where certain conditions specified in the clause exist the Court may presume the intent to defraud, defeat or delay; it does not exclude cases of transfers where the intention to defeat or delay may exist, though, so far as consideration is concerned, there may be nothing to say against them. The meaning of cl. 3 is that there must be both good faith and consideration to support a transfer by taking it out of the preceding paragraphs of the section. RANCHODDAS v. CHUNILAL, **5 Bom. L.R. 213.**

(288)—*S.* 53—*Good faith—Transfer not in good faith voidable even though with consideration — Single creditor entitled to maintain proceedings to avoid fraudulent transfers.—Held* that, even where there is some consideration, the transaction will be avoided under s. 53 of the Transfer of Property Act, if the element of good faith is not present. NARMAL DAS v. CHET RAM, **11 O.C. 197.** (30 M. 6, 34 C. 999, *R.*)

(289)—*S.* 53—*Fraudulent transfer of moveable property to the prejudice of creditors Good faith and consideration—Consideration in part discharge of debts.*—Where property sought to be assigned is not immoveable property, s. 53 has no direct application, and the question must be decided by a reference to general principles of justice, equity and good conscience. Each case must depend upon its own circumstances, and in all the question is one of fact, whether the transaction is *bona fide* or is a contrivance to defraud creditors. It may be stated, generally, that a deed is void against creditors, when the debtor is in a state of insolvency or when the effect of the deed is to leave the debtor without the means of paying his present debts. If this is the condition of the debtor or the consequence of his act, it is not sufficient to render a deed valid that it should be made upon good consideration; for a good consideration does not suffice, if it be not also *bona fide*. There is nothing in s. 53 to prevent a creditor being given preference, provided nothing more is done by the transaction, either with reference to the transferor or transferee, so as to injuriously affect the creditors of the former. But, if the transaction is entirely invalid as against the creditors, it cannot be allowed to be treated as partly valid, even to the extent to which the consideration for the deed of assignment went in discharge of the executant's creditors. It is open to these satisfied creditors to protect themselves, by discharging the

Transfer of Property Act (IV of 1882) —*continued.*

claims of the executant's other creditors, at whose instance the transaction is voidable. CHIDAMBARAM CHETTIAR v. SAMI IYER *alias* ARUNACHALAMAIYAR, **16 M.L.J. 427 =1 M.L.T. 351=30 M. 6.** [*Appl.*, 5 M.L.J. 283; *R.*, 34 C. 999=11 C.W.N. 889=6 C.L.J. 410, 11 O.C. 197, 5 Ind. Cas. 33.]

(290)—*S.* 53—*Conveyance in fraud of creditors—Suit to declare same void—Parties—Maintainability—Transfer in favour of creditors not void merely because it gives preference—Creditor's participation in fraud—"Good faith"—Interpretation of Statute—Statutes in pari materia—Stat.* 13 *Eliz., Chap.* 5, *s.* 6—Bona fide."—A suit to set aside a conveyance alleged to be fraudulent within the meaning of s. 53 of the Transfer of Property Act must be brought by or on behalf of all the creditors. (16 B. 1, 27 B. 146, 9 C.W.N. 225=32 I.A. 1, *R.*) Where a debtor purported to convey his properties for adequate consideration, for the purpose of paying off some only of his creditors, and it was proved that the debts were genuine debts and were all discharged out of the consideration for the conveyance. *Held*—that the transfer was not voidable under s. 53 of the Transfer of Property Act. It is not enough, in order to support a conveyance or transfer as against creditors, that it be made for valuable consideration. It must also be *bona fide*. A mere fraudulent intent on the part of the grantor alone will not invalidate the transfer, if it is for valuable consideration and there is no want of good faith on the part of the grantee. A creditor to whom such a transfer is made, however, occupies a more favoured position than a person who purchases for present consideration. For, in the absence of a law of bankruptcy, a preferential transfer of property to one creditor cannot be declared fraudulent as to other creditors, although the debtor, in making it, intended to defeat their claims, and the creditor had knowledge of such intention. If the only purpose of the creditor is to secure his debt, and the property is not worth materially more than the amount of the debt, the transaction is not fraudulent. If, however, the transfer is not in reality a preference of an actual debt, but is a mere colourable device to place the debtor's property beyond the reach of his creditors, or if the transaction extends beyond the necessary purpose of a mere preference, so as to secure to the debtor some benefit or advantage, or to unnecessarily hinder and delay other creditors, the transfer is fraudulent. Stat. 13, Eliz., ch. 5, s. 6, and the third paragraph of s. 53 of the Transfer of Property Act compared, and *held* that reference to English authorities bearing on the interpretation of the expression "*bona fide*" in the former enactment, for the purpose of interpreting the expression "good faith" in the latter, is not only legitimate but essential. The English and Indian authorities reviewed. LALA HAKIM LAL v. MOOSHABAR SAHOO, **11 C.W.N. 889=6 C.L.J. 410=34 C. 999.** [*R.*, 11 O.C. 197, 5 Ind. Cas. 33.]

Transfer of Property Act (IV of 1882) —*continued.*

(291)—*S.* 53—*Voluntary transfer as against creditors — Fraud.—Held*, that though the Transfer of Property Act, 1882, is not in force in the Punjab, the principles it embodies are founded on equity and justice and are of universal application throughout India In accordance with the provisions of s. 53 of the Act, the Court held that a mortgage deed of all the property, moveable and immoveable, fraudulently executed by the debtor to the prejudice of one of the creditors though for valid consideration, was void. LAKSHMI NARAIN v. TARA SINGH, **P.L.R. 1900, 513=6 P.R. 1901.** [*R.*, 81 P.R. 1908=148 P.W.R. 1908.]

(292)—*S.* 53—*Fraudulent transfer—Creditors—Interpretation.* — The term "creditors" in s. 53 of the Transfer of Property Act, 1882, includes not only the creditors of the transferor at the time or prior to the time of the assignment complained of, but also the subsequent creditors of the transferor. S. 53 of the Transfer of Property Act, 1882, lays down distinctly three propositions, the first is, that if the intent to defraud, defeat or delay is established, then the assignment is voidable at the option of the creditors. The second is, that if the transfer is made gratuitously or for a grossly inadequate consideration, then the Court may presume that the intention of the parties was to defraud the creditors. The third proposition is, that where the good faith of the transferor is established, and where he is shown to have paid consideration, then the section has no application. HOOSEINBHAI v. HAJI ESMAIL, **5 Bom. L.R. 255.**

(293)—*S.* 53—*Fraudulent transfer—Intent to defeat or defraud creditors—Consideration wanting or grossly inadequate.*—As good faith and consideration render s. 53 of the Transfer of Property Act, 1882, wholly inapplicable, a bare intent to defeat or delay the creditors does not fall within the first paragraph of the section. The intent, in order to render a transfer voidable at the option of a single creditor, must be an intent to defeat or delay not only the creditor claiming that option but the *creditors* of the transferor, *i.e.*, it must so impair the estate as to render it incapable for the remaining assets to satisfy its general liabilities otherwise the creditor can have recourse to other assets. It is not until this general inability of the estate is established, that any person complaining that he has been defeated or delayed can claim the option given by the section. The second paragraph of s. 53 shows that the intent may be presumed from the effect when the consideration is either wanting altogether or is grossly inadequate. The second paragraph of s. 53, read with the third paragraph of the section, makes it clear that the presumption of intent cannot arise from the mere effect of the transfer, even though the consideration may be inconsiderable, unless the third paragraph is rendered inoperative by want of good faith in the transferee. In cases to which the provisions of the last paragraph of s. 53 do not apply, *i.e.*, in cases where there is either no good faith or no

Transfer of Property Act (IV of 1882) —*continued.*

consideration or where there is no good-faith and the consideration is grossly inadequate, there is nothing to prevent the presumption of an intent to defeat or delay creditors arising from a transfer which has the effect of defeating or delaying creditors. BHAGWANT v. KEDARI, **2 Bom. L.R 986=25 B. 202.**

(294)—*S.* 53—*Fraudulent conveyance to defeat creditors — Subsequent suit to recover possession.*—A person transferring his property to another for the purpose of defrauding his creditors cannot, where the fraud has been carried into execution, subsequently sue to recover possession of the property transferred. HONAPPA V. NARSAPA, **23 B. 406.** [*Appr.*, 33 C. 967=10 C.W.N. 650=4 C.L.J 22; *Appl.*, 3 P.R. 1906, 7=109 P.L.R. 1906; *R.*, U. B.R. 1897—1901 ; 544, 13 Bom. L.R. 92.]

(295)—*S.* 53—*Fraudulent transfer—Transfer for love and affection—Gratuitous transfer—Consideration—Contract Act*, s. 25 (1)—*Evidence to prove transfer fraudulent—Burden of proof—Right to sue—Suit by one of several creditors to avoid transfer—Transferor adjudicated insolvent—No objection to frame of suit taken. Decree, form of.*—The provisions of s. 53 of the Transfer of Property Act are in accordance with general principles of justice, equity and good conscience and as such should be taken as a guide by the Courts of this Province. All that s. 25 of the Contract Act provides is that transactions of the kind therein specified are not void ; it does not enact that such transaction must be deemed to be for consideration. The fact that a transfer of property is not void by reason of the provisions of s. 25 (1) of the Contract Act, does not make that transfer a non-gratuitous transfer for the purposes of s. 53 of the Transfer of Property Act. A transfer of property made on account of natural love and affection is purely gratuitous and cannot be deemed to be a transfer for consideration. Where it appears that a transferor was indebted to a creditor, prior to the date of transfer, that the transfer was gratuitous and that the transferor has not been able to pay the debts, it is incumbent on the transferee to show that, at the time the transfer was made, the transferor had undisposed assets sufficient to discharge his debts, and, in default of such proof, the Court may legitimately assume that the transfer of valuable part of his property by the transferor has in fact defeated or delayed the creditor and that the intention of the transferor was to defraud such creditor. The mere fact that the transferor has, subsequent to the transfer, satisfied *some* of his creditors is insufficient to show that he was in a position to satisfy *all* his creditors. A suit to avoid a fraudulent transfer should be brought by, or on behalf of, all the creditors of the transferor. It is not open to one of the body of creditors to sue for a declaration that the property is liable to be sold in execution of his decree, especially when the suit is instituted after insolvency proceedings have commenced at the instance of the transferor.

Transfer of Property Act (IV of 1882) —*continued.*

Where a suit to avoid a fraudulent transfer was brought only by one of the creditors, but no objection was taken to the frame of suit in the Courts below or in the grounds of appeal before the Chief Court, while the transferor had meanwhile been adjudicated an insolvent, the proper decree to be passed in the case is that the transfer shall not affect the right of the transferor's creditors to treat the transferred property as still belonging to the transferor or the right of the Receiver to realize and distribute the same rateably among such creditors. CHAMPO v. SHANKAR DAS, **148 P W.R. 1912= 14 Ind. Cas. 232=165 P.L.R. 1912=74 P.R. 1912.**

(296)—*S.* 53—*Fraudulent transfer—Transfer with a view to defeat an anticipated attachment —Transferee not sharing in fraudulent intention —Burden of proof on plaintiff when he sets up a deed as genuine—Finding of fact, right of appellant to challenge in second appeal—Inferences from facts found can be challenged in second appeal.*—The mere fact that a transfer was made to defeat an anticipated attachment does not evidence an intent to defeat or delay creditors of the vendor. Where a plaintiff sues for a declaration that a particular transfer in his favour is a good and valid one, it is incumbent upon him to make out in the first instance the validity of the sale in his favour. Although an erroneous finding of fact, cannot be challenged in second appeal unless it is shown that there is an error of procedure or that there is no evidence in support of the finding yet, inferences drawn from facts found might be questioned in second appeal. BAKHT BALI SINGH v. LAKHRANI KUNWAR, **15 Ind. Cas. 509.**

(297)—*S.* 53—*Conversion of immoveable property—Payment of consideration alone not sufficient to rebut presumption—Use and meaning of the word 'colorable.'*—If a person in involved circumstances, with the intention of defeating or delaying his creditors, converts his immoveable property which could easily be got hold of by his creditors into money, the mere fact that consideration was paid for the sale would not enable the vendee to contend that the sale was not voidable under s 53, Transfer of Property Act. Notwithstanding any fraudulent intent on the part of the alienor, a *bona fide* transferee taking a transfer without notice of the alienor's fraudulent intention would be protected. Where a debtor makes alienations to the extent of Rs. 6,000 but discharges in a month thereafter only Rs. 2,000 and odd debts and soon after is declared bankrupt, *held* that the alienations are invalid as against creditors under s. 53, Transfer of Property Act. Where the plaint alienation was made with a view to discharge particular debts but those debts were paid off a month after, the Judge was not bound to find that the payments were made out of the money paid by the plaintiff. The use of the word 'colorable' may well be avoided if by it is only meant that an alienation is voidable by

Transfer of Property Act (IV of 1882) —*continued.*

third parties on the ground of fraud. ALAGAPPA CHETTY v. DASAPPA CHETTIAR, **13 M.L.T. 201=M.W.N. 1913, 141=24 M.L.J. 293.**

(298)—*S.* 53—*Subsequent creditors, whether within the meaning of the section—Presumption in cl.* (2) *of the section, whether applies to the case of subsequent creditors.*—S. 53, cl. (1) of the Transfer of Property Act does not restrict the benefit of its provisions to the existing creditors alone. Subsequent creditors are also within the meaning of the section. The presumption in cl. (2) of s. 53 of the Transfer of Property Act applies alike to the case of subsequent creditors as to that of the existing creditors. THOMAS PILLAI v. MUTHURAMA CHETTYAR, **4 Ind. Cas. 301=7 M.L.T. 28=33 M. 205=19 M.L.J. 747.** (5 Bom.L.R. 255, 23 B. 146, 26 B. 577, *R.*)

(299)—*S.* 53—*Whether mortgagor can take objection under.*—The mortgagors cannot take the objection that the mortgage was to defeat or delay creditors. Such objection can be taken only by the creditors. T. P. ASAN KANI RAVUTHAR v. ARU, ARU, SOMASUNDARAM CHETTIAR, **4 M.L.T. 66=31 M. 206.**

(300)—*S.* 53—*Mortgage—Portion of consideration real—Rest fictitious—Effect—Mortgage, how far valid.*—Where a portion of the consideration for a mortgage bond is fictitious, the whole instrument ought not to be considered fictitious. A mortgage bond must be upheld to the extent to which it was supported by debt actually due prior to the date of the instrument. (30 M. 6, 24 C. 825, *R.*) Where a debtor attempts to screen his property from his creditors by converting the nature of his property so as to make it practically unavailable to his creditors the transactions would be one prohibited by s. 53, Transfer of Property Act. *In re* JALADANKI CHINNA PITCHIA, **10 M.L.T. 183.**

(301)—*S.* 53 - *Defeating or delaying creditors—Considerations for transfer separable—If whole transfer void*—Onus *of proof*— Prima facie *case—Weakness of adversary's case.*—A transfer of property, the considerations for which are separable, part being for valuable consideration and part for the intention to defeat or delay other creditors, is valid and enforceable with regard to the part which is for valuable consideration. A mortgage was executed for a total sum of Rs. 8,500. It was found that Rs. 4,853 was actually advanced by the mortgagees, the evidence as to the balance Rs. 3,647 was extremely suspicious and seemed to be for the purpose of delaying another creditor who had obtained a decree on a *hatchitta. Held*, there ought to be a mortgage decree on the footing of Rs 4,853, being the principal money secured. (24 C. 825, 23 M. 184, *F.*) The party, on whom the *onus* of proof lies, must, in order to succeed, establish, at least, a *prima facie* case. He cannot, on failure to do so, take advantage of the weakness of his adversary's case. RAJANI KUMAR DAS v. GOUR KISHORE SAHA, **7 C.L.J. 586=12 C.W.N. 761=35 C. 1051.**

(302)—*S.* 53—*Sale genuine to the extent of portion of consideration—Sale not voidable as fraudulent transaction.*—Where a sale is genuine to the extent of a portion of the consideration at least, it cannot be considered to be fraudulent within the meaning of s. 53 of the Transfer of Property Act. MANIKAPALLI RAMAYYA v. CHINNA RANGAYYA, **10 M.L.J. 234.**

(303)—*S.* 53—*Mortgages—Prior unregistered mortgages, subsequent registered mortgagee with notice of, not entitled to the priority under s.* 50 *of the Registration Act* (III *of* 1877)—*Fraudulent transfer.*—Where one person takes a possessory mortgage of property with full knowledge and notice that another is already in possession of such property, under an earlier instrument of a similar kind, he cannot be said to be acting in good faith, and the principle enunciated in s. 53 of the Transfer of Property Act is applicable to such a transaction. Under such circumstances, the condition of things is that *qua* the prior title, though created by an unregistered instrument, the status of the second mortgagee under his registered document is affected by his own *mala fides.* Such second mortgagee cannot, on the strength of his own fraud, pray in aid the provisions of the Registration Law so as to get preference to his instrument which records a transaction that in its inception, being fraudulent, was a *nudum pactum*, since a document in the sense of s. 50 of the Registration Act means only a document legally enforceable. RAM AUTAR v. DHANAURI, **8 A. 340=A.W.N. 1886, 174.** [*Appl.*, 16 M. 148, F.B.; *R.*, 6 C.P.L.R 112, 19 A. 145=17 A.W.N. 19, 2 O.C 74, 27 B. 452.]

(304)—*S.* 53—*Right of creditor to impeach sale by debtor before his obtaining decree.*—A suit may be brought under s. 53 of the Act by a creditor who has not even obtained a decree. DEWAN JAGESHWAR PRASAD SINGH v. KUNJIRAM BRAHMAN, **16 C.P.L.R. 164.** (27 B. 146, *F.*)

(305)—*S.* 53—*Transfer in fraud of creditor—Issues.*—Case in which their Lordships refused to consider the question whether a transfer was in fraud of creditors and liable to be set aside under this section, holding that such an issue could be raised only in a suit properly constituted and that the one before them was not such a case either as to parties or otherwise. CHUTTERPUT SINGH v. MAHARAJ BAHADOOR SINGH, **9 C.W.N. 225, P.C.=32 C. 198 =2 A.L.J. 190=32 I.A. 1 = 8 Sar. 713** (5 C.W.N. 10=27 I.A. 216, P.C., 4 I. A. 66, 16 B. 91, 17 B. 375, 21 C. 85, 24 I.A. 170, *R.*)

(306)—*S.* 53 — *Transfer with intent to defeat or delay creditors of the transferor—Transfer of immoveable property by Muhammadan in satisfaction of wife's dower.*—A Muhammadan against whom a decree for money had been passed, about a week after the passing of the decree, and in order to save the property from

Transfer of Property Act (IV of 1882) —*continued.*

being taken by his creditors in execution thereof, transferred certain immoveable property belonging to him to his wife professedly in part satisfaction of a deferred dower debt due to the wife. *Held* that such a transaction was not voidable as a transfer made with intent to defeat or delay the creditors of the transferor within the meaning of s. 53 of the Transfer of Property Act, 1882. KHODIJA BIBI v. SHAH MUHAMMAD ZAHIR ALAM, **A.W.N. 1901, 64.** (8 A. 178, *R.*)

(307)—*S.* 53—*Transfer with intent to defeat or delay creditors—Transfer by Muhammadan husband to wife to whom dower was due.—Held* that a sale by a Muhammadan husband to his wife could not be impeached under s. 53 of the Transfer of Property Act, 1882, when it was found that part of the wife's dower debt was still due, and it was not shown that the husband did not retain in his possession after the transfer other property sufficient to meet the claims of his creditors, or that the transferee had acted in bad faith. UMRAO SINGH v. KANIZ FATIMA, **A.W.N. 1901, 67.** (2 Bom.L.R. 986, *R.*)

(308)—*S.* 53—*Fraudulent transfer to defeat creditors—Sale of immoveable property in satisfaction of dower-debt.*— The defendant in executing a decree against immoveable property of the plaintiff's husband, was met by the plaintiff with an objection that, subsequent to the decree, the property had been transferred to her under an arbitration award, which was made a decree of Court, in discharge of her dower-debt; and the objection having been overruled, she brought a suit to establish her title. It was found that the transaction put forward by the plaintiff was fraudulently and collusively entered into in order to defeat her husband's creditors *Held* that the award being the result of fraudulent and collusive arrangements to defeat the creditors, the mere fact that the parties in perfecting the fraud obtained a decree, would not afford an answer to the creditor's claim; and that as the arbitration award and the decree thereon were fictitious proceedings not taken for the purpose of paying the true-dower debt, but to make it appear that the property was the wife's when in fact it was the husband's, the rule laid down in 8 A. 178 and A.W.N. 1887, 52 was not applicable. MAKSUDUN NISSA v. KARAMAT-ULLAH, **A.W.N. 1890, 15.**

(309)—*S.* 53—*Transfer fraudulent—Transferee's suit to recover possession.*—A Court ought not to assist a plaintiff to recover property or enforce a contract in respect of which he has no true title or right. When a transfer to defeat creditors is made in favour of the plaintiff by the collusive act of the defendant, such plaintiff will not be helped by the Court in getting possession of property thus transferred, though the defendant, in spite of his fraudulent conduct, is accidentally allowed to be benefited thereby. RAGHAVALU CHETTY v. ADINARAYANA CHETTY, **5 M.L.T. 77=32 M. 323=2 Ind. Cas. 616.** (20 M. 326, *F.*; 5 B. 295, *R.*)

Transfer of Property Act (IV of 1882) —*continued.*

(310)—*S.* 53—*Fraudulent transfers—May be presumed to have been made with such intent as aforesaid—Shall presume—St.* 13, *Eliz.*, c. 5.—There is no warrant for construing the words "may be presumed to have been made with such intent as aforesaid" in s. 53 of the Transfer of Property Act, 1882, in accordance with the cases decided under the St. 27, Eliz, c. 4: since, to read the *may presume* of the section as the equivalent of *shall presume* would be to wrest the words from their natural meaning, and to disregard the well-recognized distinction between the two phrases. The presumption of s. 53 of the Transfer of Property Act, 1882, applies equally to cases that previously fell under 13 Eliz., c. 5. The words of the section vest the Court with a discretion in the matter, and do not impose on it the obligation to presume an intent to defraud. BAI COOVERBAI v. MAHOMED, **7 Bom. L. R. 267.**

(311)—*S.* 53, *Fraudulent transfers—Issues—Burden of proof—Presumption.*—In a suit, under s. 53 of the Transfer of Property Act, the issues that should be raised by the Court are: 1. Was the transfer made with intent to defeat and delay the creditors of the judgment-debtor? 2. If so, was the purchaser from such judgment-debtor a transferee in good faith and for consideration? The *onus* of proving the first issue lies on the creditor; and if that be established, the *onus* of proving the second will lie on the transferee. For the purposes of a suit of this class, it is not illegal or immoral to prefer one creditor to another, and, it lies on the transferee (if the intent to delay be established) to prove good faith on his part and consideration; if, however, it be proved, that there was a valuable consideration adequate to the occasion, the Court will, on ordinary circumstances, be slow to hold that there was no good faith. AMARCHAND v. GOKUL, **5 Bom.L R. 142.**

(312) - *S.* 53 — *Preference in favour of one creditor—Intent to defeat or delay other creditors—Burden of proof.*—A party who intends to rely upon a document, as not within s. 53 of the Transfer of Property Act, because it merely creates a preference in favour of some of the creditors over the rest, must show strictly that the document is such and nothing more. So in the case of a document purporting to be a mere *bona fide* security given to a creditor to the extent of his debt, the inclusion of any fictitious debt in the document being *prima facie* evidence of an intention to defeat or delay the creditors, it would be upon the parties who wish to take advantage of the document to show that there was no such intention. NARAYANA PATTAR v. VIRARAGHAVAN PATTAR, **23 M. 184.** [*F.*, 35 C 1051=12 C.W. 761=7 C.L.J. 586; *R.*, 13 C.P.L.R. 180, 6 P.R. 1901=P.L.R, 1900, 523, 17 M. L. J. 11; *D.*, 25 B. 202.]

(313)—*S.* 53—*Fraudulent transfers—Barred debt forming part of consideration for transfer—Evidence of fraud*—Onus *of proof of fraud.*—The mere fact that one creditor is preferred to

Transfer of Property Act (IV of 1882) —*continued.*

another does not, in itself, render the transaction in favour of the preferred creditor voidable under the section. It is for the Courts to say, on the evidence taken as a whole, whether it is sufficient to warrant the inference that the transfer was made, with the intent to defeat or delay creditors ; and such an intent must be established affirmatively, by the person suing for the declaration that a sale-deed is invalid as against him, as being in fraud of the creditors. The fact that a barred or irrecoverable debt is set up as part of the consideration for the transfer is, no doubt, an element in the case, which must be taken into consideration. It is *some* evidence of fraud, but a finding of that sort is not so strongly suggestive of a fradulent intent, as a finding that the debts, set up as part of the consideration, have never existed and was fictitious. The difference between the amount of the debt found due and the value of the property at the date of the sale, must not only be substantial, but it must be so gross as necessarily to indicate that the transferor, when he executed the sale-deed, did so, with the knowledge that the value of the property was greatly in excess of the amount of the debt. HANIFA BIBI SAHEBA v. PUNNAMMA, **17 M.L.J. 11**. (23 M. 183, *D.*) [*R.*, 11 C.W.N. 889=34 C. 999=6 C.L.J. 410.]

8 (314)—*S.* 53—*Intent to defeat expected execution—Transfer for consideration—Validity of—Burden of proof.*—A transfer made in order to prevent the property being sold in execution of a decree is not invalid, if the transfer actually took place and was made *bona fide* for a consideration not grossly inadequate. The burden of proving that a sale was not made *bona fide* and for good consideration lies on the person impeaching the sale, and on the latter establishing a *prima facie* case the burden is shifted on to the purchaser. DOWLAT RAO MEGHEY v. KESHAO RAO DESHMUKH, **1 C.P.L.R. 59.** (6 C. 268, *R.*) [*R.*, 9 C.P.L.R. 142, 16 C.P.L.R. 36.]

(315)—*S.* 53—*Fraudulent transfer—Fraud of transferee an essential element—Inadequate consideration — Presumption of fraud—Good faith and valuable consideration — Fraud—Pleading.*—The mere fact that the transferor intended to defraud his creditor is not sufficient to bring a transfer within the purview of s. 53 of the Act. It must be also proved that the transferee was not a transferee in good faith and for valuable consideration. (24 C. 825, 1 C.W.N. 665, 25 B. 202, *R.*) A transfer for consideration is not void under s. 53, even if it gives preference to one of the creditors of the transferor. (8 A. 178, A.W.N. 1901, 67, A.W.N. 1901, 64, *R.*) When any fraud is imputed, the use of mere general word of fraud or collusion is ineffective. (15 I.A. 119, 15 C. 533, 18 B. 144, *R.*) In the absence of any allegation as to fraud in the pleadings, it cannot be presumed from the mere fact of inadequacy of consideration. HUSAIN BUKHSH v. HAFIZ MUSAHIB KHAN, **5 Ind. Cas. 179.**

Transfer of Property Act (IV of 1882) —*continued.*

(316)—S. 53—Sale by father to his minor son —No consideration—Fraudulent transfer—*See* CONTRACT ACT, 1872, s. 11, 10 Ind. Cas. 906.

(317)—S. 53—Settlement in favour of mother —Alienation to defraud creditors—*See* HINDU LAW—ALIENATION, 62 P.L.R. 1911.

(318)—S. 53—*See* LIS PENDENS, 86 P. R. 1879.

(319)—S. 53—*See* MISJOINDER—OF PLAINTIFFS AND CAUSES OF ACTION, 18 A. 432=A.W. N. 1896, 139.

(320)—S. 53—Applicability to mortgages—Mortgage in good faith—Inadequacy of consideration— Effect— *See* MORTGAGE— GENERAL, 114 P.L.R. 1911.

(321)—S. 53—Rights safe-guarded by priviso to section—*See* MORTGAGE—GENERAL, A.W.N. 1908, 116=5 A.L.J. 305=30 A. 297.

(322)—S. 53—Fraudulent transfer—Intent to defeat or delay creditors—*Mala fide* sale—*See* PLEADINGS, 10 Ind. Cas. 922.

(323)—S. 53—Fraudulent preference—Difference between this section and s.37, Act III of 1907—*See* PROVINCIAL INSOLVENCY ACT OF 1907, s. 37, 18 P.W.R. 1912.

(324)—S. 53—Consideration not a necessary test of *bona fides*—Test of fraudulent transfers —*See* REGISTATION ACT, 1908, s. 28, 7 Ind. Cas. 614.

(325)—S. 53—*See* WILL—CONSTRUCTION, 23 B. 1.

(326)—*S.* 53 (2)—*Gift to defraud creditors—Suit to set aside gift*—Onus *of proof.*—In a suit to set aside a gift, alleged to have been made with intent to defraud creditors, where judgment has been obtained by plaintiff against the donor, the *onus* is on the donee to show that the donor was in a position to pay his debts, apart from the property, the subject of the gift. CHIDAMBARA POTHAN v. POONGAVANAM, **2 Ind. Cas. 813.**

(327)—*Ss.* 53, 67, 92, 93— *Mortgagor and mortgagee*—In a suit for redemption the mortgagee can never insist on an order for foreclosure when the mortgage is simple or usufructuary, and the order for sale on which he can insist under s. 93, Transfer of Property Act, does not operate to divest the mortgagor of his ownership in the property, until the sale has actually taken place. RAMUNNI v. BRAHMA DATTAN, **15 M. 366.** [*R.*, 22 M. 350=9 M.L.J. 108, 25 M. 244.]

(328)—Ss. 53, 86, 88 — Hypothecation of moveables—Law applicable—*See* MOVEABLE PROPERTY, 7 N.L.R. 72.

(329)—*Ss.* 53, 100—*Fraudulent transfer of property to defeat creditors—Conversion of land into cash to defeat creditors—Vendee helping vendor to defeat vendor's creditors—' Good faith' —Burden of proof—Part of consideration applied in discharge of mortgage—Right of vendee to a charge on the property sold for the said consi deration.*—If a vendee of property assists his

Transfer of Property Act (IV of 1882) —*continued.*

vendor to convert land into cash, to enable the latter to keep it out of the reach of his creditors, the sale is voidable, under s. 53 of the Transfer of Property Act, at the option of the creditors. Where, however, a part of the consideration for such sale was paid in discharge of a subsisting mortgage on the property sold, the vendee will be allowed a charge on the property to the amount of such consideration, and the sale will not be voidable *ab initio*. (30 M. 6, 16 M.L.J. 427, 1 M.L.T. 351, *Expl. and D.*) It lies on the transferee to prove good faith on his part and consideration. PALAMALAI MUDALIYAR v. THE SOUTH INDIAN EXPORT CO., LTD, **5 Ind. Cas 33=7 M.L.T. 167=20 M.L.J. 211=33 M. 334.** (5 Bom. L.R. 142, *Rel.*)

(329-*a*) *See* SALE.

(329-*b*) *See* VENDOR AND PURCHASER.

(330)—*S.* 54—*Scope of section—Registration.* —S. 54 virtually abolishes optional registration. —*Per Garth, C.J.* NARAIN CHUNDER CHUCKERBUTTY v. DATARAM ROY, **8 C. 597, F. B. =10 C.L.R. 241.** [*F.*, 17 M. 146; *Diss.*, 16 C. 622; *R.*, 5 A.W.N. 201, 19 C. 623, F. B., 16 M. 148, F.B., 2 O.C. 74.]

(331)—*S.* 54—*Sale of immoveable property—Registration, effect of.*—The registration of a sale deed effects a transfer of the property to the vendee by virtue of s. 54 of the Transfer of Property Act. PONNAYYA GOUNDAN v. MUTHU GOUNDAN, **17 M. 146.** (8 C. 597, *F.*) [*F.*, 1 M.L.T. 432; *R.*, 3 O C. 215, *D.*, 28 M. 124=14 M.L.J. 493.]

(332)—*S.* 54—*Sale of immoveable property of value less than Rs.* 100—*No registration—Delivery — Registration Act, III of* 1877. —Under s. 54 of the Transfer of Property Act, IV of 1882, a sale of immoveable property of a value less than Rs. 100 may be validily made by mere delivery of possession thereof to the vendee although the instrument of sale is not registered. The change in the law made by s. 54 of the Transfer of Property Act, in regard to the sale of immoveable property of value less than Rs. 100, comes to this, that, whilst before the passing of Act IV of 1882, a sale by execution of an unregistered deed by the vendor in favour of the vendee was a valid sale irrespective of delivery of possession, such a sale-deed now would be invalid without delivery of possession. S. 54 gives two alternative methods of effecting the sale of such property which are equally valid: (1) by execution of a registered instrument of sale, or (2) by selling and delivering possession of the property sold. There is nothing in s. 54 which would render a sale, effected in the second alternative method, void or nugatory by reason of the execution of a non-registered deed of sale. IMAMUDDIN v. RAMZAN CHAUDRI, **A. W. N. 1885, 201.**

(333)—*S.* 54—*Sale—Necessity for registration or delivery of possession for land worthless than Rs.* 100—*Compromise.*—The terms of a compromise affecting land worth less than Rs. 100 were reduced to writing, but the document was not registered nor was possession given: *Held*, that the transaction was not a "sale," and delivery of possession required by s. 54 of the Transfer of Property Act, 1882, was not essential to its validity. The nature of a compromise is that it is an acknowledgment of the existing rights of the parties. Delivery of possession is not therefore necessary to give effect to it. KRISHNA TANHAJI v. ABA SHETTI PATIL, **11 Bom. L.R. 1336=34 B. 139=4 Ind. Cas. 833.** (1 I. A. 157, *F.*)

(334)—*S.* 54—*Sale of property of value less than Rs.* 100—*Sale deed not registered--Delivery of property to vendee—Right of vendee to fall upon title by delivery.*—Where in pursuance of an unregistered deed of sale of property of a value less than Rs. 100 possession was given to the vendee, though the unregistered instrument did not confer on the vendee any title, there was nothing in the mere existence of the instrument to prevent him from falling back upon his title by delivery of the property. MT. RUPA TELIN v. BISAMBAR TELI, **8 C.P.L.R. 1.** [*R.*, 14 C.P.L.R. 57.]

(335)—*S.* 54—*Transfer of immoveable property valued less than Rs.* 100—*Delivery of possession—Transferee in possession from before date of sale.*—Where immoveable property valued at less than Rs. 100 is sold, such sale must be either by a registered instrument or by delivery of possession of property. Where there is no delivery, because the vendee has been in possession of the property from before the date of sale, and there is no registered instrument, the sale is invalid. SIBENDRA PADA BANERJI v. SECRETARY OF STATE FOR INDIA IN COUNCIL, **5 C.L.J. 390=34 C. 207.** (22 C. 179, *D.*) [*R.*, 5 M.L.T. 263.]

(336)—*S.* 54—*Agreement to sell land worth Rs.* 100—*Registration of the deed—Possession of the land given subsequently to vendee—Fresh conveyance not executed—Operation of the deed as transfer—Registration Act*, 1877 *ss.* 17 (*b*), (*c*), 49.—To meet the cost of litigation for recovering possession of certain property, the plaintiff's guardian raised Rs. 100 from the defendants and executed in their favour a registered deed, agreeing to sell to them half of the property on condition that the defendants aided him with funds for the purpose. The plaintiff's guardian accordingly filed the suit, obtained possession and delivered over a moiety to the defendants. There was no fresh conveyance passed then. Later on the plaintiff filed a suit to recover possession of the moiety from the defendants, alleging that, as no fresh conveyance was passed by the guardian when he transferred possession of the property to the defendants, the title to it still vested in him (the plaintiff). The defendants in reply relied on their possession as purchasers for over ten years. *Held* that the registered deed which was a contract of sale, took effect as transfer as soon as the conditions of the deed were carried out. KONDU KANHUJI DHAVDE v. VISHNU MORESHWAR BHAT, **14 Bom. L. R. 801.**

Transfer of Property Act (IV of 1882) —*continued.*

(337)—*S.* 54—*Sale of land of upwards of Rs.* 100 *in value, necessity of registration in the case of*—*Possession on oral sale cannot give title.*—The value of the property which was the subject of the sale in this case was upwards of Rs. 2,000. Its transfer therefore could, under s. 54 of the Transfer of Property Act, have been effected only by means of a registered instrument. Defendant claimed the property under an oral contract for sale, with possession given to him. Possession could not take the place of the registered deed required by s. 54, and defendant, therefore, even assuming that he was entitled to specific performance, cannot resist the present suit of the plaintiff against him, as the property has not passed to him and cannot vest in him unless he is in possession of a registered deed. PAPIREDDI v. NARASAREDDI, **16 M. 464.** [*Doubted*, 16 A. 344; *R.*, 13 C.P.L.R. 164, 29 M. 336=1 M.L.T. 153=16 M.L.J. 395, 7 Bom. L.R. 345; *D.*, 6 M.L.J. 33, 21 M. 291.]

(338)—*S.* 54—*Sale — Unregistered sale-deed for less than Rs.* 100 *followed by delivery of possession — Subsequent sale-deed registered — Title—Priority.* -A sale by unregistered deed of immoveable property, less than Rs. 100 in value, passes a good title to the vendee when it is followed by delivery of possession; and has priority over a registered sale of later date. VEDA MUPPAN v. KATHAN PADAYACHI, **5 Ind. Cas. 57=7 M.L.T. 372.**

(339)—*S.* 54—*Sale-deed without consideration —No possession given—Subsequent sale—Priority.*—A vendee under a registered sale deed paid no consideration for the sale and allowed his vendor to be in possession for sometime. The vendor subsequently sold the property with possession for actual consideration, also by a registered sale deed *Held*, the prior vendee's claim to the property cannot succeed as against that of the subsequent vendee. SANGU AYYAR v. CAMARASAMI MUDALIAR, **18 M. 61.** [*R.*, 3 O.C. 215, 28 M. 124=14 M.L.J. 493.]

(340)—*S.* 54—*Sale—Non-payment of consideration--Sale nevertheless complete.*-In a sale of immoveable property, non payment of the purchase-money does not prevent the passing of the ownership of the purchased property from the vendor to the purchaser and the purchaser can, notwithstanding such non-payment, maintain a suit for possession of the property. BAIJ NATH SINGH v. PALTU, **A.W.N. 1908, 38=5 A.L.J. 96=30 A. 125.**

(341)—*S.* 54—*Sale of land—Registration of deed of sale—Delivery of deed—Completion of purchase—Non-payment of consideration—Recital of receipt in sale deed—Proof of non-payment —Estoppel* —Mere registration of a deed of sale of land, unaccompanied by delivery of the deed to the vendee, does not make the transaction a completed one, and does not pass title, if it was intended by the parties that the title should pass only upon the consideration money being paid. (2 C.W.N. 207, 27 C. 7, 4 C.L.J. 334, *Rel. on.*) Notwithstanding an admission in a sale-deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid or that the consideration was different from that stated in the sale-deed. SREE NATH HOLDAR v. SREE KANTA HOLDAR, **6 Ind. Cas. 477.** (4 C.W.N. 485, 11 C. 486, 10 C.L.J. 27, 2 Ind. Cas. 953, *F.*)

(342)—*S.* 54—*Transfer of immoveable property by unregistered deed—Optional registration—Vendor out of possession—Suit by purchaser for possession.*—In declaring how transfers may be made, s. 54 draws a distinction between transfers of tangible immoveable property of the value of Rs. 100 and upwards, and of the value of less than Rs. 100. Of the former, it declares that transfer "can be made only by a registered instrument"; of the latter it declares that "transfer may be made either by a registered instrument or by delivery of the property." But the law does not state that such transfer can be made only by one of these means. Nor is it anywhere provided that a person out of possession shall not sell to another his right, title and interest in any property, nor is it declared that in such a case the transfer can be made only through a registered instrument. The actual rights may be conveyed through an unregistered instrument, for that, by the Registration Act, is receivable in evidence of the transaction, if the value of the property conveyed is less than Rs. 100. KHATU BIBI v. MADHURAM BARSICK, **16 C. 622.** [*Overruled*, 19 C. 623, F.B.; *R.*, U.B.R. 1897—1901, Vol. II, 573.]

(343)—*S.* 54—*Contract for sale of land—What interest passes to the person contracting to purchase.*—In a contract for sale of certain land under s. 54 of the Transfer of Property Act, 1882, the person contracting to purchase it acquires only a personal right against his vendor or his assignee with notice, to compel the latter by a suit for specific performance to perform his contract. But he has no direct right over the land. MAHADEO v. VASUDEV J. KIRTIKAR, **23 B. 181.** [*F.*, 6 Bom. L.R. 1013.]

(344)—*S.* 54—*Effect of registration of deed of sale as passing title—Payment of consideration—Delivery of deed.*—Though s 54 of the Transfer of Property Act, prevents the property sold from passing, except the deed is registered, the mere registration of the deed does not necessarily pass the property. Apart from the section, registration is not a formality which creates any rights, although it affects the admissibility in evidence of the document registered. Registration is *prima facie* proof of *intention* to transfer the title; but it is no proof of *operative* transfer, if there was a condition precedent as to payment of consideration and the delivery of the deed, which condition must be strictly proved. SHEO NARAIN SINGH v. DARBARI MAHTON, **2 C.W.N. 207.** [*Appl.*, 27 C. 7; *D.*, 4 C.L.J. 334.]

Transfer of Property Act (IV of 1882) —*continued.*

(345)—*S.* 54—Kobala—*Registration if dispenses with proof of passing of consideration—Conveyance, if may be challenged on ground of want of consideration by legal representative of vendor*—The mere registration of a document, which purports to be a transfer for consideration, does not, apart from all questions as to whether consideration passed or not, convey title to the transferee. The Court has to see what was the intention of the vendor, if no consideration passed. (27 C. 7, *R.*) Where it appeared that it was the intention of the owner, whether consideration passed or not, to transfer the property to the defendant who was his concubine, and the plaintiff claimed the property by right of inheritance, the defendant was not bound to prove payment of consideration, and the *kobala*, as it was, prevailed against the claim of the plaintiff. GOSTHO BEHARY GHOSH v. ROHINI GOWALINI, **13 C.W.N. 692 =4 Ind. Cas. 541.** (9 C.W.N. 477=32 I.A. 113 =27 A. 271, *Appl.*)

(346)—*S.* 54—*Undivided share in immoveable property whether tangible property - Registration not compulsory in case of sale of undivided share in immoveable property, if value under Rs.* 100 - *Held*, that an undivided share in immoveable property is a tangible immoveable property within the meaning of s. 54 of the Transfer of Property Act, and therefore a sale of such property, if under Rs. 100 in value, is not compulsorily registrable. PEARE LAL v. LALA, **14 O. C. 161** (2 O. C. 9, 18 M. 454, *R.*)

(347)—*S.* 54—*Prior unregistered contract of sale—Subsequent registered sale—Notice—Suit for specific performance.*—The plaintiff agreed to buy from the defendant, in consideration of Rs. 95, the property as to the defendant's title to which there was an action pending. The agreement was dated August 1884, and was in writing, but was not registered. By it, in the event of the defendant being successful in the suit then pending, he agreed to deliver possession of the property in question to the plaintiff, in the event of his failure, he agreed to return the purchase money. In March 1885, the suit, in which the defendant's title to the house was in question, was decided in his favour. In May 1885, he executed a registered sale-deed in respect of the house in favour of P. Plaintiff sued for the specific performance of the contract to sell the house to him. It appeared that P was aware at the time of the sale to him of the contract of August 1884 between his vendor and the plaintiff. *Held*, that the deed of August 1884, was admissible in evidence without registration, to prove the contract between plaintiff and the defendant, and also that as between the plaintiff and the defendant or any one taking under the latter with notice of the plaintiff's right, the plaintiff was entitled to specific performance of the contract and that s. 54 of the Transfer of Property Act had no application. PANCHAM LAL v. KISHORE, **A. W. N. 1887, 15.**

(348)—*S.* 54—*Essence of—Vendee in possession at date of sale.*—In case of sales of immoveable property of less than Rs. 100 in value, s. 54 of the Transfer of Property Act speaks of a transfer by delivery of the property, and that delivery is the essence of the transaction. If, on the date of sale, the vendee gets into possession, with the assent, express or implied, of the vendor, a delivery of property may be inferred. UMMAR SAHIB v. VYTHILINGA MUDALI, **5 M.L.T. 263** (34 C. 207, 22 C. 179, *R.*)

(349)—*S.* 54 — *Unregistered sale-deed, and mortgage-deed—Part of the consideration paid and the purchaser placed in possession - Suit by vendor for recovery of possession and mesne profits—Estoppel.*—Where the plaintiff attempted to sell certain land to the defendants for Rs. 110, and afterwards to the mortgage the same for Rs. 100, placed the defendants in possession on receipt of Rs. 10 as part consideration, but both deeds were not registered, and the plaintiff brought the suit present for recovery of possession on return of the sum of Rs.10. *Held*, that the plaintiff must succeed, since, in the case of sale of land worth Rs. 100 and upwards, the Transfer of Property Act lays down that the sale can be made only by a registered instrument, it follows that, where a registered instrument is not executed, there is no sale, and the plaintiff's title is not therefore extinguished, and he is entitled to recover possession. "You cannot invoke the principle of estoppel to defeat the plain provision of a statute, and we cannot evade the effect of s. 54 of T.P. Act by holding that the plaintiff is estopped from pleading it." JAGADABANDHU SAHA v. RADHA KRISHNA PAL, **36 C. 920=4 Ind. Cas. 414.** (6 A. 344, 26 A. 266, 24 B. 400, *D.*)

(350)—*S.* 54—*Agreement to sell creates no interest in property—Hindu law—Joint family—Survivorship—Sale not for binding purpose—Minor sons not bound.*—The father of plaintiffs agreed to sell property to father of defendants, and received Rs. 200 out of the purchase-money, before the sale was completed, the plaintiff's father died, and the mother sold the property and received the balance of the purchase money. In a suit by plaintiffs for recovery of the property, *held*, that the sale, not being for purposes binding upon the minors, the plaintiffs were entitled to recover the whole of the property on refunding Rs. 200. Under s. 54 no interest passed to the purchaser by the agreement of sale, and on the death of the father the whole property went by survivorship to the plaintiff. The sale by the mother was not binding. KALINDI RAMARAJU v. GADI RAJU NARASIMHARAJU, **5 M.L.T. 163.**

(351)—*S.* 54—*Sale of immoveable property, essentials of a conveyance without consideration, whether effects a sale as defined in s.* 54--*Practice.—Facts not alleged in the pleadings not to be considered.*—The essence of the contract of sale is exchange. One party transfers ownership, the other pays or promises a price. When there is no exchange, there is no sale and the transfer

Transfer of Property Act (IV of 1882) —*continued.*

does not take effect. So, where the price was not paid and the purchaser never promised to pay it, a registered conveyance of immoveable property does not effect a sale as defined in s. 54. A fact not alleged in the pleadings cannot be considered and a finding thereon cannot govern the decision of the suit. MAUNG SAING AND MA ME v. SHWE LON. **4 L.B.R. 369.** (23 B. 525, *R.*; 30 A. 125, *Diss.*)

(352)--*S.* 54--*Sale--Transfer of property, without writing, in satisfaction of decree—Validity of title of transferee.*—Where a Muhammadan widow got possession of immoveable property from her sons under an oral transfer of the same in satisfaction of a decree for dower held by her against them, *held* that, although the transfer was not one made by a Court in satisfaction of a decree, yet under the circumstances of the case, which constituted a contract of sale of the property and delivery of possession and payment of purchase money thereunder, the last clause of s. 54 of the Transfer of Property Act did not apply to the case. RAM BAKSH v. MUGHLAND KHANAM. **26 A. 266=A W.N 1904, 8.** (24 B. 400, *F.*; 18 B. 13, *D.*) [*D.*, 36 C. 920.]

(353)—*S.* 54—*Sale under registered deed—Effect of non-payment of purchase-money--Rights of subsequent purchaser and vendor as against the prior purchaser.*—Under s. 54, where there is a valid sale of land under a registered deed such a sale is a completed transaction, notwithstanding that the price agreed upon, at the time of execution of the deed, has never been paid. (22 B. 176, 23 B. 525, *R.*) The seller can, no doubt, sue the purchaser for payment of the price, and he can also sue to set aside the sale-deed, but a subsequent purchaser of the same property has no remedy whatever as against the prior purchaser. GOVINDAMMAL v. GOPALACHARIAR, **16 M.L.J. 524.** [*F.*, 6 N.L.R. 98.]

(354)—*S.* 54—*Immoveable property valued at less than Rs.* 100—*Delivery of property subsequent to passing of consideration—Unregistered deed of sale—Validity of sale—Registration Act* (III *of* 1877), *s.* 49—*Unregistered document—Admissible as evidence of intention of parties.*—A sale of immoveable property can be effected by delivery, when the value of the property is less than Rs. 100; and the fact that an unregistered conveyance had been executed, and consideration paid three years before actual physical possession was delivered, will not weaken the effect of the delivery of possession. When a sale has been effected by delivery of possession, on an unregistered document which may unnecessarily have been executed, the document can be referred to as evidence of the intention of the parties. BHAGABATI SWARNAKAR v. SAZHI BAISANABI, **2 Ind. Cas. 413.** (29 C. 623, 22 C. 179, *R.*)

(355)—*S.* 54—*Document creating an easement—Registration—Transfer of ownership—Easements Act* (V *of* 1882), *s.* 4—*Right to discharge water.*—By a document the respondent's vendor agreed that, when the appellant built his second story, he should have a right to discharge not only rain water, but also water used for daily house-hold purposes through certain spouts, and that he (the grantor) would take the additional burden on the servient tenement. *Held*, that the right granted was an easement within the meaning of s. 4 of the Easements Act. The deed did not transfer any portion of the grantor's right of ownership. The creation of such a right by grant was not a transfer of ownership as was contemplated by s. 54 of the Transfer of Property Act, and the document creating such an easement did not require registration. BHAGAWAN SAHAI v. NARASINGH SAHAI, **6 A.L.J. 871=3 Ind. Cas. 615=31 A. 612.**

(356)—*S.* 54—*Delivery of tangible immoveable property—Property already in vendee's possession—Necessity for registered document.*—Where the vendee is already in possession at the date of his purchase, and there can be no delivery of possession to him, the requirements of s. 54 of the Transfer of Property Act are not satisfied by an unregistered instrument, even if the value of the immoveable property is less than one hundred rupees; that is, where there is not a delivery, involving a change of possession, a registered instrument is necessary. MRINALINI DEBI v. MOHIMA CHANDRA MOITRA, **6 Ind. Cas. 763.** (34 C. 207, 5 C. L. J. 390, *F.*)

(357)—*S.* 54—*Transfer of right to cut and appropriate plants—Registration.*—A transfer of the right of cutting and appropriating "plants now standing or that may hereafter form" on certain land, is a transfer of an interest in immoveable property and, therefore it can only be made by a registered instrument. KUTTUVA N. LETCHUMANA BAGAVATHAR v. THOPPAI L. VENKATRAMIER, **15 Ind. Cas. 234.**

(358)—*S.* 54—*Party—Auction purchaser, whether necessary party—Application to set aside sale—Confirmation of sale—Delivery of possession, what is.*—An auction-sale cannot be set aside after it has been confirmed in proceeding to which the auction-purchaser is not a party. The defendant purchased property worth less than Rs. 100 at an auction sale in execution of a decree against the plaintiff. In 1898, he executed an unregistered document on plain paper in favour of the plaintiff, in which he, the defendant, admitted that the property was the plaintiff's and that he agreed to hold possession as a tenant for five years; it was also agreed afterwards to make the property over to the plaintiff, and that, after the lapse of five years, the entire rights should vest in the plaintiff. In a suit by the plaintiff to recover possession; *Held*, that, under s. 54 of the Transfer of Property Act, the delivery of possession was an alternative to the execution and registration of a document, which was an act formal in a high degree, that the document did not amount to a delivery of possession by the defendant to the plaintiff, and that the plaintiff did not acquire any title by means of the document. KONORMAL OSWAL v. NABIN CHANDRA DAS. **18 Ind. Cas. 228.**

Transfer of Property Act (IV of 1882) —*continued.*

(359)—*S.* 54—*Sale of interest in land in Rangoon—Verbal sale in* 1890—*Validity of sale—Law applicable prior to extension of Transfer of Property Act to Rangoon—Burma Laws Act* (XIII *of* 1898), s. 13.—The Transfer of Property Act was first extended to the local limits of the ordinary civil jurisdiction of the Recorder of Rangoon from the 1st January, 1893. Under sub-s. 2, s. 13 of the Burma Laws Act, all questions arising in civil cases instituted in the Courts of Rangoon were to be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary civil jurisdiction. A verbal sale for Rs. 350, of a share in immoveable property at Rangoon in 1890, after the Transfer of Property Act was applied to the whole of Bengal from the 1st July, 1892, though prior to the extension of the Act to Rangoon, is invalid inasmuch as it would have been invalid, if it had taken place in Calcutta in that year. MG SAN U v. MA HMYIN, **6 L.B.R. 98=5 Bur. L. T. 169=17 Ind. Cas. 954.**

(360)—*S.* 54—*Sale—How far affected by Mahomedan law.*—Mahomedans have no more right to transfer immoveable property without complying with the provisions of the Transfer of Property Act than any other members of the community, and to allow them to do so would, in effect, be repealing the provisions of the Transfer of Property Act so far as the Mahomedan community are concerned. GHAFURUDDIN v. HAMID HUSAIN, **10 A.L.J. 154.**

(361)—S. 54—*See* U.P. ACT XVIII OF 1876, s. 10, 2 O.C. 7.

(362)—S. 54—Oral agreement to sell, before attachment—Registered deed of sale after attachment—Property worth more than Rs. 100—Effect—*See* CIV. PRO. CODE, 1908, s. 64, 5 L.B.R. 6=2 Ind. Cas. 350.

(363)—S. 54—Unregistered sale-deed—Registered mortgage bond for consideration money, validity of—*See* CONTRACT ACT, 1872, s. 23, 5 Ind. Cas. 581.

(364)—S. 54—Sale valid under Mahomedan law but not under the—*See* MAHOMEDAN LAW—PRE EMPTION—NATURE AND EXTENT OF RIGHT, 16 A. 344, F.B.=A.W.N. 1894, 101.

(365)—S. 54—*See* PRE-EMPTION — CONSTRUCTION of WAJIB-UL-ARZ, 7 A. 482, F.B. =A.W.N. 1885, 97.

(366)—S. 54—*See* REGISTRATION ACT, 1908, s. 17, 10 A. 20=A.W.N. 1887, 270.

(367)—S. 54—Deed of assignment of arrears of profits due by *lambardar* to co-sharer—Not immoveable property—Registration not necessary—*See* REGISTRATION ACT, 1908, s. 17, A. W.N. 1905, 100=27 A. 564=2 A.L.J. 692.

(368)—S. 54—Release when operates as a family settlement—*See* RELEASE, 9 Ind. Cas. 267=9 M.L.T. 342.

(369)—S. 54—*See* STAMP ACT, 1879, ss. 3 (13), 5 (13) and arts. 29, 44, 27 C. 387=4 C. W.N. 524.

Transfer of Property Act (IV of 1882) —*continued.*

(370)—S. 54—Agreement to lease—Present demise—Registration if necessary—*See* SPECIFIC PERFORMANCE, 14 C.W.N. 65=5 Ind. Cas. 38.

(371)—S. 54—*See* Nos. 68, 82, 126, *supra.*

(372)—*S.* 54, *cl.* 2—*Sale of immoveable property of value of more than Rs.* 100—*Necessity for registration—Validity of oral sale.*—There is nothing in s. 54, cl. 2, which conflicts with the clear provisions of s. 47 of the Registration Act. The object of s. 54 (2) was merely to enact that sale of immoveable property of the value of Rs. 100 could not be effected by a mere oral agreement; such agreement must be committed to writing and must be registered in accordance with the provisions of the Registration Act to which s. 54 is merely supplemental. MT. SALOO BAI v. GOMA, **3 C P.L.R. 151.**

(373)—*S.* 54, *para.* 3—*Transfer by sale of immoveable property less than Rs.* 100, *how effected—Act* III *of* 1885, *intention of.*—The transfer by sale of tangible property of a value less than Rs. 100, can be effected only by one of the two modes mentioned in s. 54, para. 3 of the Transfer of Property Act, *i e.*, by a registered instrument or by delivery of possession. (16 C. 622, *Overruled.*) [*R.*, 22 C. 179, U.B.R. 1897—1901, Vol. II, 573.] The intention of the Act of 1885 was to clear away a difficulty which had arisen and which was referred to in the course of the decision in 8 C. 597, F.B. It declares that s. 54 of the Transfer of Property Act shall be read as supplemental to the Registration Act (III of 1877). Its effect, therefore is to make s. 54, para. 3, Act IV of 1882, absolute, in so far as it prescribes that a transfer of ownership, by sale, of tangible immoveable properties of a value less than Rs. 100 can be made only by a registered instrument or by delivery of the property, and that if made otherwise, *e.g.*, by an unregistered instrument unaccompanied by possession, the transfer or sale is inoperative, conferring no title on the vendee. MAKHAN LAL PAL v. BANKU BEHAREE GHOSE, **19 B. 623, F.B.** [*Appr.*, 4 N.L R. 90.]

(374)—*Ss.* 54 *and* 8—*Assignment of mortgagee's right by unregistered sale—Whether valid without registration.*—A simple mortgage was executed on August 19, 1885. The mortgagees transferred all their rights under the mortgage to the plaintiffs by an unregistered deed of sale dated December 2, 1898. In a suit by the plaintiffs for sale upon the mortgage on the basis of the assignment; *held*, that the suit was not maintainable. S. 8 of the Transfer of Property Act cannot be read so as to override the provisions of s. 54 of the same Act. The interest of a simple mortgagee is plainly an intangible thing within the meaning of s. 54, and the transfer of it can be made only by a registered instrument. MUTSADDI LAL v. MOHAMMED HANIF, **10 A.L.J. 167=15 Ind. Cas 853.**

(375)—*Ss.* 54, 55—*Contract for sale of land—Mortgage—Incumbrance—Whether a defect of*

Transfer of Property Act (IV of 1882) —*continued.*

title—Breach of—Acquisition of land contracted to be sold under the Land Acquisition Act—Measure of damages if to include amount of statutory compensation.—In a contract for sale of land, a vendor is not relieved from liability for breach of contract, if he fails to clear off an existing mortgage on the property. In a contract for sale of land, where a breach takes place on account of the default of the vendor, the purchaser is entitled to be put as far as possible in the position he would have been in if the contract had been carried out on the day it was broken, and therefore he is entitled to the difference between the contract price and the market price on the day of breach. The land having shortly after the breach of the contract been acquired by Government for public purposes. *Held*, that the plaintiff was entitled to the difference between the price paid by Government and the contract price, but not the statutory allowance paid by Government. NOBIN CHANDRA SAH PRAMANIK v. SM. KRISHNA BARONI DASSI, **15 C.W.N. 420.** (32 B. 165, 11 B. 272, *R.*)

(376)—*Ss.* 54, 55—*Sale to a minor is invalid.* —The Privy Council decision in *Mohori Bibee* v. *Dharmodas Ghose* (30 C. 539=7 C.W.N. 541 =5 Bom. L.R. 421), declaring contracts by minors void applies also to sales of immoveable properties to persons who are minors. Such sales are wholly void. *Per Benson, J.* A sale necessarily involves the idea of a contract as its foundation, and the Privy Council has held that a contract by a minor is not merely voidable at the option of the minor, but is void. *Per Krishnasawmy Iyer, J.*—There can be no sale unless there are mutual agreements in its inception. It must be invariably preceded by the contract for the sale of the property, which, as defined by s. 54 of the Transfer of Property Act, is a contract that the sale of such property shall take place on terms settled between the parties. S. 55 again imposes on the buyer liabilities, in the absence of a contract to the contrary. The imposition of these liabilities involves the notion of competency to contract, which the opening words of the section also suggest. It being, therefore, impossible to conceive of a sale without a reciprocal promise, past or concurrent, there can be no legal sale in favour of a minor contracting party. NAVAKOTI NARAYANA CHETTY v. LOYALINGA CHETTY, **4 Ind. Cas. 383.** (20 B. 755, 3 A. 408, 32 M. 325, 5 M.L.T. 255, 30 A. 125, A.W.N. 1908, 39, 5 A.L.J 96, *R.*; 30 A. 63, 5 A.L.J. 14, A.W.N. 1908, 10, *D.*)

(377)—Ss. 54, 55—*See* AUCTION SALE, 7 Bom. L.R. 845.

(378)—*Ss.* 54 *and* 55 (6) (*b*)—*Sale—Transfer —Deed of sale not registered—Title—Rights and remedies of the contracting parties.*—When a person sells his immoveable property, of more than Rs. 100 by receiving the purchase-money, and delivering the property to the vendee, but executes a conveyance which is not registered as required by law, the sale is not complete and the property does not pass to the vendee: all that the vendee can claim is the benefit of s. 56 (6) (*b*) of the Transfer of Property Act. LALCHAND v. LAKSHMAN, **6 Bom. L.R. 510= 28 B. 466.**

(379)—*Ss.* 54 *and* 55 (6) (*b*)—*Contract for sale of land—Absence of proper registered sale deed—Delivery of possession to vendee—Suit in ejectment by vendor, whether maintainable when vendee's right to specific performance not barred.* —The question in this case was whether a contract for sale, accompanied by delivery of possession gives the purchaser a lien on the property and such an interest as is sufficient to enable him to resist a suit in ejectment by the vendor, in other words, whether, where the vendee's right to obtain specific performance by way of execution of a sale-deed by the vendor has not become barred by time, the vendor is entitled to sue for recovery of possession from the vendee of the land agreed to be sold. *Held*, under s. 54 of the Act, a sale of immoveable property of the value of Rs. 100 and upwards can be made only by a registered instrument, and the section expressly enacts that a contract of sale "does not, of itself, create any interest in, or "charge on, such property." The latter provision could not be construed as enacting by implication, that contract for sale coupled with possession creates an interest or charge on the property even although the requirements of the section with reference to a registered instrument have not been complied with. The charge provided for by s. 55 (6) (*b*) of the Act in favour of a purchaser paying the price or portion thereof, when considered with the absence of any provision for the case of part performance by delivery of possession, shows that the latter was not intended to give rise to any interest in the property in the buyer. So, in a suit in ejectment, like the present case, instituted by the vendor, whose title is admitted, the defendant who has not secured the prescribed registered proof of his purchase cannot succeed by merely setting up a contract with himself on the part of the plaintiff to sell the disputed land and by showing that that contract is specifically enforcible. It might be said that, notwithstanding the express words of s. 54 of the Act, it is inequitable to apply the section as against a party, who is in possession and who, if he had sued for specific performance of the contract to sell, would have been entitled to a decree but the considerations of public policy on which the requirements laid down in s. 54 of the Act are based ought to be primarily taken into account it being borne in mind that, in enacting that section, it was the intention of the legislature, by means of compulsory registration, to minimise, as far as possible, the chances of litigation and to reduce the opportunities for perjury in connection with sales of immoveable property. KURRI VEERAREDDI v. KURRI BAPIREDDI, **1 M.L.T. 153, F.B.=29 M. 336 =16 M.L.J. 395.** (15 M. 401, 6 M.L.J. 33, 21 M. 291, *Overruled*; 16 M. 464, 24 M. 449, 13 M.L.J. 217, *Appr. & F.*; 28 B. 466, *Appr.*; 16

Transfer of Property Act (IV of 1882) —*continued.*

A. 344, *Disappr.*; 24 M. 377, *Expl.*) [*F.*, 23 T.L. R. 248; *R.*, 17 M.L.J. 189=30 M. 300=2 M. L.T. 161, 17 M.L.J. 329=30 M. 388, 31 M. 187=18 M.L.J. 158, 5 N.L.R. 70, 6 M.L.T. 192.]

(380)—*Ss* 54, 60—*Specific Relief Act*, I *of* 1877, *s.* 27—*Creation of pre-emption right in favour of mortgagee—Subsequent sale of equity of redemption—Pre-emption right not asserted for more than twenty years—Suit for redemption by purchaser—Defence based on pre-emptive right—Limitation.*—A usufructuary mortgage-deed created a right of pre-emption in favour of the mortgagee in the following terms:—"If we assign our right over these properties to any one, the land delivered possession of to you for appropriating the interest shall be assigned to you alone and it shall not be assigned to anybody else. When we assign the land, we shall receive 50 fanams more from you, and then we shall assign the land for these two amounts together." However, a year after, the mortgagors sold away the interest in the property to a third person. About twenty years thereafter, the purchaser's interest was sold in execution of a decree against him and bought by plaintiff, who instituted the present suit for redemption of the mortgage The defendant who was representative in interest of the mortgagee, asserted the pre-emptive right in defence of the suit: *Held* that plaintiff was entitled to a decree for redemption. *Per Shephard, J.*—Under the covenant, the defendant had no interest in the property. His right could be no other than a right to specific performance available under s. 27 of the Specific Relief Act against a transferee who had taken with notice of the covenant. Notice of the contract such as is required to satisfy the section must be notice of an existing obligation. In this case, the time for performance having long passed without any thing being done, the inference was that the right had been waived or otherwise discharged. Except the fact that the mortgage contained a covenant for pre-emption, there was nothing to show that the plaintiff took with notice of the contract sought to be enforced. Assuming that there was notice of the contract and that it was otherwise a valid contract, inasmuch as no suit to enforce it could be brought, the defendant could not be allowed to use it as an answer to the plaintiff's suit. *Per Bhashyam Ayyangar, J.*—A mortgagee may stipulate for the collateral advantage of a right of pre-emption in consideration of his advancing the mortgage loan, if such advantage does not directly or indirectly "clog the equity of redemption." The principle of this rule is that the option of sale is still left with the mortgagor, and he may redeem or sell as he likes; the only stipulation being that, in the event of his choosing to sell, he shall give the mortgagee the first refusal. But the stipulation contained in the present mortgage-deed was that the pre-emptor (the mortgagee) could exercise his option by paying, not the market price of the day nor the same price as that offered by a stranger, but the price fixed in the mortgage instrument itself. The true principle in such a case is whether the collateral advantage stipulated for himself by the mortgagee is or is not unconscionable or oppressive though it does not clog the redemption. In the present case, the collateral advantage, namely, the right of pre-emption, was one that could be enforced only by the equitable remedy of specific performance, and, *prima facie*, a bargain by which the mortgagor was tied down to a price by the instrument of mortgage whenever the occasion for exercising the right of pre-emption might arise, was oppressive and unconscionable. In cases in which the right of pre-emption springs from a contract, it rests only upon a covenant which does not run with the land. Being only a species of contract for the sale of immoveable property, the contract of pre-emption stands on no higher footing than a contract for the sale of immoveable property and does not of itself create any interest in or charge on the property which is subject to the right of pre-emption. Until the contract is carried out by specific performance either by act of parties or decree of Court, the pre-emptor acquires no title to or interest in such property, which alone can extinguish the right of redemption, though he may have a right to call for a conveyance of the property. The equity of redemption in a usufructuary mortgage being an intangible thing like a "reversion," can be transferred by sale only by a registered instrument and not by delivery of the property, though its value is less than Rs. 100. The equity of redemption in a simple mortgage may be tangible immoveable property, and its sale can be effected, if its value be below Rs. 100, without a registered instrument by mere delivery of the property. The right of a simple mortgagee in the property mortgaged is only an intangible thing like a charge on immoveable property within the meaning of s. 54, Tr. P. Act. A transfer by sale of a hypothecation executed to secure a debt under Rs. 100, cannot be made otherwise than by a registered instrument. The right of the mortgagee to enforce the specific performance of the contract to pre-empt was barred by lapse of time. The fact that the mortgagee was in possession could not save him from the law of limitation. RAMASAMI PATTAR v. CHINNAN ASARI, **24 M. 449.** [*F.*, 13 M.L.J. 217; *Appr.*, 29 M. 336=16 M.L.J. 395=1 M.L.T. 153, F.B.; *R.*, 3 N.L.R. 72, 30 M. 300=17 M.L.J. 189=2 M.L.T. 161, 30 M. 388=17 M.L J. 329=2 M. L.T. 354, 11 Bom. L.R. 318, 5 N.L.R. 136.]

Transfer of Property Act (IV of 1882) —*continued.*

(381)—*Ss.* 54 *and* 100—*Agreement to execute a mortgage—Creation of a charge on immoveable property—Equitable mortgage by deposit of title-deeds outside Presidency Towns, validity of—Registration Act* (III *of* 1877), *s.* 17 (*h*).—Defendants borrowed money of plaintiff at a place outside the Presidency Town of Madras and executed an agreement in writing, reciting the fact of the loan, the fact of execution of a promissory note therefor, the fact of deposit of certain documents of title relating to immove-

Transfer of Property Act (IV of 1882) —*continued.*

able property, as security for the money borrowed and wound up by a statement to the effect that a deed of mortgage would be executed by the defendants, whenever such a document should be demanded by the plaintiff. Plaintiff sued, on the basis of this agreement, for recovery of the money as against the defendant, personally, and on the security of the properties mentioned in the title-deeds deposited. This agreement was not registered. Plaintiff contended that the agreement itself constituted a charge on the immoveable properties. *Held*, that the mere agreement to execute a mortgage of immoveable property to the obligee, does not create an interest in immoveable property. Compare s. 17 (*h*) of the Registration Act (III of 1877) and s. 54 (4) of the Transfer of Property Act. Assuming that the pro-note and the agreement, together, constitute a mortgage, it is invalid on the ground of want of registration. Looking at the transactions as an equitable mortgage by deposit of title-deeds, the same is invalid on the ground that it was entered into at a place outside the Presidency Town. KONCHADI SHANBHOGUE v. SHIVA RAO, **28 M. 54.** [*R.*, 33 C. 985=4 C.L.J. 219.]

(382)—Ss. 54, 100—Unregistered sale of land —Charge for purchase-money—*See* HUSBAND AND WIFE, 10 Ind. Cas. 919.

(383)—Ss. 54 and 118—*See* PRE-EMPTION —CONSTRUCTION OF WAJIB-UL-ARZ, 7 A. 626, F. B.=A. W.N. 1885, 183.

(384)—*Ss.* 54, 123—*Sale or gift, how effected—Registration—Mutation—Estoppel—Statement by donor before mutation officer that the donee's name may be recorded, whether alone sufficient to effect transfer—Suit by donor for possession, whether maintainable.*—The husband of the plaintiff B, a widow, and R were both entitled to get possession of certain immoveable property. R made an application for mutation of his name alone in the Revenue Court. B made a statement before the mutation officer that she was the heir of her husband, but she did not want her name entered in the *khewat* and agreed to R's name being entered in respect of the estate. Upon this R's name alone was recorded in the Revenue papers. Sometime afterwards B filed a suit for possession of her husband's share in the property against R: *Held*, that the suit was maintainable. The statements of B in the mutation proceedings could not be said to have complied with the provisions of ss. 54 and 123 of the Transfer of Property Act, which lay down the effectual mode of effecting transfer of interest in immoveable property by sale or gift. RAM PRASAD v. BEDO, **13 Ind. Cas. 436**

(385)—Ss. 54, 129—Transfer of immoveable property by Mahomedan to his wife for dower and inheritance is a sale within s. 54, Transfer of Property Act—Not a *hiba-bil-ewaz* — Gift without consideration only exempted from the operation of law of gifts, by s. 129 of Act—*See* MAHOMEDAN LAW—DOWER, 13 C.W.N. 160 =4 Ind. Cas. 466.

(385-*a*)—S. 55—*See* SALE.

Transfer of Property Act (IV of 1852) —*continued.*

(386)—S. 55—*See* VENDOR AND PURCHASER.

(386-*a*)—*S.* 55—*Interpretation—Sale and execution of proper conveyance—Purchase money unpaid—Rights of buyer and seller.*—It is not permissible to extract a single clause of s. 55 and use it without relation to the clauses which have preceded it. Each clause seems to assume that the conditions imposed by those preceding it have been satisfied. Although the legal ownership of immoveable property may have passed to a buyer by virtue of a properly executed deed of conveyance, if the purchase money or any part thereof remains unpaid, such buyer will not be entitled to a decree for possession of the property sold, except on condition of first paying the purchase money in full; but the remedy of an unpaid vendor who has parted with possession of the property sold, in a case to which the Transfer of Property Act, 1882, applies, to enforce the charge allowed to him by s.65 (4) (*b*) of that enactment. BALAKRISHNA v. SHRIPATSINGH, **6 N.L.R. 98=7 Ind. Cas. 541.** (4 C.P.L.R. 92, 5 N.L.R. 70, 16 M.L.J. 524, *F.*; 2 B. 547, 22 B. 176, 23 B. 525, 11 A. 244, 3 A. 77, 30 A. 125, 8 A. 641, 2 A. 711, 27 M. 28, 10 W.R. 194, *R.*; 30 M. 524, *Diss.*)

(387)—*S.* 55—*Joint vendees—Tenants-in-common—Right of each vendee to enforce covenant running with the land—Limitation Act, art.* 116.—Where two persons purchased lands under a registered sale-deed, each paying half of the consideration, they take as tenants-in-common in the absence of anything to the contrary in the sale-deed. Their interests in the land are several and so also their interests with reference to the covenants running with the land, which, under s. 55 of the Act, a vendor is deemed to enter into with the vendee. Each of the two vendees can therefore bring a separate suit for his separate interest in the covenant without joining his co-vendee. The covenant should be taken, as part and parcel of the transaction of sale and, where the circumstances of the transaction require a writing registered, as embodied in such registered instrument and a suit in respect of such a covenant will, therefore, be governed by art. 116 of the Limitation Act. CHIDAMBARAM PILLAI V. SIVATHASAMY THEVER, **15 M.L.J. 396.** (21 M. 8, 25 M. 587, *F.*)

(388)—*S.* 55—*Lien for unpaid purchase-money —Vendor and purchaser.*—Where the consideration for a sale was the immediate payment of a portion of the purchase money and an undertaking by the purchaser as to the residue and a part payment was made and an undertaking given in the form agreed upon; *held*, that the property passed at law and in equity to the purchaser when the conveyance and agreement were executed, and that there was no lien for the unpaid purchase-money as against the property sold. When the vendor actually receives the consideration for which he stipulates, there is no lien. (4 Ch. Div. 562, 7 Eq. 409 at p. 413, 3 Russ. 488, 11 Eq. 164; 1 De. G. and J, 655;

Transfer of Property Act (IV of 1882) —*continued.*

3 My and K. 655, 3 Sim. 499, *Referred to.*) ALEXANDER BANESS LUMLEY WEBB v. JOHN LAUCHLAN MACPHERSON, **6 C.W.N. 150.**

(389)—*S.* 55—*Purchase-money not paid—Vendee entitled to possession—Vendor's lien for unpaid purchase-money.*— According to the provisions of the Transfer of Property Act, a vendee is entitled to possession even though the purchase-money is not paid and the vendor is entitled to have a statutory charge on the property for unpaid purchase-money. (30 A. 125, A.W.N. 1908, 38, 5 A.L.J. 96, 11 A. 244, *Doubted.*) It is not open to Courts of this country to introduce and enforce equities modifying the provisions of the statute law. VELAYUTHA CHETTY v. GOVINDASAMI NAICKEN, **8 Ind. Cas. 364.** (30 I.A. 238, 13 M.L.J. 389, 5 Bom. L.R. 838, 8 C.W.N. 41, 31 C. 57, *R.*)

(390)—*S.* 55—*Vendor's charge on property for unpaid balance of purchase-money—Distinction between vendor's lien under English Law and a charge under Transfer of Property Act.*—A mortgagee or chargee, who is in possession of an estate as such and gives up possession to a person entitled to it subject to his charge upon payment of what is then due to him, is not precluded from afterwards asserting his right against the estate when further instalments or further payments became due to him. The charge, which the vendor obtains under the Tr. P. Act, is different in its origin and nature from the vendor's lien given by the Courts of equity to an unpaid vendor. The latter is a creation of the Court of Equity, and can be modified according to the circumstances of the case by the Court of Equity. *Re* the former, the law of India knows nothing of the distinction between legal and equitable property in the sense in which that term is understood when equity is administered by the Court of Chancery in England; and the Tr. P. Act, gives a statutory charge upon the estate to an unpaid vendor unless it be excluded by contract. Such a charge stands in quite a different position from a vendor's lien. The Court has to find something, either an express contract, or at least something from which it is a necessary implication that such a contract exists, in order to exclude the charge given by the Statute. The charge is not excluded by a mere personal contract to defer payment of a portion of the purchase-money, or to take the purchase-money by instalments, nor is it excluded by any contract, covenant, or agreement with respect to the purchase-money, which is not inconsistent with the continuance of the charge. WEBB v. MACPHERSON, **31 C. 57, P.C.=30 I.A. 238=8 C.W.N. 41=5 Bom. L.R. 838=13 M.L.J. 389=8 Sar. 554.** [*F.*, 30 A. 172=5 A.L.J. 243=A.W.N. 1908 71=3 M.L.T. 374, 5 M.L.T. 205; *Appl.*, 29 M. 305; *R.*, 27 M. 435=14 M.L.T. 105, 6 Bom. L.R. 557, 33 C. 410=10 C.W.N. 276=4 C.L.J. 102, 9 O.C. 284, 10 Bom. L.R. 403=33 B. 53.]

(391)—*S.* 55—*Lien—Vendor's lien—Person other than purchaser—Acceptance of personal security from—Whether lien destroyed—Intention—Transfer of Property Act, s.* 55.—The question whether the acceptance of a personal security by the holder of a lien from a person other than the purchaser destroys the lien is really one of intention whether the vendor intended to do so. In the absence of any circumstances pointing to that conclusion, there is no presumption in favour of abandonment of the lien. KARUPPIAH PILLAI v. T R. HARI ROW, **10 M.L.T. 189.** (33 M. 446, *R.*)

(392)—*S.* 55—*Sale of immoveable property—Vendor not bound to disclose the existence of prior incumbrance to vendee.*—Under s. 55, there is no obligation cast on the vendor to disclose to his vendee the existence of a prior incumbrance on the property sold to the vendee. EMPEROR v. BISHAN DAS, **A W.N. 1905, 98 =2 A.L.J. 268=2 Cr. L.J. 218.**

(393)—*S.* 55—*Charge—Unpaid vendors—Vendor's lien under English law—Chancery Court's practice—Distinction between vendor's lien under English law and a charge under the Transfer of Property Act—Purchase in consideration of a covenant—Purchase in consideration of sum of money.*—A mortgagee, or charge who is in possession of an estate as such and gives up possession to a person entitled to it subject to his charge upon payment of what is then due to him, is not precluded from afterwards asserting his right against the estate when further instalments, or further payments, become due to him. The charge which the vendor obtains under the Transfer of Property Act is different in its origin and nature from the vendor's lien given by Courts of Equity to an unpaid vendor. The latter is a creation of the Courts of Equity and can be modified to the circumstances of the case by the Court of Equity. As regards the former the law of India knows nothing of the distinction between legal and equitable property in the sense in which that is understood when equity is administered by the Court of Chancery in England; and the Transfer of Property Act gives a statutory charge upon the estate to an unpaid vendor unless it be excluded by contract. Such a charge stands in quite a different position from a vendor's lien. The Court has to find something, either express contract, or at least something from which it is a necessary implication that such a contract exists, in order to exclude the charge given by the statute. The charge is not excluded by a mere personal contract to defer payment of a portion of the purchase-money, or to take the purchase-money by instalments, nor it is excluded by any contract, covenant, or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge. A conveyance or sale in consideration of a covenant to pay a sum of money in the future is different from a sale in consideration of money which the purchaser covenants to pay. The distinction between the two may seem fine one, but it is a real distinction. The former does not give rise to a charge while the latter does. WEBB v. MACPHERSON, **5 Bom. L.R. 838.**

Transfer of Property Act (IV of 1882) —*continued.*

(394)—*S.* 55—*Covenant as to title—Warranty—Fraud—Misrepresentation*—Caveat emptor.—One D, who had only a life estate in certain property, sold it to one C, and C sold it to the defendant, who subsequently sold it to the plaintiff. D and all the subsequent vendors professed absolute interest in the property. In the sale deed, executed by the defendant in favour of the plaintiff, there was a special covenant as to the vendor's title, and it was provided that if the property sold in whole or in part passed out of the plaintiff's possession owing to the claim of any person whatsoever, he would be entitled to claim from the defendant the value of the portion so lost. On a suit having been brought by the purchasers from the remainder-men, the property went away from the hands of the plaintiff. He then brought the present suit to recover his purchase-money from the defendant. It was contended on behalf of the defendant and held by the Court below that the defendant only purported to convey to the plaintiff such right as he had acquired himself and if D had only a limited interest, the defendant and the plaintiff had no more, that there was no fraud or misrepresentation on the part of the defendant, who had made over the title deeds to the plaintiff and that the principle of *caveat emptor* being applicable, the defendant was not liable. *Held*, that in view of s. 55 of the Transfer of Property Act, the doctrine of *caveat emptor* does not apply to sales of land in India (2 C.W.N. 222, *R.*), and there being a special covenant protecting the plaintiff against any latent defect in title, the plaintiff was entitled to recover his purchase-money. NAWAB MAULVI SYED MEHDI HUSAIN v. DOROGHA ASHIQ JAFAR KHAN, **8 O.C. 345**.

(395)—*S.* 55—"*Material defect*" *meaning of—Concealment of claim against property, if entitles purchaser to rescind contract—Contract Act, ss.* 17, 19.—The words "defects in the property" in s. 55 of the Transfer of Property Act, include not only defects in the property itself, but also defects in the *title* to the property. And cl. 1 (*a*) of the section casts upon the seller the duty of disclosing to the buyer all defects whether in the title or in the estate itself, while cl. 5 (*a*) casts upon the buyer only the duty of communicating facts relating to the nature and extent of the sellers interest and not relating to the property itself.' (*Mostyn* v. *The West Mostyn Coal and Iron Company*, 1 C.P.D. 145 at p. 151, *Notingham Patent Brick and Tile Company* v. *Butler*, G. Coo., 308, 2 Sw. 287. *Heywood* v. *Mallalieu*, 25 Ch. D. 357, 9 M. 82, 7 W.R. 258, *R.*) And as to the right of the buyer to rescind the contract on the ground of non-disclosure of defects in title, the Contract Act lays down in s. 19 that he would be so entitled only when such non-disclosure amounts to fraud within the meaning of s. 17 of the Act. HAJI ESSA SULLIEMAN v. DAYABHAI PARMANANDAS, **20 B. 522.**

(396)—*S.* 55—*Vendor and purchaser—Deficiency in the extent of land sold—Breach of covenant—Damages—Limitation.*—In a suit to recover damages for breach of covenant for title in regard to a small deficiency in the extent of land sold, it is enough for the plaintiff to shew that he was not put in possession of it. He need not show as to who got into possession of the deficient portion. Such a suit is governed by art. 116, Limitation Act. TAVALA NAGESVARA ROW v. SARIPALLI SAMBASIVA ROW, **M.W.N. 1911, 361.**

(397 & 398)—S. 55—Unpaid purchase money, whether a charge on immoveable property sold —*See* LIMITATION ACT, 1908, arts. 111, 132, 9 O.C. 284.

(399)—S. 55—*See* LIMITATION ACT, 1908, art. 116, 21 M. 8.

(400)—S. 55, limitation for suit to enforce a vendor's charge for unpaid purchase-money—*See* LIMITATION ACT, 1908, arts. 132, 111, 29 M. 305.

(401)—S. 55—*See* Nos. 375, 376, 377, 378, 379, *supra*.

(402)—*S.* 55, *cl.* (1) (*b*), (4) (*b*)—*Nature of vendor's lien—Vendor's possession whether adverse—Onus of proof.*—Both in England and in India, under the Transfer of Property Act, the vendor's lien for unpaid purchase-money is non-possessory. He is only entitled to retain the title-deeds and to a charge for the unpaid purchase-money. Even assuming that the onus of showing that the possession of unpaid vendor was not adverse rests upon the vendee, *held*, that, in that particular case, the onus was sufficiently discharged by the extract from the village accounts, which showed that, after the conveyance, the putta was transferred in the name of the vendee. VELAYUDA CHETTY v. GOVINDASAMY NAICKER, **17 M.L.J. 450=30 M. 524=3 M.L.T. 10.** (11 C. 229, *R.*) [*R.*, 5 M.L.T. 205; *Reheard*, 8 Ind. Cas. 364.]

(403)—*S.* 55 (1) (*f*)—*Mortgagee selling under power of sale—Possession how given—Obstructive conduct of tenants does not effect possession.*—A mortgagee of land with an inhabited house thereon sold the property in virtue of his power of sale. The purchaser, after paying a certain sum as earnest money, refused to pay the balance of the purchase money and claimed back what he had paid, because, the tenants of the house refused to recognise either party as their landlord and to pay rent. Under the circumstances the purchaser contended that the vendor could not give him effective possession of the property. *Held*, that the vendor could give effective possession of the property. SULIMAN AHMED SEDAT v. PALANEAPPA CHETTY, **8 Ind. Cas. 605.**

(404)—*S.* 55, *cls.* 1 (*f*), 3 *and* 4 (*b*)—*Unpaid purchase money, vendor's statutory charge for—Vendee's right to possession—Indian Courts, whether can introduce and enforce equities modifying statute law.*—According to the Transfer of Property Act, the vendee is entitled to possession after conveyance, and the vendor has a

Transfer of Property Act (IV of 1882) —*continued.*

statutory charge on the property for his unpaid purchase money. To hold otherwise would override the provisions of the statute. It is not open to Courts of this country to introduce and enforce equities modifying the provisions of Statute Law. The law of India, speaking broadly, knows nothing of the distinction between legal and equitable property, in the sense in which it was administered by the Court of Chancery in England. VELAYUTHA CHETTI v. GOVINDASAMI NAICKEN, **5 M.L.T. 205.**

(405)—*S.* 55, *sub-s.* 1, *cl.* (*g*)—*Sale of a mortgage-decree free from incumbrances—Vendor bound to pay off attachment thereon.*—Where a mortgage-decree was sold free from incumbrances, the vendor is bound, upon a principle analogous to that embodied in 'to pay off the claim of any attaching creditor against the decree sold, and hand the decree over to the purchaser free from incumbrance.' KHETSIDAS AGRWALA v. SHIB NARAYAN MURDHA, **9 C. W.N. 178.**

(406)—*S.* 55 (1), *cl.* (*g*)—*Contract Act* (IX *of* 1872), *s.* 69—*Payment of Government revenue by party interested in saving property—Private sale of property—Liability of vendor—Contribution.*—Where plaintiff, who was interested in saving property from sale for non-payment of Government revenue, paid the revenue, and the property was in the meantime sold by the owner, the liability of the vendor for payment of Government revenue having accrued due before the sale; *held* that the person paying the revenue was entitled to be re-imbursed by the vendor. DANTALURI RAGAVARAJU v. KANJALURI RAMASAWMY, **8 Ind. Cas. 435.**

(407)—*S.* 55 (2)—*Covenant in a dead, binding on heirs of parties—Period when parties bound*—Res judicata—*Decision of Assistant Collector, second class—Second suit in Court of Assistant Collector, first class.*—A Mahal was transferred on condition that the vendor should retain certain specified land in that Mahal and the vendee should pay the whole of the land revenue for that Mahal including the land in question, and should also pay to the vendor a certain specified sum very year. The original parties to the contract died many years ago, and a partition of the Mahal had also been made: *Held*, that an agreement of the above nature could not be enforced for all time, against the persons, who might happen to be owners of the Mahal, at the instance of those who might happen to be the owners of the land reserved. A decision of an Assistant Collector, second class, does not operate as *res judicata* to a suit of the same nature instituted in the Court of the Assistant Collector, first class, which the former was not competent to try. RAM GOVIND v. SRI THAKURJI MAHARAJ, **11 A L.J. 231.**

(408)—*S.* 55 (2)—*Sale—Implied covenant for title.*—Under s. 55 (2) of the Act, in the absence of a contract to the contrary, the seller shall be deemed to contract with the buyer that the interest which the seller professes to

Transfer of Property Act (IV of 1882) —*continued.*

transfer to the buyer subsists and that he has power to transfer the same. VISHWANATH DHUNDIRAJ v. VITHOBA BAPURAM TONGU, **13 C.P.L.R. 97.** (25 C. 298, *F.*)

(409)—*S.* 55 (2)—*Sale-deed—Warranty of title—Interest sold whether a subsisting interest.*—A prior mortgagee brought a suit for sale of the mortaged property without making puisne mortgagees parties to the suit. He had the property sold and purchased it himself. He then brought a second suit against the puisne mortgagees who were three and joint. The suit was compromised, the latter agreeing to pay certain amount, and the compromise was embodied in a decree. One of them, S, paid his one-third share of the money and recovered possession of the third share of the property. Another N paid the other two-thirds and took possession of the rest of the property. N sold this two-thirds share to P. The third puisne mortgagee, B, who was a brother of N, brought a suit against P and recovered half of the two-thirds share. In a suit for recovery of half the sale price by P against N, *held* that, while the reference to the decree and the compromise in the sale deed operated to save the vendor from a charge of fraud, it was quite insufficient to relief the vendor from the obligation imposed upon him by s. 55, cl. 2 of the Transfer of Property Act. MUHAMMAD IBRAHIM v. NAKCHED RAM, **7 A L.J. 752=6 Ind. Cas. 890.**

(410)—S. 55 (2)—*See* APPELLATE COURT —OBJECTIONS FIRST TAKEN IN APPEAL, 15 M. 50.

(411)—S. 55, cl. 2,—*See* LIMITATION ACT, 1908, art. 116, 1 M.L.J. 479.

(412)—S. 55, cl. 2—*See* LIMITATION ACT, 1908, art. 116, 1 M.L.J. 162.

(413)—S. 55 (2)—*See* TITLE, L.B.R. 1893—1900, 455.

(414)—*S.* 55, *cl.* 4 (*b*)—*Interest on purchase money—Right to payment of interest not absolute under s.* 55, *cl.* 4 (*b*)—*Subject to equities of each case--Agreement to pay money and deliver possession contemporaneously—No stipulation as to interest—Interest not payable—Object of s.* 55, *cl.* 4 (*b*).—S. 55, cl. 4 (*b*), Transfer of Property Act, does not give the vendor an absolute right to interest on the purchase-money, irrespective of the equities and circumstances of each case. The object of the clause is to give the vendor a lien on the property for the unpaid purchase money, and also for interest, if any, due on the principal sum. It does not enact that the vendor is entitled to interest in every case. (27 M. 28, M.W.N. 1910, 637, *R.*) Where the parties intended that payment of the purchase money and the delivery of possession of the property should be carried out contemporaneously, interest on the money would not be payable so long as the vendor was in possession of the land. MUTHU CHETTY v. SINNA VELLIAM CHETTY *alias* SINNA KARUPPAN CHETTY, **21 M.L.J. 236.**

Transfer of Property Act (IV of 1882) —*continued.*

(415)—*S.* 55 (4) (*b*)—*Exchange—Principle of s.* 55, *sub-s.* 4, *cl.* (*b*), *not applicable to it—No charge on property exchanged for money due.*—The principle of s. 55, sub-s. 4, cl. (*b*) of the Act, does not apply to the case of an exchange. There can, therefore, be no charge on the property exchanged for the balance of any money due under such exchange. KRISHNA NAIR v. KUNDUNAIR, **M W N. 1912, 535 = 16 Ind. Cas. 109.**

(416)—S. 55 (4) (*b*)—Nature of suit by vendor to enforce charge for unpaid balance of purchase-money—Duty of vendor as prescribed by s. 55, Transfer of Property Act—*See* LIMITATION ACTS, 1908, Arts, 111, 132, A.W.N. 1908, 71=3 M.L.T. 374=5 A.L.J. 243=30 A. 172.

(417)—S. 55, cl. (*b*)—*See* LIMITATION ACT. 1908, arts. 132, 111, 21 A. 454=A.W.N. 1899, 170.

(418)—*S.* 55—*Sub-s.* 4 (*b*)—*Vendor's lien—Suit to enforce charge against the property—Limitation—Act* XV *of* 1877 (*Indian Limitation Act*), *sch. ii. arts.* 32, 111.—*Held*, that a suit by a vendor of immoveable property to enforce against the property his lien for the unpaid purchase money under s. 55 sub-sec. 4 (*b*) of the Transfer of Property Act, 1882, falls within art. 132 of second schedule to the Indian Limitation Act. 1877. HAR LAL v. MUHAMDI, **A.W.N. 1899, 170=21 A. 454.** (18 B. 48, 22 B. 846, *F.*; 21 M. 141, 12 I.A. 12, *R.*)

(419)—*S.* 55, *cl.* 4 (*b*)—*Vendor and purchaser—Vendor's lien for unpaid purchase money—Agreement that purchase money should be paid by vendee to third parties—Whether vendor can enforce the statutory charge.*—Where the agreement between a vendor and a purchaser of property is that the vendee should pay the purchase money or part thereof to a third person to whom the vendor is indebted, there is no statutory lien on the property which the vendor can enforce in default of payment by the vendee, but only a personal covenant, the breach of which must be compensated in damages. ABDULLA BEARY v. MAMHALI BEARY, **5 Ind. Cas. 87=7 M L.T. 376=33 M. 446,** (30 I.A. 238, 31 C. 57, *R.*; 29 M. 305, *Expl.*)

(420)—*S.* 55 (4) (*b*)—*Unpaid purchase money—Vendor's lien—Money left with vendee for payment to decree-holder not inconsistent with the continuance of charge—Limitation—Sale—Vendor and purchaser.*—A sold his property to B in 1896, and left a portion of the purchase money with the vendee for payment to C, who held a decree against A. B did not pay the money to C. A, therefore, sued to recover the money from B in 1908: *held*, that the suit was not barred by limitation. S. 55 of the Transfer of Property Act, 1882, creates a charge in favour of the vendor for the unpaid purchase money. The fact that the money was left with the vendee for the payment to C, was in no way inconsistent with the continuance of the lien.

Transfer of Property Act IV of (1882) —*continued.*

HAR CHAND v. KISHORI SINGH, **7 Ind. Cas. 639.** (A.W.N.1908, 71, 3 M.L.T. 374, 5 A.L.J. 243, 30 A. 172, 31 C. 57, 13 M.L.J. 389, 5 Bom. L.R. 838, 8 C.W.N. 41, 30 I.A. 238 P.C., *R.*)

(421)—*S.* 55, *sub s.* (5), *cl.* (*b*)—*Vendor and purchaser—Mortgaged property sold subject to mortgage—Implied contract of indemnity—Seller damnified by reason of buyer not discharging mortgage-debt—Suit for damages it lies—Limitation—Limitation Act* (1877), *Sch.* II, *art.* 83—*Measure of damages.*—Where one buys from another an equity of redemption subject to a mortgage and merely pays for the value of that equity of redemption, he contracts to protect his vendor from the obligation of the mortgage, the buyer's contract with the mortgagor being that the debt should not fall upon the latter. It is a contract of indemnity and the buyer would be bound without any specific contract to indemnify the seller. Where a portion of the mortgaged property was sold subject to the mortgage, but the buyer having failed to pay off the mortgage, the latter sued on his mortgagee, and the whole of the mortgaged property was sold and the seller was dispossessed of the lands which had been retained by him. *Held*—That a suit by the seller for damages against the buyer was governed by Art. 83 of the Limitation Act, time running from the date when the seller was actually damnified, *viz*, the date of dispossesion. The word "contract" in art. 88 does not mean an express contract. *Quære*:—Whether the deed of sale being registered, the period of limitation was that provided by art. 116? *Quaere*:—What under the circumstances would be the proper measure of damages? RAM BARAI SINGH v. SHEODENI SINGH, **16 C.W.N. 1040 =16 Ind. Cas. 73.**

(422)—S. 55 (5) (*b*)—*See* SPECIFIC RELIEF ACT, 1877. S. 18, 4 L.B.R. 86.

(423)—*S.* 55 (5 *d*)—*Sale of portion of Zemindari—Buyer put in possession of property sold—Covenant by seller to do all acts necessary in respect of the sub-division and separate assessment of the property sold—Separate assessment not made by Revenue authorities—Liability of buyer to pay* peishcush *for the property sold.*—Where a portion of a Zemindari was sold to the defendants and the sellers covenanted to do any act necessary in respect of the sub-division, registration and separate assessment of the property sold, and, owing to an objection on the part of the Revenue authorities to the sub-division and separate registration, the sellers continued to pay the *peishcush* in respect of the entire Zemindari including the portion sold, and afterwards sue the defendants for recovery of the proportionate share of the *peishcush* in respect of the portion sold to them, *held*, that, under s. 55 (5-*d*) of the Act, the buyer is bound to pay all public charges subsequent to the passing of the property to him, in the absence of a contract to the contrary, and that there was no sufficient reason for imposing, on

Transfer of Property Act (IV of 1882) —*continued.*

the vendee, a liability, only conditional on the sub-division and separate assessment being brought about by the vendors, in respect of what was a first charge on the incomes of the property in the hands of the vendee, and that the non-determination of the separate assessment has no reference to the liability itself, which attaches as an incident of the transfer and is complete when the property passes. *Obiter.* The failure of the vendor's duty to have the sub-division and separate assessment effected would, at most, only entitle the vendee to damages and would not affect the question of the vendee's liability in respect of the public charges. GOPI SETTI NARAYANASAWMI NAIDU v. RAJA KAVALI ARUNACHELLA ROW, **1 M.L.T. 318 = 16 M.L.J. 563 = 29 M. 519.**

(424) *S.* 55 (5) (*d*), applicability of principle of, to Court sales—Sale of property subject to charge for maintenance—*See* CONTRACT ACT, 1872, s. 69, 17 M.L.J. 250 = 30 M. 461.

(425) *S.* 55, *sub-sec.* 6, *cl.* (*b*)—*Scope—Payment of money by purchaser—Claim to have sale completed—Refund—Charge—Applicability of clause.*—The charge given under s. 55, sub-sec. 6, cl. (*b*) of the Act, being for money paid, pre supposes that the purchaser has become entitled to get back the money. The clause applies to the case of a sale having fallen through and the purchaser consequently having acquired a right to get back the money, and does not apply to the case of a plaintiff who, having paid the money in performance of his contract, claims to have the sale completed. K. ABDUL KHADIR MUHAMMAD v. P. MAMMAD, **8 M.L.T. 361 = 8 Ind. Cas. 144.**

(426) *S.* 55 (6) (*b*)—*Sale wholly invalid—Vendee's charge—Whether exists.*—In a case where the sale is wholly invalid, s. 55, cl. 6 (*b*), does not operate so as to give the vendee a charge upon the property. MUTHU GOUNDEN v. CHELLAPPA GOUNDEN, **8 M.L.T. 464.** (29 M. 336, *Appr.*; 28 B. 466, *D.*)

(427)—S. 55 (*d*)—Proper conveyance—Duty of transferor.—*See* NEGOTIABLE INSTRUMENTS ACT, 1881, Ss. 9, 43, 46, (3), 10 M.L.T. 79.

(428)—Ss. 55 (4) (b), 57 (*a*)—Application of to the Punjab—*See* INSOLVENCY—MISCELLANEOUS, 148 P.R. 1907.

(429)—*Ss.* 55 *and* 59—*Assignment of mortgage right pending suit on mortgage—Insufficient attestation of the mortgage deed—Discovery of this defect after assignment—Suit by assignee for refund of purchase money—Special covenant protecting assignor from liability—Effect of.*—A mortgagee assigned all his rights under the mortgage bond, after instituting a suit on the bond against the mortgagor. At the time of assignment, both parties were ignorant of the fact that the bond was attested by only one witness, contrary to s. 59. The assignee specially covenanted that the assignor (mortgagee) shall not be liable for any defect in the

Transfer of Property Act (IV of 1882) —*continued.*

claim transferred and assigned or responsible for any sum of money that may not be recovered by the assignee. Subsequently, the above defect was discovered and the assignee brought a suit for declaration that the assignment was void and for a refund of the consideration paid by him to the assignor for the assignment. *Held*, that the assignment was not void, and that the assignee was not entitled to the refund, in view of the special covenant referred to above. Assuming that the technical informality in the mortgage deed would constitute a breach of the covenant, by the vendor, under s. 55 the special covenant, upon which the vendor (mortgagee) relies, negatives the statutory covenant that the interest which the seller professed to transfer subsisted. In other words, there is a contract to the contrary, within the meaning of s.55. Non-compliance with the rule laid down in s. 59, as to attestation by witnesses, does not render the personal covenant to pay the debt void. With reference to bonds for money, which purported also to mortgage immoveable property for the debts, but which were not registered as required by the Registration Act, the non-registration has been held not to affect the validity of the contract to pay the debt, and there is no real difference between the two cases. Whether a particular affirmation of the quality of a specific thing sold is conditional, and the transaction is to be null, if the *affirmation* is incorrect, is only a question of the intention of the parties to be decided by the circumstances of each case. Where, in addition to the affirmation, there is a separate warranty also in the agreement, the existence of such separate warranty shows that the matter of the warranty is not a condition or essential part of the contract, but that the intention of the parties was to transfer the property in the subject of the sale at all events. In such cases, if the sale is made in good faith and there is a breach of the warranty, a purchaser is entitled only to compensation for the breach of the warranty and the sale is not *even voidable.* The present is an *a fortiori* case, inasmuch as the vendee (assignee) has chosen to contract to take the claim with all its defects, and to hold the vendor not responsible for the consequences. SADU KAVAUR v. TADEPALLY BASAVIAH, **1 M.L.T. 416 = 17 M.L.J. 167 = 30 M. 284.** (26 C. 78, *Appr.*; 18 M. 29, *Not Appr.*; 12 B. 7, *D.*) [*F.*, 32 M. 410 = 19 M.L.J. 584 = 1 Ind Cas. 1.]

(430)—*Ss.* 55, 81, 101—*Vendor's lien—Unpaid purchase money—Recital of non-payment of purchase money and of agreement to execute mortgage therefor on sale-deed—Subsequent mortgage in favour of another having notice of non-payment of sale amount—Vendor's lien whether extinguished—Effect of* s. 101—*Transfer of Property Act—Applicability of* s. 81—*Hindu Law—Joint-family—Alienation—Sale of share by co-parcener in favour of others—Validity.*—S, one co-parcener of a joint Hindu family sold to his other co-parceners his

Transfer of Property Act (IV of 1882) —*continued.*

one-sixth share of the family properties for Rs. 70,000 and the sale deed which was executed in August 1894, contained a statement that a sum of Rs. 7,000 due on account of purchase money was not paid and that the same was reserved on account of a hypothecation bond to be executed by the vendee in favour of the vendor. In November 1894, the plaintiff obtained from the vendee a mortgage of some of the properties that formed the one-sixth share of the vendor. In December 1894, the vendee gave to the vendor a mortgage of some of the properties which formed originally part of the latter's share. *Held* that the plaintiff must be taken to have had notice that Rs. 7,000 of the sale amount remained unpaid and that the vendor-mortgagee had priority over the plaintiff. A co-parcener can alienate or get rid of his share to other co-parceners not necessarily to them all jointly but to one whom he chooses or to some out of the whole body. He can do this either by way of sale or by way of surrender. If the transaction takes the form of a sale and is for valuable consideration and if the other co-parcener accepts the transfer as a sale, there is no reason why the Court should not attach to the transaction, whether it is called a surrender or whether it is called a sale, the effect which the Transfer of Property Act gives to a sale. If it is a sale, then a charge under s. 55, Transfer of Property Act, attached to the whole of the property sold to the extent of Rs. 7,000. The statement in the sale-deed that the sum of Rs. 7,000 is reserved with the vendee in order that he may execute a hypothecation bond for that amount in favour of the vendor does not amount to a "contract to the contrary" within the meaning of s. 55 of the Transfer of Property Act. The fact that the vendor took a subsequent mortgage did not put an end to the vendor's lien. It must be held under s. 101, Transfer of Property Act, for the benefit of the vendor who has a charge upon the property, that the charge was not merged in the mortgage. S. 81, Transfer of Property Act, applies only to cases where the plaintiff has no notice of the previous mortgage. LAKSHMANA IYER v. SANKARAMOORTHI PILLAYAN, **13 M.L.T. 364.**

(431)—*Ss.* 55 (6) *(b)*, 82 *and* 95—*Charge—Money paid by the purchaser of a portion of the mortgaged property to pay off a prior mortgage—Payment by one who actually supplies the money—Contribution—Mortgage.*—In 1886 one R mortgaged an entire village B and *pattis* or shares in 4 other villages, and in March, 1901, the mortgagee obtained on the basis of this mortgage a decree for Rs. 59,480 by sale of the mortgaged property. In September 1901, the mortgagor R entered into a contract with the plaintiff for sale of the entire mortgaged property for Rs. 80,000. Before this contract was executed and formal deed of sale written out in favour of plaintiff, the mortgagor in October, 1901, entered into another contract to sell the same mortgaged property to the mortgagee for Rs. 75,000. In November, 1901, the village B was sold by R to the plaintiff for

Transfer of Property Act (IV of 1882) —*continued.*

Rs. 37,237 of which Rs. 28,000 were retained by the plaintiff to be paid to the mortgagee. In December, 1901, the plaintiff deposited the whole sum of Rs. 59,480 in Court for payment to the mortgagee, which sum was withdrawn from Court by the mortgagee in March 1902, and in pursuance of the agreement to sell made with the mortgagee in October, 1901, he brought a suit for specific performance of the contract of sale against R excluding from his claim the village B already purchased by the plaintiff and obtained a decree in 1903 as to the *pattis* in the four villages on payment of Rs. 37,763. The money was paid by the mortgagee into Court praying that it might be given to R on his executing the sale-deed. Prior to the aforesaid payment, plaintiff had informed the mortgagee, that he had paid Rs. 31,480 over and above the amount left with him by R for payment of the mortgage decree and either the said money should not be paid to R, or a notice given to the plaintiff of the deposit of the money in Court so that he might withdraw it therefrom himself. No notice of the deposit of the money was given to the plaintiff and the whole of the money was paid to R on his executing the sale-deed as to the *pattis* in favour of the mortgagee. The plaintiff then instituted this suit against the mortgagee for recovery of Rs. 31,480 *plus* interest by way of damages by sale of the property sold to the mortgagee on the ground that he had a charge to that extent on the said property. The mortgagee pleaded that the money was not a charge on the property purchased by him on the ground that the money towards the mortgage decree was not paid by the plaintiff himself but was paid by R and that it was not paid as mortgage money but as part of the purchase money. *Held*, that the plaintiff who had become the owner of a part of the mortgaged property and who paid off the mortgage debt in order to save the property from being sold in execution of the decree obtained on the basis of the mortgage of 1886, acquired a charge on the 4 *pattis* in respect of so much of the money as the *pattis* were rateably liable for.—*Held*, further, that the money having been supplied by the plaintiff for the payment of the mortgage decree, the payment must be considered to have been made by the plaintiff and it was quite immaterial that R and not the plaintiff deposited the money. *Held*, also, that even if the money paid by the plaintiff were considered as purchase money, he had a charge on the property sold to the mortgagee to the extent of the money paid by him under s. 55 (6) (*b*) of the Transfer of Property Act (IV of 1882). THE HON'BLE RAJA ALI MOHAMMAD KHAN v. THE DEPUTY COMMISSIONER OF BARA BANKI, **9 O.C. 259** B. (12 A. 110, 22 A. 284, 26 A. 407, 24 M. 96 26 M. 686, 26 B. 37, *R.*)

(432)—*Ss.* 55, 88 — *Damages for breach of statutory covenant for title—Covenant for quiet enjoyment, breach of.*—On June 30th, 1888, the defendant, in consideration of a certain sum of money, executed in favour of the plaintiff a

Transfer of Property Act (IV of 1882) —*continued.*

bin-patr of certain lands. Subsequently H. P., a brother of the defendant, who had absconded, appeared in 1897 and established his right to half this property and to that extent dispossessed the plaintiff. In his plaint, in the suit against the defendant, the plaintiff sought a decree for certain other land, belonging to the defendant, to replace the land from which he had been dispossessed. *Held*, that the plaintiff was not entitled to take any land from the defendant in lieu of the land of which he had been deprived by the defendant's brother, but in the absence of a contract to the contrary, express or implied, the defendant was liable in damages for breach of the statutory covenant for title or the statutory covenant for quiet enjoyment. JALPA PANDE v. GUR PRASAD, **5 O.C. 78.**

(433)—Ss. 55 (2) and 108 (*c*) — *See* LIMITATION ACT, 1908, arts. 116, 62, 97, 29 M. 353.

(434)--*Ss* 55 (2), 108, 109—*Sale of immoveable property—Agreement by vendee to make certain payments for all time to come—Not binding—Rent-free grant.*—Where, in the year 1833, on the sale of a zemindari property, a certain portion was excluded and retained by the vendor, and it was agreed that the vendeeshould pay the revenue assested on the portion thus excluded, and further that the vendor was to receive from the vendee a certain amount annually, and both the zemindari and the excluded portion had passed through a number of hands, *held* that the agreement did not run with the land, and the transferees of the vendees were not bound by the agreement for all time to come. The agreement could not be treated as a revenue free grant which was to remain in force until it was resumed. SRI THAKURJI MAHARAJ v. LACHMI NARAIN, **11 A. L. J. 212.**

(435)—S. 56, (6) *(b)* —Equitable principle in, application of—*See* REGISTRATION ACT, 1908, ss. 17, 49, 5 N.L.R. 70=2 Ind. Cas. 244.

(435-*a*)—S. 56--*See* Nos. 713, 819, *infra.*

(436)—*Ss.* 56, 67, 81 *and* 88—*Mortgage—Bona fide purchaser for value of part of the lands comprised in a prior mortgage—Right to insist on other lands being sold first—Marshalling.*—On reading the two ss. 56 and 81 of the Transfer of Property Act, it was *held*, that a purchaser of one of the lands comprised in a first mortgage has no right to insist that the other lands comprised in the mortgage should first be sold before selling the land that he purchased. It may however be pointed out that, under S. 88 of the Transfer of Property Act, the Court may order that a portion sufficient to discharge the plaintiff's debt be sold, and if the part not sold is sufficient, and if the plaintiff cannot possibly be prejudiced by such sale, it may be open to the Court to direct in the decree its sale before the other property. Further, in execution of a decree for the sale of all the lands, the lands not sold may be sold first, and if the sale-proceeds are sufficient to discharge the plaintiff's debt, the sale of the other lands may be stopped. KOMMINENI APPAYYA v. MANGALA RANGAYYA, **3 M.L.T. 287 F.B. =18 M.L.J. 229.** (5 M. 387, 11 C. 258, 17 A. 435, 31 C. 95, *F.*; 29 M. 217, 7 A. 711, 22 B. 30, F.B., *R.*)

(437)—Ss. 56, 81, 82—*See* CONTRIBUTION SUIT FOR—GENERAL, 31 C. 95=8 C.W.N. 30.

(438)—*Ss.* 56, 81, 88—*Marshalling of security—Mortgagee ordered to proceed against mortgage property free from other mortgages—Mortgagee not making payments as provided in mortgage-deed—Failure of consideration — Subsequent payment.*—On the 3rd January 1896, G mortgaged ten pieces of land to V, for Rs. 400. Out of this sum Rs. 200 were paid at the time of execution of the conveyance; and the balance Rs. 200 V covenanted by the mortgage-deed to pay it to N, a prior mortgagee, V failed to make this payment; and G sold to R, on the 10th July, 1897, five out of the ten pieces of land (*viz.*, Nos. 6-10) and some other property; and out of the sale-proceeds redeemed the mortgages to N. On the 15th March 1898, V paid Rs. 200 to G. A fortnight hence, that is, on the 30th March 1898, G mortgaged four pieces of land (*i.e.*, Nos. 1, 3, 4, 5) to S for Rs. 400 In 1902, S sued G on his mortgage and, in execution of the decree for sale obtained therein, became purchaser through Court of the four pieces of land. In 1904, V's heirs (the plaintiffs) sued on their mortgage. The lower Courts gave them a decree treating their mortgage as one for Rs. 200 only instead of Rs. 400; and they further directed that, in the event of G's failing to pay the amount found due on the mortgage, the plaintiffs should first proceed against piece No. 2; and to bring to sale the pieces sold to R (Nos. 6 10) and to S (Nos. 1, 3, 4, 5) only in case the decree was not satisfied by a sale of the former. On second appeal: *Held*, upholding the decree, (1) that the plaintiffs were not entitled to treat their mortgage as one for Rs. 400; because, V not having paid Rs 200 to N as agreed upon, there was a partial failure of consideration of the mortgage-deed, and the subsequent payment of the amount could not serve in law to undo the effect of that failure so as to prejudice the rights of R. (2) That the Court had power, under s. 88 of the Transfer of Property Act, 1882, to pass in such a suit a decree for sale, ordering that, in default of the defendant paying as mentioned in the decree, the mortgaged property or a sufficient part thereof be sold. S. 56 of the Transfer of Property Act, 1882. applies only as between a seller and his buyer, not as between a mortgagee of the seller and the buyer. A mortgagee, who purchases mortgaged property in execution of his decree for sale on his mortgage, becomes a purchaser by estoppel, that is to say, he purchases the interest of both the mortgagor and the mortgagee. SUBRAYA v. GANPA, **13 Bom.L.R. 678.** (5 B. 2, 5, *R.*)

(439)—*Ss.* 56 (6) (*b*), 123—*Sale—Gift—Transfer of property—Consideration in shape of services rendered or to be rendered—Grant of*

Transfer of Property Act (IV of 1882) —*continued.*

assessment—Registration Act (III *of* 1877), *s.* 17. —The plaintiff sued to recover arrears of assessment. The defendant claimed exemption from assessment under two documents which released him from the payment, and which were passed by a predecessor-in-title of the plaintiff by way of reward for services, which the defendant had rendered or was expected to render him. The documents were neither stamped nor registered. The lower appellate Court treated the transaction as one of sale and, applying s. 56 (6) (*b*) of the Transfer of Property Act, 1882, ordered the plaintiff to pay what the Court calculated to be the equivalent of purchase-money to the defendant before he recovered the assessment. *Held*, that the transaction must be regarded as one of gift, not sale; what was given in gift was regarded in Hindu Law as *nibhanda*, which is immoveable property; and there could be no gift of immoveable property except by a registered instrument, signed by or on behalf of the donor and attested by at least two witnesses. There having been no such instrument in support of the defendant's title, he could not set up the right in answer to plaintiff's claim. MADHAVARAO MORESHVAR v. KASIBAI DATTUBHAU, **12 Bom. L.R. 9 = 5 Ind. Cas. 599 = 34 B. 287.**

(440)—S. 57—*See* CIV. PRO. CODE, 1908, O. XXI, r. 2, 24 M. 412.

(441)—S. 57—*See* No. 428, *supra*.

(441-*a*)—S. 58—*See* CIV. PRO. CODE, 1908, O. XXXIV, rr. 1, 15.

(441-*b*)—S. 58—*See* LIMITATION ACT, 1908, arts. 132, 147.

(441-*c*)—S. 58—*See* MORTGAGE.

(442)—*S.* 58—*Deed of indemnity—Property mortgaged— Hypothecation.*— Certain persons sold certain property to the plaintiffs. The vendors executed a document of indemnity on the same date agreeing that, if any prior lien or charge should be disclosed they would repay the whole money with interest, and they hypothecated certain property to secure repayment for the purchase money. The vendees were dispossessed. In a suit to enforce the hypothecation in the document of indemnity *held*, that there was clearly an engagement which gave rise to a pecuniary liability and that the terms amounted to a mortgage within the meaning of s. 58 of the Transfer of Property Act. NIAZ AHMAD v. MANGU LAL, **5 A. L.J. 723 = A.W.N. 1908, 277.** (13 A.28, *R.*)

(443)—*S.* 58—*Mortgage—Attestation—Co-executant if may attest, execution by others—Evidence Act* (I *of* 1872), ss. 68, 69, 70.—A mortgage bond executed by several persons was sought to be proved by the evidence of one of the executants who was also the scribe of the document. *Held*, that a party executing a document, required by law to be attested, cannot be an attesting witness thereof, and his evidence, even if he was present at and witnessed the execution of it by others, cannot be accepted as that of an attesting witness in regard to such execution, (7 C.W.N. 385, *D.*) *Quaere* —

Transfer of Property Act (IV of 1882) —*continued.*

Whether admission of execution by a party is not receivable in proof of execution of such document by himself. PEARY MOHAN MAITI v. SREENATH CHANDRA MAITI, **14 C.W.N. 1046 = 7 Ind. Cas. 735.**

(444)—*S.* 58—*Mortgage by conditional sale—"Meddatu Krayam," meaning of—Construction whether document is sale or mortgage—Transfer of interest need not be in express terms.*—The question whether a document is a mortgage or a conditional sale is not governed by the provisions of the Act, but the provisions may be looked to with a view to determine the legal effect of the instrument in question. S. 58 specifies three instances of mortgage by conditional sale, and a document described as "*Meddatu Krayam*," which is defined as "Land, mortgaged with option to the lender to consider it as his property if the mortgage is not redeemed within a stipulated period, seems to fall under the first kind of mortgage by conditional sale specified in the section. The mere use of the word "*Meddatu Krayam*" in a document is not, however, conclusive. A transfer of an interest in immoveable property need not be in express terms, provided the instrument, taken as a whole, operate as such a transfer. KOLA VENKATANARAYANA v. VUPPALA RUTNAM, **29 M. 531.** (14 M.L.J. 337, *D.*)

(445)—*S.* 58—*Transfer of immoveable property for consideration but to defeat creditors—Object known to the transferee—Effect to transfer.*—Where a transfer, though in fact for valuable consideration, is in reality an arrangement to defeat the creditors, it is wholly void against the creditors both under s. 53 of T. P. A., and under 13 Eliz., ch. 5, and cannot be up held to the extent to which it is supported by consideration. If the object of transfer to the plaintiff was to defeat the creditors, and the plaintiff was aware of this object, then the facts that there was consideration and there was an intention to transfer will not affect the question. KOOLAYAPPA ROWTHEN v. BALUSAMI, **5 M.L.T. 283.** (30 M. 6, *Appl.*)

(446)—*S.* 58—*Mortgage—Hypothecation bond executed before Transfer of Property Act—No express provision for sale—Simple mortgage.*—A hypothecation bond, executed before the passing of the Transfer of Property Act, and not expressly containing power of sale, is a simple mortgage within the meaning of s. 58 of the Transfer of Property Act. RAMALINGA UDAYAN v. ARUKKANI, **9 Ind. Cas. 163 = 9 M. L.T. 309.**

(447)—*S.* 58—*Unregistered mortgage—Personal covenant to pay.*—The mortgagee under an unregistered mortgage is, when the document contains a personal covenant by the mortgagors to pay the debt secured thereby, entitled to sue on the covenant and obtain a personal decree against the mortgagors. GOMAJI v. SUBBARAYAPPA, **15 M. 253.** [*F.*, 25 M. 396; *R.*, 17 M.L.J. 469, 19 M.L.J. 584 = 32 M. 410; *D.*, 18 M. 29.]

Transfer of Property Act (IV of 1882) —*continued.*

(448)—S. 58—*See* BOM. ACT XXVII OF 1879. s. 22, 3 Bom. L.R. 545=26 B. 33.

(449)—S. 58—*See* DECREE—DECREE, CONSTRUCTION OF, 19 M. 249=23 I.A. 32=6 M. L.J. 53, P.C.

(450)—S. 58—*See* LIMITATION ACT, 1908, art. 148, 26 A. 337=1 A.L.J. 48, 14 B. 113.

(451)—S. 58—*See* PRE-EMPTION — CONSTRUCTION OF WAJIB-UL-ARZ, 7 A. 343=A. W.N. 1885, 46.

(452)—S. 58—Security bond—*See* REGISTRATION ACT, 1908, s. 17, 3 M.L.T. 317=31 M. 330.

(453)—*S.* 58 (*a*) *and* (*c*)—*Mortgage by conditional sale—Test—Sale with condition of re-purchase—Revision.*—A document purporting to be one of sale, though it is accompanied by a contract reserving to the vendor a right of re-purchase, is not on that account to be construed as if it were a mortgage. The test to apply is whether the relation of debtor and creditor subsists between the parties. If the relation does not exist, then the transaction does not fall within the general definition of a mortgage in s. 58 (*a*) of the Transfer of Property Act, and, therefore, cannot be regarded as *a mortgage by conditional sale* within s. 58 (*c*). (12 A. 387, 17 I.A. 98, *F.*) Where the lower Court has not duly considered the law applicable to the matter and has committed an error which goes to the root of the matter, the Court has acted with material irregularity in the exercise of its jurisdiction and the High Court would be justified in interfering in revision. MA HNIN U v. OSMAN GANI, **15 Ind.Cas. 423.** (2 L.B.R, 333, *F.*)

(454)—*S.* 58, *cl.* (*b*)—*Simple mortgage—Power of sale—Necessity for intervention of Court.*—As the expression "issued" in cl. (*b*) of s. 58 is not a right to sell but a right to cause the mortgaged property to be sold the power of sale referred to is not necessarily a power to sell without the intervention of the Court. The reference in the clause to an implied agreement is intended merely to reproduce the law as it previously existed, under which law words of hypothecation have always been understood to import the right of the mortgagee to bring the property to sale for satisfaction of the claim. MOHAMMAD AMIN v. JAN PATEL, **12 C.P.L.R. 26.** (2 C.P. L.R, 57, *F.*) [*R.*, 1 N.L.R. 76, 1 N.L.R. 117, 6 N.L.R. 20, 2 N.L.R.106; *Expl.*, 14 C.P.L.R. 17.]

(455)—*S.* 58 (*b*)—Creation, by occupancy raiyat on his non-transferable holding, of a *girby* (usufructuary) mortgage, effect of—Such mortgage falls within the definition of a usufructuary mortgage as defined in the section—*See* BEN. ACT VIII OF 1869, s. 6, 3 C.L.J. 222=10 C.W.N. 499.

(456)—*S.* 58, *cl* (*c*)—*Existing law of India.*—It may be assumed that the framers of the Transfer of Property Act in s. 58, intended to state the existing law and practice in India. BALKISHAN DAS v. W.E. LEGGE, **22 A. 149, P.C=4 C.W.N. 153=27 I.A. 58=2 Bom. L.R. 523=7 Sar. 601.** (17 I. A. 98=12 A. 387, *D.*)

(457)—*S.*58, *cl* (*c*)—*Deed of sale—Condition for re-purchase—Vendor to recover land on payment of purchase money—Vendee to render account.*—A deed of sale contained the following:—"Further, it is arranged that in the event of my paying to you the said purchase amount with interest at . . . on.....you should deliver back to me this land..... and that out of kist realized from the ryot by you and me in respect of this land before this limited time, all the assessments payable to the Sircar being deducted, the balance of kist should be credited towards the interest payable by me." Plaintiff, the assignee from the vendor, sued for redemption of the land on the footing that the transaction amounted to a mortgage by conditional sale. It was found that there was no great disparity between the sale amount and the actual value of the land sold *Held* that the mere circumstance that interest was stipulated for by the parties did not by itself indicate that the document which apparently was a sale was intended to be a mortgage. Except the mention of interest, there was no indication of an intention to create a mortgage security. The finding as to the value of the property showed the intention of the parties. The transaction amounted to a sale with a condition for re-purchase and not a mortgage by conditional sale. VENKATA KRISHNA RAO v. VENKATACHALAM, **7 M.L.J. 299.**

(458)—S. 58 (*d*)—*See* LEASE—GENERAL, 2 O.C. 12.

(459)—*S.* 58 (*e*)—*English mortgage, essentials of.*—The three essentials of an "English mortgage," as defined in s. 58 (*e*) of the Transfer of Property Act, are (1) that the mortgagor should bind himself to repay the mortgage money on a certain day, (2) that the property mortgagad should be transferred absolutely to the mortgagee, and (3) that such absolute transfer should be made subject to a proviso that the mortgagee will reconvey the property to the mortgagor upon payment by him of the mortgage money on the day on which the mortgagor bound himself to repay the same. Where a mortgage recited that "the mortgagors hereby mortgage and assign to the mortgagee" the mortgaged property, *held* that the second requisite of the definition of "English mortgage" was fulfilled by the assignment. The essence of an English mortgage is that according to contract of parties there is at law no right of redemption in default of payment on the due date. (*Per Sir Arnold White, C.J., and Bhashyam Ayyangar, J.*) NARAYANA AYYAR v. VENKATARAMANA AYYAR, **25 M. 220, F.B.**

(460)—S. 58—*See* No. 69, *supra.*

(461)—*Ss* 58, 48, 60, 67, 74, 85, 86, 88, 89, 91, 92 96 *and* 97, *Act* IV *of* 1882 *(Transfer of Property)*—*S.* 2, *cl.* 5, *Act* I *of* 1868 *(General*

Transfer of Property Act (IV of 1882) —continued.

Clauses Consolidation)—Immoveable property—Equity of redemption—Civ. Pro. Code, 1882, s. 295.—Regard being had to the definition of "Immoveable property" in s. 2, cl. 5, Act I of 1868 (corresponding to s. 3, cl. 25, Act X of 1897), the words "Immoveable property" mentioned in s. 58, Transfer of Property Act, denote not only the property itself as distinguished from any equity of redemption which the mortgagor might at the time possess in the said property, but include the rights of the mortgagor in the property mortgaged at the time of the second mortgage or, in other words, his equity of redemption in such property. So, a second mortgage and a first mortgage are mortgages of specific immoveable property within the meaning of s. 58, and a second mortgagee is entitled in a suit to which the prior mortgagee is a party, to obtain a decree ordering a sale of the mortgaged property subject to the lien of the prior encumbrancer. (4 M. 213, 1 A. 240. 8 A. 105, 8 M. 246 and 18 C. 164, P.C., *Appr.*) [*R.*, 23 C. 795, 11 C.P.L.R 75, 1 O.C. 105, 36 C. 254, 14 C.P.L.R. 177, 30 C. 599, 29 A. 385 = 4 A.L.J. 273 = A.W.N. 1907 97, F.B., 64 P.R. 1908 = 132 P.W.R. 1908; *Diss.*, 1 O.C. 53; *D.*, 1 L.B.R. 210.] The provision contained in s. 295. Civ. Pro. Code, seems to be similar in scope to ss. 96 and 97 of the Transfer of Property Act. Ss. 48, 58, 60, 67, 74, 85, 86, 88, 89, 91, 92, 96, 97 of the Transfer of Property Act reviewed. KANTI RAM v. KUTUBUDDIN MAHOMED, **22 C. 33.**

(462)—Ss. 58, 59—*See* DEED—ATTESTATION OF DEEDS, 26 C. 246 = 3 C.W.N. 84.

(463)—*Ss.* 58. 59, 100—*Simple mortgage—Transfer of interest—Charge—Attestation by one witness—Invalidity.*—A bond for the repayment of a debt contained the statement 'as collateral security for payment of the said money, I do mortgage 23 *bighas*, &c., &c.,' but there was no statement in it showing that there was any actual transfer of any interest. *Held* (*Maclean, C.J., dubitante*):—That the bond amounted to a simple mortgage as defined in s. 58 and not to a charge merely as contemplated by s. 100 of the Act. Such a document cannot operate as a valid mortgage unless attested by at least two witnesses. NOBIN CHAND NASKAR v. RAJ COOMAR SARKAR, **9 C.W.N. 1001.** (26 C. 78, 26 C. 246, 27 C. 190, 1 C.W N. 81, *F.*) [*R.*, 35 C. 837 = 12 C.W.N. 849 = 7 C.L.J. 492; *D.*, 33 C. 985 = 4 C.L.J. 219.]

(464)—*Ss.* 58, 59, *and* 100—*Transaction amounting to mortgage not valid for not being duly attested—Whether it would amount to charge.*—In a suit for money upon a bond coming within the definition of s. 58, Transfer of Property Act, it was found that the document was not duly attested as required by s. 59 of the Act. The mortgage, in consequence, being ineffectual, it was contended on behalf of the plaintiff that, even if it was not good as a mortgage, it operated as a good charge under s. 100 of the Act. *Held*, by *Maclean, C. J.*—The Legislature could not

Transfer of Property Act (IV of 1882) —continued.

have intended that a transaction, bad as a mortgage, because the document was not registered or attested as required by s. 59, was still good as a charge under s. 100, for then, the owner of that charge could afford to disregard s. 59 altogether, being amply protected by s. 100. *Mitra, J.*—Transaction in question was a simple mortgage within the provisions of s. 58 of the Act. S. 100 of the Act, therefore, could not apply. PRAN NATH SARKAR v. JADU NATH SAHA, **9 C.W.N. 697 = 32 C. 729.** (27 B. 91, 26 C. 246. 27 C. 190, *R.*; 1 C.W.N. 81, 266, 79, *Appr.*) [*F.*, 33 C. 985 = 4 C.L.J. 219; *R.*, 35 C. 837 = 12 C.W.N. 849 = 7 C.L.J. 492.]

(465)—Ss. 58, 59 and 100—Mortgage and charge, difference between—*See* COMPROMISE—GENERAL, 7 C.L.J. 492 = 12 C.W.N. 849 = 35 C. 837.

(466)—Ss. 58, 59, 100—*See* DEED—ATTESTATION OF DEEDS, 1 C.W.N 81.

(467)—*Ss.* 58, *cls.* (*a*) *and* (*c*), 60—*Relation of debtor and creditor—Sale or mortgage—Repurchase—Limitation—Prima facie* an absolute conveyance, in which there is nothing to show that the relation of debtor and creditor should exist between the parties, does not cease to be a conveyance so as to be commuted into a mortgage, merely because there is a right to re-purchase the property. (12 A. 387, 6 W.R. 242, *F.*) The test to apply is whether the relation of debtor and creditor subsists between the parties. If the relation does not exist, the transaction does not fall within the general definition of mortgage in s. 58 (*a*) of the Transfer of Property Act and, therefore, cannot be regarded as a mortgage by conditional sale within s. 58 (*c*). A right of re-purchase is lost if it is not exercised within the stipulated period, and limitation in such cases does not begin to run from the date of refusal to re-sell. Where a transaction was spoken of by the witnesses as a sale with a condition for re-purchase, and there was nothing in the evidence to show that the relation of debtor and creditor subsisted between the parties; *held*, that the transaction between the parties not being a mortgage but a sale with a condition for re-purchase, the principle of s. 60 of the Transfer of Property Act had no application to it. MAUNG THA DUN v. MAUNG MYA GYI, **8 Ind. Cas. 981.**

(468)—*Ss.* 58, 67—*Suit by a usufructuary mortgagee with a personal covenant for sale.*—A usufructuary mortgage contained an undertaking by the mortgagor to pay the amount, and the mortgagee sued for the money by sale of the property. *Held*, on the authority of 12 M. 109, that, because of the covenant to pay, the mortgage was not a usufructuary mortgage and the mortgagee could sue for sale. RAMAYA v. GURUVA, **14 M. 232.** [*Diss.*, 28 A. 157 = A. W.N. 1905, 226; *F.*, 5 O.C. 286, 26 M. 662; *Appr.*, 21 A. 4; *R.*, 24 C. 677.]

(469)—*Ss.* 58 (*d*), 67—*Mortgage deeds, construction of—Usufructuary mortgage, sale of property.*—A usufructuary mortgage contained

Transfer of Property Act (IV of 1882) —*continued.*

a provision that, after the expiry of a certain term (fixed in the deed), the mortgagee should have power to institute a suit and realise the money by public or private sale of the property mentioned in the document and of other moveable and immoveable property belonging to the mortgagors: *Held*, that the mortgage was not purely a usufructuary mortgage as defined in s. 58 (*d*) of the Transfer of Property Act, 1882, and that, by virtue of the provisions contained in the deed, the mortgagee could obtain a decree for sale of the mortgaged property. SALAMAT-UL-LAH v. PARTAB SINGH, **6 Ind. Cas. 793.**

(470)—*Ss.* 58, 67 *and* 68—*Usufructuary mortgage—Temporary sale with possession as security for debt—Suit for sale—Application of principles of Transfer of Property Act.*—A certain person borrowed a sum of money from plaintiff, and as security therefor, temporarily sold certain land to her with a promise to re-take it on payment of the consideration money and the vendor put plaintiff in possession. Sometime after, the borrower vendor entered on the land without the plaintiff's consent and was in wrongful possession. Plaintiff sued for a decree for ejectment and for possession or in the alternative, for recovery of the amount lent, to be paid within a time to be fixed by the Court and that, in default, the land be sold and the proceeds applied towards satisfaction of the amount decreed. *Held*, that the transactions amounted to a usufructuary mortgage within the definition contained in s. 58 (*d*) of the Transfer of Property Act. Though that Act was not in force where the land was situated, the principles of that Act were applicable. Applying the principles of ss. 67 and 68 of that Act, there could be no decree for sale. The decree for sale passed by the lower Court was therefore set aside and a decree ejecting the defendant and putting the plaintiff back in possession was passed. SHWE LOK v. MA SEIK KAUNG, **4 L B.R. 222.** (11 A. 367, 24 C. 677, 12 M. 109, *R.*)

(471)—*Ss.* 58, 67, 68 *and* 98—*Combination of simple and usufructuary mortgage—Mortgagee entitled to decree for money and also for sale.*—A mortgage-deed, after acknowledging the receipt of consideration and mortgaging the land with possession, the usufruct apparently going in lieu of interest, contained the following provision as to redemption:—"Thereafter, on a certain date, on paying the mortgage amount, we shall redeem or recover back our land. If, on the date fixed, the amount be not paid and the land recovered back, in whatever year on the corresponding date we may pay the amount in full, you shall deliver back our lands to us." *Held* that the mortgage was a combination of simple and usufructuary mortgage, within the meaning of s. 98, Transfer of Property Act, and the mortgagor was entitled to a decree for the mortgage-money under cl. (*a*) of s. 68 and to a decree for sale under s. 67, the right to cause the mortgaged property to be sold in default of payment being implied within the meaning of s. 58 (*b*) of the Transfer of Property Act. KANGAYA GURUKAL v. KALIMUTHU ANNAVI, **27 M. 526, F.B.** [*F.*, 10 O.C. 14.]

(472)—*Ss.* 58, 67, 99—*Security-bond for cost of appeal—Where security-bond amounts to mortgage, costs cannot be realized in execution by sale of secured property—Suit under s.* 67, *necessity for—Interest on costs cannot be allowed if not awarded by appellate Court.*—The appellants, in an appeal to the Privy Council, executed a bond to the Registrar of the High Court, as security for the costs of the respondent in the appeal. The appeal having gone against the appellants, the respondent got an assignment of the security bond from the Registrar and applied for a sale of the property secured for the costs of the Privy Council appeal payable by the appellants. Appellant's objection was to the effect that the property secured could not be brought to sale except by bringing a regular suit under s. 67 of the Act. The material portion of the bond ran as follows:—"We, the appellants to England....put a portion of our Zamindari *Milkiats*....as security for the Rs. 4,000, being the amount of the costs of the respondent;....till the passing of an order by the Privy Council, we or our heirs and representatives shall not execute any deed of sale, mortgage, &c., &c." *Held*, that the effect of the bond was to create a mortgage on the property mentioned therein within the meaning of s. 58 of the Act; (26 C. 246, 27 C. 190. *R.*) [*F.*, 31 M. 330=3 M.L.T. 317=18 M.L.J. 16, Note] and that, by s. 99 of the Act, the mortgagee (in this case, the assignee of the mortgagee from the Registrar, *i.e.*, the respondent) was not entitled to bring the mortgage interest to sale except by a suit under s. 67 of the Act. [*R.*, 35 C. 61=11 C.W.N. 1011=6 C.L.J. 320, 6 C.L.J. 462.] On a question being raised as to the power of the Court executing the decree of the Privy Council to award interest on the costs allowed to the respondent, *held*, the Privy Council not having allowed any interest on such costs, the Court executing the decree could not award any. TOKHAN SINGH v. GIRWAR SINGH, **9 C.W.N. 372=1 C.L.J. 118=32 C. 494.**

(473)—*Ss.* 58 (*b*), 69 *and* 100—*Mortgage—Charge—"Arh" and "Mustaghraq"—Intention of the parties—Power of sale—Limitation Act* (1908), *ss.* 19, 31—*Acknowledgment of a mortgage deed within the period of grace—Mortgage kept alive.*—The husband of the defendant executed an ikrarnama in 1892 in her favour in which he said he owed his wife a certain sum of money by way of dower and charged that amount on a certain property (*makful wa mustaghrak zamanat karke*). There was nothing in the deed which expressly or impliedly denoted a power of sale, and the document ended by saying that "*lihaza yeh chand kalma bataur tamassauk bakid arh zamanat ke likh diya.*" After the death of the husband she took possession of the

Transfer of Property Act (IV of 1882) —*continued.*

property with the consent of the other heirs, and they, in 1910 executed a deed of mortgage acknowledging and renewing the terms of the document of 1892. In 1893, the husband of the defendant had executed a simple mortgage of the same property and the assignees of that mortgage now sued for sale on foot of their mortgage. The defendant pleaded that the deed of 1892 was a mortgage-deed and it was kept alive by an acknowledgment contained in the mortgage of 1910 and had therefore priority over the mortgage sued on. *Held*, that the question whether a document was or was not a mortgage must be decided in each case with reference to the intention of the parties conveyed by the terms of that document; that the mere use of the words "*arh*" and "*mustaghrak*" did not necessarily imply that there was an intention to give a power of sale and of creating a mortgage; and that there was nothing in the terms of the deed of 1892 to indicate that the parties ever intended that the property should be sold, and the document therefore did not create a mortgage but only a charge. *Held*, further that a mortgage is kept alive by an acknowledgment of the debt due on it embodied, in a subsequent mortgage-deed executed within the period of grace allowed by s. 31 of the Limitation Act. MOTI BEGAM v. HAR PRASAD, **11 A.L.J. 570.**

(474)—*Ss.* 58 (*b*), 69 *and* 100—*Mortgage—Charge—Annuity—"Makful" and "Mustaghrak"—Power of sale—Intention of the parties—Power to redeem—Code of Civil Procedure* (1908), *O.* VI, *r*, 17—*Prayer to get twelve years' annuity—Change of the frame of suit and pleadings—Not allowed in second appeal.*—Defendant in 1871 executed an *ekrarnamah* whereby he agreed to pay certain yearly allowance in perpetuity and secured it on a certain property (*makful aur mustaghrak karke*). In case of default the annuitants were to take possession of a portion of it sufficient to give them the stipulated income. The plaintiff sued on the bond as if it were a mortgage. *Held*: the words "*makful*" and "*mustaghrak*" used in the bond, in view of the other terms and conditions, did not necessarily create a mortgage, nor was a power of sale necessarily implied unless the parties clearly contemplated that it should, and there could be no mortgage which could never be redeemed at all. *Held* also: that the document in suit was, under the circumstances of the case, a charge and not a mortgage. *Held* further: that the suit having been framed as one for mortgage with a prayer for the sale of the property, no decree could in second appeal be passed for the arrears of twelve years' annuity, as it would necessitate the trial of the issues as to whether the charge subsisted and the plaintiff had a title to the annuity and would involve a complete change in the frame of the suit and the pleadings. MASUMA KHATUN v. TAHIRA KHATUN, **11 A.L.J. 580.**

Transfer of Property Act (IV of 1882) —*continued.*

(475)—*Ss.*58 (*b*), 100, *applicability of—Power of sale contemplated by section—Express words unnecessary to confer power—Per Mahmood, J. Held*, (*a*) the definition of simple mortgage in s.58 (*b*) of Act IV of 1882, is only a reproduction of older law and is therefore applicable to a deed executed before the passing of the Act. (*b*) In the N.W. Provinces, words of hypothecation and simple mortgage have always been understood to import the right of the mortgagee to bring the property to sale for satisfaction of his claim, and no express words conferring such power are insisted upon as necessary to create such power. (9 M. 218, 10 M. 509, 10 B. 519, *D.*) (*c*) Where a transaction is described as '*arh*' and '*Mustagharak*' which means a hypothecation or simple mortgage, it implies a power of bringing the property to sale. (*d*) The power of sale contemplated in s. 58 (*b*) of the Act, does not mean a power to sell the property without the intervention of the Court. KISHAN LAL v. GANGA RAM, **13 A. 28=A.W.N. 1890, 216.** (10 B. 519, 7 A. 258, 10 M. 509, *Diss.*) [*Appr.*, 14 A.W.N. 57.]

(476)— *S.* 59—*Mortgage, attestation—Meaning of.*—A mortgage is duly executed, as required by s. 59 of the T. P. Act, not only when there are attesting witnesses to the actual execution of the document, but also when the witnesses attest the acknowledgment by the executant of his signature on the deed after its execution. GANGA DEI v. SHIAM SUNDER, **26 A. 69, A.W.N. 1903, 201.** (26 C. 246, 27 C. 190, *Diss.*; 4 Bom. L.R. 869, A.W.N. 1896, 89, *F.*) [*Diss.*, 31 M. 215=18 M.L.J. 219=3 M.L.T. 300, 5 N.L.R. 3=1 Ind. Cas. 179; *F.*, 6 A.L.J. 737=3 Ind. Cas. 905; *R.*, 5 Ind. Cas. 539.]

(477)—*S.* 59—*Mortgage-deed—'Attestation", meaning of—Attestation upon acknowledgment, if sufficient—Issues, framing of additional, after arguments heard and judgment reserved—Court's inherent jurisdiction—Court's duty to raise issues necessary for determining controversy—Civ. Pro. Code* (1882), *s.* 149.—The "attestation" of certain mortgage deeds by two witnesses required by s. 59 of the Transfer of Property Act is attestation of the actual fact of the execution. Where, in a suit to enforce a mortgage, after arguments had been heard and judgment reserved, it appeared from the evidence of the witnesses of the mortgage-deed that they were not present at the execution but had put their names on the document at the acknowledgment of the mortgagors, and the Court framed a supplemental issue as to whether the deed had been properly attested; *Held:* — That the Court was empowered to frame and try the additional issue under s. 149, Civ. Pro. Code (1882). *Held*, further, that, apart from that section, every Court trying Civil causes has inherent jurisdiction to take cognisance of questions which cut at the root of the subject-matter of controversy between the parties. Whilst the

Transfer of Property Act (IV of 1882) —*continued.*

first part of s. 149 of Act XIV of 1882 leaves it in the discretion of the Court to frame such additional issues as it thinks fit, the latter part makes it imperative on the Judge to frame such additional issues as may be necessary to determine the controversy between the parties. SHAMU PATTER v. ABDUL KADIR RAVUTHAN; SHAMU PATTER v. ABDUL RAJAK SAHIB, **16 C.W.N. 1009, P.C. = 23 M.L.J. 321 = 12 M.L.T. 338 = M.W.N. 1912, 935 = 10 A.L.J. 259 = 14 Bom. L.R. 1034 = 16 C.L.J. 596 = 35 M. 607 = 16 Ind. Cas. 250 = 39 I.A. 218.**

(478)—*S. 59—Mortgage—Attestation—Attestation by witness who did not witness execution Invalidity.*—Under s. 59, Transfer of Property Act, an attesting witness to a mortgage must himself have witnessed the execution of the document to make it enforceable. Attesting such a document on the executant's acknowledgment of its execution is insufficient. CHIDAMBARAM CHETTYAR v. SUBBARAGAVA SASTRI, **16 Ind. Cas. 207.**

(479)—*S. 59—Mortgage-deed—Attestation—Attesting witness interested in the money advanced though not a party to the deed—Valid attestation.*—A person who is interested in the money advanced under a deed of mortgage, but who is not himself a party to the deed, can validly attest the deed. BALU v. GOPAL, **13 Bom. L.R. 944.**

(480)—*S. 59—Attestation by witness of execution and not admission of execution.*—The attestation required by s. 59 of the Act is an attestation by witnesses of the execution of the document and not of the admission of execution. PANDURANG v. BALAJI, **14 C P.L.R. 42.** (27 C. 190. *F.*)

(481)—*S. 59—Mortgage—Attestation of mortgagor's signature.*—*Held* that s. 59 of Act No. IV of 1882 does not require that the signature of the mortgagor should be affixed to the mortgage deed in the actual presence of the attesting witnesses; but it is sufficient that the mortgagor acknowledges his signature on the deed in their presence. SHEIK GHAZI v. BHAWANI PRASAD, **A.W.N. 1896, 89.** [*F.*, 26. A. 69.]

(482)—S. 59—*Act No. I of 1872 (Indian Evidence Act), s. 68—Attesting witness—Scribe of a deed.*—*Held* that the scribe of a mortgage-deed who had signed his name on the deed, and who at the same time was in a position to give evidence as to the execution of the deed, might be considered as an attesting witness within the meaning of s. 59 of Act No IV of 1882, although there were also other witnesses to the same deed who had signed specifically as attesting witnesses. MUHAMMAD ALI v. JAFAR KHAN, **A.W.N. 1897, 146.** [*F.*, 20 A. 532.]

(483) — *S. 59 — Mortgage — Signature of mortgagor—Mortgage signed by scribe on behalf of illiterate mortgagor.*—*Such signature invalid* —. Under s. 59 of the Transfer of Property Act, 1882, it is necessary that a mortgage be signed by the mortgagor himself, or by some one vested by the mortgagor by deed in writing with full power to execute the document on behalf of the mortgagor. Where a mortgage was signed on behalf of the mortgagor who was illeterate, by the scribe of the document, not being specially empowered in this behalf, it was *held* that such a signature was not sufficient within the meaning of the section to validate the mortgage. MOTI BEGAM v. ZORAWAR SINGH, **A.W.N. 1899, 196.** [*Overruled*, 24 A. 319, F.B.]

(484)—*S. 59—Attestation, when valid—Indian Succession Act, s. 50*—There is no attestation unless the act of signing by the person who executes the document is done in the presence of the attesting witnesses. The thing must be done in the presence of the man who in future will be able to testify that it was done. The provisions of s. 50, cl. (3) of the Succession Act cannot be made applicable to other Acts as though they appeared in an Interpretation Act. Those provisions have a special history and follow the provisions of the Wills Act, 1 Vic. c. 36; and it would not be justifiable to apply them to other Acts. SHAMU PATTAR v. ABDUL KHADIR RAVATHAN, **3 M L T. 300 = 18 M.L.J. 219 = 31 M. 215.** (26 C. 246, 27 C. 190, 33 C. 864, 7 C. W. N. 160, *F.*; 27 B. 91, 26 A. 69, *Diss.*) [*Not F.*, 6 A.L.J. 737; *R.*, 5 N.L. R. 3, 5 Ind. Cas. 539.]

(485)—*S. 59—Attestation of mortgage-deed, evidence relating to—Burden of proof—Applicability of maxim* 'Omnia rite esse acta.—Suit for foreclosure. Some of the original mortgagors admitted, while others denied, execution of the mortgage-deed sued on. The first Court threw, on the plaintiff, the burden of proving the mortgage to be a valid one. The attesting witnesses were examined and they deposed that they saw the executants sign and that they attested the document but they were disbelieved by that Court, which, therefore, held the deed to be operative merely as a simple money bond. The plaintiff appealed and the Divisional Judge held that, as the execution of the deed had been proved and the attestation was one *prima facie* duly made it should be presumed valid unless there was definite evidence showing the contrary and that, as the burden of proof lay on the defendants and they had not satisfactorily discharged it, plaintiffs were entitled to obtain the foreclosure decree prayed for. On second appeal, it was further contended in support of the mortgagees that, s. 70 of the Indian Evidence Act is inconsistent with their being required to do more than prove execution by the mortgagor of a deed, which purports, on its face, to have been attested but that contention was overruled on the ground that there was no such inconsistency since the execution of a deed, to whose validity attestation is essential, designates the whole operation, including both the signature of the party and the attestation of the subscribing witnesses and s. 70 of the Indian Evidence Act lays down no rule as to the burden of proof, but, in a particular class of cases,

Transfer of Property Act (IV of 1882) —*continued.*

makes proof of partial execution adequate as proof of complete execution. *Held*, also, that, where there is evidence on both sides as to the *factum* of attestation, the maxim "*omnia rite esse acta*" can only be resorted to, if at all, when the evidence on both sides is evenly balanced. The maxim operates when there is no evidence on either side, and possibly it may be used to eke out unconvincing testimony on one side only. In the present case, therefore, the decree of the lower appellate Court was reversed, since it had erroneously proceeded as if the maxim compelled the mortgagors to show that the attesting witnesses could not have seen the mortgagors sign the mortgage-deed. JHAMA v DEOBUX, **2 N.L.R. 10**. [*Appl.*, 5 N. L.R. 3.]

(486)—*S.* 59—*Mortgage-deed, execution of—Attestation, required by law* — "*Attest*," "*Attestation*," *meaning of—Signature of witnesses affixed by other person, with their consent* — *Marks, affixing of, absence of— Illiterate witnesses* — *Touching of pen, if sufficient.* — *Per Rampini, J.*—A deed required by law to be attested is properly executed, when the signatures of the witnesses are affixed, for them, to the deed, by another person, with their consent they being illiterate and not able to write. It is not necessary that the witnesses should put their mark at the deed themselves, any such mark on the deed not being implied in the word "attest." "To attest" means only to witness the execution of a deed and there is nothing to preclude the signatures of the witnesses, as in this case, from coming under the heading of attestation. *Per Mookerjee, J.*—"To attest" is to bear witness to a fact, and it is not necessary that the witness attesting a document should sign his name personally. A signature, as contemplated by s. 59 of the Act, need not be by the mortgagor personally but, may be by some person acting on his behalf and under his authority. If the mortgagor is illiterate, it is a good signature, if, in the presence and at the request of the mortgagor, some other person signs the mortgagor's name on his behalf, as executant of the deed. There is no distinction in this respect between the signature of the mortgagor and the attestation by the witnesses. SASI BHUSAN PAL v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **4 C. L. J. 41=33 C. 861.** (24 A. 319, *R and F*; 2 C.W. N. 603, *R. and Expl*; 7 C. W. N. 160, 29 C. 749, *R.*) [*F.*, 31 M. 215=3 M. L. T. 300=18 M L.J. 219; *R.*, 13 C. 40.]

(487)—*S.* 59—*Zurpeshgi Patta—Attestation—Document executed by purdanashin lady.*—Where it appeared, from the evidence of the attesting witnesses to a *Zurpeshgi patta* executed by a *purdanashin* lady, that the witnesses were present in the room where the lady signed the document, but that she was behind a *purda* or screen at the time when she actually affixed her signature, *held—per Brett, J.*—that, having regard to the custom of this country there was a sufficient compliance with the provisions of

Transfer of Property Act (IV of 1882) —*continued.*

s. 59 of the Transfer of Property Act. *Held*, on appeal under the Letters Patent, (*Rampini, C.J. and Mitra, J.*)—that there was nothing to show that the attesting witnesses did not see the lady sign the deed, and that, moreover, the Court could not interfere at this stage with the concurrent findings of three Courts on a question of fact. HARMONGAI NARAIN SINGH v. GANAUR SINGH, **13 C.W.N. 40=3 Ind. Cas 309.** (27 C. 190, 4 C.L.J. 41, 16 C. 19, *R.*) [*R.* 14 C.W.N. 165=3 Ind. Cas. 311.]

(488)—*S.* 59—*Proof of execution of mortgage-deed—Attesting witnesses — Indian Evidence Act* (I *of* 1872), *ss.* 70, 114.—Where a mortgage deed shows on the face of it that it is attested by two witnesses one of whom is the writer whose denial of execution of the deed in his presence is found by the Court to be false, and the other is one whom the Court believes and whose evidence goes to show that the executant signed in his presence, though he is not able to remember whether the executant signed also in the presence of the writer, and it appears that the writer's signature as attesting witness, precedes that of the other witness, it may be fairly presumed, under these circumstances, that both signed as attesting witnesses, after the execution of the document by the defendant. The view that such a presumption arises is supported by s. 114 of the Evidence Act. JOGENDRA NATH MUKHOPADHYA v. NITAI CHURN BUNDOPADHYA, **7 C.W.N. 384.** *Bur-goyne* v. *Showler*, 1 Eccl. *R.* p. 5 (1844), (*Relied on.*)

(489)—*S.* 59—*Attest—Interpretation.*—An instrument of mortgage can be treated as validly attested, under the provisions of s. 59 of the Transfer of Property Act, when the witnesses sign it in the presence of the mortgagor after having received from him a personal acknowledgment of his signature. The word "attested" as used in s. 59 of the Transfer of Property Act, has the same meaning which it has in s. 50 of the Indian Succession Act: the attestation is not used in the narrow sense of attestation by witnesses of the execution of the document, but it has the sense of admission of execution as well. RAMJI v. BAI PARVATI, 4 Bom. L.R. 869=27 B. 91.

(490)—*S.* 59—*Attestation by a marksman by means of a mark—Sufficiency of attestation.* An attestation by a mark is a sufficient attestation within the meaning of s. 59 of the Act. SHRIKISAN MAYACHAND MARWARI v. SONBA BHOER, **1 N. L. R. 14.** (2 C. W. N. 603, *F.*; 3 B. 382, 11 C. 429, 15 M. 261, *R.*)

(491)—*S.* 59—*Deed — Execution of deed—Absence of attestation—Singature by the writer of the deed--Signature by Registrar under s.* 63-*A of the Dekkhan Agriculturists Relief Act* (XVII *of* 1879)—*Not valid attestation.*—A deed of mortgage bore at its conclusion the signature of the writer of the deed, and also the signature of the Sub-Registrar under s.63-A of the Dekkhan Agriculturist's Relief Act,

Transfer of Property Act (IV of 1882) —*continued.*

1879. It was not separately attested by two witnesses as required by s. 59 of the Transfer of Property Act, 1882. *Held*, that neither the one nor the other signature can be treated as an attestation ; and the deed, therefore, was not validly executed. An attesting witness is a witness who has seen the deed executed and who signs it as a witness. RANU SHIVJI v. LAKMANRAO KRISHNA, **10 Bom. L. R. 943 = 33 B. 44.**

(492)—*S.* 59—*Acknowledgment of executant before witnesses—Compliance with the section.*—When the executant of a mortgage-deed acknowledged the execution of the deed before witnesses who attested it, *held*, that there was sufficient compliance with the provisions of s. 59 of the Transfer of Property Act. BUNKATES SEWAK SINGH v. RAMA DAS, **6 A.L.J. 737 = 3 Ind. Cas. 905.** (26 A. 69, 27 B. 91, *F.*; 26 C. 246, 27 C. 190, 31 M. 215, *Not F.*)

(493)—*S.* 59—*Equitable mortgage—Property situate outside towns mentioned in s.* 59-*Validity of mortgage.*—To create an equitable mortgage by deposit of title-deeds, it is not necessary that the property to which they relate should be situated within one of the towns mentioned in s. 59, Transfer of Property Act, 1882. VALLIAPPA CHETTY v. THA HNYIN, **6 L.B.R. 23.**

(494)—*S.* 59—*Equitable mortgages in the Mufassal by deposit of title-deeds, validity of, prior to the T. P. Act.*—An existing debt or a contemporaneous advance coupled with a deposit of documents of title is evidence of the creation of an equitable mortgage. The intent to create such a mortgage may be established by instruments in writing, either alone or together, with parol evidence in support of them, or even by inference drawn from the very fact of the deposit of title-deeds. And such a security can be extended to cover future advances as much as the advance contemporaneous with the original deposit of the deeds. THE HIMALAYA BANK, LIMITED v. F.W. QUARRY, **17 A. 252 = A.W.N. 1895, 97.** [*D.*, 53 P.W.R. 1907.]

(495)—*S.* 59—*Immoveable Property situate in mofussil—Equitable mortgage in Presidency Town by deposit of title-deeds.*—An equitable mortgage, such as is recognised and given effect to in the Presidency towns can be validly made by the deposit of title deeds of property lying outside the Presidency Town. The provisions of the third paragraph of s. 59 of the Transfer of Property Act, 1882, apply equally to cases where the immoveable property covered by the title deeds happens to be situate beyond the town specified in the section and those where such property is situate within the limits of such towns. Had it been the intention of the Legislature that transactions of the above description should only affect immoveable property situate within the narrow circle of the Presidency Town, such intention would have been clearly expressed. MADHO DAS v. RAM KISHEN, **14 A. 238 = A.W.N. 1892. 97.** [14 B. 269, *R.*]

Transfer of Property Act (IV of 1882) —*continued.*

(496)—*S.* 59—*Suit by jenmi to eject tenant—Plea of oral demise on payment of renewal fees.*—In a suit for ejectment brought by the jenmi, the defendant pleaded a fresh oral agreement by the jenmi to let the land on a renewed *kanom* demise, and as registration was not necessary for a lease of the kind agreed upon between the parties, it was *held* that the absence of registration could not by itself authorize the plaintiff to eject the lessee. Further, as the suit for ejectment was brought before the expiration of the time within which the defendant might have specifically enforced the contract to renew the lease in his favour, to allow the plaintiff to eject the lessee, under such circumstances, would be giving the plaintiff a decree in fraud of his contract to renew the lease. ITTAPPAN v. PARANGODAN NAYAR, **21 M. 291 = 8 M L.J. 137,** [*Overruled*, 29 M. 336 = 16 M.L J. 395 = 1 M.L.T. 153 F.B.; *F.*, 13 C.P.L.R. 163 ; *D.*, 17 C.P.L.R. 19.]

(497)—*S.* 59—*S.* 17 (*b*), *Registration Act*, 1877—*Instrument known as 'mortgage' —'Value' of right, title or interest in immoveable property created thereby—Interest does not become principal.*—For the purposes of s. 17 (*b*), Registration Act, under s. 59, Transfer of Property Act, as it stood in 1901, *i.e.*, before the amending Act (No. 6) of 1904 came into force the 'value' of the right, title, or interest in immoveable property created by a mortgage is the principal money secured. (19 C. 623, 5 A. 447, 10 C.P.L. R. 10, 21 M. 140, *Rel. on.*) Hence in order to see whether the special kind of instrument known as mortgage requires or does not require registration it is not necessary to ascertain what the least sum recoverable under the mortgage is (5 M. 119, 23 M. 105, *D.*; 10 C. 82, 26 C. 179, 2 B. 253, 3 Bom. L. R. 133, *R*). From the simple fact that interest is calculated in advance and made payable along with the principal at a certain specified period, it cannot be regarded as principal. The proper presumption therefore is that the words "principal money secured" were deliberately inserted in s. 59 to show that interest is not to be taken into account. GAMA v. LAHANOO, **4 N. L. R. 86.**

(498)—*S.* 59—*Transfer of Property Amendment Act* (VI of 1904)—*Change effected in s.* 59 —*Mortgages where the amount secured is less than Rs.* 100 — *Necessity of registration in simple mortgages for less than a hundred.*—In a case of simple mortgage made after January 1st, 1905, the mortgage instrument must be registered, whatever the amount of mortgage money may be. An unregistered instrument would be invalid. MG SHWE BYA v. CHAWARI MUTU, **12 Ind. Cas. 25.**

(499)—*S.* 59—*Agreement to renew kanom—Original kanom and purankadom exceeding Rs.* 100—*Necessity for registration—Right of purchaser of melkanom with notice of agreement to sue for redemption.*—An agreement to give a renewed kanom, where the original kanom amount and the purankadom amounted in the aggregate to more than Rs. 100, must be in

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Transfer of Property Act (IV of 1882) —*continued.*

writing registered, as the kanom intended to be affected requires registration under s. 59 of the Transfer of Property Act. Where the plaintiff, the purchaser of a melkanom, had notice of an agreement to renew the kanom, he was still entitled to redeem the kanom, if the agreement was ineffectual for want of registration. *Quœre*:—Whether a kanom is to be regarded as a lease within the meaning of s. 2 of the Registration Act and an agreement to renew it requires registration under s. 17 of the Act, where the amount of the kanom exceeds Rs. 100? ACHUTAN NAMBUDRI v. KOMAN NAIR, **13 M.L.J. 217.** [*R.*, 29 M. 336=16 M.L.J. 395=1 M.L.T. 153.]

(500) - *S.* 59—*Sale or mortgage—Application for partition in Revenue Court by mortgagees whether affects the mortgagor—Redemption—U.P. Land Revenue Act* (III of 1901), *s.* 233-*K, application of.*—A document purporting to be a sale contained a clause to the effect that if, within six years from the date of the transaction, the amount secured was paid back, the sale would become void: *Held*, that the document was a mortgage by conditional sale and not an out and out sale. (22 A. 149, 27 I.A. 58, 4 C.W.N. 153. *F.*; 8 A.L.J. 119, 9 Ind. Cas. 140, *D.*) If the mortgagees of certain property make an application in a Revenue Court for partition of the property and the mortgagor raises no objection to the application, the right of redemption is not affected by such partition, and s. 233-K of the Land Revenue Act does not preclude the mortgagor from bringing a suit for redemption. BALBHADAR RAI v. BIRJRAJ RAI, **10 Ind. Cas. 630.**

(501)—*S.* 59—*Oral agreement in compromise —Decree creating a charge on immoveable property.*—An oral agreement recited in a petition of compromise, which does not of itself purport to create a charge on immoveable property, above Rs. 100 in value, but which creates a right to obtain a decree by way of specific performance, is not rendered inoperative under s. 59 of the Transfer of Property Act. APPASAMI v. MANICKAM, **9 M. 103.** [*R.*, 19 M. 419.]

(502)—*S.* 59 — *Proof of mortgage bond—Remand.*—Where an objection was taken at a late stage that a mortgage bond was not attested, as the law required, by two witnesses, the suit, instead of being dismissed, was remanded to the lower Court to give the plaintiff an opportunity of adducing evidence to show that at least two witnesses whose names appeared on the face of the document were attesting witnesses. DINAMOYEE DEBI v. BON BEHARI KAPUR, **7 C.W.N. 160.**

(503)—S. 59 — Essentials of attestation—Position of scribe — *See* ATTESTATION, 6 N.L.R. 152.

(504)—S. 59.—Attestation required by—*See* DEED—ATTESTATION OF DEEDS, 27 C. 190.

(505)—S. 59—*See* DEED—ATTESTATION OF DEEDS, 2 C.W.N. 603, 26 C. 78.

Transfer of Property Act (IV of 1882) —*continued.*

(506)—S. 59—*See* DEED—EXECUTION OF DEEDS, 20 A. 532=A.W.N. 1898, 148.

(507)—S. 59—*See* DEPOSIT OF TITLE DEEDS, 24 C. 348=1 C.W.N. 225.

(508)—S. 59—*See* EVIDENCE ACT, 1872, *s.* 68, 18 M. 29.

(509)—S. 59—*See* HIGH COURT, JURISDICTION OF—CALCUTTA, 38 C. 824.

(510)—S. 59—*See* HINDU LAW—DEBTS, 24 M. 397.

(511)—S. 59—*See* REGISTRATION, 6 L.B.R. 184=8 Ind. Cas. 597.

(512)—S. 59—*See* REMAND, 7 C.W.N. 160.

(513)—S. 59—*See* SCRIBE, 5 C.W.N. 454.

(514)—S. 59—Signing on behalf of illiterate executant—*See* SIGNATURE, 12 O.C. 257=3 Ind. Cas. 915.

(515)—S. 59—*See* Nos. 45, 69, 70, 429, 462, 463, 464, 465, 466, *supra.*

(516)—*Ss.* 59, *and* 100—*Document invalid as a mortgage, effect of, in creating a charge—Construction.*—A document which fails to comply with the requirements of s. 59, and is, in consequence, not a valid mortgage, can, nevertheless, operate to create a charge, upon the property mentioned therein, under s. 100, on the principle that legal effect should, if possible, be given to a legal intention clearly expressed. NELLAKANTAM IYER v. MADASAMI TEVAN, **17 M.L.J. 39.** (24 M. 399, *R.*; 26 C. 78. *D.*) [*Not Appr.*, 31 M. 337.]

(517)—*Ss.* 59, 100—*Instrument invalid as a mortgage for want of attestation--No charge created under s.* 100.—An instrument, which cannot operate as a mortgage for want of due attestation as required by s. 59 of the Transfer of Property Act, does not operate as a charge under s. 100 of the Act. SAMOO PATTER v. ABDUL SAMMAD SAHEB, **31 M. 337.** (33 C. 985, *F.*; 7 Bom. L.R. 934, *R.*; 17 M.L.J. 39, 24 M. 397. *Cons.*)

(518)—*Ss.* 59 *and* 100 — *Mortgage-deed—Attestations, absence of—Charge.*—The failure to comply with the provision for attestation contained in s. 59 of the Transfer of Property Act, 1882, does not convert a mortgage transaction into a charge. NARAYAN v. LAKSHMANDAS, **7 Bom. L.R. 934.**

(519)—*Ss.* 59, 100—*Attestation—Mortgage—Executant if may attest so as to bind co-executants —Improperly attested mortgage bond, if operates as a charge.*—A party to a document cannot, under any circumstances, be allowed to sign a document as an attesting witness, and a person, who has once signed as an executant of a mortgage bond and as one of the persons who was borrowing the money on the bond, cannot be allowed to have his position altered from an executant of the bond to that of a witness, for the purpose of rendering the document valid as a mortgage against the other executants. A

Transfer of Property Act (IV of 1882) —*continued.*

document which is inoperative as a mortgage by reason of its not being properly attested cannot take effect as creating a charge under s. 100, Transfer of Property Act. DEBENDRA CHANDRA ROY v. BEHARI LAL MUKERJEE, **16 C. W.N. 1075.=15 Ind. Cas. 666.**

(520)—*Ss.* 59, 100—*Mortgage attested by one witness—No mortgage in law—Whether it creates a charge.*—Where a document is attested by one witness only, it cannot operate as a mortgage having regard to s. 59 of the Transfer of Property Act, nor can it be treated as a deed creating a charge within the meaning of s. 100. THE COLLECTOR OF MIRZAPUR v. BHAGWAN PRASAD, **11 A.L.J. 141, F.B.**

(521)—*Ss.* 59, 123—*Mortgage signed not by mortgagor but by scribe for him—Mortgagor illiterate—Validity—"on behalf of" significance of—Construction of Acts.*—The question before the Full Bench was whether a mortgage is validly effected, where the principal money secured is Rs. 100 or upwards, if the mortgage deed is not signed *personally* by the illiterate mortgagor, but is signed for him by another under his authority, such authority not having been granted by deed in writing. *Held* by the Full Bench (*Aikman, J. dissenting*) that s. 59 of the Transfer of Property Act does not require the personal signature of the mortgagor, and that if his signature is affixed to the instrument of mortgage by another under his authority which authority need not be by a deed in writing, that is in effect the signature of the mortgagor himself, and is sufficient to constitute a valid mortgage. (1899, A.W.N. 116, *overruled.*) *Held* by *Aikman, J.*, (*dissenting*) :—Whether or not the autograph signature of the executant is required to any particular document, is usually a question of construction to be decided separately in each case. In the case of a mortgage executed in accordance with the provisions of s. 59 of the Transfer of Property Act, the law requires the personal signature of the mortgagor. (**N.B.**—The case law on the point is fully discussed in the judgment in this case.) (20 W.R. 375, 8 W. R. 1, *R.*) [*Appr. and F.*, 16 C.P.L.R. 45 ; *F.*, 12 O.C. 257 ; *R.*, 33 C. 861=4 C.L.J. 41.] The insertion of the words "on behalf of" in s. 123 of the Transfer of Property Act, and the omission of those words in s. 59, cannot be taken to show that the legislature intended to lay down in the latter section a different rule from that provided in the former. The two sections deal with different matters, and therefore, the language used in one of them cannot, according to ordinary rules of construction, be "looked at as a guide to the construction of the other." In the next place, the words "on behalf of" in s. 123 are a surplusage. Further, to hold that the legislature requires that the *personal* signature of the mortgagor is indispensable in the case of a mortgage which is only the transfer of an *interest* in immoveable property, while it does not require the same in the case of a gift or sale whereby the vendor's immoveable property is *absolutely* transferred is an anomaly, and a construction which leads to such an anomaly should not be adopted. (*Per Banerji, J.*) DEO NARAIN RAI v. KUKUR BIND, **24 A. 319, F.B=A.W.N. 1902, 127.**

(522)—*S.* 60—*Mortgage—Foreclosure of a portion of the mortgaged property.*—Under s. 60 of the Act, if the mortgagees have acquired in whole or in part the share of a mortgagor, a person interested in a share only of the mortgaged property may redeem his own share : and in such a case, the mortgagee also is entitled to foreclose such a share. INU KHAN v. NAIMUDDIN SIRCAR, **3 C.L.J. 377.**

(523)—*S.* 60—*Act of parties.*—The insertion of a clause that the mortgage should be regarded as a sale absolute, if the amount was not paid in a certain time, does not constitute an act of parties extinguishing the right of redemption. It must be by a release or other such transaction standing apart from the mortgage transaction under which the right of redemption comes into existence. PERAYYA v. VENKATA, **11 M. 403.** [*F.*, 24 M. 449 ; *R.*, 21 M. 110, 23 B. 146, 19 M.L.J. 651.]

(524)—*S.* 60—*Mortgage—Purchase of part of mortgaged property by mortgagee, whether extinguishes mortgage—Instances where such mortgage is extinguished.*—The purchase of a part of the mortgaged property by a mortgagee, subject to his mortgage has not necessarily the effect of fully discharging the mortgage without regard to the value of the property purchased and the price paid for it, whether such purchase be made in execution of a simple decree for money or in execution of a decree obtained by the mortgagee himself upon a subsequent mortgage, although such purchase has, in some instances, the effect of discharging the whole of the mortgage debt. The effect will depend upon the circumstances of each individual case. (A.W.N. 1883, p. 61, *Overruled*; 13 M.I A. 404, 12 C. 414, 2 A. 565, 5 A. 276, *Ibid.* 257, 12 A. 537, 19 A. 196, A.W.N. 1895 p, 1, A.W.N. 1885, p. 210, *R.*; N.W.P. 1867, 88, N.W.P. 1866, 125, 2 N.W.P. 4, *R.*) The provision in s. 60 that nothing in the section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, is a clear recognition that the mortgage-debt in part still subsists. [*R.*, 31 A. 373=6 A.L.J. 451 ; *D.*, 24 M 96.] Although property may be sold subject to a mortgage, and the mortgagee himself may purchase the mortgagor's equity of redemption in whole or in part, either by private sale or at auction in execution of a decree, still, in such cases, certain equities arise between the mortgagee or his representative in interest on the one hand and the mortgagor or the mortgagor's representative in interest on the other, to which a Court is bound, as a Court administering justice and equity, to give effect. One of those equities is that the mortgagee by so purchasing, should not place the mortgagor in a worse position than

Transfer of Property Act (IV of 1882) —*continued.*

that in which the mortgagor would have been, had any other person purchased the property. Such mortgagee is liable to bear a rateable share of the debt in cases falling under s. 82 of the Transfer of Property Act. Also, when property is sold subject to a mortgage, the price which the purchaser pays for it being ordinarily the difference between the market value of the property and the amount due on the mortgage, if the mortgagee himself happens to be the purchaser, and the price paid by him is not the full market value of the property, he should not be allowed to keep in his pocket the difference between the market value and the price paid by him and thereby damnify the mortgagor or other owner of the remainder of the mortgaged property. That is the reason why the mortgagee must bring into account the value of the property purchased by himself. As a result of his doing so, the mortgage may, in some instances, be found to have been fully discharged by his purchase. (*Per Banerji, J.*). NAND KISHORE v. RAJA HARI RAJ SINGH, **20 A. 23 F. B=A.W.N. 1897, 163.** [*R.*, 22 A. 284, 26 B. 88=3 Bom. L.R. 628.]

(525)—*S.* 60—*Mortgage—Purchase of part of the mortgaged-property — Mortgage foreclosed. purchaser not being made a party—Right of purchaser to redeem part of the mortgaged property.*—The plaintiffs' father purchased some *sir* land which, along with other property, was the subject of a mortgage by conditional sale. The mortgagees subsequently instituted a suit for foreclosure, in which they obtained a decree and an order absolute for foreclosure. But the mortgagees, although they had notice of his interest in the mortgaged property, did not join the purchaser as a party to their suit. *Held*, that there was no bar to the plaintiffs suing to redeem that portion of the mortgaged property in which their father had acquired an interest, and that they were not bound to redeem the whole mortgage. BRIJ KISHORE v. MADHO SINGH, **A.W.N. 1905, 279=3 A.L.J. 27=28 A. 279.**

(526)—*S.* 60—*Agra Tenancy Act* (II *of* 1901), *Ss.* 11, 18, 20—*Fixed-rate tenant—Mortgage—Covenant that the mortgagee will remain always in possession of property after redemption—Clog on redemption.*—S. 18 of the Agra Tenancy Act, 1901, relates to the right of occupancy referred to in s. 11 of the Act, and does not apply to the case of a tenant at fixed rates whose interests are under s. 20 heritable and transferable. A stipulation in the mortgage-deed, by which, on payment of the principal, interest and costs, the mortgagor is not to recover possession, but is bound to allow the mortgagee to continue in possession apparently in perpetuity upon payment of a fixed rent, prevents the mortgagor from getting the property unfettered, and is thus a clog on equity of redemption. SHEO SINGH v. BIRBAHADUR SINGH, **6 Ind. Cas. 707.** [9 B. 524, *F.*; 22 A. 238, *D.*]

Transfer of Property Act (IV of 1882) —*continued.*

(527) *S.* 60—*Mortgage—Effect of mortgagee purchasing part of the property mortgaged—Redemption.*—Where a mortgagee acquires a part of the mortgaged property, and thus a fusion takes place of the rights of the mortgagee and the mortgagor in the same person, the indivisible character of the mortgage is broken upon and one of several mortgagors may, in such a case, redeem his own share only on payment of a proportionate part of the mortgage-money, but he cannot compel the mortgagee to allow him to redeem the shares of other persons, in which he is not interested. KALLAN KHAN v. MARDAN KHAN, **A.W.N. 1905, 225=28 A. 155.** (2 A. 565, *F.*; 17 A. 63, *R.*; 15 B. 24, *D.*)

(528)—*S.* 60—*Purchase of equity of redemption in part of the mortgaged property—Suit for foreclosure—Purchaser not a party—Right of purchaser to redeem the property purchased.*—A mortgage by conditional sale of a certain village was executed in favour of the defendants' assignors. In execution of a simple decree against the mortgagor, the plaintiff's father purchased an interest in a portion of the mortgaged property. Though the defendants were aware of this purchase, they brought a suit for foreclosure without impleading the purchaser as a party thereto and got a decree, which was made absolute. The present suit was for redemption of the property purchased by the plaintiff's father on payment of a proportionate amount of the mortgage-money. *Held*, that the plaintiff is not bound to redeem the whole mortgage; under s. 60 of the Act, he is entitled to redeem the portion of the mortgaged property purchased by his father on payment of a proportionate part of the mortgage-money. BRIJ KISHORE v. MADHO SINGH, **A. W. N. 1905, 133.**

(529)—*S.* 60 — *Inheritance of mortgagor's rights by mortgagee—Integrity of the mortgage broken up.*—Where the equity of redemption in respect of a part of the mortgaged property becomes vested in the mortgagee, there is a merger of rights and the integrity of the mortgage is broken up. In order to bring about this result, it is not necessary that the fusion of rights should be by act of parties. What is necessary is that the mortgagee should have acquired the share of one of the mortgagors, whether by purchase or by inheritance or otherwise. H mortgaged certain property to B who transferred his mortgagee rights to M. M died leaving A as his sole heir. H died leaving 51 heirs one of whom was A. Some heirs of H brought this suit for redemption of their shares only. *Held*, that the plaintiffs were entitled to redeem their shares, inasmuch as the mortgagee having inherited part of the property mortgaged, the integrity of the mortgagee was broken up. HAMIDA BIBI v. AHMAD HUSAIN, **6 A.L.J. 387=31 A. 335=1 Ind. Cas. 779.** (17 A. 62, *D.*; 5 N.W.P. 148, *F.*; 13 M.I.A. 404, 28 A. 155, 29 A. 262, *Appl.*)

Transfer of Property Act (IV of 1882) —*continued.*

(530)—*S.* 60—*Suit for redemption—Averment in plaint of payment of mortgage amount and of willingness to pay amount due—Effect of non-tender or non-payment.*—A mortgagor seeking redemption may assert that the mortgage has been paid off, but that, if it be found by the Court that anything is due under the mortgage, he is prepared to pay it. Such an alternative case is not opposed to any rule of pleading, and there is really no inconsistency. Under s. 60, Transfer of Property Act, the non-payment or non-tender of the amount due on the mortgage previous to suit is not a bar to a suit for redemption. BUTCHANNA v. VARAHALU, **24 M. 408.**

(531)—*S.* 60—*Receipt of part of principal money before time—No premature right to foreclosure or redeem.*—The words in s. 60, Transfer of Property Act "at any time after the principal money has become payable" refer to the time agreed on for the payment of the mortgage money. The receipt of a portion of the principal money before that time does not give a right to redeem prematurely any more than it gives a right to foreclose prematurely. The mortgagee is not entitled to foreclose because he is kept out of possession. Even, if he were so entitled, it does not follow that the mortgagor may, if the mortgagee does not sue for foreclosure, claim to redeem before the date agreed on. The mortgagor cannot by breaking the agreement to deliver possession acquire a right to break it still further by redeeming before the fixed date. BHAGWANGIR GOSAI v. PHAGU KIRAR, **2 C. P.L.R. 241.**

(532)—S. 60—*See* ATTACHMENT — MODE OF ATTACHMENT, 21 B. 226.

(533)—S. 60—*See* MALABAR LAW—MORTGAGE, 16 M. 328.

(534)—S. 60—*See* Nos. 380, 381, 382, 461, 467, *supra* and Nos. 698, 819, *infra.*

(535)—*Ss.* 60 *and* 61—*Clog on equity of redemption—Deeds of further charge on property previously mortgaged—Bonds stipulating repayment of money borrowed within time fixed for redemption of a previous usufructuary mortgage — Foreclosure, suit for.* — The predecessors-in-title of defendants mortgaged, with possession, the property in suit for Rs. 1,000 by a deed executed on 6th July, 1891, and on the same date borrowed a further sum of Rs. 100 upon the same security. On 13th June, 1892, 25th March, 1894, and 15th October 1895, they borrowed further sums. The deeds of those dates were registered and recited that the aforesaid property was held upon usufructuary mortgage by the plaintiff under the deed of July 16th, 1891, that the sums now borrowed should be paid with interest within the time fixed in the original mortgage-deed, and that the mortgagors should not be able to redeem the mortgage without payment of the amount due on the three subsequent deeds. The plaintiff brought a suit to foreclose his mortgage claiming the amount, due under all five deeds.

Transfer of Property Act (IV of 1882) —*continued.*

The defendants admitted that the money secured by the deed of July 16th 1891, was due, but denied that the last three deeds created any further charge on the property. *Held* (*per Wells, A.J.C.*) that the three last deeds, which practically amounted to fresh mortgages were not a clog on the equity of redemption and having regard to ss 60 and 61 of the Act, the plaintiff could enforce them against the defendants. The principle on which the prohibition of clogging mortgages is based is one of equity, that, when a man is borrowing and pressed for money, he may not have to assent to unreasonable terms, and, therefore, in the mortgage-deed, there must not be any provision, which fetters his right to redeem. But this principle does not apply to a case where a man has deliberately increased the amount of the mortgage-money by taking further loans, and equity will not deprive the mortgagee of his dues. *Held* (*per Scott, J.C.*) that the three last deeds did not create mortgages or practically amount to fresh mortgages, but that, having regard to the provisions of s. 60 of the Act, they did not clog or fetter the defendants' equity of redemption and could be enforced. RADHA KRISHNA v. SHEO DIAL, **8 O.C. 132.** (26 A. 559=A.W.N. 1904, 123, 1 A. L.J. 579, *Diss.*) [*R.*, 8 O.C. 227.]

(536)—*Ss.* 60, 61—*Mortgage—Redemption in part—When allowed—Claim for consolidation of mortgages — Essentials.*—Where there are more mortgagees than one, but only one of them has acquired in part the share of a mortgagor, it is clear that the exception to s. 60, Transfer of Property Act, does not apply, and the plaintiff is entitled to redeem the whole mortgage. The rule is that a mortgage is one and indivisible and the exception arises only when the mortgagee, or, if there are more mortgagees than one, all such mortgagees have acquired in whole or in part the share of mortgagor. In order to support a claim for the consolidation of two mortgages, that is to say, to treat them as one and insist that one shall not be redeemed without the other, it is necessary both under s. 61, Transfer of Property Act, and otherwise, that the two mortgages to be consolidated should have become united in title or come into the same hand. VELAYUDAM CHETTY v. ALANGARAM CHETTY, **23 M.L J. 475=15 Ind. Cas. 605.**

(537)—*Ss.* 60 *and* 62—*Redemption, second suit for, after payment of mortgage-money into Court in previous suit—Right to redeem—Mortgage, law of, in force in Oudh previous to Transfer of Property Act—Execution of decree*—Res judicata—*Civ. Pro. Code, ss.* 13 *and* 244.—Before the commencement of the British rule in Oudh, the plaintiff's father, H.B. mortgaged certain property to M. M. the defendant's father. In 1856 H. B. sued M.M. for possession of the mortgaged property, which was decreed to him on payment of Rs. 4,000, the principal sum. On appeal, the Commissioner held that H. B. could redeem the mortgage on payment of Rs. 4,000

Transfer of Property Act (IV of 1882) —*continued.*

before 1st Asarh 1264 Fasli (8th June 1857). H.B. paid Rs.4,000 into the Government Treasury on the 30th April 1857. R. M. appealed to the Financial Commissioner against the judgment of the Commissioner. A few weeks after the money was deposited the rebellion of 1857 broke out, the Treasury was plundered, the money was lost, and all the records of the Courts including those of the Financial Commissioner were destroyed. M. M's appeal was not decided after the suppression of the rebellion. The second summary settlement of the mortgaged property was made with M. M. H. B. having died, one of his sons, M.B., sued the defendant for possession of the property, and his suit was finally dismissed. The plaintiff brought a suit against the defendant for redemption of his share of that property. *Held*, that when the mortgagor sues for redemption of the mortgage or for possession of the mortgaged property, the amount due on the mortgage having been paid, the mortgage cannot be said to have been redeemed until, in the one case, the mortgagor has obtained a decree enforcing the right to redeem, and has paid into Court the amount found due on the mortgage,or, in the other, has obtained a decree establishing his right to possession of the mortgaged property. Assuming that it was proved that H. B. obtained a decree enforcing his right to redeem and that the payment he made was one of the amount due on the mortgage, *held*, that the payment constituted redemption of the mortgage according to the law (similar to that laid down in ss. 60 and 62, Transfer of Property Act) in force in Oudh, when the decree was made. The right to redeem a mortgage is enforced under the Transfer of Property Act, when in a suit for redemption the Court decrees that, upon the mortgagor paying into Court the amount found due on the mortgage, the mortgagee shall do what is required of him by s. 60, or what is required of him by s. 62, and the amount so found due is paid into Court. When such a decree has been passed and the money has been paid, the right to redeem has been enforced, and therefore the mortgage has been redeemed. *Held* further, that the payment made by H.B. was one of the amount due on the mortgage, that he could obtain possession of the mortgaged property in execution of his decree, and that he could not neglect to execute his decree and bring a second suit for possession of the property on the same ground. *Held*, therefore, that the plaintiff's suit was barred by ss. 13 and 244, Civ. Pro. Code. AHMAD BAKHSH v. THE HON'BLE SETH RAGHUBER DAYAL, **3 O.C. 371 B.**

(538)—*Ss.* 60, 68, 72, 74, 75, 95—*Prior lien on mortgaged property—Payment of amount of lien by mortgagee to save property from execution sale—Effect of such payment—Suit by mortgagee to recover amount so paid.*—Certain mortgaged property had been subject to a prior lien by a decree of Court. The decree-holder having attached and brought to sale the mortgaged

Transfer of Property Act (IV of 1882) —*continued.*

properties, the mortgagee paid the amount of the lien into Court and thus saved the property from sale. On the death of the mortgagee, his undivided brother sued to recover the amount advanced to pay off the prior lien. The suit was against the purchaser of the property from the mortgagor. *Held* that the payment not having been made at the request or for the benefit of the defendant, the plaintiff could only succeed by showing that he had a charge upon the land which could be enforced against it in the hands of the defendant. There is no provision in the Transfer of Property Act to support the contention that, without the knowledge or concurrence on the part of the mortgagor, a second mortgagee may, by a transaction between himself and the first mortgagee, acquire a new right over the property. The plaintiff not having acquired any such charge on the property, the suit failed. *Per Subramania Ayyar, J.* No doubt a mortgagee can tack to the mortgage amount any sum paid by him to save the mortgaged property from sale. But the plaintiff was purely a usufructuary mortgagee and did not obtain possession of the mortgaged property. Consequently, he had no charge on the mortgaged property for the money recoverable by him under s. 68 of the Transfer of Property Act. The amount to be added thereto necessarily stood also on the same footing, and the plaintiff's contention that he had a charge for it also was clearly unsustainable. PERIANNA SERVAIGARAN v. MARUDAINAYAGAM PILLAI, **22 M. 332=9 M.L J. 166.** [*Rel. on*, 30 C. 794=7 C.W.N. 609.]

(539)—*Ss.* 60 *and* 74—*T.P. Act—Redemption, suit for—Mortgage—Redemption of portion of mortgaged property.*—A mortgagee, by allowing his mortgagor to pay a portion of the mortgaged debt, and releasing a proportionate share of the mortgaged property, does not thereby entitle the mortgagor or his representative to redeem the rest of the mortgaged property piece meal. BALDEO BAKSH v. JAWAHIR SINGH, **2 O.C. 344.** (17 A. 63, *R.*)

(540)—*Ss.* 60, 83—*Clog on equity of redemption—Subsequent money bond postponing redemption of prior mortgage bond.*—A stipulation which places a hindrance or stay in the way of the mortgagor in the exercise of his right to redeem is a clog on the equity of redemption and unenforceable, even though the subject of the mortgage is not directly charged by the stipulation. Where, subsequent to a usufructuary mortgage redeemable on any Jeth, the mortgagor executed a money bond in favour of the mortgagee and therein covenanted not to redeem the mortgaged property, till the money due upon the latter bond was paid, *held* that the latter created no charge on the property, and the stipulation in it was a fetter or clog on redemption which could not be enforced against the mortgagor. (*Browne* v. *Ryan*, 2 I.R. 653 and (1901) *Noakes & Co., Ld.* v. *Rice*, L.R. (1902) A. C. 24, *R.*; 4 A. 85, *Not F.*), SHEO SHANKAR v. PARMA MAHTON, **26 A. 559=1 A.L.J. 282 =A.W.N. 1904, 123.** (4 A. 85, *Not F.*) [*F.*, 27

Transfer of Property Act (IV of 1882) —*continued.*

A. 178 ; *R.*, 9 C.W.N. 789, 8 O.C. 132, A.W.N. 1906, 162=3 A.L.J. 548=28 A 638; *D.*, 3 A.L. J. 634=28 A. 712=A.W.N. 1906, 202, 6 A.L. J. 255.]

(541)—*Ss.* 60, 83, 84 *and* 91—*Mortgage-money, deposit of, by mortgagor—Deposit of mortgage-money, proper time and place for—Tenaer of mortgage money in Court—Interest upon mortgage-money subsequent to its deposit in Court—Construction of documents—Mortgage.*—The plaintiff sued the defendant to recover a certain sum of money with principal and interest alleged to be due on four mortgage deeds. The first deed was dated the 9th August 1887, and purported to have been executed in consideration of Rs. 10,360, which was to be paid in a lump sum into the treasury at Nanpara within eight years. It was further stipulated that, on failure to pay the amount on the due date, interest would be payable at the rate of eight annas per cent. per mensem from the date of the deed till date of payment. The second deed was dated the 3rd October 1888, corresponding to 13th Kuar Badi 1296 Fasli, and provided for the payment of Rs. 26,000, without interest, within a period of ten years beginning with 1296 Fasli and ending with 1305 Fasli, but there was a further clause to the effect that, after the expiry of this period, in the fallow season or on the 1st Jeth 1305 Fasli the sum advanced would be paid into the treasury at Nanpara in a lump sum, and on failure interest at the rate of Re. 1 per cent. per mensem would be payable from the date of the deed till realization. The third and fourth deeds were executed on the same terms as the second for the repayment of the money advanced without interest. The defendant deposited Rs. 10,360 on the 6th August 1895, in the Court of the Subordinate Judge of Bahraich, under s. 83 of the Transfer of Property Act, on account of the mortgage of the 9th August 1887, but the plaintiff refused to receive it. On the 23rd May 1898, Rs. 40,860 were similarly deposited on account of all four mortgages and this also the plaintiff declined to accept. In his suit against the defendant the plaintiff claimed interest on the first mortgage on the ground that although the deposit was made within the stipulated period the terms of the agreement required payment to be made in the treasury at Nanpara. It was also contended that interest was due on the other mortgages also, inasmuch as the payment of the amounts due on them was not made until after the 1st Jeth 1305 Fasli, although made before the end of that year and no payment was made at Nanpara. *Held*, that the deposit made on account of the first deed was a good payment and the plaintiff was not entitled to interest. A mortgagee may, after the mortgage has become payable and before his right to redeem is barred, either (1) pay or tender at the proper time and place the amount due on the mortgage under s. 60, or (2) deposit that amount in Court under s. 84, or (3) sue for redemption under s. 91 of the Transfer of Property Act. *Held*, further, that, as regards the second mortgage, the contract must be held to be contained in the first clause of the deed, *viz.*, that the loan was for ten years beginning with 1296 Fasli and ending with 1305 Fasli, and that the amount of the bond was to be paid on the expiry of that period ; and that the second clause, which was to the effect that the money was to be paid on the 1st Jeth 1305, was merely explanatory of the first. Where there are two inconsistent passages in a document the first should be given effect to in preference to the second. *Held*, therefore, that the date up to which the amounts of the second, third and fourth deeds could be paid was the last day of 1305 Fasli, which was a considerable time subsequent to the date on which the deposit of Rs. 40,860 was made by the defendant in the Civil Court at Bahraich under s. 83 of the Transfer of Property Act for payment to the plaintiff, who therefore was entitled to no interest. SARDAR KARAN SINGH v. RAJA MUHAMMAD SIDDIK KHAN, **4 O.C. 387-B.**

(542)—*Ss.* 60, 83, 95—*Simple-bond insisting in payment before redemption of mortgage—Clog on the equity of redemption—Effect of payment under s.* 83—*Rights of part-owners of equity of redemption.*—Plaintiff, as the purchaser of a portion of an equity of redemption, sued for possession of the whole of the mortgaged property having previously deposited in Court, under s. 83 of this Act, the whole of the amount due under the mortgage. The suit for possession was necessitated by the fact of the mortgagee having refused to accept the amount. The mortgagee's objection was that, after the execution of the mortgage, the mortgagor gave him (the mortgagee) a simple-bond for another sum of money stipulating therein that the mortgage should not be redeemed before the payment of simple-bond, that therefore, he had a charge on the mortgaged property for the amount of the simple-bond and that, therefore, possession ought not to be decreed to the plaintiff. To this suit, the purchaser of the other portion of the equity of redemption was also made a party-defendant. His contention was that he was entitled to redeem a proportionate part of the mortgaged property by paying up a portion of the mortgage-amount, which represented his share. He, also, sought to be made a co-plaintiff, to which the original plaintiff objected. *Held*, (1) the simple-bond was a clog or fetter on the equity of redemption and did not create any charge on the property. It cannot be enforced, since it places, in the way of the mortgagor, a bar to the exercise of his right of redemption (26 A. 559, *F.*) and (2) that, when the plaintiff paid into Court, the amount which, admittedly, was the full amount due under the mortgage, the effect of the payment was to satisfy the mortgage and discharge it fully. Thenceforth, there was no subsisting mortgage and nothing for the owner of the other portion of the equity of redemption to redeem. The plaintiff was, as owner of a portion of the

Transfer of Property Act (IV of 1882) —*continued.*

equity of redemption, entitled to redeem the whole mortgage. The other owner was not entitled to redeem a portion of the mortgage by paying a proportionate part of the mortgage-amount; nor was there any mortgage subsisting at the date he was made a party to the suit. Plaintiff was thus given a decree, as prayed for. RUGAD SINGH v. SAT NARAIN SINGH, **27 A. 178=A.W.N. 1904, 208=1 A.L J. 579.** [*R.*, 9 C.W.N. 789, 7 A.L.J. 185=32 A. 215=5 Ind. Cas. 269.]

(543)—*Ss.* 60, 92, 93—*Usufructuary mortgage of occupancy-holding—Previous suit for redemption decreed conditionally—Condition not complied with—Subsequent suit for redemption not barred.*—*Held*, that a person who had, before the coming into operation of the Agra Tenancy Act, made a usufructuary mortgage of an occupancy holding, is not debarred from maintaining a second suit for the redemption of it, by reason of a previous suit to recover possession of the same holding in which the decree which was passed was not complied with. GANPAT SINGH v. TOHFA, **10 A.L.J. 36=15 Ind. Cas. 15.**

(544)—*S.* 61—*Construction—Deed—Whether mortgage or charge—What s.* 61 *implies—Consolidation of mortgages—Simple mortgage—Essentials of.*—Where an instrument, contained the words "In default I shall on the security of the house site belonging to me.....pay and make good.....the principal and interest." *Held*, that the instrument created a mortgage. (20 B. 408, *F.*; 25 M. 108, 6 B.H.C.A.C. 90, 14 C. 687, 27 M. 28, 30 M. 178, 33 C. 985, 35 C. 837, 19 M. 249, 13 B. 96, *R.*) *Per White, C. J.*:—From s. 61, Transfer of Property Act, the inference is clear, that, where the property is the same, the subsequent mortgagee is entitled to insist on being redeemed. S. 61 also implies..as is shown by the illustration—that, if there are different mortgages in favour of one and the same person, not in respect of different properties, but the same property, the mortgagor cannot seek to redeem any one mortgage without redeeming the additional mortgages also. The same principle will be equally applicable to a mortgagee having several mortgages over the same property seeking to obtain an order for sale on one mortgage only. *Per Krishnaswami Aiyar, J.*:—*Obiter*—There is nothing opposed to any principle of law that there should be a charge created on the happening of a condition, where the condition itself is first stipulated and the condition happens afterwards. (14 C. 687, 3 A.L.J. 220, 12 M. 69, *R.*) A covenant to pay is an essential element of a simple mortgage. It is not necessary that there should be a formal transfer of any interest in property in words. (19 M. 249, *R.*) It is also not necessary to constitute a simple mortgage that the instrument should state that the mortgagee shall recover his money by sale of the mortgaged property. BALASUBRAMANIA NADAR v. SIVAGURU ASARI, **21 M.L.J. 562.** (20 B. 408, *R.*)

Transfer of Property Act (IV of 1882) —*continued.*

(545)—S. 61—*See* Nos. 535, 536, *supra*.

(545-*a*)—S. 62—*See* No. 537, *supra*.

(546)—*Ss.* 62 *and* 63—*Mortgage—Redemption—Limitation Act, sch.* II. *art.* 134—*Mortgage by mortgagee's donee purporting to be of a proprietary interest in the mortgaged property—Foreclosure.*—Under ordinary circumstances, a mortgagor cannot, before the time limited for payment to the mortgage expires, take proceedings to redeem the mortgage. (5 B. 22, 8 A. 95, *R.*) The widow of a usufructuary mortgagee in possession made a gift of the mortgaged property to A.H. The donee mortgaged part of the property, the subject of this gift, to P.N., purporting to mortgage the full proprietary interest in the property. P.N. took proceedings for foreclosure against A.H. as absolute owner and obtained foreclosure and possession of the property. *Held*, on the finding that P.N. acted *bona fide* and had no reason to suppose that A. H. was not, as he represented himself to be, the full owner of the property mortgaged, that P.N. was entitled, as against the representative of the original mortgagor, to the protection afforded by art. 134 of the second schedule to Act No. XV of 1877. HUSENI KHANAM v. ALI HUSAIN KHAN, **A.W N. 1907, 133=4 A.L J. 375=29 A. 471.** (25 M. 99, 23 B. 614, *D.*; 9 A. 97, 14 M.I.A. 1, 15 B. 583, 20 A. 482, 22 B. 225, 24 M. 471, 27 B. 373, *R.*)

(547)—Ss 62, 83—*See* CIV PRO. CODE, 1908, O. II, r. 2, 9 Bom. L.R. 958=31 B. 527.

(548)—*S.* 63 — *Accession — Acquisition of tenant's holding by usufructuary mortgagee.*—Where a usufructuary mortgagee of a share in a village having obtained a deed of conditional sale from an ordinary tenant got a decree for foreclosure of the holding and in execution obtained possession thereof, the acquisition of the holding by him was an accession to the usufructuary mortgage within the meaning of s. 63 of the Act. MOHANLALL v. CHAODHRY PULANDAR SINGH, **14 C.P.L.R. 169.** (10 B. H.C. 369, *Appl.*; 10 C.P.L.R. 103, *D.*)

(549)—*S.* 63—*Mortgage — Accessions—Jurisdiction of Civil Courts—Redemption—Decree—Ouster from property not affected by decree.*—Large extension into waste adjoining lands could not be regarded as accessions to mortgaged property. Where mortgagees have never been directly or constructively in possession of an additional area, the possession of this area by the mortgagees cannot be treated as possession on behalf of the mortgagors of the original area. When the Civil Courts have given a decree for redemption and the decree-holder under cover of that decree ousts a person in possession of land not affected by the decree, the Civil Courts have power to grant relief against trespass. In such a case no question arises which could properly be referred to a Revenue Court for decision. THA DUN v. THA ZAN, **11 Ind. Cas. 808.**

(550)—*S.* 63—*Right to accession of mortgaged property.*—In a suit for redemption, it was found

Transfer of Property Act (IV of 1882) —*continued.*

that the grove in question was planted during the time when the defendant was in possession as an usufructuary mortgagee, and that it was thus an accession to the mortgaged property. It was also found that separate possession and enjoyment of the grove without detriment to the principal property was not possible. It was further found that the planting of the grove was not necessary to preserve the property from destruction, forfeiture, or sale, and that the grove was not planted with the consent of the mortgagor. Consequently, under s. 63 of the Transfer of Property Act, the mortgagor was entitled to obtain delivery of possession of the accession made to the mortgaged property. ZUBEDA BIBI v. SHEO CHARAN, **22 A. 83 = A.W.N. 1899, 189.**

(551)—*S.* 63—*Accession to mortgaged property, mortgagor's right to, if depends on special advantage of mortgagee as such in acquiring the accession—Mortgagee also co-owner of the property—Acquisition by mortgagee of raiyati holdings in the property—Mortgagee's right, on redemption of mortgage.*—Where the plaintiff's share in a mehal was mortgaged to the co-proprietors of the mehal and the mortgagees, during the continuance of the mortgage, brought in some of the raiyati holdings of the mehal from the tenants and obtained possession thereof, separating the land purchased from those in possession of the tenants: *Held*—That, on redemption of the mortgage, the plaintiff was entitled to get *khas* possession of the lands to the extent of his share in the mehal on payment to the mortgagees of the proportionate share of the expenses incurred in acquiring them. *Per N. R. Chatterjea, J.*—The purchases were accessions to the mortgaged property within the meaning of s. 63 of the Transfer of Property Act. The mortgagee's right to the accessions to the mortgaged property under s. 63 of the Act does not depend upon whether the mortgagee had any special advantage by reason of his position as mortgagee in acquiring the accession. S. 63 of the Act applies to a case where the mortgagee holds the property both as co-proprietor and as mortgagee. RAM BIRCH NARAIN SINGH v. AMBIKA PRASAD SINGH, **17 C.W.N, 586.**

(552)—S. 63—*See* ESTOPPEL—ESTOPPEL BY JUDGMENT, 17 M. 17.

(553)—S. 63—*See* No. 546, *supra.*

(554)—*Ss.* 63, 72—*Mortgage—Redemption—Construction made by the mortgagee—Right to add expenses incurred thereon to amount secured by mortgage—Interest.*—Where a mortgagee in possession has expended money upon making additions to the mortgaged premises, he would be entitled, in a suit for redemption, to be repaid the expenses so incurred, if the additions made are 'accessions' within the meaning of s. 63 of the Transfer of Property Act, or are necessary for the preservation of the property, or are lasting improvements reasonably made for the benefit of the property which added to the selling value. *Held*, also, that a mortgagee is entitled, in the absence of any contract to the contrary, to interest on the amount spent by

Transfer of Property Act (IV of 1882) —*continued.*

him on repairs for the preservation of the mortgaged premises and also on the rates and cesses paid by him therefor. RAHMATULLAH BEG v. YUSUF ALI, **10 A.L.J. 124.**

(555)—*S.* 65—*Mortgagee knowing all circumstances of mortgage—Implication of contract.*—The contract which was said to have been broken in this case was a contract to be implied by reasonof s. 65 (*a*) of the Transfer of Property Act. The contract in question was only to be inferred in the absence of a contract to the contrary. It was found however that the appellant (mortgagee) knew all the circumstances when he took his mortgage. *Held*, it was reasonable to infer that there was an understanding between the parties that the mortgagor did not contract in the terms of s. 65. PARASURAMA PATTAR'S SON KRISHNAN v. KUNHUNNI, **4 M.L.T. 437.**

(556)—*S.* 65—*Purchase from mortgagor—Duty to pay revenue—Land Revenue sale—Fraudulent purchase—Burma Land and Revenue Act* (II *of* 1876), *ss.* 37, 44, *r.* 80.—The implied covenant under s. 65 of the Transfer of Property Act, for the mortgagor to pay land revenue extends to the purchaser of a property subject to a mortgage. Where such purchaser has failed to pay revenue and the land has been sold for default and purchased by him free of mortgage, the property is not freed from the mortgage but continues to be subject to it, as the omission to pay revenue is in fraud of the mortgagee VEERAPPA CHETTY v. KANNAPPA CHETTY, **17 Ind. Cas. 878.**

(557)—S. 65—*See* HINDU LAW—WIDOW, A.W.N. 1899, 95.

(558)—*S.* 65 (*c*)—*Mortgagor in possession—Duty to pay public revenue—Sale of mortgaged property for arrears of revenue—Purchase by mortgagor from purchaser at revenue sale—Extinction of mortgage.*—A mortgagor in possession having committed default in payment of public revenue the mortgaged property was sold by the revenue authorities. Subsequently, the purchaser at the revenue sale sold it to the mortgagor's heir. The latter mortgaged it to plaintiff, who instituted the present suit for sale. The assignee of the first mortgage claimed to have priority over the plaintiff's mortgage. *Held*, that it was the duty of the mortgagor to pay the public revenue accruing due on the mortgaged property, which continued to be in his possession. The fact that the mortgagor's heir derived his title to the property from the purchaser at the revenue sale did not make any difference as between himself and the mortgagee. He could not be allowed to take advantage of his father's wrong and plead for his own benefit that by reason of such wrong there had been a statutory extinction of the first mortgagee's security. Consequently, plaintiff was entitled to a decree as a puisne mortgagee only, and the first mortgagee continued to have the rights of a prior mortgagee. SANAGAPALLI LAKSHMAYYA v. INTOORI BOLLA REDDY, **26 M. 385.** (10 M.I.A. 540, *F.*)

Transfer of Property Act (IV of 1882) —*continued.*

(559)—*S.* 65, *sub-s.* 5, *cl.* (*b*)—*Sale of a mortgage-decree free from incumbrance—Vendor entitled to retain money sufficient to pay off claims outstanding against decree.*—Where a mortgage decree is sold free from incumbrances, the purchaser will be entitled, upon a principle analogous to that embodied in this section, to retain out of the purchase-money a sum sufficient to pay off any claim outstanding against the decree. KHETSIDAS AGARWALA v. SHIB NARAYAN MURDA, **9 C.W.N. 178**

(560)—*Ss.* 65,68—*Hypothecation bond—Covenant to pay—Personal remedy*—A stipulation in a hypothecation bond that the debtor will pay to the obligee every day the sale proceeds of firewood, and that the latter should retain in his hands out of the amount so paid 2 per cent. commission and Rs. 100 towards the debt, repaying the balance to the obligor, and in default of such payment the obligee is to collect the money due from the hypothecated property, does not contain such a covenant to pay as would give the obligee a personal remedy against the obligor. But where the obligor had previously mortgaged the same properties to a third party, s. 65 of the Transfer of Property Act would imply a covenant on the part of the mortgagor to pay off the mortgage when it became due, and under s. 68 of the same Act the mortgagor would become personally liable to the obligee under the hypothecation bond, if he allowed the first mortgagee to bring the mortgaged property to sale. SINGJEE v. TIRUVENGADUM, **13 M. 192.** [*R.*, 4 C.L.J. 246.]

(561)—*Ss.* 65, 68 (*b*)—*Usufructuary mortgage—Right to sue for mortgage-money—Mortgagee deprived of security in consequence of "wrongful default" of mortgagor.*—A breach of any of the obligations imposed on the mortgagor by s. 65 of the Act amounts to a "wrongful default" within the meaning of cl. (*b*) of s. 68 and entitles the mortgagee to sue for the recovery of his money. Therefore, where the mortgagor fails to disclose the existence of a prior encumbrance, cl. (*b*) of s. 68 applies. BHOLA NATH JANA v. HARA MOHAN JANA, **7 Ind. Cas. 251.**

(562)—*Ss.* 65, 86, 88, 99, *Transfer of Property Act* (1882), *objects of.*—The objects of ss. 65, 86, 88 and 99 of the Transfer of Property Act are to prevent mortgagees, from realising their securities, except in the way prescribed by the Act and unless the action in which it is sought to realise the security is one in which the procedure followed is that prescribed by the Act, it is within the provisions of s. 99, and that the mortgaged property cannot be sold in it. On an application by the assignee of the decree-holder for the attachment and sale of one of the mortgaged properties in execution of a decree obtained (not in accordance with the Transfer of Property Act) in a suit brought after the Transfer of Property Act came into operation, *held*, that the mortgaged property cannot be brought to sale, unless proceedings under s. 67 of the Act be taken, and the

Transfer of Property Act (IV of 1882) —*continued.*

procedure prescribed by the Act is followed. CHUNDRA NATH DEY v. BURRODA SHOONDURY GHOSE, **22 C. 813.** [*F.*, 22 C. 903; *R.*, 22 M. 372, 22 A. 401=A.W.N. 1900, 131, 35 C. 61=11 C.W.N. 1011=6 C.L.J. 320, F.B., 31 M. 33=3 M L.T. 107=17 M.L J. 503; *D.*, 24 C. 473, 25 C. 580, 26 C. 166, 27 A. 450=2 A.L.J. 121=A.W.N. 1905, 42, 4 C.L.J. 533.]

(563)—*Ss.* 65, 90—*Implied covenants binding mortgagor—Suit by puisne mortgagee for sale after redeeming prior mortgages — Personal decree for what amount.*—A puisne mortgagee who, having got a decree for sale after redeeming prior incumbrances, redeemed them by paying their amount, is entitled, on the sale proceeds being found insufficient to cover even the amount paid for prior incumbrances, to a decree under s. 90 for not only the amount due under his own mortgage but also the deficit in respect of the prior incumbrances. Under s. 65 of the T. P. Act, the mortgagor is bound to pay prior incumbrances and this is a covenant which the puisne mortgagee is entitled to enforce. ALI JAN v. MARIAM BIBI, **26 A. 93 =A.W.N. 1903, 202.**

(564)—*S.* 66—*Mortgage—Mortgagor's right to impose easement on mortgaged property—Easements Act* (V *of* 1882), *s.* 10.—Where the mortgagor of a house with a well in its compound made an express grant of the user of the well to the vendee of the adjoining house sold by him after the mortgage, and the mortgagee having purchased the mortgaged property in execution of his mortgage-decree, objected to the use of the well by the occupants of the adjoining house. *Held*, that to establish the validity of the grant it was for the mortgagor or his successor in interest to prove affirmatively that the imposition on the mortgaged property of the easement of taking water from the well did not, in point of fact, render the security insufficient, or, in other words, that even after the imposition of that easement the value of the mortgaged property, house and well exceeded by one-half the amount due on the mortgage. The principles of law embodied in s. 66 of the Transfer of Property Act and s. 10 of the Easements Act being in consonance with the principles of equity, good conscience and justice should be adopted by Courts in the Punjab when giving a decision on matters which are dealt with by these sections, though these Acts are not in force in the Punjab. MUSSAMMAT BHAGWAN DEI v. THE SECRETARY OF STATE, **124 P. L.R. 1902.**

(565)—*S.* 66—*Destruction of mortgaged property—Demand for additional security—Reasonable time—Limitation.*—Where the mortgaged property was wholly submerged, and the mortgagee, after demanding additional security to which the mortgagor paid no heed, waited for more than six years to bring his suit for the recovery of the mortgage money, *held* that the delay, under the circumstances, was not reasonable, and the suit was time-barred. *Semble*:

Transfer of Property Act (IV of 1882) —*continued.*

A period of six months would be a liberal allowance, in a case like the present, to enable the mortgagors to comply with the requests of the plaintiff. BHAWANI SINGH v. JANG BAHADUR SINGH, **7 A.L.J. 391=6 Ind. Cas. 569.**

(566)—*S.* 66—*Mortgage, simple — Lease by simple mortgagee after decree enforcing mortgage--No covenant against alienation—Lease not an act injurious to security.*—Where a simple mortgagor, after the passing of a decree for enforcement of a mortgage, made a lease of the mortgaged property for a term of years,—*held* that the granting of the lease was not, in the absence of any covenant against alienation, an act destructive of or permanently injurious to the security within the meaning of s. 66 of the Transfer of Property Act (IV of 1882), that section contemplating some substantial waste by the mortgagor. RAM LAL v. MUHAMMUD IRSHAD ALI, **A.W.N. 1890, 59.** (1 A. 126, *D.*; 6 C. 217, *R.*)

(567)—*S.* 67—*Mortgage—Suit by one co-mortgagee to recover his proportionate share of the mortgage-debt.*—Unless the interests of the mortgagees have been severed with the consent of the mortgagor one of two joint mortgagees cannot maintain a suit to recover his share only of the mortgage-debt, whether the suit be brought in respect of the whole or of only a proportionate part of the mortgaged property; nor can such a co-mortgagee cure the defect in his suit by joining the other co-mortgagee as a defendant. His proper course is to sue in respect of the whole property mortgaged and for the whole mortgage-debt, and then if his co-mortgagee refuses to join as a plaintiff to apply to the Court to have him brought on to the record as a defendant. GOBIND RAM v. SUNDAR SINGH, **A.W.N. 1892, 246.**

(568)—*S.* 67—*Usufructuary mortgage—The mortgage money payable after a given number of years—Order for sale.*—On the 26th of October, 1893, the defendant executed in favour of plaintiff a usufructuary mortgage, which provided that the money borrowed was repayable in two years from its date. In 1907, the plaintiff sued to recover the mortgage debt by sale of the mortgaged property. The lower Courts held that, as the mortgage was usufructuary, no order for sale could be passed. *Held*, that the mortgage was not a purely usufructuary mortgage, but was one in which the mortgage money had become payable by the mortgagor, and, therefore, in the absence of a contract to the contrary, the mortgagee had the right, under s. 67 of the Transfer of Property Act, 1882, to an order that the property be sold. DATRAMBHAT RAMBHAT v. KRISHNABHAT GOVINDBHAT, **12 Bom. L.R. 491=34 B. 462=7 Ind. Cas. 446.** (7 B. 425, 10 Bom. L.R. 615, *Expl.*)

(569)—*S.* 67—*Mortgage—Sale under decree of equity of redemption—Rights of purchaser, when decree became final.*—Although the sale of an equity of redemption is not recognised by the Transfer of Property Act, yet, where a Court entertained a suit for such relief under s. 67 of the Transfer of Property Act, passed a decree, and sold in execution the equity of redemption, and there was no appeal against the decree; *held* that the decree for sale must be treated as valid and binding on the parties to the suit, and the subsequent suit by the judgment-debtor for recovery of the property was held to be not maintainable. PARMANAND v. DAULAT RAM, **24 A. 549=A.W.N. 1902, 162.** (13 A. 432, 18 A. 325, *R.*) [*D.*, 157 P.L.R. 1905=2 P.R. 1907]

(570)—*S.* 67—*Representative of mortgagor entitled to remain in possession until sued.*—The representative of a mortgagor, in possession under a simple mortgage, is entitled, as such, to remain in possession, until a regular suit has been brought against him under s. 67, Transfer of Property Act. KAISARI MAL v. MUSST. ALLAHDI BEGAM, **1 Ind. Cas. 227.**

(571)—*S.* 67—*Mortgagee giving up mortgage lien—Money decree—Execution against mortgaged property.*—A mortgagee is entitled to give up his mortgage lien and to bring a suit only for a money decree; but in that case he cannot proceed against the mortgaged property without complying with the provisions of s. 67, T. P. Act. RAM KESHAB DEB v. SONATUN PAL, **2 C.W.N. 320.**

(572)—*S.* 67 — *Mortgage usufructuary — No covenant in contract to repay—Mortgagee not entitled to sue for foreclosure or for sale.*—In the case of a pure usufructuary mortgage, the mortgagee, under s. 67, T.P. Act, is not entitled to a decree for foreclosure or for sale, unless there is in the contract anything implying the right to repay the principal money. LUCHMESHAR SINGH v. DOOKH MOCHAN JHA, **24 C. 677.** (11 A. 367, 12 M. 109, 14 M. 232, *R.*; 11 M. 88, *Not F.*) [*R.*, 10 O.C. 14, 4 L.B.R. 222; *D.*, 11 C.W.N. 240 N=6 C.L.J. 143.]

(573)—S. 67—*See* MAHOMEDAN LAW—DOWER, 23 A. 432=A.W.N. 1901, 124.

(574)—S. 67—*See* RELINQUISHMENT OF PORTION OF CLAIM, 21 B. 267.

(575)—S. 67—*See* RES-JUDICATA—RES JUDICATA IN EXECUTION PROCEEDINGS, 25 C. 262.

(576)—*S.* 67 (*a*) — *Usufructuary mortgagee, rights of.*—Cl. (*a*) of the section should not be construed to imply that a usufructuary mortgagee may sue either for sale or for foreclosure; on the other hand, the proper interpretation is that he cannot sue for either remedy, whilst the mortgagor may either redeem or allow his right of redemption to become barred by limitation. CHATHU v. KUNJAN, **1 M. 109.** [*F.*, 24 C. 677, 4 L.B.R. 222; *R.*, 14 M. 284, 14 M. 232, A.W.N. 1892, 66, 5 O.C. 286.]

(577)—*S.* 67 (*a*)—*Usufructuary mortgage—Non-payment of mortgage-money—Suit for foreclosure or sale not maintainable—Procedure*

Transfer of Property Act (IV of 1882) —*continued.*

as to enforcement of mortgages executed prior to Transfer of Property Act. — A usufructuary mortgagee cannot, whilst his possession remains undisturbed, claim either foreclosure or sale. (6 A. 298, N.W.P., 1859, 13, N.W.P. 1873. 128, N.W.P. 1875, 55. 11 M. 88.) [*F.*, 24 C. 677; *R.*, 12 A.WN. 66, 4 L B.R 222.] Although a mortgage may be anterior to the passing of the Act, yet when a person comes into Court and claims remedy under a mortgage, the new procedure of the enactment would apply. UMDA v. UMRAO BEGAM, **11 A. 267 = A.W.N. 1889, 140.** (6 A 262, 12 C. 583, *F.*)

(578)—S. 67 (*a*)—*See* LIMITATION ACT, 1908, art. 147, 20 C. 269.

(579)—*S.* 67 *(d)—Transfer by one of several joint mortgagees of his interest—Severance of interest.*—Where one of several joint mortgagees sold to the plaintiff his interest in $\frac{1}{8}$ of the mortgage money, and the plaintiff brought the suit for recovery of the $\frac{1}{8}$th share, and made the other mortgagees and mortgagor defendants, *held* that this was not a case in which the mortgagees had severed their interests in the mortgage, within the meaning of s. 67, sub-s. (*d*) of the Transfer of Property Act, and that consequently the plaintiff could not maintain his action. LALJU v. JANGI LAL, **A.W.N 1887, 233.**

(580)—S. 67—*See* Nos. 46, 47, 48, 121, 220, 327, 436, 461, 468, 469, 470, 471, 472, *supra*, and Nos. 746, 967, *infra.*

(581)—*Ss.* 67, 68—*Usufructuary mortgage—Dispossession—Remedy.*—When a usufructuary mortgagee is dispossessed by the purchaser in execution of a decree obtained by a prior usufructuary mortgagee, the proper remedy of the dispossessed mortgagee is to sue to set aside the sale, as a usufructuary mortgagee has no right to bring the mortgaged property to sale. If he is content with taking a money decree, he cannot bring the properties to sale in execution. SAMAYYA v. NAGALINGAM, **15 M. 174.** [*R.*, 21 M. 476, F.B.; *D.*, 26 B. 241 = 3 Bom. L. R. 876.]

(582)—*Ss.* 67 (*a*), 68 (*a*)—*Usufructuary mortgagee's right to sue for sale—Covenant to pay.*—A mortgagee under a usufructuary mortgage, which also contains a personal covenant by the mortgagor to pay, is entitled to bring a suit to recover the money personally from the mortgagor and also by sale of the mortgaged property. SIVAKAMI AMMAL v. GOPALA SAVUNDRAM AYYAN, **17 M. 131 = 4 M.L.J. 50.** [*Diss.*, 28 A. 157 = A.W.N. 1905, 226; *F.*, 19 M. 411; *Appr.*, 21 A. 4.]

(583)—*Ss.* 67, 68, 88, 98—*Usufructuary mortgage—Right of mortgagee—Suit on foot of usufructuary and simple mortgage—Form of decree.*—A deed of usufructuary mortgage, which reserves to the mortgagor the right to redeem upon payment of the mortgage money either before or after the stipulated term, and which provides that, in the event of dispossession, the mortgagee may bring a suit and realize the mortgage-debt with interest from the mortgagor and his property, does not entitle the mortgagee to a decree under s. 88, Act IV of 1882. When a suit is instituted on foot of a prior usufructuary and a subsequent simple mortgage, the mortgagee-plaintiff is entitled to a simple money decree for the amount due upon the first mortgage and a decree for sale upon the second mortgage. AZIMDAD KHAN v. GHANSAM DAS, **1 A.L.J. 20.**

(584)—*Ss.* 67, 85—*Prior mortgagee's suit for foreclosure without impleading subsequent mortgagee—Right of subsequent mortgagee to redeem, extent of.*—When mortgaged property is brought to sale under a decree upon a first mortgage, the purchaser takes it free from all subsequent incumbrances, but a subsequent mortgaged, if he was not a party to the suit in which the decree was obtained, is still, as he was before, entitled to redeem the property if he so wishes, and the fact that a first mortgagee claims to foreclose and obtains a foreclosure decree ought not, in principle, to put a subsequent mortgagee who was not a party to the suit, or the purchaser under a sale under a decree upon the subsequent mortgage, in a worse position than he would have been had the first mortgagee obtained a decree for sale instead of foreclosure. It is not open to the subsequent mortgagee, however, to insist on the prior mortgagee's redeeming the subsequent mortgage, the latter being entitled to get possession from the former unless he should have redeemed the prior mortgage. BALDEO SINGH v. JAGGU RAM, **23 A. 1 = A.W.N. 1900, 178.** (5 M. 184, 17 M. 17, 8 B. 168, 20 B. 390, 10 B. 224, *R.*) [*R.*, 15 C.P.L.R. 188, 28 B. 153.]

(585)—Ss. 67, 86, 89—*See* DECREE—DECREE, FORM OF, 11 M. 88.

(586)—Ss. 67, 87—*See* LIMITATION ACT, 1908, arts. 144, 147, 16 M. 64 = 2 M.L.J. 155.

(587)—*Ss.* 67, 88, 89, 99—*Mortgage—Decree for sale of mortgaged property.*—Against an application for execution of a decree for the sale of mortgaged property under a decree made in a suit instituted after the Transfer of Property Act came into force, it was contended that under the provisions of s. 99 of the Act, the mortgagee was not entitled to bring the property to sale otherwise than by instituting a suit under s. 67 of the Act, and that, as the requirements of ss. 88 and 89 had not been satisfied in the suit, it cannot be considered as a suit under s. 67. *Held* that the contention was invalid. When the mortgagee instituted the suit, the Tr. P. Act was in force; it was the only law under which the suit could be instituted and dealt with, and it must be assumed that it was instituted under s. 67 of that Act, and that the decree for sale was made under that Act. Therefore the requirements of s. 99 had been complied with. If there has been any informality or irregularity in the proceedings in the suit, and they have not been in conformity with the provisions of the Act, a ground for appeal from the decree may have

Transfer of Property Act (IV of 1882) —*continued.*

been afforded ; but the suit must be regarded notwithstanding, to be a suit instituted under s. 67 of the Act. BHARAT SINGH v. GORAKH MAL, **A.W.N. 1884, 183.**

(588)—*Ss.* 67, 88, 99—*Suit by mortgagee to recover money paid to discharge Government Revenue due on mortgage property—No provision in decree for sale of mortgage property—Construction.*—The mortgagee of a palayam sued to recover moneys paid by him for the discharge of Government revenue assessed on the palayam. The decree that was passed in the suit was not expressed in the language prescribed by s. 88 of the Transfer of Property Act, though the plaintiff had acquired, under s. 35 of Act II of 1864, a charge on the palayam for moneys paid by him. The decree, however, conferred on the plaintiff a right to proceed against the estate also. In execution, the defendant contended that the decree was merely a decree for money and not a decree for sale. *Held* that the decree was in substance a decree for sale, as the words "the plaintiff do recover the amount sued for by means of his (defendant's) estate," when taken with the plaint, could not have been intended to mean any thing else. The decree in effect directed a sale of the palayam. SYED MEER HUSSAIN v. SUBBARAMAPPA, **5 M.L.J. 230.**

(589)—*Ss.* 67, 90—*Irregularities in execution sale, waiver of—Waiver, how made—What was waived, how inferred—Abandonment of legal objection by pleadings—Estoppel.*—When, in an execution-proceeding, a point of law was decided by a Court against a party and the decision on the point was not challenged on appeal, the decision is binding upon the party against whom it was made and the same question cannot be re-opened in a subsequent proceeding. (8 C. 51, 8 I.A. 123, P.C., *Rel. on.*) In order to determine whether the judgment-debtor waived all irregularities in the service of the previous sale proclamation, as also the issue of a fresh sale proclamation, the Court must look not merely to the petition of the judgment-debtor waiving such irregularities but to the whole proceeding in the case and particularly to the order made by the Court upon that petition. When, in a petition for postponement of sale, the judgment-debtor said that, if the sale be stayed as prayed, he would raise no objection on the ground of irregularities in the publication of the sale proclamation and the Court granted the adjournment as prayed for, on condition of the judgment-debtor paying Rs. 200 as compensation to the decree-holder and directed that the sale should take place on the adjourned date without fresh sale proclamation, and the judgment-debtor accepted these additional terms imposed upon him by the Court. *Held*, by the express terms of the petition, the judgment-debtor waived all irregularities in the publications of the sale proclamations already issued and from the fact that he raised no objection to the order passed, it must be inferred that he waived the issue of a fresh sale proclamation. The judgment-debtor could not now impugn the validity of the sale on the ground that the sale proclamation was not served in proper time and in due manner according to the provisions of the law. RAJA THAKUR BARHAM v. ANANTA RAM MARWARI, **2 C L J. 584.** (3 I.A. 230=26 W.R. 44, P.C., 25 W.R. 34, *Rel. on* ; 6 C.W.N. 42, 17 M. 304 ; *D.*, 2 C.L.J. 589, Note, *R.*) [*Commented on*, 6 C.L.J. 62=11 C.W.N 848 ; *R.*, 6 C.L.J. 62=11 C.W.N. 848 ; *D.*, 6 C.L.J. 62=11 C.W.N. 848.]

Transfer of Property Act (IV of 1882) —*continued.*

(590)—*Ss.* 67, 96, 97—*Mortgagee holding usufructuary and simple mortgages—Suit for sale on latter free of former—Presentation of appeal—Limitation--Signature in Vakalat.*--A mortgagee who holds an earlier usufructuary mortgage and a later simple mortgage over the same property by the same mortgagor cannot sue for sale on the simple mortgage subject to or free of the usufructuary mortgage, requiring the sale proceeds to be applied in discharge of both mortgages. He can, if he wishes, abandon his claim under the usufructuary mortgage and sue only on the other. (13 A. 432, F.B., *F.*; 20 A. 322, *R.*) [*Diss.*, 30 M. 408=17 M.L.J. 403=2 M.L.T. 346; *D.*, 4 A.L.J. 765=A.W.N. 1907, 286.] Where a signature in the Vakalat by the party appellant was not made within the period prescribed by law, the Court regarded the appeal as properly presented on a finding that the appellant had, as a matter of fact, appointed the pleader to file it on her behalf. BHAGWAN DAS v. BHAWANI, **26 A. 14=A.W.N. 1903, 177.**

(591)—*Ss.* 67 *and* 99—*Decree creating charge for maintenance—Enforcement how effected.*—When a charge is created in a decree for maintenance, the enforcement of the same can only be effected by instituting a suit under s. 67, Transfer of Property Act. MATANGINI DASSEE v. CHOONEYMONEY DASSEE, **22 C. 903.** (22 C. 859, *F.*; 19 C. 139, F.B , *D.*) [*R.*, 35 C. 61, F.B.=6 C.L.J. 320=11 C.W.N. 1011.]

(592)—*Ss.* 67, 99—*Decree for rent obtained by usufructuary mortgagee against mortgagor—Sale in execution of decree—Necessity of suit under s.* 67.—Where, after the execution of a usufructuary mortgage, the mortgagor executed agreements to pay rent to the mortgagee for the houses mortgaged, but failed to pay the same, and the mortgagee thereon obtained a decree against him for the recovery of the rent fallen due and proceeded to attach the houses and bring them to sale in execution of the decree it was *held* that, under the provisions of s. 99 of the Transfer of Property Act, the property could not be brought to sale except after a suit instituted under s. 67 of the Act, which must be one for sale or for foreclosure as under the mortgage deed, and in form 109 of sch. IV of the Civ. Pro. Code, 1882. AZIM-ULLAH v. NAJU-UN-NISSA, **16 A.415=A.W.N. 1894, 140.** [*F.*, 17 A. 520, 26 A. 223=A.W.N. 1904, 2, 7 O. C. 315 ; *R.*, 10 C.P.L.R. 21, 12 C.P.L.R. 26, 35 C. 61=11 C.W.N. 1011=6 C. L. J. 320; *D.*, 22 C. 859, 29 M. 424=16 M.L.J. 285.]

Transfer of Property Act (IV of 1882) —*continued.*

(593)—*Ss.* 67 *and* 99 — *Mortgagee holding money claim against mortgagor — Right of mortgogee to sue for sale of mortgaged property in satisfaction of such claim.*—The object of s. 99 is to enable a mortgagee who has a money claim on the mortgagor to bring the mortgaged property to sale in such a manner as to secure that all encumbrances shall be brought before the Court and that what shall be sold shall be not the equity of redemption, but the property itself free from all encumbrances. The most reasonable interpretation to be placed on the provision that a mortgagee should sue under s. 67 is that a suit shall be instituted under it so far as it is applicable. So when a mortgagee has obtained a money decree on the mortgagor and has attached in execution the mortgaged property he is entitled to bring a suit under s. 67 for sale of the property in satisfaction of the money decree. SALIGRAM PATERIA v. MURLIDHUR PATERIA, **10 C. P.L.R. 21.** (16 A. 415, 21 C. 34, *R.*) [*R.*, 12 C.P.L R. 26 ; *F.*, 6 N.L.R. 20.]

(594)—*Ss.* 67, 99—*Mortgage of tenure to landlord—Sale of equity of redemption under rent-decree.*—A landlord taking a mortgage of the holding of a tenant, is debarred under s. 99 of the Transfer of Property Act, from bringing the tenure to sale, in execution of his rent-decree, otherwise than by instituting a suit under s. 67 of that Act. RAI RAMANI DASI v. SURENDRA NATH DUTT, **1 C.W.N. 80.** [*R.*, 35 C. 61, F.B.=11 C.W.N. 1011=6 C.L.J. 320.]

(595)—*Ss.* 67, 99— *Civ. Pro. Code*, 1882, *s.* 43—*Purchaser—Mortgagee.*—B. S. executed a simple mortgage of certain immoveable property to B.P. The mortgagee obtained a decree on his mortgage. After this, a share of the mortgaged property was sold in execution of a simple money-decree against B.S. and was purchased by G. D sued to enforce his right of pre-emption in respect of this share and obtained a decree for the share. Then B.P. brought the same share to sale in execution of his mortgage-decree. D, in order to save that share from the sale, paid B.P. the decree amount. D then brought a suit for contribution against B S. and got a simple money decree against him. D proceeded to execute this decree against B.S.'s share of the property but was resisted by J, a mortgagee of that share, who had instituted a suit on his mortgage. D thereafter brought the present suit against J and others for sale of the share in satisfaction of the amount of his decree, claiming that he had a charge on the property by his having satisfied B P.'s decree. *Held* that the suit was barred by s. 43, Civ. Pro. Code, as D had omitted to claim the enforcement of the charge in the suit proviously brought by him against B.S. for contribution, and that D was only a purchaser who, in order to protect his own property, had paid money due by another person, that he was in no sense of the word a mortgagee, and that he could not claim the benefit of s. 99, Transfer of Property Act. JAILAL v. DHAUKAL SINGH, **A.W.N. 1887, 249.**

Transfer of Property Act (IV of 1882) —*continued.*

(596)—*Ss.* 67, 99— *Mortgagee relinquishing mortgage-lien and obtaining simple money decree cannot attach the mortgaged property.*—A mortgagee, who disclaims all interest under the mortgage and obtains a simple money-decree upon the personal covenant to pay, cannot attach and sell the mortgaged property except by a suit under the provisions of s. 67 of the Act. The relinquishment of the mortgage-lien does not prevent the property from being mortgaged property, and the mortgagor cannot be deprived of the rights conferred upon him of redemption and time for payment. MADHO PRASAD SINGH v. BAIJ NATH TEWARI, **2 A.L.J. 856=A.W.N. 1905, 152.** (2 A.L.J. 71, *R.*) [*R.*, 2 A.L J. 479=A.W.N. 1905, 189, 6 C.L.J. 320=10 C.W.N. 1011=35 C. 61, 30 A. 146=A.W.N. 1908, 49=5 A.L.J. 121, A.W.N. 1908, 265=5 A.L.J. 732.]

(597)—*Ss.* 67, 99,—*C.P.C., Act* XIV *of* 1882, *s.* 43—*Sale in execution of money decree set aside —Suit on mortgage, if barred.*—Where a sale of property in execution of a simple money decree obtained on the basis of a mortgage over the same was set aside as being void under s. 99 of the T P. Act, and the mortgagee then brought a suit on the mortgage, *held*, that the suit was not barred by s. 43 of the C.P.C. BHOLA NATH v. MUHAMMAD SADIQ, **26 A. 223.** (16 A. 415, 25 B. 161, *R.*) [*D.*, 31 A. 19=1 Ind. Cas. 561 ; 5 A.L.J. 732=A.W.N. 1908, 265.]

(598)—*Ss.* 67, 99—*Enforcement of mortgage by sale or otherwise—Whether allowable otherwise than under s.* 67.—*Held*, that, under s. 99 of the Transfer of Property Act, a person is not entitled to enforce his mortgage and to bring the land which he has attached to sale otherwise than by instituting a suit for sale under s. 67 of the Act. VEERA PANNADI v. KARUPPA PANNADI, **6 M.L.T. 154=2 Ind. Cas. 980.**

(599)—*Ss.* 67 *and* 99—*Suit by mortgagee for sale of equity of redemption of mortgaged property for amount due under simple money decree—Mortgage* —In March 1893 the defendant mortgaged certain immoveable property to the plaintiff for one lac of rupees. In March 1896 the defendant executed a simple money-bond for Rs. 22,000 in favour of the plaintiff on which he sued in 1898 and obtained a money-decree for Rs. 23,385. In September 1902 in execution of this decree he caused the mortgaged property to be attached. On the strength of this attachment the plaintiff brought a suit in which he claimed a decree for recovery of the amount due under the decree by sale of the mortgaged property, *i.e.*, the remaining rights of the mortgagor. *Held*, that having regard to the provisions of s. 99 of the Transfer of Property Act, the plaintiff's suit was not maintainable. The result of the enactment in s. 99 is that a mortgagee who has attached the mortgaged property in execution of a decree for the satisfaction of a claim arising under the mortgage, *e g.*, a claim for interest, may, notwithstanding s. 43 of the Code of Civil Procedure, include that claim in any suit that he may be able to bring under s. 67 of the Act and that a

Transfer of Property Act (IV of 1882) —*continued.*

mortgagee who has attached the mortgaged property in execution of a decree for the satisfaction of a claim not arising under the mortgage must first sue on his mortgage under s. 67, if his mortgage admits of such a suit, so that the mortgagor may exercise his right of redemption. Then if such a suit is brought and the mortgagor or any other person redeems the mortgage it ceases to stand in the way of the execution of the money decree and the erstwhile mortgagee may if necessary proceed to enforce his attachment by sale of the property : if on the other hand the mortgage is not redeemed then the property is put up for sale and the creditor may if necessary enforce his claim under the attachment against the surplus proceeds if any or if only a portion of the mortgage property has been sold against the portion remaining unsold. BABU LAL SAHU v. RAM PERSHAD, **7 O. C. 314.**

(600)—*Ss.* 67 *and* 99—*Sale of mortgaged property otherwise than under s.* 67—*Void or voidable—Remedy by application or suit—Jurisdiction—Right of redemption—Civ. Pro. Code, s.* 244—*Sale, confirmation of. Held* (by the Full Bench), that a sale held in contravention of the provisions of s. 99 of the Transfer of Property Act is not a nullity, but an irregular and voidable sale. Such a sale can be avoided by an application under s. 244, Civ. Pro. Code, before or after confirmation of the sale, on the ground that the provisions of s. 99 of the Transfer of Property Act have been contravened; but, if the application is made after confirmation, the applicant has to prove further that, owing to fraud or other reasons, he was kept in ignorance of the sale proceedings and the proceedings preliminary to sale. ASHUTOSH SIKDAR v. BEHARI LAL KIRTUNIA, **11 C. W. N. 1011, F.B.=6 C L J. 320=35 C. 61.** [*F.*, 7 C.L.J. 658=12 C.W.N. 145.]

(601)—*Ss.* 67, 99—*Enforcement of other claim against mortgaged property by suit under s.* 67. The claim of the plaintiff, under a money decree, which he sought by this suit to enforce, was one which arose independently of a usufructuary mortgage held by him and in respect of which he had attached the interest of the mortgagor. *Held*, that a suit, under s. 67, was the course to be adopted, while there was a subsisting attachment of the mortgagor's interest entitling the plaintiff to sue thereunder and having regard to the object of s. 99, the decree to be made in such a suit should not be merely for the sale of the equity of redemption, but should be for the sale of the property free from the mortgage-claim of the plaintiff, and the sale proceeds should be applied in the first instance, to the discharge of the mortgages on the property in the order of their priority, and the surplus, if any, towards the satisfaction of the plaintiff's claim under the attachment, so far as may be necessary. GOVINDA BHATTA v. NARAINA BAHTTA, **16 M L J 285=29 M 424.** [*Appl.*, 17 M.L.J. 403=30 M. 409; *R.*, 6 C.L.J. 320=11 C.W.N. 1011=35 C. 61.]

Transfer of Property Act (IV of 1882) —*continued.*

(602)—*Ss.* 67 *and* 99—*Money decree in favour of mortgagee—Transferee of money decree—Sale of mortgage property—Ss.* 232 *and* 233 *of the Civ. Pro. Code—Attachment of mortgage property for money decree.*—A transferee of money-decree obtained by a mortgagee is prohibited from selling the mortgaged property in execution of such decree, as the transferee, by virtue of ss. 232 and 233 of the Civ. Pro. Code, takes the decree subject to the conditions prescribed in s. 99 of the Transfer of Property Act. The fact that it is not open to the transferee to institute a suit, under s. 67 of the Act, as he is not the mortgagee, does not relieve him from the condition of not bringing it to sale otherwise than under s. 67 of the Act. (27 A. 450, *Diss.*; 9 Bom. L. R. 728, *Appr.*; 22 C. 813, *R.*) There is nothing in s. 99 of the Act to prohibit the attachment of mortgaged property. JEEVARATHNAM MOODALIAR v. SRINIVASA MOODELIAR, **17 M L.J. 503=3 M.L.T. 107=31 M. 33.** [*F.*, 11 O.C. 231.]

(603)—Ss. 67, 99—*See* CIV. PRO. CODE, 1908, O. XLI, r. 5, 30 C. 1060=7 C.W.N. 914.

(604)—Ss. 67 and 99—*See* RES JUDICATA—RES JUDICATA IN EXECUTION PROCEEDINGS, A.W.N. 1894, 16.

(605)—*Ss.* 67, 99, 100, *Act* IV *of* 1882 *(Transfer of Property)—Consent decree ordering money to be paid by instalments and creating charge on proverty—Property not liable to be sold in execution of decree—Separate suit to be brought under s.* 67:—When a consent decree orders payment of the decretal amount by instalments, and creates a charge on the estate of the judgment-debtor, the judgment-creditor is precluded from selling the properties in execution proceedings. He is bound to file a fresh suit under s. 67 of the Transfer of Property Act, for bringing such property to sale. AUBHOYESSURY DABEE v. GOURI SUNKAR PANDAY, **22 C. 859.** [*F.*, 22 C. 903, 28 A. 58=2 A.L.J. 479=A.W.N. 1905, 189; *R.*, 5 O.C. 9, 13 C. W.N. 787, 35 C. 61=11 C.W.N. 1011=6 C.L. J. 320, F.B.]

(606)—*Ss.* 67, 111, 116—*Lease by mortgagee in favour of mortgagor—Fixed period—Position of mortgagor after determination of lease—Lease when determined — Possession with assent of landlord—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 139—*Suit by landlord for possession.*—The predecessors of respondents made a usufructuary mortgage in favour of the predecessors of appellant for five years. The mortgagee executed a lease of the property in favour of the mortgagors for five years. Rent was paid to the mortgagees for five years, but not after that. More than 12 years after the expiry of the lease, the present suit for possession of the property was instituted. *Held*, that the suit was barred by limitation, inasmuch as, under art. 139 of the Limitation Act, such a suit should have been brought within 12 years of the determination of the lease. *Held*, further, that the lease determined on the expiration of 5 years, and a

Transfer of Property Act (IV of 1882) —*continued.*

tenancy from year to year did not come into existence, as there was nothing to show that the landlord assented to the tenant's continuing in possession. (2 A. 517, *D.*) *Held*, also, that the mortgage was an usufructuary mortgage and no suit for sale could be brought upon it. The mere fact that it provided for redemption of property by payment of the principal did not make it a simple mortgage. KHUNI LAL v. MADAN MOHAN LAL, **6 A.L J. 239=31 A. 318 =1 Ind. Cas. 208.**

(607)—*S.* 68 — *Suit for personal decree against mortgagor by usufructuary mortgagee.* —While certain property was under attachment on account of a decree held by a creditor of the mortgagor (defendant), the plaintiff took a usufructuary mortgage of the property. The mortgagor did not bind himself to repay the mortgage amount, but a clause in the instrument of mortgage provided that if the mortgage money be repaid within a period now passed, the mortgagor should be put back in possession of the lands. The property was not brought to sale under the prior attachment, but another creditor of the mortgagor who had obtained a money decree against him, attached and sold the mortgage premises. The mortgagee preferred a claim under s. 276 of the Civ. Pro. Code, but his claim was strongly rejected. He took no further steps against the attaching creditor who subsequently dispossessed him. In these circumstances, the plaintiff was not entitled to maintain a suit for the mortgage amount, against the mortgagor either under the terms of the mortgage instrument or under s. 68 of the Transfer of Property Act. GOPALASAMI v. ARUNACHELLA, **15 M 304= 2 M.L.J. 122.** [*F.*, 19 A. 191; *R.*, 21 A.W.N. 52, 4 C.L.J. 246]

(608)—*S.* 68—*Lease for fixed term by usufructuary mortgagee to mortgagor—Mortgagor's refusal to give up after term—Right of mortgagee to money decree.*—Where the mortgagor under an usufructuary mortgage entered into possession, under a lease for a term of years executed by the mortgagees, and it had been stipulated in the lease-deed that on the expiration of the said term, the mortgagor might, on fulfilment of certain conditions mentioned in the deed, renew the lease, but, the mortgagor, however, on the expiry of the term, failed to fulfil such conditions, and also refused to give up possession, the mortgagees were, under the circumstances, held entitled to a money decree for the amount due under the mortgage, whether it be under cl. (*b*) or cl. (*c*) of s. 68 of the Transfer of Property Act. HIRA LAL v. GHASITU, **16 A. 318, F.B.=A.W.N. 1894, 107.** (A.W.N. 1887, 369, 6 A. 298, *D.*) [*F.*, 2 C.L.J. 493; *Appr.*, 6 C.L.J. 143=11 C.W.N. 240 Note.]

(609)—*S.* 68—*Usufructuary mortgagee not given possession, whether could sue for sale in absence of covenant to pay.*—In the absence of a covenant to pay contained in the deed of mortgage with possession, the usufructuary

Transfer of Property Act (IV of 1882 —*continued.*

mortgagee to whom the mortgagor fails to deliver or to secure possession of the property mogtgaged, has no right to claim in a suit for the money, an order for the sale of such property. There is nothing in s. 68 of the Transfer of Property Act giving the right to sue for sale in such a case, and there is the other remedy of suing for possession of the property for which the mortgagee has bargained. ARUNACHALAM CHETTY v. AYYAVAYYAN, **21 M. 476, F.B.=8 M.L J. 154.** [*R.*, 22 M. 332, P.L.R 1900, p. 178.]

(610)—*S.* 68—*Mortgagor's failure to secure possession—Mortgagee's right to sue for mortgage money.*—The liability of the mortgagor to secure possession of the property to the usufructuary mortgagee, or in default, to pay him the mortgage-money, is not a liability arising under the common law on the ground of failure of consideration, but is a statutory liability imposed by s. 68 of the Transfer of Property Act. UNICHAMAN v. AHMED KUTTI KAYI, **21 M. 242=8 M.L.J. 81.** [*R.*, 6 C.L J. 143=11 C.W. N. 240, Note, 30 A 388=5 A.L.J. 670=A.W.N. 1908, 161.]

(611)—*S.* 68—*Sale of mortgaged land under the Land Acquisition Act—Personal remedy against mortgagor.*—The sale of mortgaged land under the Land Acquisition Act is not a destruction of the security within the meaning of s. 68 of the Transfer of Property Act, and does not entitle the mortgagee to a personal remedy against the mortgagor, as the only effect of the sale is to change the nature of the security. ARUMUGAM v. SIVAGNANA, **13 M. 321.** [*R.*, 2 P.L.R. 1908=17 P.R. 1907=67 P.W.R. 1907, 10 C.L.J. 150.]

(612)—*S.* 68—*Usufructuary mortgage of land —Failure of mortgagor to deliver possession—Remedy of mortgagee*—When parties are so ignorant of their rights and of law, as is mostly the case in Burma, considerable freedom ought to be allowed by the Courts in the amendment of the plaints or their treatment as amended. Under the contract of usufructuary mortgage the mortgagee is entitled to possession of the land, and if the mortgagor fails to deliver the land to him and to secure the possession to him, then the mortgagee has the right to sue the mortgagor for the mortgage debt in accordance with the principle laid down in s. 68 of the Transfer of Property Act. This question of fact having been left undisposed of altogether the case must go back for re-trial accordingly. MAUNG TAIK MAUNG v. MAUNG KYIN THU, **U B.R. 1892—1896, Vol. II, 573.**

(613)—*S.* 68—*Mortgaged property destroyed under compulsion and security rendered insufficient—Remedy of mortgagee—Verbal agreement by mortgagor to give another mortgage— Effect — Guarantee contingent upon an event which does not happen — Effect.*—Plaintiff advanced money to first defendant on the security of a house standing on Government leasehold land, the second defendant being

Transfer of Property Act (IV of 1882) —*continued.*

surety for the payment of any deficiency which there might be, if the house when sold did not realise the amount due on the mortgage. The Government terminated the lease and allowed the first defendant compensation and leased her another site. The first defendant built a house on the new site partly with the materials of the house on the former site. This new house was mortgaged to the third defendant. In a suit to enforce the mortgage on the new house it was held :—(1) that the plaintiff had no claim on the new house ; (2) that his only remedy was to sue the mortgagor personally for the debt as provided by s. 68 of the Transfer of Property Act ; (3) that the circumstances did not constitute a case of transmutation of the mortgaged property into another form ; (4) that, if the first defendant had promised to give another mortgage over the new house, the verbal agreement could not prevail against the registered deed to the third defendant ; and (5) that as regards the second defendant, his guarantee was contingent upon an event, which had not happened, and he was not liable. PALANIAPPA CHETTY v. MA SHINE, **14 Bur. L.R. 189.**

(614)—*S.* 68—*Suit for recovery of mortgage money—Mortgagee deprived of security through wrongful act of mortgagor—Two successive usufructuary mortgages of the same sir land.*—An owner of *sir* land mortgaged the same by a usufructuary mortgage, first, to one person, whom he put into possession, and then, together with some other property, by a second usufructuary mortgage to two other persons jointly. The second mortgagees thereupon proceeded to eject the first mortgagee. *Held* that the first mortgagee was entitled, under s. 68 of the Transfer of Property Act, to sue for his mortgage money. SUKHDEO MISR v. SHEODIAL, **A.W.N. 1901, 52.** (15 M. 304, 6 A. 298, *D.*)

(615)—*S.* 68—*Anomalous mortgage—Personal covenant to pay decree for sale* :—*Held* that, where a mortgage of a usufructuary character contains a personal covenant to pay, the mortgagee is entitled to sue for sale of the property, on the basis of such a covenant. SARDAR SINGH v. THE COLLECTOR OF SHAHJHANPUR, **10 O. C. 14.** (24 C. 677, 12 A. 203, *R.*; 27 M. 526, *F.*)

(616)—*S.* 68—*Recovery of mortgage-money—Suit by mortgagee with possession dispossessed before expiry of term.*—The appellant executed an instrument in favour of the respondent by which he mortgaged his one-third share with possession for eleven years in lieu of Rs. 400 and it was agreed that the mortgagee should take the whole of the profits for that period in payment of principal and interest and at the beginning of the twelfth year restore possession to the mortgagor. The appellant dispossessed the respondent before the expiry of the term and the latter sued for the recovery of the Rs. 400. *Held*, that the suit did not fall within the purview of s. 68 of the Transfer of Property Act and that the respondent was entitled only to sue for possession of the property. FATEH KHAN v. RAMANAND, **6 O.C. 339.**

Transfer of Property Act (IV of 1882) —*continued.*

(617)—*S.* 68 (*b*), *suit under, whether maintainable by prior unregistered mortgagee deprived of security by wrongful act of mortgagor—Covenant to pay contained in the mortgage, effect of—Subsequent registered sale-deed by mortgagor to third party without notice, whether affects rights of prior mortgagee.*—Where property, subject to an unregistered mortgage in favour of plaintiff, was conveyed by the mortgagor to the father of defendants 1 to 4, under a registered sale-deed, and these latter re-sold it to the 5th defendant and all the defendants alleged that the sales were without notice of the mortgage to the plaintiff, and the plaintiff's personal remedy against the mortgagor under a personal covenant to pay was barred : *Held*, that the mortgagee (plaintiff) was deprived of his security by the wrongful act of the mortgagor and that he was entitled to sue the mortgagor for the mortgage-money under s. 68. Such a right is not taken away by the personal covenant to repay, contained in the mortgage deed. A purchaser under a registered sale-deed has no priority over a prior unregistered mortgage if he has notice of the same. APPASAMI THEVAN v. VIRAPPA THEVAN, **29 M. 362.** (16 M. 148, *R.*)

(618)—*S* 68 (*b*)—*N.W.P. Rent Act* (XII *of* 1881), *s.* 9—*Mortgage of non-transferable cultivatory holding—Right of mortgagee to sue for money.*—Under a mortgage of his cultivatory holding executed by the defendant to the plaintiff, the latter failed to get possession because the holding turned out to be of the non-transferable kind referred to in s. 9 of the N.W.P. Rent Act. The plaintiff was entitled, under the circumstances, to sue to recover his money, because he, as mortgagee, had been deprived of the whole of his security in consequence of the default of the mortgagor (defendant) within cl. (*b*) of s. 68 of the Transfer of Property Act, since the latter must have known that she was mortgaging an estate which was by law not transferable. GANESH SINGH v. SUJHARI KUAR, **10 A. 47.**

(619)—*S.* 68, *cls* (*b*) *and* (*c*)—*Mortgage with possession—Default of mortgagor—Possession lost by mortgagee—Risk to title of mortgagee—Right to sue mortgagor for mortgage money.*—U, the original owner of a property, executed a *panayone* and *purankadam* in favour of M's father. In 1891, M purchased the property from U subject to prior encumbrances. One A got a money decree against U and also obtained a declaration that the sale in M's favour was invalid, and that he was entitled to execute his decree against U, subject to prior encumbrances only. In 1896 A purchased the property in private sale and instituted in 1898 a suit for redeeming the *panayone* and *purankadam*. The suit was dismissed but was decreed on appeal by the first appellate Court. Pending the first appeal, M and the other heirs of M's father executed in 1899 a usufructuary mortgage in

Transfer of Property Act (IV of 1882) —*continued.*

favour of the plaintiffs in the present suit. M filed a second appeal to the High Court. A executed the decree of the first appellate Court and, pending second appeal purchased the property in execution and continued in possession. *Held*, that, under the circumstances, so far as regards the suit for redemption, plaintiff's mortgagors did all that could be done to resist A's getting possession, and that there was no default on their part within cl. (*b*) of s. 68, nor did they fail to secure possession to the mortgagees under cl. (*c*) of that section The fact that A took possession under the redemption decree of the first appellate Court and that there was a temporary suspension of the mortgagees' possession does not bring the case within cl. (*c*) of s. 68. *Held*, also, that the mortgagors were under an obligation to discharge the decree for which the property was held liable in the declaration suit brought by A, and that, as the property was sold in discharge of that decree, the mortgagors had clearly committed default within s. 68 cl. (*c*), and that their heirs were liable to the extent of the assets of the mortgagors in their hands. K. V. KUNIRAMAN MENON v. M.T. AVUTHALA KUTTI, **8 M.L.T. 223=7 Ind. Cas. 173.**

(620)—*S.* 68, *cl.* (*c*)—*Mortgage—Suit for possession by mortgagee--Breach of contract to transfer immoveable property—Compensation—Specific Relief Act*, s. 12.—*Held*, that the remedy provided by s. 68 cl. (*c*), Transfer of Property Act, is an alternative remedy and does not bebar a mortgagee from bringing a suit for possession. Under s. 12 of the Specific Relief Act, unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money. SANKATA v. JAGAT NARAIN, **2 O.C. 24.** [*Diss.*, 10 O.C. 218.]

(621)—*S.* 68, *cl.* (c)—*Decree for sale on a prior mortgage— Fraudulent concealment of prior mortgage—Subsequent usufructuary mortgage—Right of subsequent mortgagee to sue for mortgage-money— Mortgage containing a covenant to pay money—Meaning of* 'khalal.'— A decree for sale against the mortgaged property was obtained on a prior mortgage. Concealing this fact, the mortgagor usufructuarily mortgaged the same property to the plaintiff. This usufructuary mortgage contained a covenant that, if any '*khalal*' occurred, the mortgagor would be responsible and would repay the mortgage-money. The decree on the prior mortgage was subsequently put into execution and the property was sold and was purchased by the usufructuary mortgagee. Shortly after, the plaintiff instituted the present suit against the defendant, the mortgagor, to recover the mortgage-money. *Held*, that the security the mortgagor gave to the plaintiff was absolutely illusory and that the case comes within cl. (*c*) of s. 68, because the mortgagor failed to secure the possession of the property to the plaintiff without disturbance. That the word '*khalal*'

Transfer of Property Act (IV of 1882) —*continued.*

is not confined to an unforeseen event or accident but includes the consequence of fraudulent conduct as displayed by the mortgagor in this case. AHMAD-ULLAH KHAN v. SALAR BAKSH, **A.W.N. 1905, 61=2 A.L J. 241=27 A. 488.**

(622)—*S.* 68 (*c*)—*Right of usufructuary mortgagee to recover mortgage money by sale of mortgaged property.*—Where an usfructuary mortgage deed provided for the recovery of the amount due "from the mortgaged property," the Court granted a decree for sale of the property where the mortgagee, being dispossessed of the mortgaged property, sued for the recovery of the mortgage money. NARPAT v. RAM SARAN DAS, **5 A.L.J. 130=A.W.N. 1908, 70=30 A. 162.** (21 A. 4, A.W.N. 1905, 226, *R.*)

(623)—*S.* 68 (*c*)—*Usufructuary mortgagee—Disturbance of possession by trespasser—Right to sue for mortgage money.*—Where a trespasser has disturbed the possession of the usufructuary mortgagee, that alone cannot confer any right on him to ask the mortgagor to pay the mortgage money. The words "any other person" in the concluding portion of cl. (*c*) of s. 68 of the Transfer of Property Act must be held to mean only any other person having a title. In the present case, the tenants of the mortgaged property, who had to pay rent to the mortgagee, wrongfully refused to do so, and, if any one disturbed the possession of the mortgagee, it was not the mortgagor but other persons with whom the mortgagor was not in collusion, and he could therefore not be affected by the acts of such third persons. NAKCHEDI RAM v. RAM CHARITER RAI, **19 A. 191=A.W.N. 1897, 14.** (15 M. 301, *F.*)

(624)—*S.* 68 (*c*)—*Mortgagee's right to sue for money when he is kept out of possession.*—When a mortgagor, after executing a usufructuary mortgage, executes a second mortgage of the same property under which the second mortgagee is put in possession, the first mortgagee who is entitled to possession but does not get it, may either sue for possession or sue at once for the money under s. 68, Transfer of Property Act. LINGA REDDI v. SAMA RAU, **17 M. 469 =4 M.L.J. 143.** [*R.*, 21 M. 476, F.B., 1 O.C. 53 1 O.C. 105; *D.*, 26 B. 241=3 Bom. L.R. 876.]

(625)—*S.* 68 (*c*)—*Personal suit for mortgage amount.*—The terms of a mortgage document provided that on failure of payment of interest at the stipulated time, the mortgagee should become entitled to possession of the mortgaged property. The mortgagor falsely alleged tender of interest on the due date. In these circumstances, a suit by the mortgagee for the recovery of the mortgage amount is under cl. (*c*) of s. 68 of the Transfer of Property Act, maintainable. SARAVANA v. CHINNAMMAL, **15 M. 65.** [*R.*, P.L.R. 1900, p. 178.]

(626)—*S.* 68—*See* Nos. 470, 471, 538, 560 561, 581, 582, 583, *supra*.

Transfer of Property Act (IV of 1882) —*continued.*

(627)—*Ss.* 68 (*cls. a, b and c*) *and* 73—*Usufructuary mortgagee, suit by—Property lost through mortgagee's default.*—Where property mortgaged is lost owing to the default of the mortgagee, the mortgagee cannot sue for the mortgage-money. Where in a usufructuary mortgage, the mortgagor binds himself to repay the money but there are reciprocal promises, and the mortgagee, by his own default precludes himself from fulfilling his part of the contract for restoration of the property on satisfaction of the debt, the mortgagee cannot compel the mortgagor, under s. 68, cl. (*a*) of the Transfer of Property Act to fulfil his promise of repayment. Clauses (*b*) and (*c*) of s. 28 provide for relief, where the mortgagee is deprived of his security otherwise than by his own fault. CHITKALI KOER v. MATHURALAL, **3 C.L J. 220.**

(628)—*Ss.* 68, 88—*Mortgage—Interest provided by mortgage—Compound interest provision for, Civ. Pro. Code, s.* 209—*Interest for period between date fixed by decree for payment and date of realisation—Civ. Pro. Code, Act* XIV *of* 1882, *s.* 222—*Interest on costs.*—In a suit brought by the appellant (mortgagee) upon a mortgage made in his favour, against the respondents (the mortgagor and subsequent mortgagees), the Court by its decree directed that the mortgagor should pay the principal sum secured by the mortgage, with interest up to the date of the institution of the suit as provided by the mortgage; that he should pay interest on the amount claimed from the date of the institution of the suit up to the date of the decree at the rate of six per cent a year; and that he should pay interest on the total amount and costs from the date of the decree to the date of payment at the same rate. It was provided by the mortgage that interest at the rate of nine per cent a year should be paid half-yearly, and should, if not so paid, be added to the principal and bear interest at the same rate. *Held*, that under s. 86 of the Transfer of Property Act the Courts are bound to give a decree at the rate of interest provided by the mortgage if it be a rate to which no valid legal objections can be taken, and that interest must be computed up to the day fixed by the Court for payment. *Held* also, that the provision for the payment of compound interest must be enforced, not being in the nature of a penalty and there being no question of fraud or oppression, improper dealing, exorbitant amount, dealing with an ignorant person, or any such consideration. *Held* therefore, that the appellant was entitled to interest at the rate stipulated in the mortgage-deed and to compound interest up to the date fixed by the decree for payment. *Held*, further, that ss. 86 and 88 of the Transfer of Property Act neither exclude nor authorise the awarding of interest after the date fixed by the decree for payment; but that in making a decree for sale under the Transfer of Property Act, the Court may, under s. 209, Civ. Pro. Code, order interest at such rate as it deems

Transfer of Property Act (IV of 1882) —*continued.*

reasonable to be paid for the period between the date fixed by the decree for payment and the date of realization. The provisions of s. 209, Civ. Pro. Code, being applicable, interest after the date fixed by the decree for payment, is in the discretion of the Court, notwithstanding that a fixed rate of interest is mentioned as payable "up to realization" in the mortgage. In such a case, however the discretion of the Court may be guided by the contract between the parties. *Held* further, that the appellant was entitled under s. 222, Civ. Pro Code, to the interest allowed by the Court on costs, the provisions of that section being applicable, in so far as they were not inconsistent with the T. P. Act. ALLAHABAD BANK LIMITED, ALLAHABAD, THROUGH MR. R. R. DEANS v. SAIYED MOHAMMAD JAWAD, **2 O.C 37.** [*Cons.*, 3 O.C. 129.]

(629)—*Ss.* 68, 100—*Charge—Bengal Tenancy Act* VIII *of* 1885, s. 65.—The provisions of s. 68 are not amongst those which are referred to in s. 100 of the Act. The "charge" referred to in s. 65 of the Bengal Tenancy Act is not such a "charge" as is defined by s. 100 of the Transfer of Property Act. S. 65 of the Bengal Tenancy Act is an enactment for the benefit of the landlord. It gives him rights which are denied to other creditors. FOTICK CHUNDER DEY SIRKAR v. E.G. FOLEY, **15 C. 492.** [*Appr.*, 10 C. P.L.R 48; *R.*, 4 C.L.J. 219=33 C. 985; *Commented on*, 11 C.P.L R. 95.]

(630)—*S.* 69—*Power of sale—Mortgage.*—The provisions of the second paragraph of s. 69 of the Transfer of Property Act are applicable to a depreciatory condition, and are by no means confined to defects in the circumstances which serve as the occasion for the sale. The words of s. 69 of the Transfer of Property Act permit of a distinction between an unauthorized exercise of the power of sale and an improper or irregular exercise of the power, where the purchaser is affected with notice. Hence, though a sale may not be impeachable on the mere ground that the power was improperly exercised, this protection does not extend to a case where there is the additional ground that the purchaser had notice of the improper exercise prior to the sale of the property. CHABILDAS v. DAYAL MOWJI, **6 Bom. L. R. 557.**

(631)—*S.* 69—*Mortgagee, selling powers of—Mortgagor, rights and liabilities of—Stopping of the sale.*—It is not competent to a mortgagee who has given a notice, under s. 69 of the Transfer of Property Act, calling in principal and interest, and for a sale in default of payment, to exercise a power of sale for interest in arrears before the expiry of three months from the service of that notice. When a mortgagee rightly exercises his power of sale for arrears of interest the mortgagor, if he wishes to stay the sale, must pay up all the interest which is due up to the date of payment, and that if he tenders a smaller sum the mortgagee is justified in refusing to accept it. DOOLABHDAS v. CHHABILDAS, **1 Bom. L.R. 273.**

Transfer of Property Act (IV of 1882) —*continued.*

(632)—*S.* 69—*Property situated within town of Bombay—Meaning of expression.*—Property situate at Mahim within the island of Bombay and within the local limits of the High Court of Bombay's original civil jurisdiction, is situate within the town of Bombay in the sense in which that expression is used in s. 69 of the Transfer of Property Act (IV of 1882). TRIMBUK GANGADHAR RANADE v. BAGWAN DAS MULCHAND, **23 B. 348.**

(633)—*S.* 69 (1).—The proviso contained in s. 69 (1), in regard to notice, is not a condition, which either suspends or defeats the power to sell, but contains only a direction in regard to its exercise, the infringement of which affords a ground for damages if any, to the person or persons damnified by the sale. THE MADRAS DEPOSIT AND BENEFIT SOCIETY v. PASSANHA, **11 M. 201.**

(634)—S. 69—*See* Nos. 473, 474, *supra.*

(635)—*S.* 70—*Accretions to mortgaged property—Right of mortgagee to have lien on such accretions.*—Where the mortgagor pulled down the houses that were on the mortgaged premises at the time of the mortgage and subsequently built other houses thereon the mortgagee is entitled to a lien on the new houses so built. BHOORESAO KHEMCHAND v. MAHOMED SYED KHAN, **1 C.P.L.R. 38.**

(636)—*Ss.* 8 *and* 70—*Leose-hold property—Free-hold property—Renewal of mortgaged property.*—The Transfer of Property Act, 1882, makes no distinction between free-hold and lease-hold property for the purposes of the rule of law embodied in ss. 8 and 70 of the Act. In this respect the Act reproduces the English law, which is that all things which are annexed to the property mortgaged are part of the mortgage security and therefore the deed need contain no mention of structures or fixtures unless a contrary intention be collected from the deed. Hence, where a mortgagor subsequent to the date of the mortgage pulled down a building standing upon the piece of land mortgaged and erected a new structure in its place, it was held that the new structure would be included in the mortgage unless there was contract to the contrary. MACLEOD v. KISSON, **6 Bom. L.R. 995=30 B. 250.**

(637)—Ss. 70, 111 (*d*)—*See* MERGER, 33 C. 1212.

(638)—*S.* 72—*Usufructuary mortgagee, right of—Payment of a prior simple mortgage-decree.*—The section entitles a usufructuary mortgagee, who had saved the property from sale by paying of a prior mortgagee's decree, to retain possession of the property mortgaged to him until the amount due on his usufructuary mortgage and the money paid by him to the prior-mortgagee have both been discharged. He cannot bring the property to sale subject to his own mortgage. ABDUL QUAYYUM v. SADAR-UD-DIN AHMED KHAN, **2 A.L.J. 23 =A.W.N. 1905, 11=27 A. 403.** (24 A. 179, *F.*) [*D.*, A.W.N. 1907, 286=4 A.L.J. 765.]

Transfer of Property Act (IV of 1882) —*continued.*

(639)—*S.* 72—*Mortgage—Redemption—Mortgagee paying a simple money decree to save mortgaged property from sale — Charge—* Malikana—*Condition for recovery by separate suit—Set-off in account.*—A property in the possession of certain usufructuary mortgagees was put up for sale in execution of a decree on a simple money bond of a prior date. The mortgagees paid up that decree, and prevented the sale. *Held*, that the mortgage being made after the date of the simple money bond, the mortgagees had an interest in protecting the mortgaged property from sale and were entitled to recover the amount of the simple money decree paid to save the property from sale, when subsequently the mortgagors sought to redeem the property. In the mortgage deed the mortgagees had covenanted to pay Rs. 1,000 as *malikana* to the mortgagors. This was alleged not to have been paid up to the day the suit for redemption was brought. *Held*, that the mortgagors were entitled to the *malikana* allowance which should be credited to them in taking the accounts. The fact that under the terms of the deed the *malikana* could be recovered by a separate suit would not prevent its being set-off at the time of redemption. Where only some of the mortgagors executed further mortgages in favour of the mortgagees covenanting to pay the mortgage debts with the money payable on the prior mortgage, *held* that this would not preclude the mortgagors as a body from exercising their right to redeem the earlier mortgage only. MUHAMMAD HUSAIN v. SHEODARSHAN DAS, **4 A.L.J. 176=A.W.N. 1907, 71.** [*Appl.*, 7 A.L.J. 1087.]

(640)—*S.* 72—*Not exhaustive.*—The provisions of s. 72, T. P. Act, though they enumerate certain cases in which payments made to save property from sale for arrears of revenue or rent may be secured by a charge on the property, do not profess to be exhaustive. RAKHOHARI CHATTA RAJ v. BIPRADAS DEY, **31 C. 975.**

(641)—*S.* 72 — *Mortgagee in possession making his title good to the mortgaged property entitled to debit expenses to the mortgagor—Redemption—Details of expenses can be given in execution proceedings.*—Under s. 72 of the Transfer of Property Act, a mortgagee in possession is entitled to add, in the absence of a contract to the contrary, sums spent by him for making his own title thereto good against the mortgagor. The mere fact that the mortgagee in the redemption suit, did not give details of the sums either in the course of the trial or in his written statement, is not sufficient to deprive him of his right, as those details can be gone into after the redemption decree providing for an account has been passed. DATTARAM v. VINAYAK : RAMCHANDRA v. VINAYAK, **5 Bom. L.R. 916=28 B. 181.**

(642)—*S.* 72—*Costs of suits between mortgagor and mortgagee—Right of mortgagee to have*

Transfer of Property Act (IV of 1882) —*continued.*

lien on mortgaged property for such costs.—A mortgagee is entitled to add to the mortgage money the costs of previous suits between himself and the mortgagor concerning the mortgaged property. The mortgagee does not lose his lien for the costs by the fact that he has got a decree therefor. SUBHANSHA FAKIR v. YACOOB ALI, **1 C.P.L.R. 66.**

(643)—*S.* 72—*Usufructuary mortgage—Mortgagee granting lease of property to mortgagor—Construction of deeds.*—A usufructuary mortgagee, instead of taking possession of the mortgaged property, granted a lease of it to the mortgagor, the rent reserved being equivalent to the interest payable on the mortgage calculated at the rate of 11 as. per cent. per annum; both the deeds were registered on the same date; in the mortgage deed reference was made to the lease, and the latter referred to the former; and the lease was terminable with the mortgage and not before. *Held* that all the circumstances clearly indicate that the mortgage and the lease form one transaction, *viz.*, that of a usufructuary mortgage, the lease providing the manner in which the usufruct was to be taken in lieu of interest; that the relation of the parties was, therefore, that of mortgagor and mortgagee; that any rights and liabilities arising under the lease must be considered as arising out of that relation; and therefore, the mortgage was not redeemable under s. 72 of the Transfer of Property Act without payment of all arrears of lease money due to the mortgagee. IMDAD HASAN KHAN v. BADRI PRASAD, **20 A. 401=A.W.N. 1898, 90.** [*R.*, 6 O.C. 26, 17 P.W.R. 1908; *D.*, 11 M.L.J. 186.]

(644)—*S.* 72—*Mortgage—Mortgagee in possession spending money to preserve property from forfeiture—Suit by mortgagee to recover moneys so spent.*—S. 72 of the Transfer of Property Act (IV of 1882) does not take away from a mortgagee in possession the right of suit for the recovery of money spent by him in order to preserve the mortgaged property from forfeiture. PARSOTAM DAS v. JAIJIT SINGH, **A.W.N. 1890, 90.** [*R.*, 13 A. 195.]

(645)—*S.* 72—*Property hypothecated sold in execution of a simple money decree—Sale likely to imperil mortgagor's security—Usufructuary mortgagee when not entitled to mortgage money nor to a personal decree.*—The plaintiff was the mortgagee in possession of certain plots of land. Subsequent to the mortgage the said plots were attached and proclaimed for sale in execution of a simple money decree against the mortgagor. On plaintiff's objection the plots were ordered to be sold subject to his lien. The plaintiff thereafter paid the decretal money and filed the present suit against his mortgagor for recovery of the money paid with interest. *Held*, that, s. 72 of the Transfer of Property Act is intended to apply to cases where the forfeiture or sale is likely to imperil the mortgagor's security. *Held further* that, if the plaintiff exercised his right by virtue of his having been a usufructuary mortgagee, that money became a part and parcel of the mortgage money and he was not entitled to a personal decree for that amount. SHEO DULARE v. MUSAMMAT BATASHA, **16 O.C. 48.**

(646)—*S.* 72 (*a and b*)—*Redemption—Rights of mortgagee with possession as regards improvements made by him—Damages for planting of groves by tenants with mortgagee's permission, claim against mortgagee for—Mortgage improvements.*—Under a deed of mortgage with possession, the mortgagee was put into possession of the mortgaged property and by the terms of the mortgage-deed was entitled to appropriate the entire profits in lieu of interest. There was a covenant between the parties that the mortgagor should be entitled to redeem and regain possession of the mortgaged property at the end of five years or subsequently on payment of the whole principal sum together with the arrears of advances to tenants (*taqavi*), the cost of building new houses for tenants and other miscellaneous expenses such as advances of seed grain. The plaintiff having purchased the property from the mortgagor brought a suit for redemption. The Subordinate Judge found that the plaintiff was entitled to redemption on payment of the principal sum secured by the mortgage less certain sums on account of damages caused to the mortgaged property by the planting of groves by tenants and others in a number of plots of land with the mortgagee's permission, but allowed certain sums on account of cost of embankment, sinking wells, erecting houses for tenants, reclaiming barren land and survey. *Held*, that as the mortgage-deed contained a distinct contract regarding the sums payable to the mortgagee on redemption, he was not entitled to add to the principal money any other sums spent by him for the improvement of the property under s. 72, cls. (*a*) and (*b*) of the Transfer of Property Act; (26 C. 1, P.C., 19 M. 327, *R.*) that his claim to costs incurred for building houses for tenants was rightly allowed; and that the plaintiff's claim to damages for the planting of groves could not be maintained. THAKUR JAWAHIR SINGH v. THAKUR SARDAR KUAR, **9 O.C. 18.**

(647)—*S.* 72, *cls.* (*a and c*)—*Suit for redemption against mortgagee in possession—Right of mortgagee to claim costs of defending mortgagor's title and of realizing rent from tenant let into possession by himself.*—Where a mortgagor sued for redemption from the mortgagee in possession, the latter was entitled to claim the costs incurred by him in defending the mortgagor's title, but he could not claim costs of the suit instituted by him to recover rent from tenants let into possession by himself. POKREE SAHIB BEARY v. POKREE BEARY, **7 M.L.J. 238.**

(648)—*S.* 72 (*b*)—*Scope of.*—The rules contained in the section only reproduce the doctrines which the Courts of Justice in India have uniformly adopted. GIRDHAR LAL v. BHOLA NATH, **10 A. 611=A.W.N. 1888, 238.** [*Appl.* 22 B. 440; *R.*, 28 A. 593=3 A.L.J. 435=A.W.N. 1906, 150.]

Transfer of Property Act (IV of 1882) —*continued.*

(649)—S. 72—*See* Nos. 538, 554, *supra.*

(650)—S. 73—*Scope of—Mortgagee.*—The object of s. 73 is to relieve the mortgagee of the effects of the injury which he would suffer by the property, which was the security for his money, being sold, and to give him a right over the residue of the sale proceeds. It is not intended in any way to enlarge the interests of persons purchasing at a sale for arrears of revenue or rent. It is intended to refer to cases where the law has otherwise provided that the effect of a sale for arrears of revenue or rent should nullify a mortgage. BENI PROSAD SINHA v. REWAT LALL, **24 C. 746.** (15 C. 546, *R.*) [*D.*, 9 C.W.N. 117.]

(651)—S. 73—*Putni created and registered after mortgage of revenue-paying estate—Act* XI *of* 1859, *ss.* 40, 41—*Decree on mortgage against proprietor and putnidar—Sale of estate for arrears of revenue—Transfer of lien to sale-proceeds if relieves putni interest from liability to sale.*—The proprietor of a revenue-paying estate executed mortgages in favour of A and subsequently granted a *putni* to B who had it registered under s. 40 of Act IX of 1859. The mortgagee, A, obtained a decree on his mortgages in a suit in which the *putnidar* B was made a party. After the decree the estate was sold for arrears of revenue subject to the encumbrance of the *putni*. The mortgagee withdrew the surplus sale-proceeds in part satisfaction of his decree, and for the unsatisfied balance applied for sale of the *putni* interest. *Held*, that s. 73 of the Transfer of Property Act, by providing that the mortgage-lien is to be transferred to the surplus sale-proceeds, did not relieve the *putni* from liability to sale in satisfaction of the mortgage-decree. A mortgagee is not bound, upon receipt of notice of an application for registration of an incumbrance under s. 41 of Act XI of 1859, to oppose such application. *Quære*: Whether such opposition by a mortgagee would be a sufficient ground for the rejection of the application by the revenue officer. SUSILABALA DASI v. DINABANDHU NANDI, **14 C.W.N. 186 =5 Ind. Cas. 70** (6 C. 142, 20 C. 241, 27 C. 181, *Cons.*)

(652)—S. 73—*Sale for arrears of revenue—Mortgage between date of default and date of sale—Extinguishment of mortgage-lien by the sale—Charge on sale proceeds.*—Where an estate is sold for arrears of revenue the mortgage of a share of such estate between the date of default and the date of sale is invalid as against the purchaser and the mortgage-lien on the property is extinguished by the sale. (17 C. 148, *F.*) That lien, having been extinguished so far as it existed on the property itself, is transferred as a charge to the sale proceeds, (15 C. 546, *Expl.*) and, under s. 73 of the Act, the mortgagee becomes entitled to recover his mortgage-debt out of those sale-proceeds after payment of the arrears of revenue. The section must be taken to apply to any case where the effect of the sale is that the lien on the mortgaged property

Transfer of Property Act (IV of 1882) —*continued.*

in favour of the mortgagee has been extinguished owing to a sale of that property through the failure of the mortgagor to pay an arrear of revenue or rent. UMATARA GUPTA v. UMA CHARAN SEN, **3 C.L.J. 52.** [*R.*, 7 C.L.J. 1; *D.*, 7 C.L.J. 387.]

(653)—S. 73—*Rent sale, with power to purchaser to annul incumbrances—Bengal Tenancy Act* (VIII *of* 1885), *s.* 167—*Right of mortgagee to have lien transferred to sale-proceeds.*—In the case of a rent-sale (under the Bengal Tenancy Act), with express power to the purchaser to annul all incumbrances, so long as such power remains in the purchaser, the lien of a mortgagee is in jeopardy and is liable to be destroyed by the purchaser, if he so pleases. In such a case, the mortgagee may abandon his lien upon the mortgaged property, and ask to realise his demands from the surplus proceeds. NIM CHAND BABOO v. ASHUTOSH DUTT, **9 C.W.N. 117.** (15 C. 546, 24 C. 746, *R.*)

(654)—S. 73—*Surplus sale-proceeds on sale of mortgaged property for arrears of revenue, right of mortgagee to enforce his charge on*—Property which had been mortgaged to the plaintiff, in this case, was subsequently sold under a decree in rent suit and a surplus was left, of the sale proceeds, after paying off the arrears of rent and it was *held*, that, under the provisions of s. 73 of the Act, plaintiff had the right to enforce his charge on the surplus proceeds and that there was nothing in ss. 159 and 161 to 167 of the Bengal Tenancy Act to prejudice such right of the plaintiff as mortgagees. GOBIND SAHAI v. SIBDUT RAM, **33 C. 878.**

(655)—S. 73—*Surplus sale proceeds of revenue sale—Art.* 132, *sch* II, *Limitation Act*, 1877—*Suit on mortgage.*—Where a property mortgaged to the plaintiff was sold for arrears of Government revenue and out of the surplus sale proceeds held in the Collectorate, certain creditors of the mortgagors drew out the amounts of their money decrees obtained against the mortgagors, and the plaintiffs sued these creditors for the money which they had taken out from the Collectorate with interest, *held* that, having regard to the provisions of s. 73 of the Transfer of Property Act the suit was one to enforce payment of money charged upon immoveable property, and was governed by art. 132 of sch. II of the Limitation Act. JOGESHUR BHAGAT v. GHANASHAM DASS, **5 C.W.N. 356.** (12 C. 389, 27 C. 180, *R.*, [*F.*, 3 C.L J. 52; *R.*, 9 C.W.N. 989=33 C. 92.]

(656)—S. 73—Scope—*See* BEN. ACT VIII OF 1885, ss. 161, 166, 167, 9 Ind. Cas. 248.

(657)—S.73—*See* SALE—SALE FOR ARREARS OF RENT—SURPLUS PROCEEDS OF SALE, RIGHT TO, 20 C. 241.

(658)—S. 73—*See* No. 627, *supra.*

(659)—*Ss.* 73, 82, 101—*Portion of hypotheca sold for arrears of rent—Rights of mortgagee.*—Where, pending a suit on a mortgage, some

Transfer of Property Act (IV of 1882) —*continued.*

of the hypotheca are purchased by the mortgagee himself in execution of a decree for arrears of rent, the charge on such portion is extinguished and transferred to the balance of sale proceeds after paying the rent under s. 73 of the Transfer of Property Act. No decree can therefore be passed in the mortgage suit against that portion, in spite of the provisions of s. 82, but only a charge can be declared against the surplus sale proceeds. HEM CHANDRA CHOWDHURY v. TAFAZZEL HOSSEIN KHAN, **8 C. W.N. 332.**

(660)—*S.* 74—*Mortgage—Sale of mortgaged property—Price applied to payment of mortgage debts—Payment not made by purchaser, but by mortgagor.*—A mortgagor sold certain property which was subject to two mortgages, and it was agreed that the bulk of the consideration money should be paid by the purchaser to the mortgagees. The purchaser paid off the amount due on the first mortgage, but not that due to the second mortgagee. *Held*, on suit by the second mortgagee for sale, that the purchaser was not entitled to set up the first mortgage as a shield inasmuch as it had not in reality been paid off by him, but by the mortgagor, his vendor. BALJNATH v. MURLIDHAR, **A. W. N. 1907, 85=4 A.L.J. 349.** (27 A. 400, *F.*) [*R.*, 6 A.L.J. 549.]

(661)—*S.* 74—*Decree on a prior mortgage—Rights of subsequent mortgagee—'Tender.'*—A subsequent mortgagee, discharging a prior mortgage at the mortgagor's request, becomes his debtor's agent and his act does not constitute "tender" within the meaning of s. 74. He cannot dictate to the mortgagor the manner in which the consideration should be applied. He must institute a suit on his own mortgage to recover the entire amount due under it, instead of resorting to the cumbrous procedure of partially recovering his loan by executing the prior mortgagee's discharged-decree and instituting a separate suit on his own mortgage for the remainder. TUFAIL FATIMA v. BITOLO, **2 A.L.J. 13=27 A. 400=A.W.N. 1904, 284.** (24 A. 179, *D.*) [*F.*, A.W.N. 1907, 85=4 A.L.J. 349; *R.*, 3 A.L.J. 630=28 A. 778=A.W.N. 1906, 230.]

(662)—*S.* 74—*Mortgage — Subsequent usufructuary mortgage to another—Sale of mortgaged property in execution of decree on prior mortgage—Usufructuary mortgagee not party to suit—Suit by first mortgagee to recover amount of decree from usufructuary mortgagee.*—Plaintiffs had obtained two mortgages in respect of the plaint property, which was subsequently mortgaged with possession to another. Plaintiffs instituted a suit on their mortgages and in execution of the decree obtained by them brought the mortgaged property to sale and one of them purchased it. The usufructuary mortgagee was not a party to the suit. Plaintiffs now sued praying that the usufructuary mortgagee might be ordered to pay them the amount of the decree and that in default of such payment he might be absolutely debarred of his right to redeem the prior mortgages and be directed to surrender possession of the property to plaintiffs. *Held* that, the puisne mortgagee not having been made a party to the suit, his right under s. 74 of the Transfer of Property Act to redeem the prior mortgages was not affected by either the decree or sale. The only effect of the sale was to transfer to the purchaser, one of the plaintiffs, the equity of redemption of the mortgagor. The puisne mortgagee, however, could not be in a better position than he would have been, if he had been made a party to the suit. He could not claim a decree for sale of the property. He was only entitled to redeem the prior mortgages with the view of enforcing his own mortgage. GOVERDHANA DOSS v. VEERASAMI CHETTI, **26 M. 537.** (24 M. 171, *F.*) [*R.*, 26 A. 464=A.W.N. 1904, 108.]

(663)—*S.* 74—*Rights of prior and puisne mortgagees* interse.—*Nature of interest acquired by puisne mortgage.*—A prior mortgagee instituted a suit on his mortgage without making the puisne mortgagee a party thereto, obtained a decree for sale and purchased at the sale in execution of that decree the property mortgaged to him and obtained possession thereof. The puisne mortgagee also instituted a suit on his mortgage without making the prior mortgagee a party thereto, obtained a decree for sale and purchased at the sale held in execution of that decree the property mortgaged to him. The puisne mortgagee then sued the prior mortgagee claiming possession of the property purchased by the latter on payment of the actual purchase money or of the sum which was due upon his mortgage at the date of the institution of his (prior mortgagee's) suit. *Held* that the puisne mortgagee was entitled to be put into possession on payment to the prior mortgagee of the sum which was actually due upon the prior mortgage at the date upon which the prior mortgagees purchased. [*R.*, 25 A. 446=23 A.W.N. 150, 26 A. 185=A.W.N. 1903, 219, 12 O.C. 133=2 Ind. Cas. 836.] *Held*, in the case mentioned above that the possession of the puisne mortgagee was, as to the property included, in his own mortgage, proprietary; but as to the property not so included, possession as mortgagee only; and that the puisne mortgagee was not entitled to the rights of the prior mortgagee as purchaser of the equity of redemption. DELHI AND LONDON BANK, LIMITED v. BHIKARI DAS, **24 A. 185=A.W.N, 1902, 7.**

(664)—*S.* 74—*Mortgage—Prior mortgage extinguished on execution of a second mortgage.*—S. 74 of the Transfer of Property Act does not apply, when it is clear on the facts that the first mortgage has been satisfied and extinguished on the execution of the second mortgage which alone is outstanding, although the first one was satisfied out of money raised by the second. SHEO NANDAN v. SAMBHU RATAN, **12 O.C. 285=4 Ind. Cas. 21.** (19 M. 105, 9 O. 961, *R.*)

Transfer of Property Act (IV of 1882) —*continued.*

(665)—*S.* 74—*Redemption of prior mortgage.* —S. 74 of the Transfer of Property Act contemplates the existence of two mortgages at one and the same time, and the independent action of the subsequent mortgagee to put an end to the prior mortgage. The section does not apply when the first mortgage is a *usufructuary* mortgage and the second also purports to be a usufructuary mortgage KOOPMIA SAHIB v. CHIDAMBARAM CHETTI, **19 M. 105.**

(666)—S. 74 — *See* DECREE — DECREE, FORM OF, 18 A. 189=A.W.N. 1896, 65.

(667)—S. 74—*See* Nos. 461, 538, 539, *supra* and No. 837, *infra.*

(668)—Ss. 74, 75—*See* LIMITATION ACT, 1908, art. 144, 11 M. 416.

(669)—*S.* 75 — *Prior mortgagee — Puisne mortgagee — Redemption suit against prior mortgagee to which puisne mortgagee not a party —Foreclosure decree absolute—Prior mortgagee redeeming the puisne mortgagee.* — A prior mortgagee, who obtains a foreclosure decree absolute in a suit to which a subsequent mortgagee is not a party, is entitled to redeem the subsequent mortgagee. *Per Aston, J.*—"When an order absolute for foreclosure has been made in a suit between a mortgagor and a prior mortgagee, the fact that a second mortgagee was not made a party to that suit does not deprive the prior mortgagee (who has by such order absolute acquired what was the mortgagor's interest in the equity of redemption) of his right to redeem the second mortgagee; and this right must at his option prevail ultimately even though the equities of the suit between him and the second mortgagee may require that the decree should allow the second mortgagee to exercise in the first instance his own right to redeem the first mortgagee, a right which notwithstanding the foreclosure survives to the second mortgagee until he is himself redeemed by reason of his charge on the equity of redemption not having been represented in the former suit which was therefore insufficiently constituted as to parties." *Per Jacob, J.*—"If the puisne mortgagee would still be liable to be redeemed, then it is no hardship on him that he should be redeemed at the instance of the prior mortgagee, who has by foreclosure acquired the title of the mortgagor rather than by the mortgagor himself or any other private assignee of the mortgagor's interest." HASANBHAI v. UMAJI, **5 Bom. L.R. 892=28 B. 153.**

(670)—S. 75—*See* Nos. 538, 668, *supra.*

(671)—*Ss.* 75, 85 *and* 96—*Duty of Court when all interested parties are before it—Two successive simple mortgages—Second mortgagee's right to decree for sale subject to first mortgage —Calculation of amount payable for redeeming prior mortgage.*—Where all the interested parties are before the Court, it is the duty of the Court, if it can do so, to make a decree which shall deal finally with the question between them and shall preclude the necessity of further litigation for the enforcement of any right arising out of the mortgage or mortgages in question in the suit. It is the right of the prior mortgagee to require the second mortgagee to redeem him or submit to a sale of whatever interest he holds in the property (s. 75); and the decree must give effect to this right, unless by doing so it unnecessarily deprives the second mortgagee of any right of his own. S. 96 of the Act does not support the view that the puisne mortgagee is not required to redeem the prior mortgagee when the latter is a party to the suit. (30 C. 599, 29 A. 385, *D.*) The amount to be paid for redeeming the prior mortgage must be calculated on the mortgage amount, but not on the money paid by the assignee of the first mortgagee. GANGAYAM VENKATARAMA AYER v. HENRY JAMES COLLY GOMPARTY, **3 M.L.T. 397=18 M.L.J. 298=31 M. 428.** (20 M. 120, *Appl.*) [*D.*, 32 M. 485=19 M.L.J. 728.]

(672)—*S.* 76—*Liability to accounts.*—Where the usufructuary mortgagees have paid a less consideration than that agreed upon and recited in the mortgage-deed and have been in possession of the property since the date of the mortgage, and the mortgage-deed provides that the mortgagees should be in possession of the property in lieu of interest, the mortgagees must account for the profits, under the terms of s. 76 of the Transfer of Property Act. MUHAMMAD ALLAHYAR KHAN v. MUHAMMAD SAMIUDDIN KHAN, **A.W.N. 1887, 245.**

(673)—*S.* 76—*Mortgagee in possession—Taking of accounts—No rule of abstract justice —S. 76 though not extended to Burma, to be followed.*—There is no rule of abstract justice in taking the accounts of a mortgagee in possession, and the Indian rule embodied in s. 76, T.P. Act, should, though the Act has not been extended to Burma, be followed there in preference to the English practice. KADIR MAIDIN v. NEPEAN, **26 C. 1, P.C.=2 C.W.N. 665=25 I.A. 241=7 Sar. 394.** [*F.*, U.B.R. 1907, 3rd Quarter, Mortgage, 1; *R.*, 9 O.C. 18; *Expl.*, 3 N.L.R. 72.]

(674)—*S.* 76—*Interference by one mortgagee with another—Opening of shut-up door in common party-wall—Duty of mortgagee.*—A mortgagee has a possessory title in the mortgaged premises and, on the strength of such title, he has the right to maintain an action with the view to restrain others from trespassing upon it. The re-opening by a mortgagee of a door of communication between the portion of the house mortgaged to him and the portion mortgaged to another, which door had been closed before the mortgage, would constitute an interference with his enjoyment and an act of trespass which the latter could proceed to prevent. He could maintain an action, not only for the above reasons, but also on the ground that, as a mortgagee in possession, it was his duty to preserve the mortgaged property from destruction. LACHMI NARAIN v. JETHU MAL, **16 A. 386=A.W.N. 1894, 129.**

Transfer of Property Act (IV of 1882) —*continued.*

(675)—*S.* 76—*Mortgagee—Liability to pay enhanced Government revenue—Absence of contract to the contrary*—Under s. 76, the mortgagee, in the absence of a contract to the contrary, would be liable to pay the enhanced Government revenue. VEYATHEN SRIDENI *alias* KEZHOIKKI KOVILAKATHVILLA THAMBURTI AVERGAL v. LAKSHMIAMMAL, **5 M.L.T. 284.**

(676)—S. 76—*See* CO-SHARERS—GENERAL, 7 Ind. Cas. 772.

(676-*a*)—S. 76—'Contract to the contrary,' interpretation of—*See* DEED—CONSTRUCTION OF DEED, 18 M.L.J. 31.

(676-*b*)—S. 76, scope of—Effect upon mortgagor's remedies—*See* LIMITATION, ACT, 1908, s. 23, arts. 115, 116, 6 M.L.T. 239=33 M. 71.

(676-*c*)—*S.* 76 *(c)—Mortgagee, when bound to pay Government revenue—Construction of mortgage deed.*—Under s. 76, cl. *(c)* of the Act, a mortgagee is bound to pay the revenue only in the absence of a contract to the contrary, and if he is able to pay the same out of the income of the property in his hands. A mortgage deed provided that the mortgagee was to appropriate for interest on the amount, the rent of paddy and Rs. 20 less the Government revenue, which was to be paid to the mortgagor by the mortgagee, pending the transfer of patta to the name of the mortgagee. *Held*, that the mortgagee, by the contract between the parties which allowed them to appropriate the income less the revenue, both of them ascertained amounts, was not liable to pay a subsequent increase in the assessment payable to Government. PANIGATAN KANARAN v. RAMAN NAIR, **17 M.L.J. 517.** (14 M.L.J. 488, *R.*) [*R.*, 8 Ind. Cas. 845.]

(677)—*S.* 76 *(h)—Liability of mortgagee in possession.*—Under s. 76 *(h)* of the Act, where a mortgagee in possession cultivates the mortgaged land or part of it, he may be charged the net profits of his cultivation or a fair occupation rent as under the circumstances of the case may seem just. DADNU v. SOMNATH, **6 N.L.R. 109 =7 Ind. Cas. 541.** (7 W. R. 244, 6 C. 377, 12 B.H.C. 88, *D.*)

(678)—*S.* 77—*Usufructuary mortgagee—Liability to account—Act* XXVIII *of* 1855, *s.* 4—*Recent to be appropriated in lieu of interest only.*—In the absence of an express stipulation therefor, a usufructuary mortgagee is not liable to render account to the representatives of the mortgagor in an action for redemption. The fact that the rents of the property are to be appropriated in lieu of a portion of the interest only cannot alter the usufructuary character of the mortgage. SHAFI-UN-NISSA v. FAZALRAB, **7 A.L.J. 787=7 Ind. Cas. 293.**

(679)—*S.* 78—*Gross negligence—Priority—Registration Act, ss.* 17 *(d)*, 48—*Notice.*—The conduct of a mortgagee in allowing the title-deeds relating to the mortgaged property to remain in the possession of the mortgagor, may

Transfer of Property Act (IV of 1882) —*continued.*

amount to gross negligence within the meaning of s. 78 of the Transfer of Property Act, so as to give a subsequent mortgagee, who takes without actual notice of the previous mortgage and *bona fide* priority over the earlier mortgage. [*R.*, 31 M. 7=3 M.L.T. 87=17 M.L.J. 499.] The mere registration of a mortgage deed does not affect a subsequent mortgagee with constructive notice of its existence so as to preclude him from claiming priority in respect of his mortgage. MADRAS BUILDING CO v. ROWLANDON, **13 M. 383.** [*Appr.*, 7 C.W.N. 11.]

(680)—*S.* 78—*Prior mortgagee parting with title deeds, when guilty of gross negligence—Postponement of priority.*—A prior mortgagee parting with the title-deeds to the mortgagor for the purpose of raising money by another mortgage, is guilty of gross negligence, unless he takes the ordinary precautions that any person advancing money on the security of the deeds should know of his mortgage, such as sending some person with the deeds, insisting that they should be inspected in his presence or otherwise. Non-registration would not of itself be gross negligence as the law allows four months, but it is a reason for extra caution. Also where the title deeds were on the face of them all, in order, and there was nothing to excite the suspicion of the subsequent mortgagee, that there was a prior incumbrance, he would be entitled to priority over such incumbrance. THE MADRAS HINDU UNION BANK v. C. VENKATARANGIAH, **12 M. 424.** [*R.*, 15 M. 268, 3 M.L.T. 87=17 M.L.J. 499=31 M. 7, 13 M. 383.]

(681)—*S.* 78—*Certificate of title given back to mortgagor—Gross negligence of prior mortgagee.*—Certain mortgagees, subsequent to the plaintiff, claimed priority over him on the ground that he was guilty of gross negligence in having placed the certificate of title in the hands of the mortgagors who remained in the possession of the premises. The subsequent mortgagees did not abstain from all inquiry, but were misinformed by the party whom the plaintiff enabled by his negligence to commit the fraud. The plaintiff was therefore not entitled to the benefit of the rule "*qui prior est in tempore patior, est in jure.*" DAMODARA v. SOMASUNDARA, **12 M. 429.** [*Appr.*, 12 M. 424, 7 C.W.N. 11; *R.*, 15 M. 268, 3 M.L.T. 87=17 M.L.J. 499=31 M. 7.]

(682)—*S.* 78—*Gross negligence—Priority of mortgages—English Law—Fraud—Registration—Notice—Non-search, effect of.*—The tendency of the English decisions has been to refuse to postpone the owner of the prior legal estate to a subsequent equitable incumbrance merely on the ground of gross negligence unaccompanied by any element of fraud. The words "gross neglect" in s. 78 of the Transfer of Property Act need not necessarily be read by the light of the English decisions. When a first mortgagee allows the title-deeds for nearly four years after his mortgage to be in the possession

Transfer of Property Act (IV of 1882) —*continued.*

of the mortgagor, and gives no reasonable explanation of their being so in his possession, he is guilty of gross neglect within the meaning of s. 78 of the Transfer of Property Act, and liable to be postponed to a second mortgagee taking without notice of the prior mortgage. [*R.*, 31 M. 7=17 M.L.J. 499=3 M.L.T. 87; *Not F.*, 18 B. 444.] Registration is not of itself notice to subsequent purchasers and mortgagees, and non-search of the registry is not such gross negligence as to disentitle a subsequent purchaser or mortgagee to relief. SHAN MAUN MULL v. MADRAS BUILDING COMPANY, **15 M. 268=2 M.L.J. 95.** [*Not F.*, 18 B. 444; *Diss.*, 26 B. 538; *Appr.*, 23 C. 790, 27 C. 358, 7 C.W.N. 11; *R.*, 13 C.P.L.R. 43, 27 B. 452, 6 Bom. L.R. 1043.]

(633)—*S.* 78—*Existence of gross negligence —Failure of prior mortgagee to get possession of title-deed—Delay in registration.*—The existence of gross negligence, within the meaning of s. 78 of the Act, must be determined according to the circumstances of each case, and one of the circumstances to be taken into consideration is that, in this country, universal registration exists. Failure on the part of a prior mortgagee to get possession of title-deeds is not, therefore, in the absence of reasonable explanation, necessarily to be imputed to him as gross negligence. (2 C.W.N. 750, *F.*; 18 B. 444, *R.*; 12 M. 429, 13 M. 393. 12 M. 424, 15 M. 268, 4 M.H.C. 369, *D.*) Delay in getting the mortgage registered, which had the effect of enabling the mortgagor to effect a second mortgage, would not make the prior mortgagee's failure to obtain the possession of title-deeds amount in law to gross negligence. RANGASWAMY NAIKEN v. ANNAMALAI MUDALI, **17 M.L.J. 499=3 M.L.T. 87=31 M. 7.** [*F.*, 4 M.L.T. 217.]

(684)—*S.* 78—*Mortgage—Notice—Title-deeds —Whether failure to obtain title-deeds is gross negligence.*—A mere failure to obtain the title-deeds would not amount to gross negligence, within the meaning of s. 78 of the Transfer of Property Act. MUNUSAWMY NAIDU v. RAJAGOPALA CHETTY, **4 M.L.T. 217.** (31 M. 7, *F.*)

(685)—*S.* 78—*Registration--Possession of title deeds—Gross negligence.*—The same importance does not attach to the possession of the title-deeds in the *Mofussil* as in the city of Madras, and facility in inspecting the registry provided by the Registration Law should be taken into account in determining whether there was gross negligence in the prior incumbrancer. P. L.S.A.R.S. CHETTIAPPA CHETTIAR v. N. PERIASAMI THEVAN, **7 Ind. Cas. 810=20 M.L.J. 979.** (31 M. 7, 3 M.L.T. 87, 17 M.L.J. 499, *R.*)

(686)—*S.* 78—*Prior mortgagee, postponement of, for gross negligence.*—After inspecting the title-deeds of the mortgagor and approving his title, the mortgagee got the mortgage executed and registered, but returned the title-deeds to the mortgagor, without any negligence or fraudulent intent whatever, but only in accordance with a practice to such effect obtaining in the mofussil. Subsequently, without actual notice of such prior mortgage, another person happened to advance money on one of those title-deeds with the mortgagor without investigating his title or searching the registry, and such person was held to be not entitled to the postponement of the prior mortgage. MONINDRA CHANDRA NANDY v. TROYLUCKHO NATH BURAT, **2 C.W.N. 750.** [*F.*, 31 M. 7=17 M.L.J. 499=3 M.L.T. 87.]

(687)—S. 78—Laches—*See* LACHES, 1 N.L.R. 158.

(688)—*Ss.* 79, 80—*Priority—Security for due payment of rent—Constructive* res judicata—*Puisne incumbrancer, if personally liable for mortgage money.*—A mortgagee making a further advance shall not, in respect of that advance, acquire any priority as against an intermediate mortgagee; the rule is subject to an exception that the intermediate mortgagee who has notice of the prior mortgage is postponed in respect of advance subsequently made on the security of that mortgage, provided it expresses the maximum to be secured thereby and that maximum is not exceeded. On the 28th September, 1900, the mortgagors took a lease from the mortgagees of a certain property and executed a security bond to secure the due performance by them of their engagement to pay rent. The two documents were registered on the 11th October, 1900. As the lessees defaulted in paying rent, the landlords sued to recover rent as also for the enforcement of the security, and joined, as defendants, several persons, and among them a mortgagee under a bond of the 12th October, 1900, on the allegation that they had acquired an interest in the properties given by the lessees by way of security. A decree was obtained on the 13th March, 1907, allowing the claim for priority by the landlords over the mortgage of the 12th October, 1900. *Held*, that the security bond of the 28th September was not entitled to priority over the mortgage of the 12th October, as the puisne incumbrancer had no notice of the prior mortgage, except to the extent that the matter was *res judicata* by virtue of the decree of the 13th March, 1907, in respect of the sum then in controversy. A Court will not extend the doctrine of constructive *res judicata* beyond the subject-matter of the particular litigation. A puisne mortgagee, as holder of a fragment of the equity of redemption, cannot be held personally responsible for the payment of the mortgage-debt which is primarily payable by the mortgagor. DALIP NARAYAN SINGH v. CHAIT NARAYAN SINGH, **16 C.L.J. 394.**

(689)—*Ss.* 79, 80—*Priority—Prior and subsequent mortgagees—Maximum amount—Release of part of security, effect of.*—Under s. 79 of the Transfer of Property Act, two elements

Transfer of Property Act (IV of 1882) —*continued.*

have to be considered : *first*, whether the subsequent mortgagee took with notice of the prior mortgage, and *secondly*, whether the prior mortgage expresses the maximum sum secured thereby. Where a deed, after stating that a lease had been granted for a term of 9 years upon an annual rental of Rs. 12,125, and that the proprietors (lessors) wanted reliable security for the payment of the annual rent, recited that the lessees hypothecated their properties for the payment of the annual rent and interest on defaulted instalments : *Held*, that the mortgage expressed the maximum to be secured thereby within the meaning of s. 79 of the Act and would have priority over a subsequent mortgagee, if the latter took with notice. If a mortgagee has relinquished valuable property for an inadequate consideration, he cannot be permitted to throw the burden of the balance of the debt upon the remaining properties. DALIP NARAYAN SINGH v. CHAIT NARAYAN SINGH, **16 C.L J 401.**

(690)—*S.* 80 – *Mortgage—Effect of payment of prior mortgage by a subsequent mortgagee as against intermediate charge* — A subsequent mortgagee may redeem a prior mortgage and keep alive such prior mortgage for his benefit. An intermediate mortgagee or his successor in title cannot insist that his mortgage should be redeemed by the subsequent mortgagee before or at the time of the redemption of the previous mortgage. No equities arise in favour of the intermediate mortgagee. RADHA RAM v. RALA RAM, **139 P.L.R. 1904=30 P.R. 1904.** (10 C. 1035, P.C., 32 P.R. 1903, S.C., 54 P.L.R. 1903, 67 P. R. 1899, 38 P. R 1894, *R*.)

(691)—S. 80 – *See* RIGHT OF SUIT—SALE IN EXECUTION OF DECREE, 12 A. 546=A. W. N. 1890, 77.

(692)—S. 80—*See* Nos. 688, 689, *supra.*

(693)—*Ss.* 80, 101—*Payment of prior mortgage by subsequent mortgagee—Intermediate mortgagee, rights of, how affected.*—The suit property was hypothecated to the plaintiff under a bond dated 2-1-1873 to secure a sum of money. There was an earlier mortgage of the property in favour of B under a mortgage-deed dated 26-6-1872, and subsequently a third mortgage dated 17-1-1874 in favour of the defendant, who, on 21-6-1875, paid off B's mortgage. The present suit was, thereupon, brought by the plaintiff for recovering the amount due under the bond of 2-1-1873 by enforcing the lien against the suit property. The defendant contended that, by reason of his having paid off the mortgage of B, he was entitled to priority over the plaintiff in respect of the amount paid off. *Held* that the defendant was not entitled to such priority. He cannot defeat the prior lien of the plaintiff by the device of paying off the mortgage of B and affecting to hold it as a shield against other incumbrances in the sense of s. 101 of the Transfer of Property Act (IV of 1882). The rule of s. 80 of the Act is an utter defeat to the

Transfer of Property Act (IV of 1882) —*continued.*

pretensions of the defendant in this respect. SHANKAR LAL v. NANIK CHAND, **A. W. N. 1885, 293.**

(694)—*S.* 81 — *Registration — Notice.* — A mere registration of a sale or mortgage in itself gives notice to subsequent purchasers or mortgagees. This doctrine is as applicable since the introduction of the Transfer of Property Act as it was before. DINA v. NATHU, **4 Bom. L.R. 253=26 B. 538.**

(695)—*S.* 81—*Decree for sale of the mortgaged property and recovery if necessary from the mortgagor — Construction.*—Where a decree upon a mortgage directed the sale of the mortgaged property, and if necessary from the defendant, *held* the words "if necessary" in the decree cannot be construed as giving the decree-holder the right of abandoning his claim against the mortgaged property in order to create a necessity to proceed against other property. A necessity contemplated by the decree is a necessity of proceeding against other property, or the mortgagor personally, if the mortgaged property proves insufficient to realise the amount due. MANTI KAMOJI v. CHODIMALLA RAMAMURTHY PANTULUGARU, **3 M.L T. 335.** (29 A. 369, *R.*)

(696)—*S.* 81—*Registration not "notice."—First mortgagee effecting a subsequent mortgage after land mortgaged has been mortgaged to a third person—Intention.*— Mere registration is not notice within the meaning of s. 81. (15 M. 268, *F.*; 6 B. 168, *Diss.*) It is a notice at or before the time of the mortgage, which under the terms of s. 81, alone, negatives the right conferred by the section. [*F.*, 27 C. 358, 4 C.W.N. 490, 7 C.W.N. 11; *Appr.*, 13 C.P.L.R. 43, 1 L B.R. 196, 27 B. 452 =5 Bom. L.R. 144; *Not F.*, 26 B. 538.] In the case of a person having a mortgage on his debtor's land and then, after it has been mortgaged to a third party, taking a further mortgage including the same land, it cannot be presumed that he had any intention of relinquishing his original security. INDER DAWAN PERSHAD v. GOBIND LALL CHOWDHRY, **23 C 790.**

(697)—S. 81—*See* Nos. 430, 436, 437, 438, *supra* and No. 819, *infra.*

(698)—*Ss.* 81, 82, 60—*Contribution—Partial redemption.* — Two divided brothers jointly mortgaged their two houses for Rs. 800. Subsequently one of the brothers sub mortgaged his house to the plaintiff for Rs. 400, and the other sold his house for Rs. 700 and paid off Rs. 550 to the original mortgagees, being a moiety of the mortgage amount then due. The plaintiff now sues on his subsequent mortgage and insists that the prior mortgagees should not have allowed the co-mortgagor to retain Rs. 150 out of the sale-proceeds of the other house sold. The houses being of equal value, each house should bear only a moiety of the burden under s. 82 of the Transfer of Property Act.

Transfer of Property Act (IV of 1882) —*continued.*

It was not competent for the plaintiff to compel the original mortgagees of both the houses to get their debt satisfied out of the house not mortgaged to him, to the extent of the entire value. NEELAMEGAM v. GOVINDAN, **14 M. 71.**

(699)—*S.* 82—*Contribution—Mortgage-debt—Liability of land in possession of third person.*—The plaintiffs were the holders of a mortgage. In execution of the decree on a prior mortgage some of the property included in the mortgage of the plaintiffs was sold, and themselves became the purchasers thereof. The remaining land comprised under the prior mortgage passed into the possession of some of the defendants by purchase. Plaintiffs sued on their mortgage. Besides seeking to enforce the ordinary remedies of mortgagees against their mortgagors and against the property comprised in the mortgage they claimed on the principle of contribution to charge any balance which might still remain due to them against the other property which, with the property comprised in their own mortgage, was included in the prior mortgage. *Held* that plaintiffs had no right of contribution and the other property stood free from any lien. Even if the plaintiffs' claim were maintainable, it ought not to have been joined with the ordinary claim on the mortgage. *Held* also that the plaintiffs' claim on the mortgage was not affected by the purchase by them of a part of the property mortgaged to them in execution of the decree on the prior mortgage. The sale conferred on them an absolute right to the property purchased by them, and it did not deprive them of their mortgage right. SESHA AYYAR v. KRISHNA AYYANGAR, **24 M. 96=12 M.L.J. 383.** [*F.*, 12 M.L.J. 390, 28 A. 593=3 A.L.J. 435=A.W.N. 1906, 150; *R.*, 27 M. 428, 26 A. 407=A.W.N. 1904, 74, 7 O.C. 307, 9 O.C. 259, 3 S.L.R. 17, 18 M.L.J. 238; *D.*, 26 B. 379.]

(700)—*S.* 82—*Mortgage—Contribution.*—Where, of two properties belonging to the same owner, one is mortgaged to secure one debt, and then both are mortgaged to secure another debt for the purpose of apportioning the liability of respective properties in regard to the subsequent mortgage, the value of the two properties must be taken into account, and credit given for the amount due upon the earlier mortgage out of the value of the property comprised in the subsequent mortgage. Where the amount due upon the earlier mortgage exceeds the value of the property comprised in that mortgage, the necessary result is that the whole of the amount of the second mortgage is recoverable from the other property comprised in the later mortgage. GHULAM HAZRAT v. GOBARDHAN DAS, **8 A. L. J. 195.**

(701)—*S.* 82—*Co-mortgagors—Contribution—Default of subsequent incumbrancer—Sale at the instance of prior mortgagee—Benami purchase by subsequent incumbrancer—Not entitled to benefit of his own wrong—Partial*

Transfer of Property Act (IV of 1882) —*continued.*

redemption.—A and B hypothecated their respective properties to C by a single mortgage-deed and left in his hands part of the consideration forethe redemption of a prior mortgage, held over a portion of B's property by D. C did not redeem D, who subsequently obtained a decree on foot of his mortgage, and upon the property being sold in execution, C purchased the same in the name of E. *Held* that the integrity of the mortgage in favour of C was broken up, and A's representatives were entitled to redeem the portion of the mortgaged property upon payment of a proportionate amount of the mortgage-money. A's share being under s. 82, Act IV of 1882, liable only for its own *quota* of the debt, C could not throw the whole burden upon it and claim that D's property had been sold to discharge a prior mortgage, inasmuch as it was C's wrongful conduct which led to that sale. WAJHAT HUSAIN v. RATAN LAL, **8 A.L.J. 1092.**

(702)—*S.* 82—*Property mortgaged sold in execution of simple-money-decree—Purchase by simple money-decree holder—Discharge of mortgage-debt by the said purchaser—Suit for contribution—Time at which the valuation of mortgaged property to be made for purposes of contribution, date of the mortgage and not the date of purchase.*—Two persons mortgaged two villages by way of conditional mortgage in favour of a certain person. The plaintiff, a simple-money-decree-holder against the mortgagors, sold a two-third share of one of the villages in execution of his decree and purchased it himself. To protect the property from being sold in execution of the mortgage-decree obtained by the mortgagee in a subsequent suit for foreclosure, the plaintiff discharged the mortgage-debt in full. The plaintiff brought the present suit claiming contribution from the other village and contended that the time, at which the two villages comprised in the mortgage were to be valued for the purpose of contribution, was the date when he purchased a share of one village and not the date of the mortgage as urged by the appellant. *Held*, that, having regard to the present tense used throughout the section and the provision, "that in calculating the value of the properties the amount of any other incumbrance to which any property may be subject *at the date* of the mortgage is to be deducted from the value of such property," the section contemplates that properties are to be liable to contribute rateably according to their values at the date of the mortgage and not at a future date. Hence, for the purpose of contribution in this case, the date of the execution of the mortgage and not the date of purchase by the plaintiff determines the value of the property. MARDEN SINGH v. THAKUR SHEO DAYAL, **A.W.N. 1905, 95=2 A.L.J. 307=27 A. 549.**

(703)—*S.* 82—*Mortgage of several properties—Sale of some properties to satisfy mortgage debt—Contribution—"Contract" to the contrary, construction of.*—Several properties had been

Transfer of Property Act (IV of 1882) —*continued.*

mortgaged to secure a debt. Subsequently, the mortgagor and his sons entered into a partition, whereby each of them took a share of the mortgaged properties and became liable to a share of the mortgage debt. Later on, one of the sons sold the greater portion of his share in the mortgaged properties to the plaintiff, free from incumbrances, and executed an indemnity bond to him authorizing him to proceed against the other properties of the vendor in case the property conveyed be sold by the mortgagee. On its so happening, the amount for which the vendor became liable under the indemnity bond was paid to the plaintiff. Notwithstanding, the plaintiff sued for rateable contribution from the other properties mortgaged. It was contended for the defendants that the plaintiff could not maintain the suit, inasmuch as he had received the amount secured by the indemnity bond. It was also contended that the plaintiff must debit himself with the share of his vendor in the mortgage debt before he could claim contribution from the other properties. *Held* that the receipt by plaintiff of the amount due under the indemnity bond did not entitle the plaintiff's vendor to sue for contribution. That was not the legal effect of the transaction between the plaintiff and his vendor. Though the plaintiff's vendor had nothing more to convey than an equity of redemption, he purported, nevertheless to convey the lands free from incumbrances. The moneys received by the plaintiff under the indemnity bond represented the difference between the value of the lands, if they had been conveyed free from incumbrance, and their value subject to the incumbrance. The result of the transactions was to convey an equity of redemption alone at an agreed price. The plaintiff's right to rateable contribution was in no way affected by the indemnity bond or the payment to him thereunder. *Held* also that having regard to the principle upon which the equitable doctrine of contribution is based, an agreement binding only as between the mortgagors is not a 'contract to the contrary' within the meaning of s. 82 of the Transfer of Property Act. The family partition, though binding on the co-owners did not affect their assigns. Plaintiff in consequence was entitled to contribution without any debits. RAMABHADRACHAR v. SRINIVASA AYYANGAR, **24 M. 85**. [*R.*, 26 A. 407=A.W.N. 1904, 74.]

(704)— *S.* 82—*Marshalling—Contribution—Mortgagor and mortgagee.*—There is nothing in the provisions of the Transfer of Property Act to support the view that, as between a mortgagee and the holders of the equity of redemption, the mortgagee is bound to distribute his debt rateably upon the mortgaged properties. HARA KUMARI CHOWDHURANI v. EASTERN MORTGAGE AND AGENCY CO., LTD., **7 C.L.J. 274.** (29 M. 217, 18 C. 320, *F.*; 30 C. 755, 1 C.L.J. 337, 3 C.L.J. 571=33 C. 613, *D.*) [*R.*, 10 C. L.J. 150=1 Ind. Cas. 264.]

Transfer of Property Act (IV of 1882) —*continued.*

(705)—*S.* 82—*Tender, requisites of—Mortgagee seeking possession—Redemption.*—In a mortgage deed after enumerating several contingencies provision was made on the happening of any of them in the following terms. "Notwithstanding anything contained to the contrary the mortgage debt for the time being owing on the security of these presents shall at once become payable as if the due date or extended date if any had elapsed and in such case all such rights and remedies shall be available to the Banker as will be available to her under the term of these presents upon default being in payment of the principal moneys or interest and all other moneys hereby secured and the Banker may in such event in her discretion without any further consent on the part of the company forthwith enter upon or take possession of the mortgaged premises or any of them of which she is not already in possession." Owing to the happening of some of the contingencies the plaintiff claimed that the debt owing on the security of the mortgage deed had become payable and that she was entitled to enter upon and take possession of the premises mortgaged to her. She contended that the expression "as if the due date had elapsed" not only served to accelerate the due date, but also to fix the amount of the mortgage money at what it would have been if in fact the due date had elapsed. The defendant alleged a tender of the mortgage money to plaintiff's attorneys and refusal to accept the same, and claimed to redeem the property. *Held*, (1) that the words 'as if due date had elapsed' were used merely to accelerate payment, and they could not be construed to cover the further amount that would have been due on the expiry of the due date of the mortgage. (2) That the tender was not good, as the plaintiff's attorney disclaimed authority to receive it. (3) That the defendant was entitled to redeem the property. A tender must be made either to the principal whose business it is to consider it or to his authorised agent, and a tender made to a person who disclaims authority to receive it is made at the maker's risk. BAI RUTTOMBAI v. THE FRASER ICE FACTORY, **10 Bom. L.R. 203= 32 B. 521.**

(706)—*S.* 82—*Purchase of the mortgage-decree by the holder of the interest of one of the mortgagors, effect of—Reduction of the mortgage-debt in proportion.*—Where the holder of the interest of one of the mortgagors in one of several mortgaged properties, subsequently purchases the whole mortgage-decree, the mortgage is satisfied to the extent of the proportion which the value of the mortgaged property purchased by him bears to the value of all the properties mortgaged. Wherever there is a confluence of the estates of the mortgagor and the mortgagee in the same person, the mortgage-debt is extinguished in proportion to the extent of the mortgaged property acquired by the mortgagee, and the mortgagee or his assignee can only recover the balance of the mortgage-debt from

Transfer of Property Act (IV of 1882) —*continued.*

the other properties mortgaged. HARENDRA KUMAR GUHA v. DINDAYAL SAHA, **4 C.L.J. 195**. [*Doubted*, 4 C.L.J. 573=34 C. 13.]

(707)—*S.82—Suit on mortgage bond - Contribution — Contention that mortgage debt should be apportioned—Decree.*—The intention of the Law as contemplated by s. 82, Transfer of Property Act, is not that the lien of the mortgagee should be split but simply to determine the liability of the purchasers *inter se*. S. 82, upon the face of it, refers to contribution as between the various persons, who may be liable with respect to the same debt. In a suit on a mortgage bond, the contention of the purchasers of the equity of redemption from the mortgagors,—the only defendants, — that the debt should be apportioned under s. 82 of the Transfer of Property Act, between the various mortgaged properties, held, by each of them, was disallowed, it being pointed out that the mortgagee was entitled to realise the whole debt upon the whole property, the right to contribution being only as between the defendants. ROGHU NATH PERSHAD v. HARLAL SADHU, **18 C. 320**. [*F.*, 7 C.L.J. 274; *R.*, 21 M. 369, 29 M. 217, 10 C.L.J. 150.]

(708)—*S. 82—Contribution to mortgage-debt, extent of liability of the several properties for.*—Such of the mortgaged properties as have been sold for the realisation of the mortgage money and have thus contributed to the mortgage debt are not liable to a claim for contribution; such a claim can only be advanced by the owners of those properties which have contributed more than their rateable share of the debt, and that against those portions of the mortgaged property only which have not contributed to the mortgage debt and have benefited by the sale of the property of the claimants for contribution. HARI RAJ SINGH v. AHMAD-UD-DIN KHAN, **19 A. 545=A.W.N. 1897, 168.** [*R.*, 23 A. 355, 26 A. 407=A.W.N. 1904, 74.]

(709)—*S. 82—Mortgage—Mortgagee's purchase at auction of part of mortgaged property—Effect on reduction of mortgage amount—Effect in case of private purchase.*—The price paid by the mortgagee for the portion of the mortgaged property purchased by him at auction, is not, in the absence of fraud, a material factor in determining the extent of the mortgage debt which is extinguished by the purchase. Where, therefore, the mortgagee buys at auction the equity of redemption in a part of the mortgaged property such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, *i.e.*, a portion of the debt which bears the same ratio to the whole amount of the debt that the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. (22 B. 304, 20 A. 23, A.W.N. 1895, 1, 19 A.196, *Cons.*; 16 C. 682, 3 A. 404, 13 M.I.A. 404, N.W.P. 1867, 88, *R.*) [*F.*, 4 C.L.J. 317; *R.*, 26 B. 88=3 Bom. L.R. 628, 26 A. 72 =23 A.W.N. 190, 6 Bom. L.R. 284, 7 O.C. 307, 9 O.C. 259, 4 C.L.J. 195, 31 A. 373=6 A.L.J. 451, 12 C.W.N. 745=8 C.L.J. 92; *D.*, 26 B. 88=3 Bom. L.R. 628, 28 A. 700=A.W.N. 1906, 208=3 A.L.J. 791, 4 C.L.J. 573=34 C. 13.] *Semble*, if the same result will ensue if the purchase by the mortgagee is made under a private contract with the mortgagor and not at Court auction. BISHESHUR DIAL v. RAM SARAP, **22 A. 284, F.B.=A.W.N. 1900, 69.** [*R.*, 12 C.W.N. 745=8 C.L.J. 92.]

Transfer of Property Act (IV of 1882) —*continued.*

(709-*a*)—*S. 82—"In the absence of contract to the contrary"—meaning of.*—The words "in the absence of a contract to the contrary" in s. 82 of the Transfer of Property Act, do not necessarily refer to a contract entered into at the time of the mortgage. RAMA v. MANAK, **7 Bom L.R. 191.**

(710)—S. 82 — *See* CONTRIBUTION, SUIT FOR—MISCELLANEOUS, 6 C.W.N. 583.

(711)—S. 82 — *See* HINDU LAW—JOINT FAMILY, 23 A. 355=A.W.N. 1901, 101.

(712)—S. 82—*See* Nos. 271, 431, 437, 659, 698, *supra* and Nos. 819, 915, *infra*.

(713)—*Ss.* 82, 56—*Contribution—Purchaser of a portion of property—Charge.*—*Held*, that a purchaser of mortgaged share, who satisfies the mortgage-decree obtained against him and others, is entitled to sue for contribution according to the proportionate value of the proportionate share of the mortgaged property, and to hold it liable to satisfy the debt under s. 82 of the Act. S. 56 applies to a case of a vendor-purchaser and enables a purchaser of a portion of the property subject to a charge to have this charge satisfied out of the other portion of the property in the absence of a contract to the contrary. SIRAJ-UD-DIN v. SIRAJ-UD-DIN, **2 A.L.J. 698.**

(714)—*Ss.* 82, 83, 100—*Contract Act* (IX *of* 1872), *s.* 69—*Contribution, suit for—Several lands burdened with payment of common revenue—Liability of owners who have not paid to person who pays the revenue—Nature of decree—Plaintiff's right to a charge.*—Where several lands are liable for payment of a definite amount of Government revenue and the amount has been paid by the owner of one of such lands, the latter is entitled, in a suit for contribution, to a charge on the land of each of the others for the proportionate fraction of the amount payable by each, and not to a personal decree. PUTHENPURAYIL AMMAN PARUKYI v. MANGALASERI PULLIKANDI PAKRAM HAJI, **15 Ind. Cas. 262.** (26 M. 686, 28 M. 493, 15 M.L.J. 219, 14 C.W.N. 361, 5 Ind. Cas. 779, *R.*; 33 M. 41, 3 Ind. Cas. 624, 19 M.L.J. 627, 6 M.L.T. 198, *Expl.*)

(715) *Ss.* 82, 89—*Order absolute—Notice—Contribution—Purchase by mortgagee*—No notice is necessary to be given to the mortgagor before an order absolute for sale is made under s. 89 of the Act. Where certain properties, along

Transfer of Property Act (IV of 1882) —*continued.*

with others, are subject to two mortgages in favour of the same person, and the mortgagee has purchased and obtained possession of such properties, in a sale in execution of his decree on the first mortgage, such properties are liable to contribute to the discharge of the second mortgage debt, and when a decree is obtained upon the second mortgage and sought to be executed, there must be a deduction from the amount of the second decree, of the sum payable as such contribution. MAHOMED TAKI REZA v. W. A. THOMAS, **4 C.L.J. 317.** (22 A. 284, 13 M.I.A. 404, 4 C. 475, *F.*) [*Doubted*, 4 C. L.J. 573=34 C. 13.]

(716)—*Ss.* 82, 91—*Mortgagee purchasing portion of hypotheca—Effect on mortgagee's right on remainder—Right of puisne mortgagee—to redeem after decree on prior mortgage to which he was no party.*—Where a mortgagee purchases a portion of the hypotheca, a portion of the mortgage-debt proportionate to the value of the hypotheca so purchased, is extinguished, but it is open to the mortgagee to sue for sale in respect of the remaining portion of the debt against the remaining portion of the hypotheca. (26 A. 446, 22 A. 284, N.W.P. 1867, 88, *R.*) Where a prior mortgagee got a decree for sale on his mortgage without making the puisne mortgagee of part of the hypotheca a party to the suit and purchased some items himself, and, the latter also got a similar decree without making the other a party, and the latter obtained a declaration that the former was not entitled to bring to sale the portions not purchased by himself without giving the puisne mortgagee an opportunity to redeem, *held*, in a suit by the first mortgagee for sale of such remaining portions, that the puisne mortgagee was entitled to redeem only the portion of the hypotheca then in suit and not the whole of the hypotheca. SHIB LAL v. BHAWANI SHANKAR, **26 A. 72=A.W.N. 1903, 190.**

(717)—*Ss.* 82, 95—*Contribution, suit for, principle of—Mortgage-decree—Payment of mortgage-debt by one of two co mortgagors, to save property from sale—Purchasers of equity of redemption—Assignees of property from permanent lease-holder, right of—Lien over mortgaged properties—Interest on the money paid to save property, if may be higher than that provided for in the mortgage bond—Personal decree—Charge—Equitable lien.* The principle upon which contribution is claimed by, and is allowed to, one co-sharer of a property against another, when the former discharges a joint-debt, is a well-known principle, *viz.*, that parties who are equally bound to pay a common debt and who are relieved of the burden of that debt by one of them, should reimburse him of all that he has paid in excess of his proper share of the debt. A *puisne* incumbrancer, who pays off a prior mortgage, is entitled to be placed in the position of a prior mortgagee, if his intention was not to extinguish the prior lien. (10 C. 1035, *R.*) The same principle applies in a case where one of two co-mortgagors pays off the entire mortgage-debt and claims to be in the position of the mortgagee, for the purpose of obtaining contribution from his co-mortgagor (4 A. 58, 26 B. 379, 26 A. 407, *R.*; 14 C. 809, *D*; 9 C.W.N. 865, *Expl. and D.*) The same principle does not, however, apply to persons, who are not co-mortgagors, but are the assignees of a *mokarari* interest granted by the mortgagor himself, and they are not entitled to claim the same lien, as against the shares of the co-mortgagors as the co-mortgagors. They are entitled only to a personal decree. Co-mortgagors who have purchased the equity of redemption of the shares in the property of some of the mortgagors and have saved the property from sale, by paying the balance of the entire mortgage-debt, are not bound by the covenant as to the rate of interest as provided in the mortgage-bond. The liability of the defendants to pay the contribution-money to the plaintiffs, arises upon very different considerations from those which existed at the time of the execution of the mortgage-bond, and it is not right and proper to refuse to the plaintiffs the ordinary rate of interest at 12 *per cent. per annum*, which, in a case like this, the Court allows. RAUSHAN ALI KHAN CHOWDHURY v. KALI MOHAN MOITRA, **4 C.L J. 79.**

(718)—*Ss.* 82, 95, 100—*Mortgage-decree—Payment by one of several representatives of deceased mortgagor—Charge—Contribution.*—A mortgagee having obtained a decree on his mortgage, the decretal amount was paid off by one of several representatives of the deceased mortgagor. *Held*, that the latter did not thereby acquire a charge on the mortgaged property, within the meaning of s. 100 of the Act. The provisions of ss. 95 and 82 of the Act do not apply to such a case. NAWAB JAHAN ARA v. MIRZA SHUJAUDDIN BUKHT BAHADUR, **9 C. W.N. 865.** (26 A. 227, *Disappr.*; 26 B. 379, *D.*; 25 C. 565, *R.*) [*D.*, 4 C.L.J. 79.]

(719)—*Ss.* 82, 100—*Mortgage—Entire debt paid off, but not by sale of the plaintiff's property—Contribution—Limitation Act (IX of 1908), arts.* 62, 132—*Money had and received.*—Where several properties are mortgaged to secure one debt, the owner of the property that has been made liable for more than its rateable proportion of the debt has a charge on the other properties. S. 82 of the Transfer of Property Act is a statutory enactment in India of a principle which has long been recognised to be founded on justice and equity. *Per Richards, C.J.*—"It seems to me that the s. 82 creates what I may call a statutory charge on the other properties. It creates no personal liability against the owner of the property. In some cases it might be most inequitable to make the owner personally liable. The liability might be greater than the interest in the property. In my opinion, art. 99 of the Limitation Act has no application whatever t›

Transfer of Property Act (IV of 1882) —*continued.*

a suit to enforce the right conferred by s. 82. It makes no difference whatever that the party claiming the charge did not redeem the mortgage or discharge the mortgage-decree before the property was actually sold, nor does it make any difference that the amount of the mortgage or mortgage-decree was not entirely realised out of the plaintiff's property. In considering whether or not the plaintiff has a charge, we need not and ought not to go outside the provisions of ss. 82 and 100 of the Transfer of Property Act. Ss. 82 and 95 are quite independent of each other." *Per Banerji J.*—The liability to contribute is that of the estates subject to the mortgage, and where those estates have passed to a purchaser or to the heirs of the mortgagor, it is not a personal liability. The necessary effect of the provisions of s 82, therefore, is that, where one of the mortgaged estates has contributed more than its own *quota* of liability, the owner of that estate is entitled to recover the excess from the other estates subject to the mortgage, and acquires a charge on those estates. This charge is created by the provisions of s. 82 read with s. 100. *Per Banerji, and Chamier, JJ. (Richards, C.J., dubitante)* :—"Where two properties are mortgaged to secure one debt and both properties are sold in execution of a mortgage-decree the owner of the property which has borne more than its rateable share has a right to a personal decree against the owner of the property that has borne less than its rateable share of the debt, where the latter has actually received the surplus proceeds of the sale of his property." *Per Richards, C.J.* —" The plaintiff's right originally was not a personal right for contribution. He had a charge on the property which had borne less than its rateable share of the mortgage debt. He could enforce this right so long as the property of the defendants 3 to 5 remained unsold ; and any right that he had against that property would attach to surplus proceeds of sale after the property had been sold. The property, however, having been sold and the surplus proceeds paid out, the plaintiff's right, if any, has now completely changed. He has no right now unless it can be said that the payment out of the surplus proceeds gave him a new cause of action. The surplus proceeds of the sale belonged to the defendants 3 to 5 subject to the plaintiff's charge. No fiduciary relation existed between the plaintiff and the defendants 3 to 5, although it may be that, after the plaintiff had filed an objection to the payment out of the money, the Court was wrong in allowing payment to be made without providing for the plaintiff's charge. It seems to me that his claim can hardly be regarded as a claim for money had and received by the defendants 3 to 5 to the use of the plaintiff." *Per Banerji, J.*—In spite of the charge in the plaintiff's favour, the property belonging to the defendants 3 to 5 was liable to be sold in execution of the decree obtained on the mortgage and was accordingly sold. Had the whole amount of the sale-proceeds been appropriated to the discharge of the mortgage, the charge would have been of no effect. But as there was a surplus, the charge attached to the surplus. Had a part only of the property been sold for the satisfaction of the mortgage, the plaintiff would have been entitled to enforce his charge on the remainder of the property, but as the whole property was sold and the rest of it acquired free from the charge, the plaintiff could not follow it into the hands of the purchaser. His lien would attach to the surplus sale-proceeds into which the property was converted. Those proceeds are substituted for the property itself and are therefore subject to the lien to which the property itself was subject. The principle is recognized in s. 73 of the Transfer of Property Act. It arises out of equitable considerations and the lien acquired is an equitable and not a possessory lien. The fact, therefore, of the withdrawal from Court of the money to which it attached cannot extinguish or affect it. Under the category of suits referred to in art. 62 are included actions for money wrongfully received by the defendant to which the plaintiff was in justice and equity entitled. Where, therefore, surplus sale-proceeds were withdrawn from the Court by the defendants, in spite of the protests of the plaintiff who had a charge upon them, *held* that the suit for recovery of the money was an action for money had and received within the meaning of art. 62, Limitation Act, and the time began to run from the date when the money was withdrawn. *Per Banerji, J.*—If the claim be regarded as one to enforce an equitable right, it is Governed by the six years' rule of limitation provided in art. 120, and is within time, whether the cause of action arose on the date the property was sold or when the money was withdrawn. BHAGWAN DAS v. KARAM HUSAIN, **8 A.L.J. 854.**

(720)—Ss. 82, 100—*See* MAD. ACT II OF 1864, ss. 2, 32, 42, 26 M. 686, F.B.

(721)—*Ss.* 82, 105—*Sale of property of one of several co-mortgagers—Sale not sufficient to satisfy whole decree, but fetching more than due from him—Contribution, suit for*—*Held* by *Stanley, C.J.*, and *Burkitt, J.* (*Banerji, J., Diss.*) One of two or more co-mortgagors (including the transferees of the equity of redemption from one of them) whose portion of the mortgaged property has been sold in execution of a decree for sale on the mortgage and has fetched at auction a larger sum than was reteably attributable to it (under s. 82, Tr. P.Act), but has not discharged the whole of the mortgage-debt, has no right by law against his co-mortgagors to compel them to contribute and indemnify him to the extent by which the proceeds of the sale of his portion of the mortgaged property were in excess of the amount rateably due from it. He does not, therefore, acquire a charge over his co-mortgagor's portions of the mortgaged property to the extent of that execess. There is no

Transfer of Property Act (IV of 1882) —*continued.*

analogy between such cases and cases of co-sureties. Co-sureties bind themselves to discharge in certain eventualities the liabilities of third parties, for which they otherwise would not be responsible, while co-mortgagors (including in that name their transferees) are themselves the debtors liable jointly to their mortgagee for repayment for money they have borrowed from him on the security of their immoveable property, a liability which is enforceable by sale of that property (12 A. 110, 4 A 58, *Ex parte Giffard*, (1802) 6 Ves. 805 = 6 R.R. 53, *Davies* v. *Humphreys*, (1840) 6 M. and W. 153 = 55 R.R. 547, 14 C. 809, 26 M. 686, 21 C. 142, 20 M. 23, 14 A. 273, *Platt* v. *Mendel*, (1884) L.R. 27 Ch. D. 246, 22 C. 100, *Tombs* v. *Roch*, (1846) 2 Collyer 490, *R.*, *Per Benerji* (*contra*) :—A right of contribution arises in cases in which payment has been enforced by sale of the property of the claimant for contribution as well as in cases in which payment has been made to avert a legal process (24 M. 96, *Radgers* v. *Maw*, (186) 15 M & W. 444, 2 A. 815, 12 A. 110, 13 A. 371, 19 A. 545, 24 M. 85, 26 M. 686, *R.*) It is not essential for the accrual of the right of contribution that the whole of the mortgage-debt has been paid. The test in such cases is whether the payment made by the claimant of the amount realized by the sale of his property exceeds the amount for which that property was rateably liable, and whether the property, from the owners of which contribution is claimed, has to that extent been relieved of liability and has thus benefited. There is no distinction between the case of co-sureties and the case of co-mortgagors (*Davies* v. *Humphreys*, (1840) 6 M. & W. 153 = 55 R.R. 547, *Dering* v. *The Earl of Winchester*, (1787) 2 W. & T. 7th Ed., p. 535 *Craythorne* v. *Swinburne*, (1807) 14 Ves. 160, 2 A. 115, 12 A. 110, 19 A. 545, 26 M. 686, 19 A. 332, *Cottingham* v. *The Earl of Shrewsbury*, (1848) 3 Hare 627, *R.*) A person claiming contribution in the case of mortgage-debt is entitled to a charge on the property for contribution (2 A. 115, 4 A. 58, 12 A. 110, 13 A. 371, 19 A. 545, 23 A. 355, 26 B. 379, 14 A. 273, 14 C. 809, 26 B. 437, 21 C. 142, *R.*) *Per Burkitt, J. Quære.*—Whether, in a suit for sale by a mortgagee against several co-mortgagors (and their transferees) liable to the plaintiff-mortgagee under one and the same mortgage, the Court hearing the suit can settle the respective equities of the several co-mortgagors *inter se*? IBN HASAN v. BRIGBHUKAN SARAN, **26 A. 407 = A.W.N. 1904, 74, F.B. = 1 A.L.J. 148, F.B.** [*R.*, 4 C.L.J. 79, 13 O.C. 23, 9 O.C. 259, A.W.N. 1908, 289 ; *D.*, 31 A. 65 = 12 C.W.N. 5 = 6 A.L.J. 2 = A.W.N. 1908, 289 = 5 M.L.T. 46, 10 C.L.J. 150 = 1 Ind. Cas. 264.]

(722)—*S.* 83—*Deposit into Court of mortgage money by mortgagor after death of mortgagee—Dispute as to legal representative — Notice under s.* 83, *Tr. P. Act* IV *of* 1882. — *Rights of mortgagor.*—Where, on the death of a mortgagee, in consequence of disputes having arisen between two persons as to who was his legal representative, the mortgagor deposits the mortgage-money in Court and serves notice of deposit on the disputants as required by s. 83 of the Transfer of Property Act, IV of 1882, he is entitled to possession of the mortgaged property, the mortgage-debt having been legally discharged. And the fact that the amount deposited was paid by the Court to the claimant with the worst title, would not affect his rights. RAM SUMRAN v. SAHIBZADA BIJAI PARTAB NARAIN SINGH, **A.W.N. 1885, 328.**

(723)—*S.* 83—*Money deposited insufficient—Mortgagee entitled to refuse and can claim interest—Duty of mortgagee accepting deposit to return mortgage-deed.*—A mortgagee is not bound to accept money deposited by the mortgagor under s. 83 of the Act, if it is insufficient. If he accepts the amount he will have to give up the mortgage-deed and will lose all claim to the balance. If the amount deposited is insufficient the mortgagee will be entitled to interest. BALARAM v. NANURAM, **1 C.P.L.R. 154.** [*R.*, 14 C.P.L.R. 49.]

(724)—*S.* 83—*Deposit by puisne mortgagee of amount due to prior incumbrancer—Acceptance, effect of.*—Where money deposited in Court under s. 83, Transfer of Property Act, by a subsequent mortgagee for the purpose of redeeming the prior mortgagee, is withdrawn by the latter, the act of withdrawing the money without objection amounts to an acknowledgment that the person to whose credit the money is deposited holds an actually existing mortgage over the property mentioned and that the mortgage is capable of being redeemed. He cannot, in equity be allowed to retain the money and at the same time to say that the person who has executed the mortgage to the subsequent mortgagee has no power to execute the document. SUNEHRA v. SHADI RAM, **1 A.L.J. 590.**

(725)—*S.* 83—*Amount due under mortgage deposited by mortgagor—Conditions prescribed by the section to be complied with for the amount to become the property of the mortgagee.*—Money deposited in Court by a mortgagor, under this section, for payment to the mortgagee, becomes the property of the mortgagee, only on his compliance with the conditions prescribed by the section as conditions precedent to his drawing the money out of Court. So, the amount is not liable to be attached by a creditor of the mortgagee, unless he has stated his willingness to accept the amount deposited in full discharge of the mortgage money and has deposited the mortgage-deed in Court. MOTHIAR MIRA TARAGAN v. AHMATTI AHMED PILLAI, **29 M. 232.** [*R.*, 7 M.L.T. 207.]

(726)—*S.* 83—*Deposit—Redemption decree—Appeal by mortgagee—Wthdrawal of deposit—Amount in deposit—Attachment by mortgagee's creditors*—Where a deposit made under s. 83 of the Tr.P. Act continued in Court after the refusal of the mortgagee to take it, and the mortgagee, after a redemption decree had been passed

Transfer of Property Act (IV of 1882) —*continued.*

against him and pending an appeal therefrom, applied for and got the deposit amount, *held* that the conditions of s. 83 of the T.P. Act applied to the money so long as it remained in deposit, that the mortgagee should be deemed to have received it in full discharge of the mortgage claim, and that he had no right to prosecute the appeal. The Court in which money deposited under s. 83 of the T.P. Act, continues even after the refusal of the mortgagee to accept it, has no jurisdiction to allow it to be attached by the mortgagee's creditors, since the amount stands to the credit of the mortgagor only, and could be withdrawn by him as it belongs to him. DAL SINGH v. PITAM SINGH, **25 A. 179 =A.W.N. 1903, 2.** [*F.*, 29 M. 232 ; *R.*, 7 M. L. T. 207.]

(727)—*S.* 83—*Payment to credit of mortgagee and third person—Whether valid tender.*—Payment under s. 83 of the T.P. Act must be to the account of the mortgagee alone and not to that of the mortgagee and another. The mortgagee suing to enforce his claim without taking notice of such a deposit is not disentitled to claim interest from its date. DEBENDRA MOHAN RAI v. SONA KUNWAR, **26 A. 291=A.W.N. 1901, 21=1 A.L.J. 5.**

(728)—*S.* 83—*Deposits under—Suit for redemption after refusal to accept the deposit—Subsequent suit for profits from date of deposit to possession, maintainability of.*—On 12th May, 1902, the plaintiffs deposited the mortgage money under s. 83 of the Transfer of Property Act. After the mortgagee's refusal to accept the money, the plaintiffs brought a suit for redemption which was decreed and obtained possession on 30th July 1905. The present suit was brought to recover profits from the mortgagees for the period, 12th May 1904 to 13th July 1905. *Held*, that the plaintiffs could not now sue for profits which ought to have been and could have been taken into account in the former suit, but for which they failed to sue therein. UMRAI v. GULZARI LAL, **12 O.C. 152=2 Ind. Cas. 834.**

(729)—*S.* 83 — *Mortgagor — Mortgagee — Tender of money—Possession with mortgagee under a consent decree—Mesneprofits—Account.* —A mortgagee entered into possession of the mortgaged property in virtue of a consent decree which provided that the possession was to pass to him on default of payment of certain instalments of mortgage money provided by the decree. But before the mortgagee obtained actual possession, the mortgagor tendered the mortgage money into Court under s. 83 of the Transfer of Property Act, and demanded possession from the mortgagee. The mortgagee, notwithstanding this, took possession of the property. The mortgagor thereupon sued for possession and for mesne profits: *Held*, that the mortgagor was entitled to possession on payment of the mortgage money, but as the tender under s. 83 was premature the mortgagee was not liable to account for the mesne

Transfer of Property Act (IV of 1882) —*continued.*

profits of the property for the period during which he remained in possession. RAM SONJI v. KRISHNAJI, **3 Bom. L.R. 939=26 B. 312.**

(730)—*S.* 83—*Deposit paid to mortgagee—Balance promised—Whether a full discharge.*—Some money was deposited under s. 83, Transfer of Property Act, for payment to a mortgagee. On objections being raised by the mortgagee as to the insufficiency of the amount, the mortgagor agreed to pay the balance which was found due to him. At the request of the pleader for the mortgagors, the Court paid the money deposited to the mortgagees and endorsed payment on its back and returned the deed to the mortgagees. *Held* that the mortgagees did not take the money in full discharge of the mortgage as provided by s. 83, Transfer of Property Act. HARDIAL v. PIRTHI SINGH, **7 A.L.J. 65=32 A. 142=5 Ind. Cas. 518.**

(731)—*S.* 83—*Civ. Pro. Code, s.* 375.—Where a sum of money is deposited in Court under s. 83 of the Transfer of Property Act, by the vendee of the mortgagor, and the mortgagee raises objections, which, however, are subsequently withdrawn in pursuance of a compromise, the mortgagee is not precluded by s. 375, Code of Civil Procedure, from enforcing the terms of the compromise by the fact that those terms were not brought to the knowledge of the Court. TATAYYA v. PICHAYYA, **13 M. 316.**

(732)—*S.* 83—*Conditional deposit, invalidity of.*—The deposit of mortgage-money, provided for by s. 83 of the Transfer of Property Act, should be made unconditionally. So, a deposit made along with a prayer by the petitioner that his opponent be called upon to bring in certain documents, and, that, on his doing so, the amount may be paid to him, could not be accepted by the Court as a proper and valid deposit under the section. NANU v. MANCHU, **14 M. 49.** [*D.*, 17 M. 267.]

(733)—*S.* 83—*Mortgage—Suit by mortgagee —Tender after suit, or in a different Court—Invalidity—Payment in Court after suit—Civ. Pro. Code*, 1908, *O.* 24, *r.* 1—*English Law — Costs—Right of mortgagee to obtain costs—When lost.*—A tender of the mortgage amount under s. 83, Transfer of Property Act, subsequent to the suit, is not valid in law and does not disentitle the plaintiff to interest after the deposit. Nor could a deposit be made under the section in a Court different from that in which the suit is pending. When a suit has been instituted, payment into Court is regulated by O. 24, r. 1, Civ. Pro. Code, 1908. Where the mortgagors took possession of the mortgaged property without discharging the mortgages, when it had been agreed that the mortgagees should remain in possession of the property as security for the amounts due on the bonds. *Held*, that the mortgagors were bound to give possession to the mortgagees and to allow them in possession before making a deposit under s. 83 (26 B. 312, *R.*). S. 83 presupposes that the mortgagor, when he proposes

Transfer of Property Act (IV of 1882) *c—ontinued.*

to take action under s. 83, has a valid right to redeem and is not attempting to exercise the right of redemption in a manner contrary to the provisions of the contract between the parties. There is no statutory provision in India, such as there is in England, that a mortgagor may tender the amount and ask for a stay of action before the hearing. A mortgagee is entitled to his costs, unless there are special reasons disentitling him to them. BAYYA SAO v. NARASINGA MAHAPATRO, **10 M.L T. 37.**

(734)—*S.* 83—*Deposit in Court by mortgagor —Full and unconditional tender.*—When a mortgagee accepts the amount deposited by the mortgagor under s. 83 of the Transfer of Property Act, as the full amount due, neither his subsequent denial that the amount is the full amount, nor the claim of the mortgagor to a registered receipt (which the mortgagee accepts) and to the return of the title deeds, would make the tender conditional or invalid. KORA NAYAR v. RAMAPPA, **17 M. 267.** (14 M. 49, *D.*)

(735)—S. 83—Application under—Reference by Court under O. XLVI, r. 1, Civ. Pro. Code, on such application—Not allowed—*See* CIV. PRO. CODE, 1908, s. 141, O. XLVI, r. 1, 21 M.L.J. 613.

(736)—S. 83—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 58, 60, 61, 62, A.W.N. 1891, 220.

(737)—S. 83—*See* RIGHT OF SUIT—REVENUE SALE FOR ARREARS OF, 13 A. 195= A.W.N. 1890, 228.

(738)—S. 83—*See* SANCTION TO PROSECUTE, A.W.N. 1895, 145.

(739)—S. 83—*See* Nos. 234, 540, 541, 542, 547, 714, *supra.*

(740)—*Ss.* 83, 84—*Interest after date of tender.*—Where it is found that there has been a tender of the mortgage money by the mortgagor but it is not known whether it was made to the proper person in the proper manner, or whether the mortgagor kept the mortgage money afterwards unemployed, *held*, that the mortgagor was not entitled to cessation of interest from the date of tender which he would have been entitled to if he had deposited the money as required by s. 83 of the Transfer of Property Act. RAM NATH TARKARATNA BHATTACHARJEE v. GOPAL CHANDRA SANKAR, **19 C.W.N. 153.**

(741)—*Ss.* 83, 84—*Mortgagor making a deposit in full discharge of mortgagee's rights— Withdrawal of the deposit by the mortgagee's agent— Presumption*—Onus probandi—*Principal and agent—Agent's omission to comply with statutory requirements— Estoppel.*— Where a mortgagor deposited in Court, under s. 83 of the Transfer of Property Act, a sum of money in full discharge of the only amount he alleged to be then recoverable on his bond, and, after the mortgagee had, on receipt of the notice under the section, disputed the sufficiency of the amount deposited to discharge in

Transfer of Property Act (IV of 1882) *—continued.*

full the mortgagor's liability, the mortgagee's agent drew the amount out of Court and applied it to the mortgagee's use. *Held*, that money lodged "in full discharge" of a liability could only be drawn out by a creditor in full discharge of that liability; that it was for the mortgagees to show that their agent acted under such conditions that the statutory result did not follow from his act, and, if they failed to do that, then there was nothing to defeat or modify the operation of the statute, and the consequences must be those which it prescribed. RAM CHANDRA MARWAI v. RANI KESHOBATI KUMARI, **10 C.L.J. 1, P.C.=6 A.L.J. 617 =6 M.L.T. 1=11 Bom. L.R. 765=13 C.W.N. 1102=36 C. 840=2 Ind. Cas. 935=19 M.L.J. 419=36 I.A. 85.** [*R.*, 11 C.L.J. 226.]

(742)—*Ss.* 83, 84—*Mortgage-money—Interest —Tender—Deposit in Court—Minor mortgagee —Guardian* ad litem—*Mortgagor's duty to have appointed a guardian* ad litem.—On the 25th October 1898, a mortgage deed was executed: it provided that the mortgagor was not entitled to redeem after the 25th October, 1899 without paying interest to the 25th October, 1900. On the 12th October 1899, the plaintiff deposited in Court the money then due on the mortgage; but the mortgagee being a minor, it became necessary to appoint a guardian *ad litem* to receive notice of the deposit. Notice was issued to the minor's mother for her appointment as a guardian *ad litem*, and was made returnable on the 18th November 1899. On that day she was appointed guardian *ad litem*. Then a notice was again issued to her calling on her why she should not receive the deposited money: the notice was made returnable on the 9th December 1899, when she refused to accept the money in full discharge of the amount due on the mortgage as it did not include interest subsequent to 25th October, 1899. The deposited amount was returned to plaintiff who filed this suit. *Held*, that the plaintiff failed to make a tender before the 26th October 1899 the deposit made by plaintiff in Court on the 12th October 1899, and the application made by him on that day for the appointment of a guardian *ad litem* were not sufficient by themselves to amount to tender, under s. 83 of the Transfer of Property Act: the plaintiff could not be said to have done all that had to be done by him until he procured the appointment of a guardian *ad litem*. PANDURANG v. MAHADAJI, **4 Bom. L.R. 714=27 B. 23.**

(743)—*Ss.* 83, 84—*Deposit of mortgage money in favour of persons entitled as well as those not entitled, effect of.*—A deposit of mortgage money made by the mortgagor to the credit of several persons of whom some alone were entitled to it, while others were not, would not amount to a proper deposit so as to entitle mortgagor to the benefit of ss. 83 and 84 of the Transfer of Property Act, inasmuch as even the persons really entitled could not draw it by themselves. MADHAVI AMMA v. KUNHI PATHUMMA, **23 M. 510.**

Transfer of Property Act (IV of 1882) — *continued.*

(744)—*Ss.* 83, 84—*Tender—Deposit of mortgage amount in Court—Refusal of mortgagee to accept the amount—Withdrawal by mortgagor—Suit for redemption of mortgage—Right to cessation of interest—Costs of suit.*—In the case of a tender of the mortgage amount by the mortgagor to the mortgagee, continued readiness to pay is necessary for the cessation of interest. S. 84 of the Transfer of Property Act pre-supposes the continuance of the deposit to justify the claim for cessation of interest. Where a mortgagor deposited the mortgage amount into Court under s. 83 of the T. P. Act, whereupon notice was issued to the mortgagee, who refused to receive the money and the mortgagor thereon withdrew the deposit from Court. *Held*, in a suit for redemption, that the withdrawal of the amount by the mortgagor disentitled him to cessation of interest from the date of deposit. (33 M. 100, 6 M.L.T. 262, 3 Ind. Cas. 729, *R.*) In such a case the mortgagee is not disentitled to his costs of suit, merely because he claimed a larger amount than he was entitled to. KRISHNASWAMI CHETTIAR v. THIPPA RAMSWAMI CHETTYAR, **8 Ind. Cas. 763=9 M.L.T. 131.** (21 W.R. 234, *R.*)

(745)—*Ss.* 83, 84—*Deposit in two instalments.*—There is nothing in ss. 83 and 84 of the T. P. Act to prohibit the deposit being made on two dates, when the amount first paid is discovered to be insufficient and the depositor pays the balance on another day, and when both payments are known to the mortgagee. RAGHUB PRUSTI v. BHOBUI SAHOO, **8 C.W.N. 216.**

(746)—*Ss.* 83, 84, 67—*Costs of mortgagee.*—Before notice of deposit under s. 83 of Act IV of 1882 the mortgagee filed a suit, and the mortgagee *was not proved to know of the deposit. Held*, plaintiff could sue and get a decree with full vakil's fee as in a contested case—as here there was no confession of judgment. SITARAMAYYA v. VENKATARAMANNA, **11 M. 371.**

(747)—*S.* 84—*Tender by mortgagor—Refusal by mortgagee—Subsequent inability to pay by mortgagor—But no demand by mortgagee—Interest, whether will run—"Tender," meaning of.*—The mortgagor tendered the mortgage amount, but the mortgagee refused to accept the same. Subsequently the mortgagor became unable to pay, but the mortgagee did not make any demand. *Held*, that, under s. 84 of the Transfer of Property Act, interest ceases from the date of tender—The word "tender" does not in itself imply that the tenderer must always be ready to pay the money—The mortgagee, not having made any subsequent demand, was not entitled to interest from the date of the tender. VELAYUDA NAICK v. HYDER HUSAIN KHAN, **6 M.L.T. 262=3 Ind. Cas. 729=19 M.L.J. 648=33 M. 100.**

(747-*a*)—S. 84—*See* Nos. 234, 541, 740, 741, 742, 743, 744, 745, 746, *supra.*

(748)—*S.* 95—*Reason for enactment.*—Before the passing of the T. P. Act, decrees for sale were made of all sorts of interests in properties mortgaged. Properties were sold subject to one, two, three, four, and six mortgages. Persons interested were not made parties to the suits, and endless litigation was the result. One reason for the passing of the T.P. Act was to strike at the shameful abuses which had arisen by reason of the procedure allowed by some of the Courts in the enforcement of mortgages, procedure which often only benefited the legal profession—no doubt a very deserving body of men and ended in the ruin of the unfortunate mortgagor, if not of one or more of the mortgagees. In order to strike at the system, s. 85 of the Act was introduced to bring all persons interested before the Court in one suit, so that their rights may be dealt with and disposed of. SRI GOPAL v. PIRTHI SINGH, **20 A. 110, F.B. =A.W.N. 1897, 216.** (13 A. 432, 16 A. 478, 17 A. 537 at p. 559, *R.*) [*R.*, 30 B. 156=7 Bom. L.R. 811.]

(749)—*S.* 85—*Applicability to mortgages executed before the Act.*—S. 85 of the Act only applies a principle which was long before recognised by the Courts of this country, and is a principle to which in justice, equity and good conscience, those Courts were bound to give effect. Therefore, it applies equally to mortgages executed before the passing of the Act. NAMDAR CHAUDHRI v. KARAM RAJI, **13 A. 315=A.W.N. 1891, 90.** [*R.*, 17 A. 537, 1 O.C. 53.]

(750)—*S.* 85—*Party interested—Plaintiff, no notice—Decree, effect of, on interested party, not joined—Transfer of Property Act, not a complete Code—Substantial justice.*—S. 85 of the Transfer of Property Act imports an obligation upon the mortgagee-plaintiff to bring on the record interested persons, of whose existence he has notice. The section does not lay down what consequences are to flow from the breach of this statutory obligation. If a person interested in the mortgage security or in the right of redemption, has not been joined as a party to the mortgage-suit, the decree and sale in execution do not destroy his right of redemption, and he is entitled to exercise it in any proceeding properly framed for the purpose, or set it up in defence whenever his title is sought to be ignored or assailed. The Transfer of Property Act does not purport to be a complete Code, and a recourse to the first principles of jurisprudence may occasionally be useful in the administration of law as contained in an Indian Code, however carefully it may have been drawn up. One of these fundamental principles which regulate the administration of justice is that no one is to be condemned, punished or to be deprived of his property in any judicial proceeding unless he had an opportunity of being heard. The law has not always been developed on logical lines. What has to be steadily kept in view is not logical precision, but substantial justice in the determination of controversies. A mortgagor executed several mortgages on distinct shares of the

Transfer of Property Act (IV of 1882) —*continued.*

same property, which were entitled to co-ordinate rank; he then created another mortgage, without specifying the prior security to which it was subordinate: *Held*, that the last mortgagee was entitled to be treated as subordinate to the lightest incumbrance. Principle of partial redemption explained. BUNSEE DAS v. GENA LAL JHA, **14 C.L.J. 530.**

(751)— *S.* 85— *Application for addition of parties — Principles which ought to guide a Court in dealing with such applications.*— When an application is made to a Court to amend some defect or irregularity in the form of a suit, such as an application to add parties whose addition is required by s. 85 of the Transfer of Property Act, such application ought, as far as possible, to be granted in the case of a defect which can be set right without any injustice to the other parties concerned and where the defect or irregularity is not the result of bad faith or misconduct on the part of the applicant. AMIR-UD-DIN HUSAIN v. KHAIR-UD-DIN HUSAIN, **A. W. N. 1900, 20.** [*R.*, A. W. N. 1905, 35.]

(752 & 753)—*S.* 85—*'Property comprised in the mortgage,' meaning of — Suit to enforce mortgage — Necessary parties to such suit — Frame of suit—Hostile and paramount title to mortgagor and mortgagee if may be enquired into in such suit.*—The only persons who are proper parties to a suit to enforce a mortgage are persons having an interest in the property comprised in the mortgage, that is, the interest which the mortgagor is competent to transfer by way of mortgage at the date of the transaction. The term 'property' used in s. 85 of the Transfer of Proporty Act in the phrase "property comprised in the mortgage," indicates not the actual physical object but denotes merely the rights in such object which form the subject matter of the transaction. JAJNESWAR DUTT v. BHUBAN MOHUN MITRA, **3 C. L. J. 205 = 33 C. 425.** (1 C.L J. 337, *F.*; 13 A. 432, *Diss.*) [*R.*, 29 A. 385, F. B. = 4 A. L. J. 273 = A. W. N. 1907, 97.]

(754)—*S.* 58—*Necessary parties.*—Where the mortgagees were not made parties to the appeal in a suit relating to a mortgage either in the High Court or in the lower appellate Court, and the appellants' vakeel applied that they might be made parties at the time of the hearing in the High Court, and explained that he was not able to make them parties to the second appeal as they had not been made parties in the lower appellate Court and he was unable to give any satisfactory reason for the omission in that Court, *held* under the above circumstances, that the second appeal should be dismissed on the ground that the appellant had not complied with the requirements of s. 85 of the Transfer of Property Act. KESAVAN v. SANKARAN NAMBUDRI, **25 M. 570, Note 2.** (25 M. 571, Note (1), 25 M. 571 Note (2, *F.*) [*Cited*, **25 M. 568.**]

Transfer of Property Act (IV of 1882) —*continued.*

(755)—*S.* 85—*Necessary parties.*—Where the original mortgagees have been made parties in a suit relating to a mortgage, but are struck off from the array of parties to the appeal, on the application of the appealing plaintiff, the appeal should not be heard and determined but should be dismissed. VASUDEVA NAMBUDRIPAD v. THE COLLECTOR OF MALABAR, **25 M. 570, Note.** [*Cited*, 25 M. 568.]

(756)—*S.* 85—*Mortgage—Suit for a sale on a mortgage—Parties.*—In a suit for sale on a mortgage, the ordinary rule is that a plaintiff mortgagee cannot be allowed so to frame his suit as to draw into controversy the title of a third party, who is in no way connected with the mortgage, and who has set up a title paramount to that of the mortgagor and mortgagee. JOTI PRASAD v. AZIZ KHAN, **A.W.N. 1908, 263 = 6 A.L.J. 5 = 5 M.L.T. 47 = 31 A. 11 = 1 Ind. Cas. 53.** (33 C. 425, 32 C. 746, A.W.N. 1908, 100, *R.*)

(757)—*S.* 85—*Mortgage—Suit for sale on a mortgage—Parties.*—Whether or not s. 85 of the Transfer of Property Act, 1882, refer solely to persons interested in the equity of redemption, it is not essential to join as a party defendant, in a suit for sale on a mortgage, a person whose interest in the mortgaged property, if it exists, would be antagonistic to the claims of both mortgagor and mortgagee. KHAIRATI v. BANNI BEGAM, **A.W.N. 1908, 100 = 30 A. 240 = 5 A.L.J. 604.** (33 C. 425, *R.*) [*R.*, A.W.N. 1908, 263, 31 A. 11.]

(758)—*S.* 85—*Whether applies to suits in ejectment.*—The provisions of s. 85 of the Transfer of Property Act do not apply to suits in ejectment. They apply only to suits for foreclosure sale or redemption. ARUMUGAM PILLAY v. KATHANA PILLAY, **1 Ind. Cas. 560.** (1 A.L.J. 367, *R.*)

(759)—*S.* 85—*Parties—Suit by subsequent mortgagee—Prior mortgagee not party—Appeal.*—A subsequent mortgagee did not implead, in his suit, a prior usufructuary mortgagee, but he agreed to take a decree subject to the prior mortgagee's rights, and a decree was accordingly passed. The defendant appealed against the decree and to his appeal the prior mortgagee was not a party. *Held* that the property mortgaged to the plaintiff was not merely the equity of redemption but the actual property, and that the prior mortgagee was a necessary party to the appeal before the lower appellate Court. AMMAYI AMMAL v. RATHNA PATHAN, **14 M. L.J. 427.**

(760)—*S.* 85—*Plaintiff suing for amount rateably due—Non-joinder of parties, effect of.*—Where a plaintiff sues to recover what is due to him, not exceeding the amount rateably due on the property against which he wishes to proceed, s. 85 of the Transfer of Property Act, is no bar. VENKATRAYALU REDDIAR v. SHEIKH FARID SAHIB, **5 M.L.T. 258 = 1 Ind. Cas. 80.** (31 M. 333, *F.*)

Transfer of Property Act (IV of 1882) —*continued.*

(761) — *S.* 85 — *Parties — Parties claiming adversely to mortgagor, if necessary parties — Contract Act* (1 *of* 1872), *s.*23—*Illegal contract.* — S. 85 of the Transfer of Property Act does not require persons who claim adversely to the mortgagor to be made parties. (32 C. 746, *F.*) A mortgage contract is not illegal within the meaning of s. 23 of the Contract Act, merely because the mortgagors were entitled only to a half share and not the whole of the property mortgaged. JOGO MOHAN DEB LASKAR v. DAUDOONG BURMAN, **12 C.W.N. 94.**

(762) —*S.* 85—*Suit upon mortgage —Joinder of parties as defendants—Hindu Law—Father represents his sons in a suit on mortgage against him* —The rule enacted by s. 85 of the Transfer of Property Act is that all persons, having an interest in the property comprised in a mortgage, must be joined as parties to any suit, under Chapter IV of the Act, relating to such mortgage, provided that the plaintiff has notice as such interest; but this rule does not interfere with the rule of Hindu Law, that it is open to a father or the manager in a Hindu family to represent subject to certain conditions, his sons or other members, in a suit brought upon a mortgage against him. RAMAKRISHNA NARAYAN SINDHE v. VINAYAK NARAYAN SASWADKAR, **12 Bom. L R. 219=5 Ind. Cas. 967=34 B. 354.**

(763) — *S.* 85—*Hindu Law—Joint Hindu family—Suit on a mortgage executed by a Hindu father—Sons not made parties —Notice—Burden of proof.*—Where the sons in a joint Hindu family come into Court seeking to get rid of the effect, as against their interest in the joint family property, of a decree on a mortgage executed by their father obtained in a suit to which they were not made parties, the burden of proof lies on them to establish that the mortgagee when he brought his suit had notice of their interests in the mortgaged property. SITLA BAKSH SINGH v. MEWA LAL, **A.W.N. 1899, 34.**

(764)—*S* 85 — *Mortgage —Sale upon a mortgage—Mortgage executed by managers of a joint Hindu family —Mortgage executed to liquidate ancestral debt and marriage expenses of a co-parcener —Suit upon the mortgage against the manager alone —The adult co-parcener no party to mortgage or suit—His interest passes under the sale—Party to a suit —Practice.* —The managers of a joint Hindu family passed a deed of mortgage for an ancestral debt and for cash advanced for the marriage of a co-parcener (defendant No. 2). In a suit brought on the mortgage against the managers, a decree for sale of the mortgaged property was passed, and at the Court sale the property was sold. The defendant No. 2, who was an adult co-parcener, was not a party either to the mortgage-deed or to the suit and execution proceedings. He claimed that his share in the family property did not pass under the mortgage or under the sale; *Held*, (1) that by reason merely of the provisions of s. 85 of the Transfer of Property Act, 1882, it could not be held that no interest passed upon a sale under a mortgage-deed except that of persons made parties to the suit. (21 M. 222, 25 A. 234, *F.*) (2) That, even apart from s. 85 of the Transfer of Property Act, 1882, the sale under the mortgage in question was binding upon all the co-parceners. CHIMNA SADASHIV v. SADA BARKA, **12 Bom. L.R. 811.** (14 I.A. 187, *F.*)

(765)—*S.* 85—*Suit against a mitakshara father on mortgage of ancestral property—Son, whether a necessary party.*—The language of s. 85, T.P. Act, is compulsory, and all those who had an interest in the mortgaged property, that is, in the equity of redemption, ought to be made parties to the mortgage suit. So, in a suit against a mitakshara father on a mortgage of ancestral property executed by him alone the son is a necessary party, when the mortgagee has notice of his interest. LALA SURAJ PROSAD v. GOLAB CHAND, **28 C. 517=5 C.W. N. 640.** [*F.*, 2 N.L.R. 90; *R.*, 3 C.L.J. 12, 34 C. 642, F.B.=11 C.W.N. 593=5 C.L.J. 491 =2 M.L.T. 207, 2 N.L.R. 116, 11 C W.N. 1078=6 C.L.J. 719.]

(766)—*S.* 85—*Mortgage —Suit for redemption —Parties.*—Where, out of three properties subject to one mortgage, two had been redeemed by payment of a proportionate part of the mortgage-debt and the third alone was the subject of a suit for redemption upon payment of the balance of the mortgage-money, it was *held* that s. 95 did not make it necessary to join, as a defendant to such a suit, a person, having an interest in one of the properties already redeemed NAZIR HUSAIN v. NIHAL CHAND, **A.W.N. 1905, 156=2 A.L.J. 628.**

(767)—*S.* 85—*Vendee of mortgagor not made party—Suit to redeem.*—Where a mortgagee sues on his mortgage without making the purchaser from the mortgagor a party, and purchases the mortgaged property in execution of his decree for sale, the vendee is entitled to redeem, whether the mortgagee was aware of the sale at the time of his suit or not. KUPPU NAYUDU v. VENKATA KRISHNA REDDI, **20 M. 82=6 M.L.J. 229.**

(768)—*S.* 85—*Civ. Pro. Code* (*Act* V *of* 1908), *O.* XXXIV, *r.* 1—*Mortgage suit—Party—Person interested in equity of redemption —Omission to join him as party —Right of redemption not destroyed.*—Where a mortgagee plaintiff has, with or without notice of the existence of the right of a person interested in the equity of redemption, omitted to join him as a party defendant, the person omitted is entitled, notwithstanding a decree, sale and purchase, otherwise regular, to exercise his right of redemption in any proceeding properly framed for the purpose or set it up in defence whenever his title is sought to be ignored or assailed. BANGA DAS v. GENALAL JHA, **12 Ind. Cas. 155.** (26 M. 484, 7 B. 146, *Rel. on*; 21 M. 222, 11 C. W.N. 1078, *N.F.*)

Transfer of Property Act (IV of 1882) —*continued.*

(769)—*S.* 85—*Suit for foreclosure, prior mortgagee a necessary party to, when can be added as such.*—The High Court was of opinion that, in a suit by a puisne mortgagee, a prior mortgagee must necessarily be joined as a party, but that there was no objection to his being made a party at the hearing and after the hearing of the preliminary issue, and directed that the prior mortgagee be made a party. SORABJI v. RATTONJI, **22 B. 701.** [*R.*, 14 C.P. L.R. 177.]

(770)—*S.* 85—*Suit on mortgage—Parties—Notice—Person not known to be interested and not made a party, if bound—Representation of debtor's estate by adult heirs only—Suit to redeem brought after sale—Limitation—Limitation Act* (XV *of* 1877), *sch.* II, *art.* 12 (*a*).—In a suit to enforce a mortgage, the mortgagee made one only of two persons, who represented the estate of the mortgagor, a party defendant, not having notice of the existence of the other. *Held* that the latter was bound by the decree obtained by the mortgagee, and his interest passed at the sale held in execution of the decree. (21 A. 194, 28 C. 517, 6 B. 515, *Rel. on*; 4 C. 142, 7 A. 822, 14 C. 464, *R.*) That, for the purpose of the suit, the estate of the mortgagor was sufficiently represented, as the person who was sued was alone in possession of the mortgaged property, and the other person a minor, was not known to the mortgagee, and his interest did not appear to have suffered by reason of his not being made a party. (9 C.W.N. 201=32 C. 296=32 I.A. 23, *F.*) *Sharfuddin, J.*—A suit by the latter to redeem the mortgage, after the property had been sold as above, could not succeed without the sale being set aside, and not having been instituted within one year of his attaining majority, was barred under art. 12 (*a*) of sch. II of the Limitation Act. RAM TARAN GOSWAMI v. RAMESWAR MALIA, **11 C.W.N. 1078=6 C.L.J. 719.**

(771)—*S.* 85—*Suit by second mortgagee—Sale of mortgaged property without redeeming prior mortgage—Rights of prior and subsequent mortgagees—"Property"—Equity of redemption, Chapter* IV, *Transfer of Property Act.*—The second mortgagee sued the representatives of the mortgagor and of the prior and subsequent mortgagees for recovery of principal and interest by sale of the mortgaged property. In the plaint he made no offer to redeem the prior mortgage. *Held*, that he could bring the mortgaged property to sale without redeeming the first mortgage: *Held* further, that the term "property," in Chapter IV of Act IV of 1882, does not mean only an actual physical object, but includes the equity of redemption. AZIM ALI v. MOHAMMAD HUSAIN, **10 C. 105.** (13 A. 432, *Diss.*) [*Rel. on*, 3 O. C. 254; *R.*, 5 O C. 335, 7 O.C. 330; *Not F.*, 10 O.C. 145.]

(772)—*S.* 85—*Civ. Pro. Code* (1908), *O.* XXXIV, *r.* 1—*Mortgage suit—Joinder of party—Person having right to redeem, whether necessary party under s.* 85—*Creditor of mortgagor attaching mortgaged property in execution of money-decree, whether to be joined as party in mortgage suit.*—O. XXXIV, r. 1, of the new Civ. Pro. Code, requires that not only a person having an interest in the mortgage security, but also a person having an interest in the right of redemption shall be joined as a party to any suit relating to the mortgage. But s. 85 of the Transfer of Property Act, which is repealed, by O. XXXIV, r. 1, required that a person having an interest in the mortgage security only should be made a party to such a suit. A creditor of the mortgage, who attaches the mortgaged property in execution of a money decree, does not obtain by his attachment any charge or lien upon the attached property, he only has the right to redeem. He is, therefore, not a necessary party in a suit upon the mortgage brought before the new Civ. Pro. Code came into operation, although he would be a necessary party after the Code was passed. SHANABDA CHANDRA PAL v. SRI NATH ROY, **17 Ind. Cas. 432=17 C.W.N. 871.**

(773)—*S.* 85—*Redemption-suit—Part owners of mortgaged property who did not execute mortgage-deed and who did not receive mortgage-money—Whether necessary parties to suit.*—The question for decision was whether in a suit for redemption the part owners of a mortgaged property, who did not execute the mortgage-deed and who did not receive the mortgage-money, were necessary parties thereto. *Held*, that as they were not interested in the equity of redemption of the mortgaged property, they were not necessary parties to the suit. MANMOHINI GHOSE v. PARVATI NATH GHOSE, **32 C. 746.** [*R.*, 33 C. 425=3 C.L.J. 205, 12 C.W.N. 94, 31 A. 11=A.W.N. 1908, 263=5 A.L.J. 397, Note=6 A.L.J. 5=5 M.L.T. 47.]

(774)—*S.* 85—*Purchase by mortgagee in suit for sale—Suit by him for possession against purchaser of equity of redemption—Right of such purchaser.*—Where a mortgagee sued upon his mortgage and in execution of his decree purchased the mortgaged property and thereafter sued to recover the property from the purchaser of the equity of redemption from the mortgagor, who was not a party to his previous suit, the latter was entitled to redeem the mortgagee-purchaser. MUTHIA CHETTI v. SUBBAYYAN, **2 M.L.J. 294.**

(775)—*S.* 85—*Suit for redemption—Appeal by defendants—Dismissal of appeal for non-compliance with provisions of section.*—Plaintiff sued for redemption of a mortgage. The mortgagees contended that the plaint mortgage had come to an end or did not subsist and that they held the suit property under a mortgage from some other persons, who claimed the property adversely to the plaintiffs. Plaintiffs got a decree in the first Court. The other persons referred to above appealed against the decree. They however, did not join the mortgagees as parties either in the first appeal or in the second appeal to the High Court. *Held* that, in the absence of satisfactory explanation for non-compliance with the provisions of s. 85 of the Act,

Transfer of Property Act (IV of 1882) —*continued.*

the second appeal was liable to be dismissed. KESAVAN v. SANKARAN NUMBUDRI, **7 M.L.J. 266.** [*D.*, 2 C.L.J. 202.]

(776)—*S.* 85—*Suit for redemption decreed—Appeal by three sub-tenants—Kanomdar necessary party to appeal.*—Where a jenmi has sued a kanomdar and his sub-tenants for redemption and obtained a decree for possession on certain terms, the kanomdar is, under s. 85 of the Transfer of Property Act, a necessary party to an appeal that may be preferred from the decree by the sub-tenants, and if he is not made a party in the appeal and a decree is passed, that decree should be set aside, unless reasonable excuse is shown for leaving him out in the Appellate Court. (25 M. 571 N., 25 M. 571, N, *F.*) *Quære*—Whether sub-tenants' improvements are liable for rent due by the kanomdar to the jenmi. VEDAPURATTI v. AVARA, **25 M. 568.** (7 M. 545, 21 M. 138, *R.*)

(777)—*S.* 85—*Suit by daughter for redemption, the widow not being a party, maintainability of—Buddhist Law—Rights of the widow in husband's property—Daughter, right of—Trustee and beneficiary—Civ. Pro. Code, s.* 437.—The plaintiff, a daughter governed by the Buddhist Law, brought a suit to redeem the land mortgaged by her adoptive father. It was found that the land was re-mortgaged by the widow. The widow was not added as a party to the suit. *Held*, that the suit by the daughter, without joining the widow as a party to it, for the redemption of the property mortgaged by her deceased father, was not maintainable. Under Buddhist Law, a widow is entitled to an absolute interest in her own share of the family property and to a life interest in the remainder. The daughter is bound by an act of the widow extending a mortgage for a term of years. A suit, brought on his own account by a person beneficially interested to a certain share in the family property without the consent of his trustee, is not maintainable. MAUNG P. v. MA TAIK, **3 L.B.R. 15.** (1886, S.J.L.B. 378, 2 L.B.R. 255, 21 W.R. 428, 7 M.I.A. 323, *Cited.*) [*R.*, 3 L.B.R. 241.]

(778)—*S.* 85—*Parties—Suit for foreclosure—Portion of property exempted—Persons interested in the property exempted—Not necessary parties.*—*Held, per Stanley, C J.*, that a plaintiff in a suit for foreclosure is entitled to exempt from his claim the portion of the property which belongs to persons, who were not impleaded in the suit. He is not bound to attempt to enforce a claim against property, the title to which was in dispute or was doubtful. (2 A. 906, *D.*) *Per Banerji, J.*—Where several properties are mortgaged to the same mortgagees for the same debt, each of these properties is liable, as between the mortgagor and the mortgagee, for the whole of the debt, and the mortgagee has a right to recover the debt from any part of the property. There is no obligation on him to proceed against the whole of the property. (25 A. 79, A.W.N. 1898, 120, *R.*) In the same

Transfer of Property Act (IV of 1882) —*continued.*

way, he is equally competent to sue for foreclosure of a part of the mortgaged property. In the case of a mortgagee by way of conditional sale, if a mortgagee thinks that a part of the mortgaged property would be sufficient to cover the amount of his mortgage, there is no reason for forcing the whole property on him. The abandonment by a mortgagee of a portion of the mortgaged property cannot work any injustice except where the mortgagee hat purchased a portion of the same himself. (2 A. 905, *Diss.*) The object of a suit for foreclosure being to put an end to the equity of redemption, only those persons are necessary parties to the suit, who have the right of redemption of the property sought to be foreclosed. (2 A.L.J. 628 = A.W.N. 1905, 156, *F.*) *Per Richards, J.*—In a case of simple mortgage, the mortgagee can omit from his suit any part of the mortgaged property and the owners of the equity of redemption of the property omitted need not be made parties. There is no distinction between a suit to enforce a simple mortgage and a suit for foreclosure. SHEO TAHAL OJHA v. SHEODAN RAI, **2 A.L.J. 630, F.B. = A.W.N. 1905, 244 = 28 A. 174.** [*R.*, 6 C.L.J. 46, 31 M. 333, 11 C.L.J. 639.]

(779)—*S.* 85—*Suit for foreclosure or sale—Joinder of prior mortgagees as defendants—Necessity for their retention till the end.*—S. 85 of the Act requires the prior mortgagee as a person interested in the mortgaged property to be joined as a defendant. But it does not follow that because he is joined he is to be retained to the end whether or not there is any room for adjudicating between him and the plaintiff or a co-defendant. CHULAJI TELI v. FAKIR SHAH, **17 C.P.L.R. 139.** (20 C. 527, 14 C.P.L.R. 177, *R.*)

(780)—*S.* 85—*Mortgage—Subsequent mortgagee not made a party to suit by prior mortgagee—Decree for sale in favour of prior mortgagee—Mortgage property not saleable in execution of such decree.*—Where a prior mortgagee who has notice of a subsequent mortgage obtains a decree for sale without making the subsequent mortgagee a party to the suit, as required by s. 85 of the Transfer of Property Act, 1882, he is not entitled to bring the mortgaged property to sale, and it is not the proper course to allow the sale to take place subject to the subsequent mortgagee being given an opportunity of redeeming the decree-holder's mortgage. DEOKALI KUNWAR v. ALIM UN-NISSA BIBI, **A.W.N. 190. 122.** (16 A. 478, *F.*)

(781)—*S.* 85—*Mortgagees not made respondents in lower appellate Court or in High Court—Dismissal of second appeal.*—Where the mortgagees in a proceeding relating to a mortgage, are not made respondents in the lower appellate Court or in the High Court, no effectual relief can be given and the second appeal should be dismissed. VEDAPURTTI v. GOVINDA MENON, **25 M. 571, Note (2).** [*F.*, **25 M. 568.**]

Transfer of Property Act (IV of 1882) —*continued.*

(782)—*S.* 85—*Mortgagees not made parties in lower appellate Court—Dismissal of second appeal.*—In this case, the second appeal in a suit relating to a mortgage was dismissed without the High Court entering on a consideration of the question of law raised on behalf of the second appellant, on the ground that as, in the appeal brought in the lower appellate Court, the mortgagees had not been made parties, no effectual relief could have been decreed to the appellant. RAMUNNI PANIKAR v. SANKARA PANIKAR, **25 M. 571, Note (1).** [*F.*, 25 M. 568.]

(783)—*S.* 85—*Suit by sub-mortgagee to recover mortgage-debt by sale of mortgage rights sub-mortgaged to him—Original mortgagor not a necessary party—No decree can be made for sale of mortgagee's rights—Sub-mortgagee entitled to money-decree only.*—In a suit by a sub-mortgagee to recover his mortgage-debt by sale of his mortgagor's interest in the property mortgaged to him, the mortgagor is not a necessary party, as, under the provisions of the Transfer of Property Act, the sub-mortgagee could not get a decree for sale of the mortgagee's rights sub-mortgaged to him but could only obtain a money-decree. RAM JATAN ROI v. RAMHIT SINGH, **A.W.N. 1905, 76=2 A.L J 434=27 A. 511.**

(784)—*S.* 85—*Civ. Pro. Code (Act* XIV *of* 1882), *s.* 43—*Mortgage—Holder of two mortgages on same property suing separately on each.*—There is nothing in the Code of Civil Procedure or in the Transfer of Property Act to prevent the holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit, but subject to this, that he cannot sell the property twice over, nor sell it under the second decree subject to the first. DWARKA NATH NANDI v. MRITUNJOY PATRA, **3 Ind. Cas. 175.** (30 A. 322, F.B., *F.*; 25 M. 108, *Not F.*)

(785)—*S.* 85—*Separate decrees on prior and subsequent mortgages—Rights* inter se *of purchasers in execution.*—Where mortgaged property is brought to sale upon a first mortgage, the purchaser takes it as it stood at the time of the mortgage, that is, free from all subsequent incumbrances, but a subsequent mortgagee who was not a party to the suit in which the sale took place, if he so wish, is still entitled to redeem the property, in the present case, the second mortgagee, not having had an opportunity to redeem, would have been entitled to do so, and there is no reason why the purchaser in execution of the prior mortgage decree, should be in a better position, when redemption is sought by the purchaser at a sale under a decree on the second mortgage, than he would have been if the second mortgagee himself had sought to redeem. KUDRAT-ULLAH v. KUBRA BEGAM, **23 A. 25=A.W.N. 1900, 185.** (13 A. 432, 16 A. 478, 22 A. 212, *D.*; 18 A. 469, 13 I.A. 106, 26 C. 734, 10 B. 224, 17 B. 390, *R.*)

Transfer of Property Act (IV of 1882) —*continued.*

(786)—*S.* 85—*Transferees from mortgagors—Purchase with consent of mortgagee—Suit for contribution—Apportionment of debt—Parties—Suit by mortgagee against purchasers of mortgaged property—Purchasers no parties to the mortgage suit—Frame of suit—Redemption.*—The heirs of a mortgagor, against whom a decree on the mortgage had been obtained by the mortgagee, in execution of which the mortgaged property was sold and a part of it purchased by the mortgagee himself, and a person who purchased a portion of the mortgaged property with the consent of the mortgagee, are not necessary parties in a suit by the mortgagee for contribution or apportionment of the mortgage-debt. [*R.*, 64 P.R. 1908=132 P.W.R. 1908.] A suit by the mortgagee framed improperly, for a declaration of the rights of the purchasers of a portion of the mortgaged property to redemption of the properties purchased by them, such purchasers not having been made parties in the mortgage suit, and for a declaration of the mortgagee's absolute right over those properties on the failure of such purchasers to redeem, and for *khas* possession will not lie. The only relief which the mortgagee in such a case is entitled to is a decree for apportionment of the mortgage-debt on the property purchased by the purchasers, account being taken in that apportionment as well ofthe property transferred by the mortgagor to other parties with the consent of the mortgagee, as of the portion of the mortgaged property purchased by the motgagee himself. RAMMOY HAZRA v. PREMCHAND NASKAR, **5 C.W.N. 423.**

(787)—*S.* 85—*Purchaser of one of the mortgaged properties not made party to suit on mortgage—Mortgage-debt, apportionment of.*—If a person who purchases from the mortgagor one of the mortgaged properties, which has been subsequently released by the plaintiff-mortgagee, is not made a party to a mortgage suit by the mortgagee, the suit is not to be dismissed for non-joinder. The mortgage should be treated as having been split up and the release of one of the properties by the mortgagee should be held to have the same effect as if the mortgagee had himself bought, and the mortgage-debt apportioned between that property and the other mortgaged property. HARI KISHEN BHAGAT v. VELIAT HOSSEIN, **30 C. 755=7 C.W.N. 723.** [*F.*, 2 C.L.J. 202; *R.*, 3 C.L.J. 577, 28 M. 555=15 M.L.J. 442, 1 C.L. J. 337=33 C. 613=10 C.W.N. 551=3 C.L.J. 576. 33 C. 1079, 5 C.L.J. 315=11 C.W.N. 403, 12 C.W.N. 911, 31 M. 333; *D.*, 7 C.L J. 274, 64 P.R. 1908=132 P.W.R. 1908.]

(788)—*S.* 85—*Non-joinder of puisne mortgagee.*—The non-joinder of a puisne mortgagee in a suit on a prior mortgage, in which the decree provides for the sale of the mortgaged property in the event of default being made in the payment of the mortgage amount, is not fatal to a suit for possession by the decree-holder

Transfer of Property Act (IV of 1882) —*continued.*

who is also the purchaser in execution. KRISHNAN v. CHADAYAN KUTTI HAJI, **17 M. 17.** [*R.*, 23 A. 1.]

(789)—*S.* 85—*Two mortgages of same property by one mortgagor—Suits for sale—Subsequent suit between rival mortgagees* inter se—*Civ. Pro. Code, s.* 43.—As a prior mortgagee is a person who has an interest in the mortgaged property, he is, under s. 85 of the Transfer of Property Act, a necessary party to the suit for sale brought by a puisne mortgagee, provided that he has notice of such prior mortgage, and the omission to implead the holder of the prior mortgage may entail the dismissal of the suit. But there is nothing in the said s. 85 of the Transfer of Property Act to bar the subsequent institution of a properly framed suit against the prior mortgagee for redemption of the mortgage, nor can it be successfully contended that the provisions of s. 43 of the Civ. Pro. Code, have the effect of imposing a bar to such suit. That section, providing as it does against the splitting of causes of action, cannot apply except where the cause of action for both the suits is the same. It nowhere prescribes that where one person has two distinct causes of action, different in their nature and in their incidents, respecting the same property one against one person and the other against another person, he is bound to join those causes in one suit, and a puisne mortgagee's cause of action as against the prior mortgagee to redeem the prior mortgage is not the same cause of action that he has against the mortgagor for the sale of the mortgaged property. BALMAKUND v. SANGARI, **19 A. 379, F.B. = A.W.N. 1897, 94.** [*R.*, 21 A. 301, 22 A. 307, 30 B. 156 = 7 Bom. L.R. 811, 64 P.R. 1908 = 132 P.W.R. 1908.]

(790)—*S.* 85—*Mortgage—Mortgage of mortgagee rights—Legal position of sub-mortgagee—Act No.* IV *of* 1882 (*Transfer of Property Act*), *s.* 85.—*Held* that a sub-mortgagee, or mortgagee of a mortgagee's rights, has no interest in specific immoveable property which he is empowered to bring to sale directly under his mortgage. MISRI LAL v. ABDUL AZIZ KHAN, **A.W.N. 1902, 216.** (13 A. 432, *R.*)

(791)—*S.* 85—*Mortgage suit—Parties—Omission to join all the heirs of a purchaser of mortgaged property within time—Effect—Limitation—Notice—Apportionment of debt.*—Where, three days before the period of limitation would expire, a mortgagee instituted a suit on his mortgage, making the original mortgagors and one out of several heirs of a purchaser of the mortgaged properties defendants and the latter in his written statement, filed after the period of limitation had expired, objected that the suit was not maintainable by reason of the other heirs of the purchaser not having been made parties: *Held*, that the suit could not be dismissed on the ground of defect of parties unless it was found that the plaintiff was aware, at the date of the suit, of the interest of these persons in the mortgaged property; *Held* further, that the proper procedure was to add these heirs as parties, and, if it appeared that at the date of the suit the plaintiff was not aware of their interest in the property, to ascertain what proportion of the debt was due by the heir who had been made a party in time and to pass a decree against his share for that amount. BASIRUDDIN BISWAS v. DEBENDRO NATH BISWAS, **12 C.W.N. 911.** (18 A. 109, 7 C.W.N. 723 = 30 C. 755, *R.*)

(792)—*S.* 85—*Suit by mortgagee to recover mortgage-debt by sale of mortgaged property—Addition of prior incumbrancers at the instance of Court under s.* 32, *Civ. Pro. Code—Suit not liable to be dismissed for non-joinder of prior incumbrancers in the plaint—Burden of proving prior incumbrancer's claim.*—In a suit by a mortgagee to recover the mortgage-debt by sale of the mortgaged property certain persons alleged to be prior incumbrancers of the mortgaged property were made defendants at the instance of the Court acting under s. 32, Civ. Pro. Code. Neither the newly added defendants nor any other defendant proved that any sum remained due on foot of the prior incumbrance. So, the Court of first instance passed a decree for sale of the mortgaged property in favour of the plaintiffs on non-payment to the amount found to be due to them on foot of their mortgage. On appeal, the District Judge, without entering into the merits of the case, came to the conclusion that the suit of the plaintiffs must fail, owing to the fact that they did not, in their plaint, implead the prior mortgagees. *Held*, that the Court by exercising the power conferred upon it by s. 32, Civ. Pro. Code, and directing that the prior mortgagees should be brought on the record as defendants, has satisfied any obligation which lay upon the plaintiffs in respect of a prior mortgage and cured the defect, if any, on the ground of non-joinder of parties in the first instance: whether or not anything was due on foot of their prior mortgage was a matter peculiarly within the knowledge of the mortgagees and a matter of which the plaintiffs would ordinarily be in ignorance. Appeal allowed and suit remanded for disposal on the merits. KUNDAN LAL v. FAQIR CHAND, **27 A. 75 = 1 A.L.J. 476.** (12 A. 548, *D.*; 17 A. 48; *R.*)

(793)—*S.* 85—*Occupancy holding, mortgage by raiyat—Subsequent transfer to stranger—Collusive suit by landlord for ejectment and recovery of possession—Landlord if in possession under paramount title—Suit on mortgage—Landlord, if necessary party.*—When it is found that a landlord obtained possession of an occupancy holding, alleged to be non-transferable, by bringing a collusive suit for enjectment against a transferee from the raiyat: *Held*—that, in a suit by a mortgagee of the holding on his mortgage, the landlord would be a proper party, his possession of the holding resting on acquisition from the transferee and not on a paramount title. PANCHANAN GHOSH v. MIR ABDUL MOLIK, **16 C.W.N. 920.**

Transfer of Property Act (IV of 1882) —*continued.*

(794)—*S.* 85—*Mortgagee cannot release part of mortgaged land and seek to enforce entire claim on other portions—Persons against whom no relief is claimed, suit not liable to be dismissed under* s. 85 *for non-joinder of—Relief afforded to plaintiffs in such cases.*—A mortgagee cannot release a part of the mortgaged land, and then seek to enforce entire claim upon another portion in which third parties have become interested as assignees of the equity of redemption. Where no relief is claimed against the persons interested in the portions of the property mortgaged, *held*, that the Court is not bound to dismiss under s. 85 of the Transfer of Property Act, a suit for not joining such persons in the suit. (29 M. 217, 28 A. 174, 15 M. 487, 30 C. 755, *R.*) The plaintiffs should, in the suit, as brought, be allowed to recover what is due to them, not exceeding the amount rateably due on the property they proceeded against. PONNUSAMI MUDALIAR v. SRINIVASA NAICKEN, **31 M. 333**. [*Appl.*, 5 M.L.T. 258 = 1 Ind. Cas. 80.]

(795)—S. 85—Parties to be joined in the suit —*See* C. P. ACT XVIII OF 1881, s. 65, 1 N.L.R. 117.

(796)—S. 85—*See* APPELLATE COURT—OBJECTIONS FIRST TAKEN IN APPEAL, 18 A. 109 = A.W.N. 1896, 7.

(797)—S. 85—*See* CIV. PRO. CODE, 1908, O. I, rr. 8 (2), 10 (2) (3), (5) and 11, 5 O.C. 94.

(798)—S. 85 — Mortgage suits—Right of manager of joint Hindu family to represent the co-parcenary—*See* CIV. PRO. CODE, 1908, O. XVI, r. 1, 5 N.L.R. 181.

(799)—S. 85 — *See* DECREE — DECREE, FORM OF, 9 A. 125 = A.W.N. 1886, 318.

(800)—S. 85—*See* EXECUTION OF DECREE —MODE OF EXECUTION, 24 C. 190 = 1 C.W.N. 156.

(801)—S. 85—*See* GUARDIAN—DUTIES AND POWERS OF GUARDIAN, 23 B. 287.

(802)—S. 85—Mortgage of joint family property executed by father alone—Decree for foreclosure—Sons not made parties—Right of sons to redeem—*See* HINDU LAW—ALIENATION, A.W.N. 1908, 106 = 5 A.L.J. 267 = 30 A. 256.

(803)—S. 85—*See* HINDU LAW—ALIENATION, 27 C. 725 = 4 C.W.N. 701.

(804)—S. 85—*See* HINDU LAW—DEBTS, 7 A.L.J. 852 = 7 Ind. Cas. 112.

(805)—S. 85—Mortgage of family property by managing member—Decree for sale—Suit by son and other members to recover the family property—*See* HINDU LAW—JOINT FAMILY, 7 A.L.J. 945 = 7 Ind. Cas. 902.

(806)—S. 85 — *See* HINDU LAW — JOINT FAMILY, 25 A. 214 = A.W.N. 1903, 21.

(807)—S. 85—A mortgage decree could not bind persons of whose interest a mortgagee had notice and whom he omitted to implead in his suit as required by this section—*See* HINDU LAW—JOINT FAMILY, 3 C.L.J. 12.

Transfer of Property Act (IV of 1882) —*continued.*

(808)—S. 85—Sons of occupancy tenants in the Central Provinces, if a necessary party to a suit on a mortgage by the tenant or his father —*See* LANDLORD AND TENANT—MISCELLANEOUS, 5 N.L.R. 103 = 3 Ind. Cas. 52.

(809)—S. 85—*See* LIMITATION ACT, 1908, ART. 182—STEP IN AID OF EXECUTION, 30 C. 761 = 8 C.W.N. 251.

(810)—S. 25—Suit by benamidar for foreclosure of mortgage, maintainability of—*See* PARTIES TO SUIT—GENERAL, 24 C. 644.

(811)—S. 85—Suit by mortgagee against mortgagor and two of his sons sale under decree obtained in—Suit by third son for his share—*See* PARTIES TO SUIT—GENERAL, 21 M. 222 = 8 M.L.J. 126.

(812)—S. 85—Parties to a mortgage suit —*See* PARTIES TO SUIT—*See* PARTIES TO SUIT—GENERAL, 15 M. 487.

(813)—S. 85—*See* PARTIES TO SUIT—GENERAL, 19 A. 543 = A.W.N. 1897, 153, 22 M. 207, 22 A. 212 = A.W.N. 1900, 27, 21 A. 193, 21 A. 149.

(814)—S. 85—*See* REGISTRATION, 7 C.W.N. 11.

(815)—S. 85—*See* RES JUDICATA—PARTIES, 8 Ind. Cas. 129 = 8 M.L.T. 445.

(816)—S. 85. cl. (*b*)—*See* HINDU LAW—ALIENATION, 5 N.L.R. 117 = 3 Ind. Cas. 570.

(817)—S. 85—*See* Nos. 71, 72, 73, 122, 216, 461, 584, 671, *supra*.

(818)—*Ss.* 85 *and* 3, *notice—Putnidars of a portion of property comprised in mortgage have an interest in it—Such putnidars entitled to redeem—Persons if not putnidars entitled as second mortgagees to redeem—Effect of not having been parties to suit by mortgagee—Relief which plaintiff claims must be specific.*—The notice required by s. 85 of the Transfer of Property Act need not be actual notice, and it includes constructive notice as defined in s. 3 of the Act. [*R.*, 64 P.R. 1908 = 132 P.W.R. 1908.] Putnidars of part of the property comprised in a mortgage clearly have an interest in such property within the meaning of s. 85, Transfer of Property Act, and are entitled to have an opportunity of redeeming. (5 C.L.R. 243, 8 C. 79,) R. [*R.*, 7 C.W.N. 11, 31 C. 737, 29 A. 679 = A.W.N. 1907, 227 = 4 A.L.J., 703, 9 Bom. L.R. 656 (P.C.) = 11 C.W.N. 561 = 5 C.L.J. 563 = 17 M.L.J. 263 = 4 A.L.J. 344. 64 P.R. 1908 = 132 P.W.R. 1908; *D.*, 7 O.C. 243.] If defendants were not putnidars, they were entitled as second mortgagee to have an opportunity to redeem the prior mortgage and to be parties to that suit. Not having been parties, *khas* possession must not be given to the plaintiff. (5 C. 265, 5 C. 269, 6 C. 317, *R.*) [*R.*, 7 C.W.N. 11, 31 C. 737, 29 A. 679 = A.W.N. 1907, 227 = 4 A.L.J. 703, 9 Bom. L.R. 656, P.C. = 11 C.W.N. 561 = 5 C.L.J. 563 =

Transfer of Property Act (IV of 1882) —*continued.*

17 M.L.J. 263=4 A.L.J. 344; *D.*, 7 O.C. 243.] There must be a specific claim of the relief desired. The mere insertion of a general prayer clause in the plaint is not sufficient for the purpose. JUGUL KISSORE LAL SINGH DEO v. KARTIC CHUNDER CHATTOPADHYA, **21 C. 116.** [*Rel. on*, 31 C. 433=8 C.W.N. 408.]

(819)—*Ss.* 85, 81, 82, 95, 56, 60—*Mortgagee not compellable to distribute the debt among the mortgaged properties or to marshal to his prejudice—Right of contribution, when obtains in respect of properties not comprised in suit—Powers of Court in introducing unnecessary complications under s.* 85 *and in executing mortgage-decree—When marshalling can be exercised.* —Where joint family property of the mortgagor and his two nephews is mortgaged to secure a family debt, and afterwards the equity of redemption in the shares of the mortgagor and one of the nephews is sold away by the mortgagor, there is nothing in the Act to suggest the view that, as between a mortgagee and the purchasers of the equity of redemption, the former can be compelled to distribute his debt, rateably upon the mortgaged property, so as to entitle the purchasers to insist upon their interest not being proceeded with until after the unsold portion of the mortgaged property has been proceeded against. (5 M. 385, *R.*) The mortgagee's right to be paid the whole of his debt, from whatever portion of the mortgaged properties he wishes to compromise in his suit, cannot be questioned. In the event of the purchasers being obliged to pay the whole debt and being able to show that the unsold share is also liable, they would be entitled to contribution from the unsold share, notwithstanding its non-inclusion in the mortgagee's suit, (2 A. 807, 20 B. 615, *F.*) The rule, that all persons interested in the actual subject of the suit should be before the Court, in order that, as between them, complete justice might, as far as possible be done, cannot be taken as authorising a Court to complicate a suit by a mortgagee, by introducing into it controversy, in which the mortgagee, is really not interested. If the action of a mortgagee has had the effect of extinguishing the mortgage lien, upon any portion of the mortgaged property, so as to relieve it from the liability to bear its proportion of the debt, he cannot recover more than what the property he proceeds against would be rateably liable for. And where a mortgagor conveys not merely the equity of redemption in a portion of the mortgaged property, but the property itself, free from any liability to contribute to the mortgage debt, the purchaser may insist upon the mortgagee proceeding, in the first instance, against the mortgaged property which is unsold in the hands of the mortgagor. But where the purchasers have not purchased it free from the mortgage and where the share not proceeded against is not in the hands of the mortgagor, and is the property of a third party, who is sought to be affected by a transaction entered into by another, purporting to act

Transfer of Property Act (IV of 1882) —*continued.*

under the power incident to the position of the mortgagor of a joint family, the doctrine of marshalling does not apply. Nor does it apply so as to compel a mortgagee to proceed against a security which may be insufficient, or doubtful, or may involve him in litigation to realise. As regards the execution of a mortgage decree, it is quite competent to the Court to exercise its control so as to bring to sale, in a particular order, the different items of property comprised in the decree, with a view properly to adjust the equities possessed by the parties before it (*obiter*). KRISHNA AYYAR v. MUTHUKUMARASWAMIYA PILLAI, **29 M. 217.** (9 C. 406, *D.*) [*Diss.*, 6 C.L.J. 46; *F.*, 5 C.L.J. 274; *Expl. & Appr.*, 31 M. 419=18 M.L.J. 229=3 M.L.T. 287; *R.*, 31 M. 333, 10 C.L.J. 150.]

(820)—*Ss.* 85, 86, 88 *and* 89—*Puisne mortgagee made party-defendant in a suit by first mortgagee—Decree directing mortgagor to pay second mortgagee also, validity of—Rate of interest after date fixed for payment of decretal amount—Right of second mortgagee to redeem first mortgage.*—A suit was brought by the first mortgagee to recover a certain sum due to him from the mortgagors. In the suit, the second mortgagee also was made a party defendant. The Subordinate Judge directed that, on default in the payment of the amounts due to the first and second mortgagees, the mortgaged properties should be sold and the sale-proceeds distributed in the manner provided in the Transfer of Property Act. The contractual rate of interest was allowed to the mortgagees up to the date fixed for payment and thereafter the interest was to be 3 *p.c. per annum*. There was no provision in the decree allowing the second mortgagee to redeem the first mortgage by paying off the debt due to him. *Held*, the object of making a second mortgagee a party defendant is that the property may be sold free of his encumbrance, not to enable him to practically obtain a decree against the principle defendant without bringing a suit properly framed for that purpose. The provisions of Ch. III of the Court-Fees Act would be defeated if the decree be allowed to stand as it did. *Held*, also, that the plaintiff mortgagee is entitled to interest at the rate stipulated in the bonds till the date fixed for payment and thenceforth until payment, at the Court rate of 6 *p. c. per annum*. *Held*, further that the decree of the lower Court should be modified so as to enable the second mortgagee to redeem the first mortgage. L. J. MACKINTOSH v. N. S. WATKINS, **1 C.L.J. 31.** (24 C. 190, 29 C. 43, 25 M. 108, *R.*; 5 C. 101, 22 C. 100, *D.*) [*R.*, 10 C.L.J. 150.]

(821)—*Ss.* 85, 88—*Non-joinder of parties—Joint Hindu family—Suit for sale on mortgage by father, without joining sons—Civ. Pro. Code, s.* 42—*Act* I *of* 1877 (*Specific Relief Act*), *s.* 42. In a suit brought by the sons of a mortgagor as members of a joint Hindu family, against the father and the mortgagee for a declaration that their share out of the ancestral property was

Transfer of Property Act (IV of 1882) —*continued.*

not liable to attachment and sale by the mortgagee in execution of a decree obtained against the mortgagor, on the ground that they were not parties to the suit by the mortgagee—*Held*, that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditor's remedies for their debts, if not tainted with immorality on the sole ground that they were not made parties to the suit by the mortgagee. *Held*, s. 85 of Act IV of 1882 has introduced no change in the rights and liabilities of a mortgagee, who ought to have been but was not made a party to the suit. *Held* further, that it being entirely in the discretion of the Court to grant or refuse such a declaration, as was asked for in this suit, a Court does not exercise a sound discretion in making a declaration in any suit, which is brought in contravention of s. 42 of the Code of Civil Procedure. SHEO RATTAN v. JAGMOHAN SINGH, **1 O.C. 53.** (17 A. 537, *Diss. from*; 13 A. 432, *Discussed*; 13 C. 21, *F.*) [*R.*, 4 O.C. 93; *Enunciated*, 4 O.C. 178.]

(822)—*Ss.* 85, 91—*Attachment of mortgaged property by holder of a money decree—Suit on mortgage—Decree—Attaching creditor not made party, effect of.*—Where mortgaged property was attached by a person holding only money-decree, and after attachment the mortgagee brought a suit on his mortgage and obtained a decree for sale, without impleading the attaching creditor as a party: *Held*, that the order for sale obtained by the mortgagee was not binding on the attaching creditor, who was entitled to bring the property to sale under his attachment. TITALI VENKATA SEETHARAMAYYA v. VEDVLA VENKATARAMAYYA, **15 Ind. Cas. 334.**

(823)—*Ss.* 85, 91—*Redemption—Persons entitled to redeem--Plaint defective for non-joinder of parties—General principle to be followed such as contained in Transfer of Property Act.*—On the principle laid down in s. 85 of the Transfer of Property Act, all persons having an interest in the property comprised in the mortgage ought to have been joined in the suit provided the plaintiff had notice of such interest, which, of course, in this case, he had. The language of the section is very stringent, saying that all such persons must be joined as parties. The Transfer of Property Act has not been brought into force as yet in this province but the spirit of the rules which it contains is the natural guide of Courts bound under s. 4 (2) of the Civil Courts Regulation to act according to justice, equity and good conscience. Besides this, the Courts in Upper Burmah are under a special obligation in the matter, for by Circular No. 24 (Civil) of 1892 this High Court has, with the previous approval of the Local Government, directed that they "shall be guided, so far as may be, by the provisions of ss. 83 to 97, both inclusive, of the Transfer of Property Act, in dealing with suits relating to mortgages." It was therefore the plain duty of the Courts below to insist on the joinder of all the proper parties. The necessity of a strict adherence to the rules on this subject is abundantly apparent from the confusion that has taken place in the present proceedings. MAUNG KO v. MAUNG KYE, **U.B.R. 1892—1896, Vol. II, 586.** [*R.*, L.B.R. 1905—1906, 169, 241, U.B.R. 1907, 4th Qr., Evidence 13.]

(824)—*Ss.* 85, 96—*Mortgagee holding two mortgages on same property—Right to sue on first mortgage alone for sale of mortgaged property.*—A person who claims to have a simple mortgage and a subsequent usufructuary mortgage on one and the same property cannot maintain a suit on the first mortgage alone for sale of the mortgaged property subject to the subsequent mortgage in his own favour. DORASAMI v. VENKATASESHAYYAR, **25 M. 108=11 M.L.J. 373.** [*Not F.*, 3 Ind. Cas. 175; *F.*, 30 M. 353=17 M.L.J. 301=2 M.L.T. 330; *Appr.*, 1 C.L.J. 31; *R.*, 7 O.C. 152, 30 B. 156=7 Bom. L.R. 811, 17 M.L.J. 515, 17 M.L.J. 20, Note, 31 A. 182=6 A.L.J. 654=2 Ind. Cas. 859.]

(825)—*Ss.* 85, 96—*Prior mortgagee, express reservation in a mortgage decree of the admitted rights of a, necessity of—Decree to be construed with reference to pleadings and admissions.*—Granting, though it is open to doubt, that a mortgage suit in which all the parties admit the existence of, and raise no dispute about a prior incumbrance in favour of a person not impleaded in the suit is liable to be dismissed as one framed in contravention of s. 85 of the Act, there is yet nothing in the provisions of the Act, which requires that the decree in such a suit should, in terms, reserve the rights of such prior incumbrancer and should expressly order the sale to be subject to such rights and s. 96 of the Act cannot be construed as implying that whenever property is not to be sold free from a prior mortgage, the decree should reserve the prior mortgagee's rights in express terms even when such rights have to be admitted and undisputed and his rights therefore will be left unaffected by the omission to make a special reservation of them in the decree itself. Further where the plaintiff has claimed for relief only subject to such admitted rights, the decree cannot possibly be construed and if the Court had granted him larger relief than he himself asked for. The decree might have clearly provided that the mortgaged property should be sold subject to the prior mortgage and the proper course to be observed in drawing up a decree is that pointed out in *Lachmi Narain* v. *Jwala Nath* (18 A. 344, *R.*,) still, in construing a decree, admission in the pleadings or in the course of the case should not be ignored and the decree taken as negativing any right which was conceded by all parties, and in respect of which there was no necessity for the Court to make reference in terms in the decree, provided such a construction does not infringe any statutory provision. SRINIVASA ROW SAHIB v. YEMUNABHAI AMMAL, **29 M.84=16 M.L.J. 50.** [*F.*, 17 M.L.J. 33 N.; *R.*, 7 M.L.T. 191.]

Transfer of Property Act (IV of 1882) —continued.

(826)—*S.* 86—*Mortgage—Decree for foreclosure—Failure to deposit mortgage-money within time fixed—Execution of decree.*—On the 13th October 1882, W obtained a decree for foreclosure in terms of s. 86 of the Transfer of Property Act, declaring that if the mortgage money were not paid within six months, the defendant should be absolutely debarred from all right to redeem the property. The defendant judgment-debtor did not deposit the money till the 14th of April 1883. The Court executing the decree held that as the money had been deposited beyond time, the mortgage should be foreclosed and made an order accordingly. On appeal, the lower appellate Court held that the payment of the money on the 14th instead of on the 13th April might be treated as an application for extension of time and set aside the order of the Court of first instance. On appeal to the High Court, it was *held*, that the terms of a decree cannot be modified by the Court executing the decree, and in the present case, even if it were to exclude the 13th October 1882, the deposit made by the defendant judgment-debtor was beyond time, six months being clearly named in the decree. The decree of the lower Court was accordingly reversed. WALI MUHAMMED v. HUSAIN BAKHSH, **A.W.N. 1884, 178.**

(827)—*S.* 86—*Application for order absolute of decree nisi—Application for execution—Intervention of objections subsequently proved to be groundless—Continuation or revival of previous application—Limitation Act (XV of 1877), sch. II, art. 178—Limitation Act (IX of 1908), art. 181, whether governs application for order absolute under O. XXXIV, r. 3, of Civ. Pro. Code (Act V of 1908).*—Under the law, as it stood before the Civ. Pro. Code of 1908 and the Limitation Act of 1908 came into operation, there was no rule of limitation applicable to an application for order absolute, of a decree *nisi* made under s. 86 of the Transfer of Property Act (22 C. 924, 6 C.L.J. 119, 34 C. 672, 11 C.W.N. 674, *F.*) An application for execution of a decree may be treated as in continuation or for revival of a previous application, similar in scope and character, the consideration of which has been interrupted by the intervention of objections and claims subsequently proved to be groundless, or has been suspended by reason of an injunction or like obstruction. (1 C.L.J. 381, 32 I.A. 102, 27 A. 334, 15 M.L.J. 258, 9 C.W.N. 601, 2 A.L.J. 397, 7 Bom. L.R. 433, 23 C. 437, 24 B. 345, 18 A. 482, *R.*) Art. 178 of the Limitation Act of 1877 did not apply to applications beyond the scope of Civ. Pro. Code, but it does not follow that that article, or the corresponding article of the Limitation Act of 1908, applies to all applications made in the course of a suit. Art. 181 of the Limitation Act of 1908 does not govern an application for order absolute under O. XXXIV, r. 3 of the Code of 1908. A decree *nisi* in a mortgage suit was made on March 30, 1904, for foreclosure, and there was also a decree made for costs against the

Transfer of Property Act (IV of 1882) —continued.

mortgagee in favour of the daughters of the mortgagor who were made parties to the suit. An appeal from the decree was withdrawn on March 5, 1907. On September 9, 1908, an application was made for order absolute for foreclosure by M, the decree-holder. On September 19, 1908, A objected that the decree *nisi* had been purchased by her at execution sale for costs of the daughters of the mortgagor on August 11, 1908, which was confirmed on November 4, 1908, and she alone was competent to execute the decree *nisi*. M. then applied on December 23, 1908, for reversal of the sale. A, in the meanwhile, applied for execution of the decree, and the Court on December 19, 1908, dismissed the application of M for decree absolute. On July 7, 1909, the sale was set aside, and the application of A for order absolute was dismissed. On the next day, that is, on July 8, 1909, M applied for order absolute, but no order was passed on that application. A appealed from the order setting aside the sale, and the appeal was dismissed on February 2, 1910. On February 10, M again applied that her application of July 8 might be taken into consideration and order absolute may be made. The judgment debtor objected that it was barred by limitation: *Held*, that the applications of July 8, 1909, and February 10, 1910, should be treated in substance as applications for rivival or continuation of the original application for order absolute made on September 9, 1908, and that, even if either of these two applications be treated as an independent application, it is not barred by limitation, as art. 181 of the Limitation Act of 1908 does not govern applications in pending suits by which the Court is invited to make the final decree. MADHAN MONI DASI v. PAMELA LAMBART, **6 Ind. Cas. 537 = 12 C.L.J. 328 = 37 C. 796.**

(828)—*S.* 86—*Mortgage by conditional sale—Decree—Informal and irregular—Execution—Order absolute—Delivery of possession.*—Where in a suit upon a mortgagee by conditional sale, the plaintiff mortgagee prayed that the defendant should be debarred from the right to redeem in case the money was not paid within a certain time, and the Court passed a decree in the following terms, "that the claim be decreed with costs, with interest at 6 *p.r cent. per annum*; that the defendant do pay to the plaintiff the decretal money within two months." *Held*, that the decree, though irregular as to the form, was, in effect, a decree for foreclosure within the meaning of s. 86 of the Transfer of Property Act. *Held, further*, that after the decree had been made absolute and no appeal laid against the decree absolute, it was not open to the defendant to object to the delivery of possession to the plaintiff. JOGENDRA CHANDRA ROY v. RAMA NATH BHATTACHARYA, **4 C.L.J. 533.**

(829)—*S.* 86—*Suit by mortgagee—Decree directing payment by mortgagor within a certain time and in default foreclosure—Default by mortgagor—Possession of mortgagee adverse—*

Transfer of Property Act (IV of 1882) —*continued.*

Second suit by mortgagor for redemption barred. —In a suit instituted by a mortgagee, a decree was passed to the effect that, if the amount due under the mortgage on a date fixed, be not paid on that date, the mortgage would be foreclosed and the defendant mortgagor would be absolutely debarred of all right to redeem. Before the date so fixed, the mortgagor applied for an extension of the time for payment of the mortgage-amount and got the extension on condition that the mortgagee should immediately obtain possession of the mortgaged premises and be in possession until payment was made by the mortgagor and should surrender possession at the time of such payment. The term fixed expired; the mortgagor did not pay the amount; and the mortgagee held possession for more than twelve years. The mortgagor now sued for redemption on payment of the mortgage amount. *Held*, that, apart from the question whether the mortgagor can bring a suit for redemption when he failed to pay the mortgage-amount ordered to be paid under the decree in the first suit, the suit was barred by limitation, more than twelve years having expired since the date fixed in the decree in the first suit, as also more than twelve years from the date as per the extension granted, and the defendant having, by adverse possession for more than twelve years, acquired an indefeasible title to the property; the possession of the defendant, after the lapse of the term fixed for payment, was not as mortgagee but as absolute owner. MAKHAN v. BHAGIRATH PERSHAD, **8 O.C. 33.** (19 M. 249, P.C., *D.*)

(830)—*S.* 86—*Decree for foreclosure—Delivery of possession to mortgagee on expiry of period specified for payment—Decree—Not made absolute—Right of mortgagor to sue for redemption.*—Where after the expiry of the period specified for payment of money due under a decree for foreclosure obtained under s. 86, T. P. Act, the mortgagee obtained possession without an order absolute for foreclosure being passed the mortgagor could not bring a separate suit for redemption but could only enforce any rights that he might have by application in the original proceedings. A suit for redemption brought in a Court of higher jurisdiction could not be treated as an application in the original proceedings. BAXI v. KESHO RAO, **7 C.P.L.R. 40.** (14 C. 605, 16 C. 246, 18 C. 139, *R.*) [*R. & F.*, 9 C. P.L.R. 75, 1 N.L.R. 81.]

(831)—*S.* 86—*Foreclosure decree—Competency of Court to give personal decree in addition.*—Under s. 86 of the Act the Court can pass a decree for foreclosure of the mortgaged property only and cannot in addition give a decree against the mortgagors personally for the mortgage-money and costs. KHUSHAL SINGH v. SHRINIVAS RAO, **2 C.P.L.R. 94.** [*Diss.*, 12 C.P.L.R. 78.]

(832)—S. 86—*See* DECREE—DECREE, CONSTRUCTION OF, 20 C. 279.

Transfer of Property Act (IV of 1882) —*continued.*

(833)—S. 86—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 16 A. 269=A.W.N. 1894, 79.

(834)—S. 86—*See* INTEREST—CASES WHERE INTEREST WAS NOT SPECIFICALLY PROVIDED FOR, 24 C. 766=1 C.W.N. 550, 21 M. 364, 20 C. 360.

(835)—S. 86—*See* SUITS VALUATION ACT, 1887, s. 11, 2 O.C. 103.

(836)—*S.* 86—*Cl.* IV—*Right of sub-mortgagee to sue for sale of original mortgagor's interest—Meaning of property.*—The term "derivative mortgage" is used in text-books and decided cases as synonymous with "sub-mortgage." A sub-mortgagee or assignee of a sub-mortgage being "a person who claims by derived title" within the meaning of s. 86 of the Transfer of Property Act, can sue for the sale of the original mortgagor's interest in circumstances which would have entitled the mortgagee, on the date of the sub-mortgage, to sue for such relief. The rule is based on the same principle as allows the original mortgagor to redeem the sub-mortgage. [*F.*, P.L.R. 1900, p. 219, F.B., 9 O.C. 233; *Appr.*, 27 A. 472=2 A.L.J. 162=A.W.N. 1905, 58; *R.*, 1 O.C. 53, U.B.R. 1906, Sub-Mortgage, 1, 9 C.L.J. 429, 29 A. 385, F.B.=4 M.L.J. 273=A.W.N. 1907, 97, 14 C.W.N. 165, 10 C.L.J. 470.] The term "property" in Ch. IV of the T. P. Act includes not merely the "actual physical object" as was held in 13 A. 432 and 18 A. 113, but also mere rights relating to physical objects. MUTHU VIJAYA v. VENKATACHELLAM CHETTY, **20 M. 35=6 M.L.J. 235.** [*R.*, 29 A. 385, F.B.=4 A.L.J. 273=A.W.N. 1907, 97, 1 O.C. 105, 5 O.C. 335.]

(836-*a*)—S. 86—*See* Nos. 46, 49, 216, 272, 328, 461, 562, 585, 820, *supra*, and No. 945, *infra*.

(837)—*Ss.* 86 *and* 74—*Mortgage—Foreclosure—Puisne mortgage—Decree for foreclosure—Foreclosure suit—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 244—*Application—Suit.*—On the 20th July 1889, C executed a mortgage by conditional sale in favour of B and K, with regard to villages Patara and Bhatpura. On the 22nd October 1889, C executed a second mortgage by conditional sale in favour of A and B: this mortgage comprised Patara and eight other villages not including Bhatpura. On the 1st October 1891, A sold his moiety of this mortgage to G. On the 17th September 1893, B and K commenced a suit against C and G for foreclosure of the first mortgage. On the 27th September 1893, B and G commenced a suit in the same Court against C for foreclosure of the second mortgage. On the 22nd December 1894 decrees were made in both these suits. By the decree in the first suit it was ordered that on the defendant paying to the plaintiff or into Court on the 22nd April 1895, a stated sum, the plaintiff should deliver up to the defendant all documents in his possession relating to the

Transfer of Property Act (IV of 1882) —*continued.*

mortgaged property and should transfer the property to the defendant free from incumbrances created by the plaintiff, but if such payment were not made on the date fixed the defendant should be absolutely debarred of all right to redeem the property. The decree in the second suit was in the same form *mutatis mutandis*. The time for redemption on the decree was from time to time enlarged but the money was not paid by the mortgagor. Finally, on the 3rd January 1896, when the enlarged time was about to expire, G paid into Court a sum of money, and that sum was taken out by the plaintiffs, the first mortgagees, in discharge of their mortgages. On the 3rd August 1897, G made an application to the Court that a decree for absolute foreclosure of the mortgaged property might be prepared in his favour. This application was dismissed by the Subordinate Judge on the grounds that as G paid up the amount due under the decree and complied with the order embodied in the decree, the decree no longer remained capable of execution, and that as G had become the representative of the prior mortgagee under s. 74 of the Transfer of Property Act, he was entitled to bring a suit for foreclosure. On the 3rd February 1898, G commenced a foreclosure suit against B, K and C. B objected to the suit on the ground that it was barred by s. 244 of the Civ. Pro. Code. The High Court held that the suit was so barred. *Held*, (1) that s. 244 of the Civil Procedure Code was no bar to the suit since on payment by G of the sum into Court before the expiry of the enlarged time and acceptance of that sum by the plaintiffs the decree was spent and became discharged and satisfied, and there was, therefore, nothing left to be done in the execution department. G, having made that payment, acquired under s. 74 of the Transfer of Property Act, all the rights and powers of the mortgagees as such, but this would not have the effect of reviving or giving validity to a decree; which by the terms of it had become discharged (2) that the decree passed in the first suit was not adapted to a suit by a first mortgagee against subsequent incumbrancers and mortgagor. It appeared to be a transcript of the form of order given in s. 86 of the Transfer of Property Act; that form contemplates a suit between one mortgagee and the mortgagor only and should be treated as a common form and not to be literally followed in every suit for foreclosure, but to be adapted to the particular circumstances of each case. The decree in question did not provide for the exercise by the puisne incumbrancers of their successive rights of redemption or for working out the rights of the parties in the event of any puisne incumbrancer in front of the mortgagor redeeming the mortgaged property so as to make a complete decree. GOPI NARAIN v. BABU BANSIDHAR, **7 Bom. L.R. 427=9 C.W.N. 577=2 A.L.J. 336, P.C.=2 C.L.J. 173 =15 M.L.J. 191=27 A. 325=32 I.A. 123=8 Sar. 799.**

Transfer of Property Act (IV of 1882) —*continued.*

(838)—*Ss. 86 and 87—Decree for foreclosure obtained against all the defendants—Order absolute obtained only against some of the defendants, validity of—Payment of the decretal amount by the defendant against whom no order absolute passed, effect of—Foreclosure decree discharged by the payment made by one defendant against all—Decree joint and indivisible against all the judgment-debtors—Redemption by a puisne mortgagee, effect of.*—In 1892 one B mortgaged a portion of his share by way of conditional sale in favour of the respondent. Subsequently, in 1896, after the death of B, his sons mortgaged with possession the entire share to one K, now represented by the appellant. The respondent instituted a suit for foreclosure on his mortgage of 1892 and impleaded K, and the sons of B, as defendants to his suit, and obtained a decree for foreclosure. In applying for an order absolute, however, he did not make K, a party to the proceedings and obtained the order only against the sons of B. Subsequently, on the objection of K, it was decided that the order obtained against the sons of B, did not bind him and that he should be allowed to deposit the decretal amount and thereby to redeem the property. K deposited the money which the respondent withdrew and thus his mortgage was satisfied. The respondent now, on the basis of the order absolute against the sons of B alone, sought to redeem K's mortgage of 1896. The question for decision was, whether the order absolute obtained by the respondent could still be considered as subsisting, although his decretal amount had been deposited in full and his mortgage-decree satisfied; *Held*, that the decree for foreclosure obtained by the respondent was a joint and indivisible decree against all the defendants, and there could be only one order absolute affecting all the defendants. The effects of the deposit of money by K, who was not a party to the order absolute was that the respondent's mortgage has been satisfied in its entirety, and he could not, therefore, urge that the equity of redemption, which was acquired by him as a complement to the mortgagee-rights under an incomplete foreclosure proceeding, still vested in him. The effect of the payment of the decretal money by K was, that the respondent's rights as mortgagee passed to the redeeming puisne mortgagee, whatever they were at the date of such payment. RAM PARTAP v. BACHU MISRA, **10 Ind. Cas. 174.** (28 B. 153, 10 O. C. 356, *R.*)

(839)—*Ss. 86 and 87—Nature of proceedings under section—Whether suit is to be regarded as pending until decree is made absolute—Appeal.*—Proceedings under s. 87 of the Transfer of Property Act, are regarded by the Legislature as a continuation of the suit referred to in s. 86 of that Act. Therefore, a mortgage suit must be held to be pending, at any rate, until the decree conditional, referred to in s. 86, has been made absolute, or until the payment made by that decree has been validly made, as the

Transfer of Property Act (IV of 1882) —*continued.*

case may be, where the point in issue is, whether an appeal lies from an order made in the course of such proceedings. (2 N.L.R. 178, *F.*; 1 N.L.R. 143. 3 C.W.N. 756, *R.*; 3 N.L.R. 55, *Not F.*) S. 87 of the Transfer of Property Act, does not contemplate the framing of a separate decree in the event of payment being made, as ordered in the decree conditional. GANPATI v. DAJI, **4 N.L.R. 158**.

(840)—*Ss.* 86, 87—*Time for redemption—Possession by mortgagee*—The right of the mortgagor to redeem is not concluded otherwise or earlier than by an order under s. 87 of the Transfer of Property Act, and the fact that possession has been taken by the mortgagee under an order of Court does not affect such right. SALIG RAM v. MURADAN, **25 A. 231 = A.W.N. 1903, 20**. (20 A. 446, 27 C. 705, *R.*) [*R.*, 2 N.L.R. 137]

(841)—*Ss.* 86, 87—*Extension of time fixed by original Court by passing of decree by Appellate Court.*—Where a time is fixed under s. 86 for payment of the decree amount the passing of a decree by the Appellate Court does not extend the time, in the absence of an express provision to that effect in the decree. THAKUR NARWAR-SINGH v. TULSI RAM, **11 C.P.L.R. 115**. (18 A. 455, 16 M. 214, *R.*)

(842)—*Ss.* 86, 87—*Scope of.*—S. 87 of the Transfer of Property Act empowers the Court making the decree in a suit for foreclosure, upon good cause shown, and upon such terms, if any, as it thinks fit, to postpone the day appointed for the payment. Reading that section and s.86 together, it seems clear that the amount to be paid to avoid foreclosure is the amount determined under s. 86, *plus* the costs incurred and allowed subsequent to the decree, and *plus* also any additional sum which, when an extension is granted, may be made payable. RAFI KUNNISSA BIBI v. TARINI CHURN SIRKAR, **20 C. 279.**

(843)—Ss. 86, 87—*See* LIMITATION ACT 1908, art. 10, 20 A. 358 = A.W.N. 1898, 67.

(844)—Ss. 86 and 87—Mortgage—Decree for foreclosure—Appeal against a portion of decree —Execution of appellate decree—*See* LIMITATION ACT, 1908, arts. 181, 182, 2 A.L.J. 180, F.B. = A.W N. 1905 70 = 27 A. 501, F.B.

(845)—Ss. 86, 87—*See* LIMITATION ACT, 1908, arts. 181, 182, 24 A. 542 = A.W.N. 1902, 160.

(846)—Ss. 86-87—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 13 C. 346.

(847)—*Ss.* 86 *to* 88, *Scope of.*—The provisions of ss. 86 to 88 of the Transfer of Property Act do not apply to 12 C. 569 (F.B.). S. 86 of the Transfer of Property Act directs that the decree shall order an account to be taken of what will be due to the plaintiff for principal and the interest on the mortgage up to the day on which the mortgagor may redeem. MANGNIRAM MARWARI v. RAJ PATI KOERI, **20 C. 366, Note.**

Transfer of Property Act (IV of 1882) —*continued.*

(848)—*Ss.* 86 *to* 88, *scope of*—*Decree for foreclosure—Order absolute, effect of.*—*Per Stanley, C. J.*—The decree passed under s. 86 is not a money-decree, nor is the order absolute passed under s. 87 such a decree. The order absolute for foreclosure, so far from directing the payment of the mortgage-debt, has the effect of discharging the debt. If, in a foreclosure-suit, the mortgagor thinks fit to pay the mortgage-debt, and thus save his interest in the property, he does so by reason of the obligation, which he undertook when he executed the mortgage security, and with a view to preserve the property, and not in obedience to any order of the Court. Any payment made by him will not be in execution of the decree. The decree *nisi* puts him under no obligation to pay the debt, but simply declares what the consequences of non-payment will be. Similar observations apply to the order contemplated by s. 88 of the Act. The mortgage security does not lose its character, until an order absolute for foreclosure is passed. It remains a debt secured upon the property. It is only when the order absolute for foreclosure has been passed, that the debt is discharged and, in lieu of it, the mortgagee acquires the absolute ownership of the property. SHAM SUNDER v. MUHAMMAD IHTISAM ALI. **2 A.L.J. 180, F.B. = A.W.N. 1905, 70 = 27 A. 501.**

(849)—Ss. 86, 87, 88, 89—*See* EXECUTION OF DECREE—MISCELLANEOUS, 4 O.C. 301.

(850)—*Ss.* 86, 87, 89—*Foreclosure decree—Discretion of Court to enlarge time for redemption.*—It is within the discretion of the Court to enlarge or not to enlarge time, so as to allow redemption at a late stage and a mortgagor has not an absolute right of redemption at any time before an order absolute for foreclosure is passed. KESHAV RAO KAWALE v. BAXI, **9 C.P.L.R. 75**; BUDDHU LAL PARMANAND SAC v. BALDEO PERSAD, **9 C.P.L.R. 78.** (16 C. 246, 18 C. 139, *D.*) [*R.*, 12 C.P.L.R. 101, 2 N.L.R. 137.]

(851)—Ss. 86, 87, 93—*See* PRE-EMPTION—MISCELLANEOUS. 10 O. C. 374.

(852)—*Ss.* 86 *and* 88—*Award of interest for period subsequent to date fixed for payment in decree—Practice—Decree silent as to payment of such interest—Effect.*—Though ss. 86 and 88 of the Act do not confer any power on the Court to award interest on the mortgage money for any period subsequent to the date fixed for payment by the decree, still the Court has power derived from a long course of practice, which has not been forbidden by the legislature, in spite of the sections to award subsequent interest and where the decree is silent as to the payment of such subsequent interest it must be interpreted as awarding interest only up to the date fixed for payment. SETH GHASIRAM MAHESHRI v. RAJA GOKULDAS, **17 C.P.L.R. 164.** (26 C. 39, *Expl.*; 21 A. 361, *D.*)

(853)—*Ss.* 86 *and* 88—*Decree for sale on a mortgage—Rate of interest after date fixed for*

Transfer of Property Act (IV of 1882) —*continued.*

payment.—Where a decree for sale on a mortgage gives interest after the date fixed by the decree for payments of the mortgage-debt, it is not necessary that such interest should be at the contractual rate. LACHMI NARAIN v. UMAN DAT, **A.W.N. 1907, 60=4 A.L.J. 219 =29 A. 322.** (26 C. 39, 2 C.W.N. 249, *R.*)

(854)—*Ss.* 86 *and* 88—*Decree under—Claim by mortgagor to redeem before the expiry of the term allowed.*—Where, in accordance with the provisions of ss. 86 and 88 of the Act, a conditional decree for sale was passed fixing a date for payment, the mortgagor could not claim to redeem before the expiry of the term allowed, on payment of the principal money and cost together with interest calculated up to the actual date of payment, though it was open to him to move the Court before passing a conditional decree to accelerate the date fixed for payment. KHUMAN SINGH v. BHOLANATH, **1 N.L.R. 106.**

(855)—*Ss.* 86 *and* 88—*Interest allowable after date fixed for payment—Construction of decree —Decree when ambiguous to be construed as a decree in accordance with law.*—Where it is possible to do so the construction to be placed upon a decree is that construction which would make the decree one in accordance with the law. If a decree goes beyond what the law allows and leaves no doubt as to the construction to be placed upon it, then the Court executing the decree has no option but to execute it for the sum decreed, even though it be a sum beyond what the law allows. It is not competent to a Court making a decree for sale under s. 88 of the Transfer of Property Act, 1882, to allow interest beyond the date fixed in the decree for the payment of the mortgage money. THE MAHARAJAH OF BHARATPUR v. RANI KANNO DEI. **A.W.N 1898, 164.** (19 A. 174, *Apor.*; 24 C. 766, *Diss.*) [*Reversed*, 23 A. 181, P.C.; *F.*, 28 A. 223, P.C.=3 C.L.J. 85= 16 M.L.J. 160=1 M.L.T. 65, 3 O.C. 129; *R.*, 21 A. 361.]

(856)—Ss. 86, 88—*See* DECREE—DECREE, CONSTRUCTION OF, 19 A. 174=A.W.N. 1897, 9.

(857)—Ss. 86, 88—*See* DECREE—DECREE, CONSTRUCTION OF, 21 A. 361, F.B.=A.W.N. 1899, 91.

(858)—Ss. 86, 88—*See* DECREE—DECREE, FORM OF, 23 M. 637.

(859)—Ss. 86, 88—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 7 A. 194=A.W.N. 1884, 332.

(860)—Ss. 86, 88—*See* HINDU LAW—STRIDHANAM, 3 O.C. 130.

(861)—Ss. 86 and 88—*See* INTEREST—CASES WHERE INTEREST WAS NOT SPECIFICALLY PROVIDED FOR, 26 C. 39, P.C.=25 I.A. 179= 2 C.W.N. 633, 20 B. 744, 21 C. 274.

(862)—*Ss.* 86, 88, 89—*Appeal against preliminary decree—Authority of Court which passed the decree in making it absolute.*—Pendency of an appeal against a preliminary decree made under s. 86, Transfer of Property Act, does not prevent the Court which passed the decree from making it absolute. MADAN MOHAN MITTER v. RAM HURI SAHU, **1 C.W.N. 197.**

(863)—*Ss.* 86, 88 *and* 94—*Direction in the decree for payment of interest beyond the day fixed down to the day of actual payment.*—Ss. 86 and 88 of the Transfer of Property Act, 1882, contain no direction for interest beyond the day to be fixed by the Court up to which the account is directed to be taken. It is, however, competent to the Court to allow interest after the fixed day; such interest should however be calculated at the Court rate and not at the mortgage-rate. The scheme and intention of the Transfer of Property Act is that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest, and costs, due on a fixed day; and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree. The directions for payment to the parties contained in s. 88 of the Transfer of Property Act, 1882, cannot be read literally because s. 94 contemplates a final adjustment and provides for payment of subsequent costs, and there is nothing in the Act which precludes the subsequent interest also being taken into account. RANI SUNDAR v. RANI SHAM KRISHEN, **9 Bom. L.R. 304. A=11 C.W.N. 249 =17 M.L.J 43=2 M.L.T. 175=34 C. 150=4 A. L.J. 109=5 C.L.J. 106, P.C.=34 I.A. 9.**

(864)—*Ss.* 86, 89—*Application for order absolute—Civ. Pro. Code, s.* 462.—Under s. 86, Act IV of 1882, a decree for sale of certain property was passed in favour of B against S, a minor, in accordance with a compromise effected by the latter's guardian *ad litem* without the leave of the Court. On application being made by the decree-holder for an order absolute under s. 89, Act IV of 1882, objection wat taken to the decree on the ground that the leave of the Court had not been obtained under s. 462, Civ. Pro. Code. *Held* that the propriety of the decree could not be questioned in proceedings held under s. 89, Act IV of 1882, which are proceedings in execution of decree. BASDEO v. SHEO ADHIN, **1 O.C. 49.** [*R.*, 7 O. C. 199; *Cons.*, 4 O. C. 123.]

(865)—*S.* 87—*Notice.*—S. 87 does not require that any notice should be given to the judgment-debtor before an order absolute for foreclosure is made. So an order absolute for foreclosure is not rendered invalid merely for want of notice thereof. TARA PADO GHOSE v. KAMINI DASSI. **29 C. 644.** [*Diss.*, 32 C. 253, F.B.=9 C.W.N. 81, 3 N. L.R. 55.]

Transfer of Property Act (IV of 1882) —*continued.*

(866)—*S.* 87—*Necessity for notice to judgment-debtor before making order absolute.*—Under the Act no notice is required to be given to the judgment-debtor before the making of an order absolute for foreclosure. CHAITRAM v. DAOLAT GOND, **9 C P.L.R. 5.** (12 A. 61, 13 A. 278, 6 C.P.L.R. 1, *R.*) [*Diss.*, 3 N.L. R. 55; *F.*, 16 C.P.L. R. 92.]

(867)—*S.* 87--*Foreclosure decree--No direction for delivery of possession--Remedy open to decree-holaer.*—Where a foreclosure decree absolute contains no direction for delivery of possession of the property mortgaged, the decree-holder's remedy is by way of application under the section for a formal order for possession. RAMCHANDRA BANIA v. BALKRISHNA GANPAT RAO DESHPANDE, **17 C.P.L.R. 62.** (11 C.P.L.R. 141 and 16 C.P.L.R. 114, *R.*)

(868)—*S.* 87—*Foreclosure—Decree for payment of costs as well—Passing of order absolute for foreclosure—Right of mortgagee to execute costs.*—The expression "the debt secured by the mortgagee" in s. 87 of the Act is wide enough to include the costs of the foreclosure suit if the decree in that suit makes the right to redeem depend on the payment of the costs. So where a decree declares that the mortgagee can foreclose if the amount due on the mortgage together with the costs is not paid then the costs must be deemed to have been secured by the mortgage. Though they may not have been in so many words secured by the instrument of mortgage still in effect they are secured by the instrument in consequence of the provisions of the law regulating the enforcement of the security. Consequently when an order absolute for foreclosure is made the costs also are discharged and no further execution can issue for them, notwithstanding the terms of the decree. KHUSHAL SINGH v. SHRINIVAS RAO, **2 C.P. L.R. 94.** (14 C. 185, *Diss.*) [*Diss.*, 12 C.P.L.R. 78.]

(869)—*S.* 87—*Enlargement of time fixed for payment—Payment a few days after day fixed—Forfeiture not to be enforced.*—An enlargement of time for payment of money may be granted under s. 87, Transfer of Property Act "upon good cause shown." The law should not be strictly enforced to the letter, when no possible hardship can arise to the mortgagee by its not being so strictly enforced. A very strong reason is not necessary for a first enlargement. A judgment-debtor, who has paid the entire amount due, should not be made to forfeit his estate merely because he paid the amount a few days after the day fixed for payment. GOVINDA v. GANGARAM, **2 C.P.L R. 29.**

(870)--*S.* 87--*Extension of time on condition of judgment-debtor paying interest—Personal liatility of judgment-debtor to pay interest.*—Where an extension of time was granted on condition of the judgment-debtor paying interest not provided for in the decree the judgment-debtor is personally liable for the interest accruing due

Transfer of Property Act (IV of 1882) —*continued.*

subsequent to the passing of the decree. MUKUND LAL PARWAR v. SETH MANGALJEET, **12 C.P L.R. 78.** (20 C. 360, 16 A. 269, *Appr.*) [*R.*, 3 N.L.R 97, 2 N.L.R. 116.]

(871)—*S.* 87--*Foreclosure decree, sums paid by the mortgagor towards.—Order absolute, application for, in lieu of a portion of the decretal amount—Money paid by the mortgagor to discharge a portion of the decree.*—*Held*, that where a mortgagor pays only a certain sum under a foreclosure decree, but fails to pay up the whole and an application is made by the mortgagee for an order absolute to foreclose the mortgaged property in lieu of the unpaid portion, the mortgagor cannot ask the Court that the sums paid by him under the decree should be returned to him before the decree is made absolute. SYED FIDA HUSSAIN AND ANOTHER v. LALA CHHANGA MAL, **10 O. C. 354.**

(872)—*S.* 87—*Final order for foreclosure or redemption—S. 2, Civ. Pro. Code—Decree—Right to redeem after due date fixed in decree for foreclosure or redemption—Equitable relief.*—Every application, which initiates a proceeding under s. 87 of the Transfer of Property Act, is a "plaint," and the proceeding itself is a "suit," though not the original mortgage suit within the meaning of those words in the definition of the term "decree" given in s. 2 of the Civ. Pro. Code. Therefore an order making foreclosure absolute, as well as an order that a redemption has taken place, is a decree and is, therefore, appealable. (3 N.L.R. 55, 18 C. 500, *Appr.*; 27 C. 705, *Diss.*; 2 N.L.R. 137, *F.*) The mortgagor is entitled to redeem the mortgaged property, as of right, before the date fixed for redemption in the decree for foreclosure or redemption. But, if default is made in the payment of the amount, the decree holder is entitled to apply at any time after the *dies redemptionis* for an order absolute, and the Court is bound to pass such an order, unless, on sufficient cause, it extends the period of redemption. The mortgagee's right to foreclose after the due date is subject to an equitable relief allowed to the mortgagor on proper grounds. The equitable relief is one within the reasonable discretion of the Court, and is subject to all the usual principles governing the conduct of persons seeking such relief. LAXMI BAI NAIKIN v. RAMCHANDRA MALHAR, **3 N L.R. 146.** [*R.*, 4 N.L.R. 158, 4 N. L.R 54.]

(873)—*S.* 87—*Order absolute—Foreclosure, decree for—Notice to judgment-debtor before passing order absolute*—Ex parte *order absolute—Civ. Pro. Code, s.* 108.—In November 1896 the appellant obtained a decree against the respondent and other persons for foreclosure of certain mortgaged property. This decree was confirmed in appeal and time was allowed up to the 23rd August 1899 for payment of the decree-money. In September the decree-holder applied to have the order for foreclosure made absolute, the money not having been paid up

Transfer of Property Act (IV of 1882) —*continued.*

to that time. The 7th October was fixed for the disposal of the application and the Court directed that notice should be served on all the judgment-debtors. In the case of the respondent the notice was served by affixing it to the door of his house. On the 7th October the Court passed an order absolute for foreclosure. The respondent made an application which purported to be one under s. 108 of the Code of Civil Procedure to have that order set aside on the ground that the notice had not been served upon him. The Court rejected the application. *Held*, that s. 108, Civ. Pro. Code, was inapplicable, and the fact that the respondent was not served with notice gave him no right to have the order framed under s. 87, Transfer of Property Act, set aside. The order of the Court making the decree for foreclosure was a proper order, and, one which it was bound to pass. MUSAMMAT JAFRI BEGAM v. LAKSHMI DHAR, **4 O.C. 238.** [*R.*, 4 O.C. 301.]

(874)—*S.* 87—*Postponement of date of payment—Application by outsider—Stay of proceedings — Court's power — Foreclosure decree—Preliminary decree to be made absolute, Court's discretion to refuse.*—S. 87 of the Transfer of Property Act does not allow the Court to postpone the date of payment on the application of an outsider. The provision regarding the power of the Court to postpone the date of payment relates to matters as between the mortgagor and mortgagee. S.87, Transfer of Property Act, does not give inherent jurisdiction to a Court to stay proceedings. Where, in a suit for foreclosure, the Court was asked, after the expiry of the period allowed for the payment of money, to make the preliminary decree absolute under s. 87, Transfer of Property Act, the Court has no jurisdiction to decline to make the decree absolute on the application of a third party who seeks in a separate suit to establish his right to redeem the property mortgaged. AKSHYA KUMAR BAROSI v. SURJA KUMAR CHATTERJEE, **6 C.W.N. 654.**

(875)—*S.* 87—*Order under section—Proceeding in execution—Notice—Civ. Pro. Code*, 1882, *s.* 248.—The view of the majority of the Full Bench in 25 M. 244, which related to proceedings under s. 89 of the Transfer of Property Act is applicable to proceedings under s. 87, and such proceedings are proceedings in execution of the decree passed under s. 86 of the Act. So, where an application under s. 87 is made within one year of the date of decree, no notice is necessary to the judgment-debtor under s. 248, Civ. Pro. Code. The decision in 22 M. 133 proceeds upon the view that the defendant could apply for an extension of the time for redemption, only if and when the plaintiff applies for an order absolute under the second paragraph of s. 87, a view which has been dissented from by the Full Bench in 25 M. 300. PANDU PRABHU v. JUJE LOBO, **27 M. 40.** (25 M. 244, *R.*)

(876)—*S.* 87—*Time fixed for payment—Mortgagor's right to redeem after expiration of time but before order absolute.*—A mortgagor can redeem the mortgaged property at any time before the decree for foreclosure is made absolute. PARDAS SINGH v. DWARKA SINGH, **7 Ind. Cas. 50=7 A.L.J. 953.** (11 C. 246, 21 C. 818, 27 C. 705, 22 M. 133, 20 A. 446, 25 A. 231, *R.*; 19 A. 180, *Not F.*)

(877)—S. 87—*See* APPEAL—DECREES AND EXECUTION OF DECREES, 14 A. 520=A.W.N. 1892, 99.

(878)—S. 87—Application for decree absolute for foreclosure—Plea of payment by defendant—No bar to inquiry—*See* CIV. PRO. CODE, 1908, O. XXI, r. 2, 16 C P.L.R. 111.

(879)—S. 87 — *See* GUARDIAN — DUTIES AND POWERS OF GUARDIAN, 2 O.C. 45.

(880)—S. 87—*See* LIMITATION ACT, 1908, Art. 120, 20 A. 375, F.B.=A.W.N. 1898, 78.

(881)—S. 87—Application for possession of foreclosed property—No bar of limitation—*See* LIMITATION ACT, 1908, art. 178, 16 C. P.L.R. 114.

(882)—S. 87—*See* LIMITATION ACT, 1908, ART 182—STEP IN-AID OF EXECUTION, A. W.N. 1892, 5.

(883)—S. 87—*See* LIMITATION ACT, 1908, ART. 182—MISCELLANEOUS, 20 A. 357=A. W.N. 1898, 713.

(884)—S. 87—*See* Nos. 272, 586, 838 to 851, *supra.*

(885)—Ss. 87, 98, 89, 90 and 93—*See* LIMITATION ACT, 1908, arts. 181, 182, 6 O.C. 114.

(886)—*Ss.* 87, 89—*Mortgage, redemption of—Right of redemption after the decree absolute—Mistake of the Court in drawing up the decree, form of order.*—In the case of a mortgage by way of conditional sale, until an order in terms of paragraph 2 of s. 87 of the Act is made by the Court on an application by the mortgagee, debarring the mortgagor absolutely from redeeming the property, the mortgagor is entitled to redeem, even though an order absolute in terms of s. 89 has been made. ALIMEA CHOWDHRI v. ROSHUN ALI MATBAR, **3 C.L.J. 533.** (27 C. 705, 16 C. 246, 22 M. 133, *F.*)

(887)—*Ss.* 87, 89—*Mortgage—Order absolute for foreclosure or sale without notice to mortgagor—Application to set aside such order—S.* 108, *Civ. Pro. Code.*—An order absolute was made under s. 89, Transfer of Property Act, without notice to the mortgagor, the judgment-debtor. The judgment-debtor put in a petition, under s. 108, Civ. Pro. Code, to set aside the order, on the ground of absence of notice and of fraud and collusion on the part of the decree-holder. The Subordinate Judge rejected the petition on the ground that there was no procedure for setting aside an order making a decree absolute. On appeal to the High Court, the Divisional Bench that heard it dissenting from the view of the law taken in *Tarapado Ghose* v. *Kamini Dasi*, 29 C. 644, referred the matter to a Full

Transfer of Property Act (IV of 1882) —*continued.*

Bench. *Held*, that a Court has an inherent power to deal with an application to set aside an order of the kind in question made *ex parte* and to set it aside upon a proper case being substantiated. The rule applied whether the order absolute was made under s. 87 or 89, Transfer of Property Act. BIBI TASLIMAN v. HARIHAR MAHTO, **32 C. 253, F.B.=9 C.W.N. 81.** (29 C. 634, *Diss.*) [*F.*, 10 C.W.N. 306, 31 B. 45=8 Bom. L.R. 803, 35 C. 767; *R.*, 2 C.L.J. 306, 7 Bom. L.R. 961, 3 N.L.R. 55; *D.*, 4 C.L.J. 317.]

(888)—*Ss.* 87 *and* 89, *application under—Application for execution or in execution of a decree— Civ. Pro. Code*, s. 258, *applicability of.—Held*, that an application under s. 87 or 89 of the Transfer of Property Act is an application for an execution or in execution of a decree, and, consequently s. 258 of the Civ. Pro. Code applies to proceedings held under the application. MUSSAMMAT SHEORANI v. CHANDARPAL, **13 O.C. 137=6 Ind. Cas. 1000.**

(889)—*S.* 88 *—Practice—Order under s.* 88, *Transfer of Property Act.*—In cases under s. 88, Transfer of Property Act, the Court should be careful to draw up the order strictly in accordance with the law. WAJIHAN *alias* ALIJAN v. BISHWANATH PERSHAD, **18 C. 462.**

(890)—*S.* 88—*Property subject to charge—Suit maintainable.*—In a suit for a sale on foot of a mortgage of properties subject to a charge for maintenance, *held* that the plaintiff did not occupy the position of a second mortgagee and could maintain the suit. The person entitled to maintenance from the properties had a charge thereon and was not a mortgagee. LALMAN v. MOHAR SINGH, **3 A.L.J. 848=A.W.N. 1907, 18=29 A. 205.** (13 A. 432, *D.*)

(891) —*S.* 88 —*Calculation of interest.* —Under a decree, as provided by the Transfer of Property Act, interest should be calculated on the basis of the bond from the date of the bond up to the date fixed by the decree for the repayment of the money due. BROJO LAL RAI CHOWDHURY v. TARA PRASANNA BHATTACHARJI, **3 C.L.J. 188.** (29 C. 43, *R.*) [*R.*, 10 C.L.J. 91=1 Ind. Cas. 677.]

(892)—*S.* 88—*Mortgage—Interest, rate of, due from the date fixed by the decree for payment up to date of realization.*—S. 88 of the Transfer of Property Act does not limit the interest at the contract rate to the date fixed by the decree for payment of the principal and interest, nor does it preclude the interest from extending over the time down to realisation of the entire amount due. RAJA BALWANT SINGH v. AMOLAK RAM, **3 C.L.J. 85=1 M.L.T. 65, P.C=28 A. 223=16 M.L.J. 160.**

(893)—*S* 88 —*Decree for sale —Construction of decree—Interest.*—A decree for sale under s. 88 of the Transfer of Property Act, 1882, provided that the judgment-debtor should pay on or before the 22nd of February, 1892, a certain sum, being principal and interest calculated up to the 22nd of January 1892, together with future interest at 6 per cent; but the decree did not specify that the interest was to be paid up to the date of realization. *Held* that the decree framed as above only carried interest up to the 22nd February 1892. TARA CHAND v. DINA NATH, **A.W.N. 1895, 76.**

(894)—*S.* 88—*Construction of decree for sale under.*—A decree under s. 88 of the Transfer of Property Act provided for future interest, but did not expressly state that the future interest was payable until realization, nor did it state that it was to stop at any earlier date. *Held* that the decree should be construed as awarding interest until the date of realization. DHAN KUNWAR v. MAHTAB SINGH. **22 A. 79, F.B. =A.W.N. 1899, 181.** (21 A. 361, *R.*)

(895)—*S.* 88—*Mortgage suit—Prior auction purchasers of mortgaged property not included as parties—Their right to redeem.*—A purchaser at an auction-sale, held in execution of a decree for sale passed in a suit for the sale of mortgaged property, to which suit the prior purchasers of the same property sold in execution of a simple money decree against the mortgagor were not made parties, brought a suit against the prior purchasers asking for payment of the amount due under the mortgage or in default for possession of the mortgaged property. *Held* that a decree should be passed allowing the defendants to redeem the property by payment of the amount found due at the date of the mortgage decree for sale and, in default of their doing so, their right would be foreclosed and the possession of the property be delivered to the plaintiff. RAM PRASAD v. BHIKARI DAS, **26 A. 464.** (19 A. 541, 21 A. 235, 26 M. 537, *R.*)

(896)—*S.* 88—*Mortgage of property held by mortgagor as mortgagee.*—In a suit upon a mortgage deed hypothecating certain property which the mortgagor himself held as a mortgagee, the plaintiff is entitled to obtain an order for sale of the mortgagee's interest in such property. THE MAHARAJA OF BENARES v. RAMKUMAR MISIR, **26 A. 611=1 A.L.J. 330.**

(897)—*S.* 88—*Mortgage-Decree for sale—Father representing sons—Registration—Notice.*—The father in a joint Hindu family consisting of himself and his son executed a mortgage of some family property. At a partition between the father and son, the latter acquired a share in the mortgaged property. The deed of partition was registered. Subsequently, the mortgagee sued the father alone on the mortgage and in execution of the decree which he obtained, the mortgaged property was sold. The son then sued for a declaration that his share in the property was not affected by the decree or the sale thereunder. *Held*, (1) that the right, title and interest of the son in the property passed by the sale in execution of the decree in which he was sufficiently represented by his father. (2) That the registration of the deed of

Transfer of Property Act (IV of 1882) —*continued.*

partition did not operate as notice to the mortgagee of the son's right in the property. Registration is notice to all subsequent purchasers or incumbrancers of the same property. The doctrine, however, cannot be extended to others besides subsequent purchasers or incumbrancers. A person acquiring a title to or interest in immoveable property should, before acquiring, investigate the title and inquire whether it is in anyway burdened, or else he acquires the title or interest subject to the existing burdens on the property. That makes it incumbent upon him to search in the registry. No duty, however, is laid by law on a person, who has acquired a title or interest in property, to search for subsequent titles or interests. TATYARAO VENKTRAO VASE v. PUTTAPPA KOTRAPPA, **12 Bom. L.R. 940=8 Ind. Cas. 633.** (12 Bom. L.R. 219, *R.*)

(898)—*S.* 88—*Mortgage—Decree for sale—Payment to be made to prior mortgagee—Payment made, but withdrawn by decree-holder.*—Certain decree-holders held a decree for sale on a mortgage, which decree provided that the decree-holders should pay to certain of the defendants to the suit or into Court a sum specified in respect of a prior mortgage over a portion of the property covered by the decree for sale which had been discharged by these defendants. The decree-holders paid the sum in question within the time limited by the decree, but subsequently, by means of an application for execution of their decree for sale, attached the amount which they had so paid in and drew it out of Court. The decree-holders then applied for sale of the whole of the mortgaged property in execution of their decree. *Held*, that the payment into Court made by the decree-holders was a merely illusory payment, and that the decree-holders had not complied with the terms of their decree and were not entitled to bring to sale the portion of the property which had been purchased by the defendants MAHOMED AKBAR KHAN v. ABDUL AZIZ, **A.W.N. 1898, 105.**

(899)—*S.* 88, *para* 2—*Suit for foreclosure—Power of Court to pass decree for sale.*—In a suit for foreclosure, if the Court finds that the mortgage is not one by way of conditional sale, it may grant the plaintiff the lesser form of relief mentioned in s. 88, para. 2 of the Tr. P. Act, IV of 1882. SHEORATAN RAM v. JAI MANGAL RAI, **A.W.N. 1885, 329.**

(900)—S. 88—*See* CIV. PRO. CODE, 1908, s. 47, 26 M. 237.

(901)—S. 88—Application by owner objecting to sale in execution of property comprised in a decree under—Order in appeal, no appeal lies to High Court from—*See* CIV. PRO. CODE, 1908, s. 47, O. XXI, r. 59, A.W.N. 1906, 62.

(902)—S. 88—Sale in execution of a decree on a mortgage-bond is governed by s. 310-A of the Code of Civil Procedure—*See* CIV. PRO. CODE, 1908, O. XXI, r. 89, 2 Bom. L.R. 635=25 B. 104.

Transfer of Property Act (IV of 1882) —*continued.*

(903)—S. 88—*See* DECREE—DECREE, CONSTRUCTION OF, 20 A. 523, F.B.=A.W.N. 1898, 157.

(904)—S. 88—*See* DECREE—DECREE, CONSTRUCTION OF, 20 A. 397=A.W.N. 1893, 93.

(905)—S. 88—*See* EXECUTION OF DECREE—MISCELLANEOUS, 5 O C. 108.

(906)—S. 88—*See* HINDU LAW—ALIENATION, 15 A. 75, F.B.=A.W.N. 1893, 52.

(907)—S. 88—*See* INTEREST—CASES WHERE INTEREST WAS NOT SPECIFICALLY PROVIDED FOR, 18 M. 248=4 M.L.J. 265.

(908)—S. 88—*See* LIMITATION ACT, 1908, arts. 181, 182, 1 A.L.J. 15.

(909)—S. 88—*See* LIMITATION ACT, 1908, ART. 182—GENERAL, A.W.N. 1901, 29.

(910)—S. 88—Applicability of s. 257-A, Civ. Pro. Code, 1882—*See* LIMITATION ACT, 1908, ART. 182—STEP IN AID OF EXECUTION, 7 A.L.J. 251=5 Ind. Cas. 295=32 A. 257.

(911)—S. 88—Joint Hindu family—Suit for sale on mortgage by father without joining sons—*See* PARTIES TO SUITS—GENERAL, 17 A. 537, F.B.=A.W.N. 1895, 12.

(912)—S. 88—*See* SALE—SALE IN EXECUTION OF DECREE--GENERAL, 18 A. 31=A.W.N. 1895, 144.

(913)—S. 88—*See* SUCCESSION CERTIFICATE ACT, 1889, s. 4, 16 A. 259, F.B.=A.W.N. 1894, 74.

(914)—S. 88—*See* Nos. 273, 274, 328, 432, 436, 438, 461, 562, 583, 587, 588, 628, 820, 821, 847, 848, 849, 852 to 863, 885, *supra.*

(915)—*Ss.* 88 *and* 89—*Mortgage—Decree, form of—Execution of decree not made absolute.*—The mortgagee obtained a decree against the mortgagor for the recovery of his money from the mortgaged property by attachment and sale. He applied for execution and a portion of the mortgaged property was put up to auction and sold. Subsequently he applied for attachment and sale of the remaining portion of the mortgaged property. The mortgagor objected that the decree had never been made absolute under s. 89 of the Transfer of Property Act, and could not therefore be executed. *Held* that the decree was clear in its terms, and, having been partly executed on a previous occasion and no objection having been made to its form, it was capable of execution. NOBIN CHANDRA CHATTERJEE v MAZHAR ALI KHAN, **2 O.C. 337.** (A.W.N. 1890, 223.)

(916)—*Ss.* 88, 89—*Order absolute for sale—Execution of decree—Limitation—Act No.* XV *of* 1877, *sch* II, *art.* 179.—The period of limitation for execution of a decree for sale under s. 89 of the Transfer of Property Act, begins to run from the date of the granting of the order absolute for sale, without which the decree cannot be executed, and not from the date of

Transfer of Property Act (IV of 1882) —*continued.*

application to the Court to grant such order. MULCHAND v. MUKTA PAL SINGH, **A.W.N. 1896, 100.** (12 A. 278, A.W.N. 1892, 5, *R.*) [*R.*, 19 A 520, 27 A. 501, F.B.=2 A.L.J. 180=A.W.N. 1905, 70.]

(917)—*Ss.* 88, 89—*Execution of decree—Execution sought against a judgment-debtor whose name had been omitted from the order absolute for sale.*—A decree under s. 88 of the Transfer of Property Act, 1882, cannot be executed against a person whose name does not occur in the order absolute for sale made under s. 89 of the Act. BHAGWAN DAS v. MANSUMART DAS, **A.W.N. 1901, 23.** (19 A. 520, *R.*)

(918)—*Ss.* 88, 89—*Sub-mortgagee's right to sue for sale.*—A mortgagee's right cannot be ordered to be sold under ss. 88 or 89 of the T. P. Act. AJUDHIA PRASAD v. MAN SINGH, **25 A. 46=A.W.N. 1902, 176.** (13 A. 432, 18 A. 113, *R.*)

(919)—*Ss.* 88, 89--*Execution of decree--Objection that decree invalid, if can be taken in execution—Mortgagee decree by consent—Instalments-decree—Order absolute—Waiver by judgment-debtor.*—It is not open to a Court of execution to consider the validity of the decree of which execution is sought. And a judgment-debtor cannot in execution proceedings object that the decree has not been passed by a Court of competent jurisdiction. (10 Ind. Cas. 533, *Rel. on.*) A mortgage-decree was passed by consent in these terms: 'The judgment-debtor is to pay Rs. 1,200 to the decree-holder by instalments of Rs. 15 a month, upon failure to pay three instalments, the decree-holder is to become entitled to take out execution without any order absolute.'' *Held*, that, as the mortgage-decree was payable by instalments, it was not a decree in the terms of s. 88 of the Transfer of Property Act, and therefore provisions of s. 89 were inapplicable. (1 Ind. Cas. 677, 10 C.L.J. 91, *R.*) An order absolute is entirely for the benefit of the mortgagor, and if he deliberately waives his right in this behalf, it is not open to him subsequently to turn round and contend that the decree-holder is not entitled to execute the decree without an order absolute. BISWA NATH PROSAD v. BHAGWANDIN, **10 Ind. Cas. 536.**

(920)—*Ss.* 88, 89—*Joint decree for sale—Application for order absolute by some of the decree-holders—How far competent—Code of Civil Procedure (Act V of 1908), O. XXXIV—General Clauses Act (X of 1897), s. 6.*—A decree for sale under the provisions of s. 88, Transfer of Property Act, was passed jointly in favour of B and K. B died before any order absolute for sale was passed. On 30th April, 1909, the sons of B made an application for order absolute under s. 89, Transfer of Property Act. K was not made a party to it. *Held*, that the application was competent, inasmuch as the sons of B, being joint decree-holders with K, were entitled to apply for an order for sale

Transfer of Property Act (IV of 1882) —*continued.*

(whether or not such order be in fact a final decree), their right to do so being inherent in the decree under s. 88, Transfer of Property Act. The subsequent repeal of the section could not "affect any right acquired or liability incurred" thereunder. GANGA SINGH v. BANWARI LAL, **8 A.L.J. 1229.**

(921)—*Ss.* 88, 89—*Suit for sale on latter mortgage—Purchasers who paid prior incumbrances made parties—Amount payable to them—Interest if payable to purchasers.*—Where in a suit for sale on a mortgage, purchasers of the hypotheca are made parties who have paid off prior encumbrances, the plaintiff is not entitled to an order absolute unless he pays to such purchasers not only the money paid by them for the prior mortgages but the full sums due on such mortgages. (19 A. 527, *Expl*) [*F.*, 12 O.C. 133=2 Ind. Cas. 836.] The representatives of the prior incumbrancers are not entitled to interest since they got possession of the properties and since it must be presumed that the usufruct yielded was sufficient return for the investment. SRI RAM v. KESRI MAL, **26 A. 185 =A.W.N. 1903, 219.** (24 A. 185, *F.*)

(922)—*Ss.* 88 *and* 89 — *Civil Pro. Code, s.* 248—*Order absolute for sale--Minor defendant—Guardian dead—Notice of order not served—Effect of.*—A decree was passed against R, under the guardianship of his mother, for sale of property. One year after the decree, an application was made for an order absolute. Notice was issued to the mother under s. 248 of the Civ. Pro. Code, but it was found that she was dead. No other guardian was appointed, and the decree was made absolute without notice. The decree holder applied for execution of the decree. R objected. *Held*, that R being properly represented in the suit in which the decree under s. 88 of the Transfer of Property Act was passed, he could not question the validity of the decree. The order under s. 89 of the Transfer of Property Act only made that decree absolute. So long as that order subsisted, it was enforceable, and its validity could not be impugned in the execution department. If the order was defective, the remedy of R was to get it set aside in accordance with law. RAM JAS v. SHEO PRASAD, **2 A.L.J. 640=A.W.N. 1905, 241=28 A. 193.** (13 A. 278, *R.*; 3 A. 424, 21 C. 19, *D.*)

(923)—*Ss.* 88, 89—*Mortgage suit—Consent decree, directing in case of non-payment, a sale of a mortgaged property and recovery of mortgage money in execution Realisation of balance from the person and other properties of the mortgagor—Separate suit to enforce compromise, if necessary—Transfer of Property Act (IV of 1882), ss. 58, 89—Order absolute, Court's power to make—Order absolute for sale, appeal—Civ. Pro. Code (Act V of 1908), O. XXXIV, rr. 4 and 5—Civ. Pro. Code (Act XIV of 1882), s. 540 — Inherent power of Courts to do justice—Public policy, waiving advantage*

Transfer of Property Act (IV of 1882) —continued.

—*Act not a complete Code.*—An application for an order absolute under s. 89 of the Transfer of Property Act is not an application for execution of a decree, and the order absolute is itself not an order in execution proceedings, and is, in its essence, the final decree for sale and is consequently appealable as such (25 C. 133, 1 C.W.N. ccix, 29 C. 651, *R. & F.*; 12 A.61, F.B., 13 A. 278, *Diss.*) Where a compromise-decree directs the sale of the mortgaged properties in execution, in the event of the failure of the mortgagors to pay two consecutive instalments, and this contingency has happened, and where the compromise-decree has never been varied, but the mortgagees merely seek to enforce it strictly according to its terms, they are entitled to execute the decree without recourse to another suit. (19 A. 186, *D.*) S. 89 of the Transfer of Property Act authorizes the Court to make on order absolute only in cases under s. 88, and in the event of non-payment of the sum determined under that section as due to the mortgagees. The characteristic of a decree under s. 88 of the Transfer of Property Act is that the entire sum due is made payable on a day specified; and a decree for payment by instalments is not contemplated by the Act; unless the entire amount specified as payable is brought into Court for payment to the mortgagee, the latter is entitled to an order absolute, as the mortgagee is not bound to accept any sum in part satisfaction of his decree. A consent decree which lacks these essential characteristics is not a decree in accordance with s. 88 of the Act, and as such a decree is not contemplated by s. 88, the provisions of s. 89 are not applicable thereto. (3 C.L.J. 188, 7 C.W.N. 172, 3 C. 469, *R.*) There is nothing to prevent the parties to a litigation from waiving an advantage of a particular law or rule, if that law or rule is not based on a ground of public policy and is intended solely for the benefit and protection of an individual in his private capacity. (6 C.L.J. 320, *R.*) A consent decree directing payment by instalments is perfectly valid in law, though it is not covered by s. 88 and though the provisions of s. 89 of the Transfer of Property Act are consequently inapplicable to it. (11 C.W.N. 879, *R.*; 21 C. 818, *Expl.*) The Court has, where the circumstances require it, an inherent power to do that justice for the administration, of which it alone exists; and where the Legislature has provided no procedure to be followed in cases which must and do arise, the Court must be taken to have inherent power to decide the question of procedure and, if necessary, to invent a procedure for themselves. (3 C.L.J. 29, 67, 10 C.W.N. 719, 5 C.L.J. 611, 15 A. 59, *R and F.*) The Transfer of Property Act, in so far as at any rate it relates to the procedure in mortgage suits, is not a complete Code. It makes no provision for decrees by consent and is necessarily silent upon the question of the procedure to be followed for orders absolute when such a decree has been made. This, however, does not show that the Legislature intended by implication to exclude decrees by consent in the case of mortgage suits. In a case of this description, where the mortgagee decree-holder applies for an order absolute upon notice to the judgment-debtor, the Court ought to entertain the application and make the necessary order. The object of an order absolute is to afford to the mortgagor an opportunity to show that the preliminary decree has been satisfied. An application for an order absolute is entirely for the benefit of the mortgagor, upon the principle that, when a conditional decree has been made, the decree-holder ought not to be ordinarily allowed, without previous notice to the judgment-debtor, to take out execution, on the allegation that the condition or contingency has been fulfilled. (10 C.W.N. 306, 9 C.L.J. 271, 32 C. 253, *R*). A Court in the administration of justice will not refuse an application, which on the merits it ought to grant, and in law can grant, simply because the applicant asks the Court to exercise its admitted powers under a wrong section. Judicial procedure has been framed for the furtherance of justice and not to defeat it, and the Court cannot refuse to act in aid of justice on merely technical grounds. (34 C. 1037, F.B., *R. and F.*) The Court, in dealing with the application for an order absolute, must be guided by consideration as to whether any delay on the part of the mortgagee has not been unreasonable, so as to bring it within the rules applied in such cases by Courts of Equity. It could be quite open to the Court, in a case where an application for order absolute is made with a view to defeat the operation of the law of limitation, to consider whether the applicant should be assisted to attain his purpose. BECHU SINGH v. BICHARAM SAHU, **10 C.L.J. 91 = 1 Ind. Cas. 677.** [*R.*, 11 C.L.J. 226 = 14 C.W.N. 617 = 5 Ind. Cas. 165, 12 C.L.J. 65, 6 Ind. Cas. 323.]

(924) — *Ss. 88 and 89—Decree for foreclosure incapable of execution before it is made absolute.*—A foreclosure decree, passed under S. 88 of the Act, must be made absolute under the provisions of s. 89 before execution thereof; otherwise, it is incapable of execution. BANSIDHAR v. ABU TALIB KHAN, **8 O.C. 75.** (28 C. 73, 18 C. 139, 22 C. 931, *R.*; 12 A. 539, *Concurred.*)

(925)—*Ss. 88 and 89—Civ. Pro. Code, s. 258—Execution of decree—Alleged payment out of Court not certified.*—Applications for an order absolute for sale under s. 89 of the Transfer of Property Act, 1882, are applications for the execution of the decree under s. 88 of the Act. (13 A. 278, 25 M. 244, *R.*). To such applications s. 258 of the Code of Civil Procedure is applicable, and bars the recognition of payments made out of Court in pursuance of the decree unless such payments are certified to the Court in the manner prescribed by the section. HAKIM SINGH v. RAM SINGH, **A.W.N. 1908, 103 = 5 A.L.J. 272 = 30 A. 248.** (28 M. 473, *F.*; 24 M. 412, 8 C.W.N. 102, *Diss.*)

Transfer of Property Act (IV of 1882) —*continued.*

(926)—*Ss.* 88, 89—*Order for sale of part of hypotheca—Subsequent application for sale of other part.*—There is nothing to prevent a mortgagee decree-holder who had already obtained an order absolute for sale of part of the hypotheca, from obtaining a further order under s. 89 of the Transfer of Property Act for sale of the whole. SAT NARAIN v. RADHA KISHAN, **23 A. 264**= **A.W.N. 1903, 30.**

(927)—*Ss.* 88, 89—*Mortgage, suit on—Decree for sale conditioned on redemption of prior mortgage—Payment after time allowed by decree —Effect of payment.*—Where a mortgagee suing on his mortgage obtained a decree for sale under s. 88 of the Tr.P. Act, but with a condition that he should redeem certain prior mortgages within a certain fixed time, but the mortgagee decree-holder paid the amount only after the time fixed in the decree; *held* that the defendant mortgagor not having taken any steps to redeem, the plaintiff mortgagee was entitled to the benefit of the payment, though made after time, and to a decree absolute for sale under s. 89 of the Tr.P. Act. DEBI PRASAD v. JAI KARAN SINGH. **24 A. 479** (20 A. 446, 20 A. 375, 24 A. 44, *R.*; 19 A. 180, *D.*) [*R.*, 1 A.L.J. 300, 2 N.L.R. 137, 28 A. 328=3 A.L.J. 81=A.W.N. 1906, 40, 36 C. 122=8 C.L.J. 547=13 C.W.N. 36, N.]

(928)—*Ss.* 88, 89 -*Assignment of decree for sale before passing of order absolute—Rights of assignee subject to* lis pendens—*Assignee made party to appeal from decree—Civ. Pro Code, s.* 372.—Appellant was the assignee of a decree which was a decree *nisi* for sale under s. 88 of the Transfer of Property Act. He took that decree subject to its being made absolute by an order under s. 89 of the Act. Until such order was made, the suit could not be said to have come to an end. Therefore, as he took his assignment *pendente lite*, the doctrine of *lis pendens* applied to his case. So, where he was made party-respondent, as he could properly have been under s. 372 of the Civ. Pro. Code, to an appeal from the decree preferred against his assignors, he could not raise any defence such as a plea of limitation, which his assignors could not have put forward. CHUNNI LAL v. ABDUL ALI KHAN, **23 A. 331**. [*F.*, 2 C.L.J. 288, 29 A. 76=A.W.N. 1906, 283=3 A.L.J. 675; *R.*, 9 C.W.N, 171, 9 C.W.N. 383, 2 N.L.R. 178, 3 P.R. 1907=3 P.L.R. 1908, 34 C. 612, F.B.=11 C.W.N. 521=5 C.L.J. 486 =2 M.L.T. 312.]

(929)—*Ss.* 88, 89,—*Decree for sale—Application for execution granted without order absolute being made—Subsequent application for order absolute made more than three years thereafter —Limitation Act, sch.* II, *art.* 179.—The holder of a decree for sale of mortgaged properties applied for execution of the decree by sale of the properties. The application was granted, though no application had been made for an order absolute and none was passed. More than three years after this application, the decree-holder applied for an order absolute. *Held* that the order passed on the prior application must be considered to be an order absolute for sale as well as an order directing certain further steps in execution, and such being the case it was not open to the decree-holder now to apply for an order under s. 89 of the Transfer of Property Act. His present application was nothing more than an ordinary application for execution and as such it was barred as having been presented more than three years from the date of the last similar application. VENKATARAZU v. CHINNA RAMAYYA, **24 M. 695**. [*R.*, 25 M. 244, F.B.]

(930)—*Ss.* 88, 89—*Execution of decree for sale—Sale of mortgaged property without order absolute for sale being made—Right of judgment-debtor to question validity of sale.*—Where, in execution of a mortgage decree, the mortgaged properties were sold without any order absolute for sale having been made, and the judgment-debtor did not object to the sale taking place, though he had notice thereof, he could not subsequently be permitted to plead that the sale was not valid, on the ground that there was no order absolute for sale. RAYALA PATTAR v. NARAYANA PATTAR, **24 M. 699, Note.** [*R.*, 25 M. 244, F.B.]

(931)—*Ss* 88 *and* 89—*Order absolute for sale —Application for execution—Limitation—Duty of Court on receiving application for order absolute—Pendency of application—Limitation.* —Plaintiff applied to the Court of first instance, for an order absolute for sale, under s. 89 and the Court merely made an order "decree made absolute." More than three years from the date of that application, plaintiff made an application for execution, to which, however, the defendant (judgment-debtor) pleaded limitation, on the ground that this application was made more than three years after the application for order absolute, which was an application for execution. *Held*, that the Court, having passed the order absolute, was bound, also, to order that the mortgaged property be sold and the proceeds dealt with as mentioned in s. 88. The Court having omitted to pass any such order, the earlier application should be considered to be still pending and the later application should be treated as a part or continuation of the earlier and that there was, therefore, no bar by limitation. It is wrong to hold that, until the passing of an order absolute for sale, the decree in a mortgage-suit is incapable of execution, and that time would not begin to run till the date of the order absolute for sale. 25 M. 244 is to the effect that a decree under s. 88 is capable of execution and that an application under s. 89 is only an application for the execution of that decree. TALAPOORI APPIAH v. MARAM REDDI RAMI REDDI, **1 M.L.T. 294**= **16 M.L.J. 503.**

(932)—*Ss.* 88, 89—*Decree for sale—Execution—Limitation—Order absolute under s.* 89. —Until an order absolute under s. 89 of the

Transfer of Property Act (IV of 1882) —*continued.*

Transfer of Property Act has been passed, the mortgagor's right to redeem does not become extinct; and it is only when the right of redemption of the mortgagor is gone, that the mortgagee can cause the mortgaged property to be sold by applying for execution of the decree obtained by him under s. 88 of the Act. Since his right to make an application for execution depends on the passing of the order absolute, his application would be one within time if presented within three years from the date of such order under s. 89. The prayer for an order under that section and the prayer for the sale of the property may be made in one and the same application of the decree-holder, who is not bound to make a separate application for an order under s. 89, though that would be a preferable course to pursue. MAHABIR PRASAD v. SITAL SINGH, **19 A. 520 = A.W.N. 1897, 137.** (13 A. 278, A.W.N. 1896, 100, *R.*) [*R.*, 28 B. 416, 27 A. 501 = A.W.N. 1905, 70 = 2 A.L.J. 180.]

(933)—*Ss.* 88, 89 — *Form of decree.*—Where a decree passed soon after the Transfer of Property Act came into force, merely stated, "the hypotheca being also held liable for the whole amount awarded," it was *held* that, though, it was informal, it was yet substantially a decree for sale and could be executed as such. ANNA PILLAI v. THANGATHAMMAL, **20 M. 78.** [*R.*, 2 O.C. 337.]

(934)—Ss. 88, 89—*See* CIV. PRO. CODE, 1908, ss. 11, 47, 22 A. 442 = A.W.N. 1900, 155.

(935)—Ss. 88 and 89—*See* CIV. PRO. CODE, 1908, s. 60, 3 O.C. 1.

(936)—Ss. 88, 89—Application for order for sale—Limitation—*See* CIV. PRO. CODE, 1908, O. XLI, r. 20, 16 C.W.N. 49.

(937 & 938)—Ss. 88 and 89—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 22 C. 931.

(939)—Ss. 88, 89—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 12 A. 539 = 10 A.W.N. 97, 16 A. 270 = A.W.N. 1894, 80.

(940)—Ss. 88, 89 — Application for order absolute for sale, may be made to Court executing decree—*See* EXECUTION OF DECREE—MISCELLANEOUS, 13 A. 278, F. B. = 11 A.W.N. 83.

(941)—Ss. 88, 89 — *See* EXECUTION OF DECREE—MISCELLANEOUS, A.W.N. 1890, 223.

(942)—Ss. 88, 89—*See* INTEREST—SPECIAL CASES, 6 C.W.N. 769.

(943)—Ss. 88 and 89—Application for order absolute—*See* LIMITATION ACT, 1908, arts. 181, 182, 2 A.L.J. 371 = A.W.N. 1905, 136 = 27 A. 625.

(944)—Ss. 88 and 89—*Res judicata*—Sale of mortgaged property in execution of decree—Objection to execution of decree taken after

Transfer of Proper Act (IV of 1882) —*continued.*

part of mortgaged property sold under decree—Order absolute—*See* RES JUDICATA — RES JUDICATA IN EXECUTION PROCEEDINGS, 5 O.C. 251.

(945)—Ss. 88, 89, 86—*See* INTEREST—CASES WHERE INTEREST WAS NOT SPECIFICALLY PROVIDED FOR, 17 A. 581, F.B. = A.W.N. 1895, 128.

(946)—*Ss.* 88, 89, *and* 90—*Procedure under—Mortgage—Personal liability, question of, when can Court consider.*—In a suit to enforce a mortgage, the Court is competent to decide in the first instance the question of the personal liability of the defendant. There is nothing in reason or in the Code to warrant the contention that the Court acquires jurisdiction to deal with that question, only after the security has been sold and its sale proceeds are found to be insufficient. S. 90 read with ss. 88 and 89, Transfer of Property Act, shows that the proper procedure to follow in mortgage suits is to postpone the consideration of the right of the plaintiff to sell the properties of the defendant until the need for it has actually arisen. ABBAKKE v KRISHNAYYA, **5 M.L.T. 246 = 32 M. 534.** (14 A. 515, 13 A. 360, 5 M.L.T. 294, 31 C. 792, *F.*)

(947)—Ss. 88, 89, 90—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 11 A. 486 = 9 A.W.N. 191.

(948) —Ss. 88, 89, 90—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 10 A. 632 = A.W.N. 1888, 254.

(949)—*Ss.* 88, 89, 92—*Mortgage—Power to enlarge time of redemption.*—A puisne incumbrancer-plaintiff may be allowed to redeem a prior incumbrancer by paying the amount due to him though the time fixed for the purpose in the decree has passed, where the defendant, the prior mortgagee, has not taken any steps against him in the meantime. SAUDAGAR MAL v. JAN ALI, **1 A.L.J. 300.** (24 A. 479, 16 C. 246, *F.*)

(950)—*Ss.* 88 89 *and* 93—*Usufructuary mortgage—Decree for sale in default of payment on fixed date—Payment after such date—Delivery of possession made to mortgagor—Mortgagee not applying for sale when ousted—Mortgagee subsequent to ouster contesting delivery of possession to mortgagors—Proceedings subsequent to decree for sale, nature of—Ss.* 2, 244 *and* 310 *A, Civ. Pro. Code—Effect of default on possession of mortgagor after decree for sale—Rate of interest.*—On a decree directing sale, in default of payment, of property usufructuarily mortgaged, the mortgagor paid the money, some months after the fixed date, into Court, with an application in the form of an application for execution of a decree, and obtained delivery of possession of the mortgaged property. Till then the mortgagee remained in possession, but had not, when he was ousted, applied for an order for sale under s. 89, Transfer of Property Act.

Transfer of Property Act (IV of 1882) —*continued.*

He refused to receive the money and contended that the Court had no power, in execution proceedings, to permit the mortgagors to pay it into Court and to direct delivery of possession to them, they not having paid on the fixed date. *Held* that a decree for sale, under s. 88 of the Transfer of Property Act, is a final decree, and all subsequent proceedings are proceedings in execution of that decree, and to them the provisions of the Civ. Pro. Code are, so far as they may be applicable, to be applied. (25 M. 244, *R.*) Unless, then, there is something in the decree to debar him from so doing, the judgment-debtor is entitled to stop execution by payment of the debt, at any time after the decree has been passed, and before the execution sale is complete and it is not finally complete until he has had his opportunity of obtaining its rescission under s. 310-A of the Code. The decree for sale does not debar the mortgagor of any right in default of payment ; the only penalty affixed to the default is the liability to have the property sold. (31 C. 863, *R.*) Though the mortgagors be regarded as decree-holders, within the meaning of s. 2, Civ. Pro. Code, (19 M. 40, *D.*; 24 M. 244, 25 M. 300, *R.*) by their default, they only lose the privileges of a decree-holder, which their creditor has thrust upon them, but they do not thereby lose their rights as judgment-debtors to pay the debt into the Execution Court and require satisfaction to be entered up. A mortgagor can obtain possession of his property in execution-proceedings after paying money into the Court executing the decree. Regarding the rate of interest to be awarded to the mortgagee after the decree directing the sale, he was *held* entitled only to the usual Court rate of interest, *i.e.* 6 per cent. and not to the melwaram of the property according to the terms of the mortgage. AUDIPURANAM PILLAY v. GOPALASAWMY MUDALI, **3 M.L.T. 281=18 M.L.J. 259=31 M. 354.** [*R.*, 5 M.L.T. 76=2 Ind. Cas. 616.]

(951) —*Ss.* 88, 90—*Decree unsatisfied by sale of mortgaged property,—Right of mortgagee to decree for sale of other than mortgaged property.* —A decree under s. 88 of the Transfer of Property Act (IV of 1882) in a suit by a mortgagee for sale, can only direct the sale of the mortgaged property, and should not go further and give power to the decree-holder, to bring to sale any other property of the judgment-debtor, or to execute the decree against his person. But where the nett proceeds of the sale are insufficient to pay the amount due for the time being upon the mortgage, the mortgagee may, if the balance is legally recoverable otherwise than out of the property sold, obtain from the Court, under s. 90 of the Act, a decree for the balance to be recovered in the ordinary way in which a money-decree would be recoverable against the person and other property of the judgment-debtor. Upon an application for such decree, notice would issue to the judgment-debtor, who would have an opportunity of showing cause why such a decree should not be passed. Nothing in the terms of the original decree under s. 88 can make any question arising under s. 90 *res judicata.* HAFIZ-UD-DIN AHMAD v. DAMODAR DAS, **A.W.N. 1887. 149.** (10 A. 632, *R.*; 10 A. 127, *Dist.*) [*Appr.*, 14 A. 513 ; *R.*, 13 A. 356.]

(952)—*Ss.* 88, 90—*Combined decree*—*S.* 230, *Civ. Pro. Code—Applicability to combined decree under—Limitation* —A combined decree under ss. 88 and 90, T. P. Act, is one passed in contravention of the provisions of the T. P. Act, (25 A. 541, *Diss.*). S. 230, Civ. Pro. Code, 1882, would apply where a combined decree under ss. 88 and 90, T. P. Act, is passed and is executed for the realisation of the balance after the sale of the mortgaged property ; and an application for execution after twelve years from the commencement of proceedings against the judgment-debtor's person and his other property will be barred. CHANDI CHARAN ROY CHOWDHRY v. AMBIKA CHARAN DUTT, **31 C. 792.** (27 C. 285, *Expl.* ; 25 C. 580, *R.* ; 25 A. 541, *Diss.*) [*Expl.*, 5 M.L.T. 246=32 M. 534.]

(953)—*Ss.* 88, 90—*Mortgage—Decree—Sale under mortgage—Personal decree for unrealised balance.*—S. 90 of the Transfer of Property Act, 1882, gives a substantial right to a mortgagee, who has obtained a decree for sale under s. 88 of the Act, to apply for a personal decree, where the proceeds of the sale are not sufficient to liquidate the decretal debt and where the balance is legally recoverable from the judgment-debtor. Whether the balance is legally recoverable or not is a question which must depend upon evidence, and the Court ought to go into it, even though the judgment-creditor had not asserted and proved the right in question in the suit, and even though the decree passed under s. 88 provided for no such relief. The right to a personal decree is given by s. 90 under certain circumstances, and these the judgment-creditor must prove. RAMA DATTU v. SAKHARAN LINGU, **11 Bom L.R. 1127=4 Ind. Cas. 256.**

(954)—*Ss.* 88 *and* 90—*Mortgage decree—Personal liability for costs—Costs included in* s. 90.—In drawing a decree under s. 88 of the Act, it will not only be opposed to the scheme of the Act, but also inequitable and opposed to the practice of the Court of equity in England, to make the mortgagor personally liable for costs, in any case, before the sale proceeds have proved insufficient to satisfy the mortgagee's claim. Payment can be enforced personally against the mortgager under s. 90, if the sale proceeds are insufficient to satisfy the mortgagee's claim, and the words "the amount due for the time being on the mortgage" include costs also. KAMALLAMMA v. NARASIMHA CHARLU, **17 M.L.J. 317=2 M.L.T. 359 =30 M. 464.** (20 A. 523, *R.*) [*R.*, 11 O. C. 377.]

(955)—*Ss.* 88, *and* 90—*Decree for sale—Land Acquisition proceedings—Compensation money—Application for execution against compensation*

Transfer of Property Act (IV of 1882) —*continued.*

money.—When the property covered by the mortgage was, under Land Acquisition proceedings, converted into money, the lien which was attached to the property was transferred to that which then represented the property, namely, the compensation standing to the credit of the mortgagor in the Collectorate, and the mortgagee is entitled to take out in execution of a decree for sale of the mortgaged property, the money standing to the credit of the mortgagor in the Collectorate. It is not necessary for him to obtain a further decree under s. 90 of the Transfer of Property Act. JATUNI CHOWDHURANI v. AMAR KRISHNA SAHA. **6 C.L.J. 745** (16 A. 78, *Diss.*) [*R.*, 10 C.L.J. 150=1 Ind. Cas. 264.]

(956)—Ss. 88 and 90—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 10, 21, s. 48, A.W.N. 1893, 184.

(957)—Ss. 88, 90 - *See* CIV. PRO. CODE, 1908, O. XXI, rr. 10, 21, s. 48, 25 A. 541=A.W.N. 1903, 98.

(958)—Ss. 88, 90—Decree not satisfied by sale of mortgaged property—Sale of other property—Rights of mortgagee—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 16 C. 423.

(959)—Ss. 88, 90—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 21 C. 26, 15 A. 334=A.W N. 1893, 127.

(960)—Ss. 88, 90—Attachment of property in execution of supposed decree for balance of mortgage-debt — Mortgage—Civ. Pro. Code—s. 248—*See* EXECUTION OF DECREE—MISCELLANEOUS, 6 O C. 59.

(961)—Ss. 88 and 90—*See* LIMITATION ACT, 1908, art. 182, A.W.N. 1905, 132=2 A.L.J. 376 =27 A. 619.

(962)—Ss. 88, 90—*See* RES JUDICATA — ADJUDICATIONS, 20 A. 386=A.W.N. 1898, 83.

(963)—Ss. 88, 90—*See* RES JUDICATA — RESJUDICATA IN EXECUTION PROCEEDINGS, 3 A L.J. 606=A.W.N. 1906, 251=29 A. 12.

(964)—*Ss.* 88, 94—*Decree for sale under s.* 88—*Rights of decree-holder under s.* 89—A decree for sale under s. 88 of the Transfer of Property Act can only be executed as provided by the Act, that is, for the amount decreed or found in account to be due, and the order for sale cannot except with regard to any additional costs which may be provided for by s. 94, extend in any way the liability of the judgment-debtor or his property under the decree. Nor can the holder of such a decree be entitled to have execution of an agreement for payment of the decretal amount by instalments in consideration of a certain increase in the decree amount and the payment of additional enhanced interest. KASHI PRASAD v. SHEO SAHAI, **19 A. 186=A.W.N. 1897, 12.** (5 A. 492, *D.*) [*R.*, 19 A. 205, 28 A. 771=A.W.N. 1906, 237=3 A. L.J. 585=1 M.L.T. 247, F.B.; *D.*, 10 C.L.J. 91.]

Transfer of Property Act (IV of 1882) —*continued.*

(965)—Ss. 88, 97—*See* INTEREST—SPECIAL CASES, 23 A. 181=3 Bom. L.R. 51=5 C.W.N. 137=28 I.A. 35, P.C.

(966)—*Ss.* 88, 97 *and* 98—*Mortgage-decree, interest on—Document, ambiguous, construction of.*—A Court has power, under a decree in a mortgage suit, to allow interest subsequent to the date of decree and the date fixed by the decree for payment, until realization. The object of fixing a day for payment by the mortgagor is for the purpose of assigning a definite time at which the mortgagor's right of redemption is to cease, and the mortgagee's right to foreclose or sell is to attach, and not for the purpose of staying the payment of interest. The language of s. 88, Transfer of Property Act, is calculated to cause difficulty for it ignores the difference between a foreclosure and a sale. In the case of a foreclosure interest stops because the mortgagee gets the property in lieu of his debt, whereas a sale must be subject to some substantial delay, and in many cases is subject to long delays. But considering the universality of the long established practice, its continuance for years after the Transfer of Property Act was passed, the manifest justice of it, the lack of any apparent reason for upsetting it, the conformity with it of s. 97 which is *pari materia* with s. 98, the presumption that s. 88 was framed with reference not to the running of interest but to the determination of the time for redemption or sale alternatively, and the form of suit sanctioned by the Civil Procedure Code, the proper construction to be placed on s. 88 should be in accordance with the decisions given in *Achalabala* v. *Purendra Nath Dey* (I L.R. 24 Cal. 766), *Supparayar* v. *Ponusami* (I.L.R. 21 Mad. 364) and *Bakar Sajjad* v. *Udit Narain Singh* (I.L.R. 21 All. 361). All ambiguous documents should be construed rather to make them accord with law than to make them conflict with it. MAHARAJA OF BHARATPUR v. RANI KANNO DEI, **3 Bom. L. R. 51.**

(967)—*Ss.* 88, 99 *and* 67—*Right of a decree-holder to sell mortgaged property in execution of a simple money decree.*—The decree-holders held a mortgage decree as well as a simple money decree against the same judgment-debtors. An application was made for the attachment and sale of the mortgaged property in execution of the money decree and the property was duly attached but no order for sale was made. The decree-holders then applied to sell the property in execution of the mortgage decree which was a decree absolute for sale of the mortgaged property. While these proceedings were pending and before the sale was held, the Court was asked to sell the property for the realization of the amounts of both the decrees. The property was then sold and purchased by the appellant who was not a party to either of the decrees. The judgment-debtors then applied to have the sale set aside. *Held*, there was nothing irregular in selling the property for the amounts of

Transfer of Property Act (IV of 1882) —*continued.*

the two decrees as the decree-holders had already instituted a suit under s. 67. BEHARI BHARTHI v. BHAGWAN GIR, **6 A.L.J. 43=31 A. 114. =1 Ind. Cas. 162.**

(968)—*S.* 89—*No notice necessary before order absolute for sale is made.*—S. 89 of the Transfer of Property Act does not require that notice must be given before an order absolute for sale is made. KRISHNA AYYAR v. MUTHUSAMI AYYAR. **25 M. 506=12 M.L.J. 62.** [*R.*, 9 C.W.N. 81, F.B.=32 C. 253, 3 N.L.R. 55.]

(969)—*S.* 89—*Order absolute for sale.*—An order absolute for sale under the T.P. Act is not an indispensably necessary condition precedent. It is sufficient that there is an order for sale passed on the application of the mortgagee-decree-holder. PHUL CHAND RAM v. NARSINGH PERSHAD MISSER, **28 C. 73.** (18 C. 139, 22 C. 931, *R.*) [*R.*, 25 M. 244, F.B., 29 A. 275 =4 A.L.J. 135=A.W.N. 1907, 64, 30 M. 507= 17 M.L.J. 291=2 M.L.J. 347, 7 C.L.J. 282, 8 O.C. 75.]

(970)—*S.* 89—*Order absolute for sale essential—Proceedings in execution void without such order.*—When no order absolute for sale has been passed under s. 89 of the Transfer of Property Act, and no application for such an order has been made to the Court, the decree is incapable of execution, and all proceedings purporting to be taken in execution of it must be held to be null and void. SUBRAHMANYAM PILLAI v. NARAYANA AIYANGAR, **9 M.L.J. 349.** (22 C. 931.)

(971)—*S.* 89—*Decree—Execution by sale of mortgaged property—Limitation.*—An application for execution of a decree, which directs that in default of payment of the debt, the debt should be recovered by sale of the property mortgaged, is to be deemed to be an application under s. 89 of the Transfer of Property Act, to which no period of limitation is applicable. GANU v. NARAYAN, **5 Bom. L.R. 540.**

(972)—*S.* 89—*Sale on a mortgage decree—Order directing sale, sufficient authority under s.* 89, *Transfer of Property Act.*—Where there had been a sale on a mortgage decree, *held*, an order directing a sale would be sufficient authority under s. 89 of the Transfer of Property Act, even if the order did not take the form of a decree such as is prescribed for a decree absolute in the case of a suit for foreclosure. SIVA PERSHAD MAITY v. NANDO LALL KAR MAHAPATRA, **18 C. 139.** [*F.*, 28 C. 73; *R.*, 8 O.C. 75; *Not F.*, 12 C.P.L.R. 82; *D.*, 9 C.P.L.R. 75, 2 C. 931.]

(973)—*S.* 89—*Order absolute for sale, application of ss.* 291, 310-*A of Civ. Pro. Code, to sale held in virtue of.*—Although the Transfer of Property Act does not empower the postponement of the operation of an order absolute for sale passed under s. 89 of the Act, there is nothing to prevent the application of the provisions of ss. 291 or 310-A of the Civ. Pro. Code to a sale held in virtue of such an order. RAJA RAM SINGHJI v. CHUNNI LAL, **19 A. 205=A.W.N. 1897, 47.** [*Diss.*, 25 C. 703; *F.*, 20 A. 354; *Appr.*, 1 O.C. 193, 25 M. 244, F.B.; *R.*, 25 B. 104, 25 M. 300, 31 C. 373, 31 C. 863= 8 C.W.N. 684, 28 A. 28=A.W.N. 1905, 168, 7 C.L.J. 1.]

(974)—*S.* 89—*Discharge of an anterior encumbrance after Court-sale of property—Right of person discharging—Order absolute for sale, effect of.*—In the absence of clear proof to the contrary, it is to be taken that, when the money of a person interested in immoveable property, as for example, the owner of the equity of redemption of a puisne mortgagee, goes to discharge an anterior encumbrance affecting it, the presumption is that the anterior encumbrance enures to the advantage of the party making the payment, if it is for his benefit so to treat it. So, where, after sale of properties in execution of a decree, a person advances money to the judgment-debtor to enable him to set aside the sale under s. 310-A, the said presumption arises and may be inferred as well from the terms of the instrument under which the loan has been made, *viz.*, the recitals therein as to the decree, the execution thereunder and the loan being for the discharge of the debt. (10 C. 1035, *R. & F.*) On a contention raised, in this case, that, on the passing of the order absolute for sale the mortgagee's security became extinguished by virtue of the provision to that effect at the end of s. 89 of the Transfer of Property Act, and the decree-holder and the judgment-debtor came, thereafter, to be precisely in the position of parties to a simple money-decree and, that, therefore, the payment in question to the judgment-debtor could not operate to confer any right of him on the lender, *held*, the construction of the provisions of s. 89, (25 M. 244, *R.*) as contended for would upset completely one of the main principles underlying the law of mortgages, *viz.*, that the effect of a sale in execution of a mortgage-decree is to vest in the purchaser, at such sale, the property as it stood at the date of mortgage and, therefore, free from that and all subsequent encumbrances. (29 I.A. 9, *R. & F.*) The right of the purchaser and the mortgagees can, therefore, be protected only by postulating the continuance of the lien down to the time of the sale, and the transfer of it thereafter to the sale proceeds. VANAMIKALINGA MUDALI v. CHIDAMBARA CHETTY, **29 M. 37.** [*Appr.*, 28 A. 778=3 A.L.J. 633=A.W.N. 1906, 230; *D.*, 6 A.L.J. 549.]

(975)—*S.* 89—*Prior and subsequent mortgagees—Right of puisne mortgagees satisfying in part prior mortgage-debt.*—In a suit by a prior mortgagee of certain shares in two villages, for sale of the mortgage property, wherein the puisne mortgagee of those shares and other property was impleaded, the Court declined to take an account on the puisne mortgage on the ground that the claim was not admitted by the mortgagor. The prior mortgagee realized the

Transfer of Property Act (IV of 1882) —*continued.*

greater portion of his claim by the sale of the shares in one of the villages mortgaged to him and the puisne mortgagee discharged the balance due to the prior mortgagee. *Held*, that the discharge would entitle the puisne mortgagee to step into the shoes of the prior mortgagee and decree-holder to get an order which would authorise him to sell up the share in the other village mortgaged to the prior mortgagee and to recover thereby the balance which he had paid in full satisfaction of the decree held by the prior mortgagee. But it would not entitle him to recover also the amount due on his own bond, and to get an order for sale of the property mortgaged to him other than those mortgaged to the prior mortgagee. JAMNA DAS v. MISRI LAL, **26 A. 504.** (24 A. 179, *R.*)

(976)—*S.* 89—*Order absolute for sale of part of hypotheca—Sale proceeds insufficient—Application against other part.*—An application under s. 89 of the Transfer of Property Act is an application in execution. Therefore, if an order absolute has been made for the sale of part only of the mortgaged property and the sale-proceeds prove insufficient to satisfy the decree, there is nothing to prevent the decree-holder from obtaining an order for sale of other portions of the mortgaged property. BALKISHANJI MAHRAJ v. MITHU LAL, **25 A. 212 = A.W.N. 1903, 17.**

(977)—*S.* 89—*Appeal.*—An appeal lies from an order passed upon an application made under s. 89 of the Transfer of Property Act. An order on an application under s. 89 of the Transfer of Property Act is not an order made in a proceeding in execution, and is not appealable as such. Such an order, however, seems to have the effect of a final decree, and an appeal lies therefrom under s. 540, Civ. Pro. Code. (21 C. 818, 22 C. 924, 22 C. 931, 25 C. 133, *F.*) *Per Sir Arnold White, C.J. and Moore, J.* An application under s. 89, Transfer of Property Act, is an application for the execution of a decree passed under s. 88, and an order thereon is appealable as an order under s. 244 (*c*). *Per Davies, Benson and Bhashyam Ayyangar, JJ.* MALLIKARJUNADU SETTI v. LINGA MURTI PANTULU, **25 M. 244, F.B. = 12 M.L.J.** 279. (13 A. 278, 20 A. 302, 23 B. 644, *F.*) [*F.*, 31 M. 354 = 18 M.L.J. 259 = 3 M.L.T. 281, 27 M. 40, 16 M.L.J. 503 = 1 M.L T. 294; *Diss.*, 29 C. 651, 16 C. P. L. R. 111, 1 N. L. R. 143; *Expl.*, 26 M. 780 = 13 M. L. J. 412; *Cons.*, 25 M. 300 F. B. = 12 M. L. J. 128; *R.*, 29 M. 37, 33 C. 867 = 4 C. L. J. 141, 31 M. 68 = 3 M. L. T. 254 = 17 M. L. J. 956, 17 M. L. J. 66 Note, 18 M. L. J. 23 = 3 M. L. T. 328, 6 C. L. J. 119 = 11 C. W. N. 674, 30 A. 248 = A. W. N. 1908, 103 = 5 A. L. J. 272, 12 C. W. N. 282 = 7 C. L. J. 581 = 3 M. L. T. 202.]

(978)—*S.* 89—*Applications under—Limitation—Limitation Act*, 1877, *Arts.* 178, 179. —Applications under s. 89 of the Transfer of Property Act are governed by art. 179, and not by art. 178 of sch II of the Limitation Act, 1877. BHAGWAN v. GANU, **23 B. 644,**

(979)—*S.* 89, *proceedings under—Appeal from order absolute made under s.* 89—*Ss.* 540, 258, *Civ. Pro. Code*, 1882—*Application under—Effect.*—Proceedings under s. 89, Transfer of Property Act, are not proceedings in execution of a decree, but are proceedings in continuation of the original suit. (22 C. 925, 931, *Relied on; Majority of the Full Bench in* 25 M. 244, *Diss.*; and *minority, F.*) An appeal lies against the order absolute that was made by the first Court under s. 540, Civ. Pro. Code, as an appeal from an original decree. [*F.*, 16 C.P.L.R. 111, 6 Bom. L.R. 1043, 4 L.B.R. 83 = 14 Bom. L.R. 323; *R.*, 6 O.C. 114, 33 C. 867 = 4 C.L.J. 141, 10 C.L.J. 91; *Approved*, 10 C.L.J. 115.] In an application under s. 89, Transfer of Property Act, for an order absolute for the sale of certain mortgaged-property, s. 258, Civ. Pro. Code, is no bar to the Court's inquiring into the plea of payment (raised by the mortgagor) in satisfaction of the decree *nisi* made under s. 88, Transfer of Property Act. PRAMATHA CHANDRA ROY v. KHETRA MOHANA GHOSE, **29 C. 651.**

(980)—*S.* 89 "*Thereupon*," *construction of —Right of mortgagor to redeem before sale—S.* 291, *Civ. Pro. Code*, 1882 (= *O.* XXI, *r.* 69, *new Code*).—The word "thereupon" in s. 89, Transfer of Property Act, relates to the actual sale and the distribution of the proceeds and not merely to the passing of the order absolute for sale. So a mortgagor has the right to redeem at any time until the sale of the mortgaged property has been completed. BIBIJAN BIBI v. SACHI BEWAH, **31 C. 863 = 8 C.W.N. 684.** (19 A. 205, 25 M. 344, 25 B. 104, 31 B. 373, *F.* 6 C.W.N. 769, *R.* [*F.*, 28 A. 778 = 3 A.L.J. 630 = A.W.N. 1906, 230, 31 M. 354 = 18 M L.J. 259 = 3 M.L.T. 281; *Rel, on*, 28 A. 28 = A.W.N. 1905 168; *Appl.*, 2 C.L.J. 202, 7 C.L.J. 581 = 12 C.W.N. 282 = 3 M.L.T. 202; *Expl.*, 7 C.L.J. 1; *R.*, 9 C.L.J. 96 = 13 C.W.N. 226.]

(981)—*S.* 89—*Order absolute for sale—Auction purchaser in execution sale on money decree — Respective rights.*—Where the equity of redemption has been extinguished by an order absolute for sale before an auction sale in execution of a simple money decree, the auction purchaser can avert the sale of the property by paying off the amount due under the mortgage. The mere fact that that he was not made a party to the proceedings taken in execution of the mortgage decree would not confer on him a right to the mortgaged property which could avail against the subsequent purchaser at the sale held in such execution. INDARJIT v. GHULAM MOHI-UD-DIN, **1 A.L.J. 699.**

(982 & 983)—*S.* 89—*Refusing to make order absolute for sale—Ground for—Appeal from preliminary decree, pendency of—Time, extension of.*—The pendency of an appeal against a decree under s. 88 of the Act is, of itself, no ground for refusing to make an order absolute

Transfer of Property Act (IV of 1882) —*continued.*

for sale under s. 89 of the Act. A Court has no power, of its own motion, to extend the time provided in s. 89, for making an order absolute. RAM GOLAM LAL SAHU v. CHOWDHRY BABU BARSATI SINGH, **10 C.W.N. 910.**

(984)—*S.* 89—*Order absolute—Application by judgment-debtor to raise decretal amount by sale or mortgage—Civ. Pro. Code, s.* 305—*Sufficient cause—Appeal—Civ. Pro Code, s.* 244, *clause* (*c*)—*Transfer of Property Act, sale of mortgaged property when decree passed under—Civ. Pro. Code, chapter* XIX, *part A, B and C.*—*Held*, that an order under s. 305, Civ. Pro. Code, postponing or refusing to postpone the sale is one determining a question relating to the execution, discharge, or satisfaction, or to the stay of the execution of the decree, and is therefore appealable under clause (*c*), s. 244. *Held*, that the provisions of s. 305, Civ. Pro. Code, are not inconsistent with those of s. 89, Transfer of Property Act, and are applicable where the decree is one for the sale of mortgaged property passed under the Transfer of Property Act. Before the Court can grant a certificate under s. 305, Civ. Pro. Code, the judgment-debtor must satisfy the Court that there is sufficient cause for believing that the amount of the decree can be raised by mortgage or lease, or by private sale of the property. *Held* further, that the rules contained in parts (A) (B) and (C), chapter XIX of the Code of Civil Procedure, 1882, in force at the time the Transfer of Property Act came into force, are generally applicable to sales of mortgaged property where the decrees are passed under the Transfer of Property Act. CHANDIKA BAKSH v. BIRJBIHARI LAL, **3 O.C. 42 B.**

(985)—*S.* 89—*Execution of decree—Payment into Court of decretal money and costs—Stay of sale—Civ. Pro. Code, s.* 291.—Where the sale of mortgaged property has been directed by an order absolute under s. 89 of the Transfer of Property Act, 1882, it is open to the person holding the equity of redemption in such property to pay into Court at any time before the sale, the amount of the decretal debt and costs, and thereupon the execution-proceedings will cease. It is not necessary that the person holding the equity of redemption should wait until the property is actually put up for sale. MISRI LAL v. MITHU LAL, **A.W.N. 1905, 168 =28 A. 28.** (19 A. 209, 20 A. 354, *F.*; 31 C. 863, *R.*)

(986)—*S.* 89—*Mortgage suit—Decree* nisi—*Interest not allowed after period of grace—Order absolute—Subsequent application for assessment of such interest, if may be entertained—Decree absolute—Court's function ministerial in making—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 209.—The functions of the Court in drawing up a decree absolute under s. 89 of the Transfer of Property Act are more or less ministerial. Where therefore the decree *nisi*, in a mortgage suit allowed no interest after the expiry of the period of grace, the Court would not, upon the decree-holder's application made after the order absolute was passed, make an order granting such further interest. MOHA PROSAD SINGH v. RAMANI MOHAN SINGHA, **13 C.W.N. 744= 4 Ind. Cas. 546.**

(987)—*S.* 89—*Sale in execution—Mortgage decree directing the sale of the mortgaged property—Decree* nisi *not absolute—Application to stop the execution—Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 578.—After an order was passed for sale of the mortgaged property in execution proceedings taken under a mortgage decree directing the sale of the mortgaged property in default of payment by the mortgagor within a certain time, an application was made by the mortgagor to stop the execution on the ground that there was no decree *absolute* and that therefore his right of redemption was not extinguished. *Held*, (1) that all the conditions of s. 89, Transfer of Property Act, 1882, having been complied with except that in the application for the order for sale the word "absolute" did not appear, the application must fail; (2) that even if there had been an error, it was of the most technical description and one manifestly covered by s. 578 of the Civ. Pro. Code, 1882. MANCHERJI v. THAKORDAS, **5 Bom. L.R. 389.**

(988)—S. 89—*See* BOM. ACT XXVII OF 1879, s. 44, 1 Bom. L.R. 136=23 B. 644.

(989)—S. 89—*See* CIV. PRO. CODE, 1908, O. IX, r. 13, 25 A. 42=A.W.N. 1902, 189.

(990)—S. 89—*See* CIV. PRO. CODE, 1908, O. XXI, r. 2, 8 C.W.N. 102.

(991)—S. 89—*See* CIV. PRO. CODE, 1908, O. XXI, r. 15, 26 A. 318.

(992)—S. 89—Application by assignee of mortgagee decree-holder to be brought on record and for issue of notice to judgment-debtor —No prior application for order absolute—Effect.—*See* CIV. PRO. CODE, 1908, O. XXII, r. 22, 2 Ind. Cas. 433=8 M.L.T. 232.

(993)—S. 89—Order under—is an order in execution—Scope of the Act.—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 53, 16, s. 60, O. XXI, r. 64, 5 M.L.T. 278=1 Ind. Cas. 535.

(994)—S. 89—Not in conflict with s. 291, Civ. Pro. Code (1882).—*See* CIV. PRO. CODE, 1908, O. XXI, r. 69, 6 Ind. Cas. 813=14 C.W.N. 1019.

(995)—S. 89—*See* CIV. PRO. CODE, 1908, O. XXI, r. 69, 31 C. 373.

(996)—S. 89—*See* CIV. PRO. CODE, 1908, O. XXI, r. 69, 20 A. 354=A.W.N. 1898, 70.

(997)—S. 89—S. 310-A, Civ. Pro. Code, (1882)—*See* CIV. PRO. CODE, 1908, O. XXI, r. 89, 6 A.L.J. 513=5 M.L.T. 386=31 A. 346 2=Ind. Cas. 400.

(998)—S. 89—Decree not in accordance with —Enforcement of decree—*See* COMPROMISE—EFFECT OF, 6 C.L.J. 95=11 C.W.N. 879=34 C. 886.

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Transfer of Property Act (IV of 1882)—*continued.*

(999)—S. 89—Order refusing application for order absolute under section—Appeal—*Ad valorem* Court-fee on value of appeal should be paid on memorandum of appeal—*See* COURT-FEES, 12 C.W.N. 1028.

(1000)—S. 89—*See* EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 21 C. 818.

(1001)—S. 89—*See* EXECUTION OF DECREE—MISCELLANEOUS, 20 A. 302=A.W.N. 1898, 40, 4 O.C. 123.

(1002)—S. 89—*See* LIMITATION ACT, 1908, ss. 6. 8, 2 A.L.J. 453=A.W.N. 1905, 163=27 A. 704.

(1003)—S. 89—*See* LIMITATION ACT, 1908, art. 181, 16 A. 23=A.W.N. 1893, 198, 22 C. 924.

(1004)—S. 89—Mortgage decree—An application for sale should be taken to be an application for order absolute—*See* LIMITATION ACT, 1908, art. 182, 6 M.L.T. 361=4 Ind. Cas. 42.

(1005)—S. 89—Application for order absolute not in accordance with the Civil Rules of Practice—*See* LIMITATION ACT, 1908, art. 182, 17 M.L.J. 596=3 M.L.T. 254=31 M. 68.

(1006)—S. 89—*See* MAHOMEDAN LAW—GIFT, 6 Bom. L.R. 1043.

(1007)—S. 89—*See* RES JUDICATA—CAUSE OF ACTION, 10 O.C. 145.

(1008)—S. 89—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 1 O.C. 155.

(1009)—S. 89—*See* Nos. 274, 461, 585, 589, 715, 820, 849, 850, 862, 864, 885 to 888, 916 to 950, *supra*.

(1010)—*Ss.* 89, 90—*Decree for sale of part only of hypotheca—Sale proceeds insufficient—Application under* s. 90—*Validity of decree for sale of part of hypotheca.*—Whether a decree was passed for sale of only a part of the mortgaged property (the plaintiff having left out the remainder as being encumbered), and such decree being left unimpeached, the sale proceeds of the part ordered to be sold was insufficient to cover the amount of the decree, *held*, on an application under s. 90, that a decree could be passed against the unhypothecated property of the mortgagor. The words "such sale" in that section mean a sale of the property directed to be sold in the decree under s. 88 or the order under s. 89. [*F.*, 2 A.L.J. 413=A. W. N. 1905, 165, 28 A. 19, 28 A. 674=3 A.L.J. 465=A. W. N. 1906, 205; *R.*, 1 N.L.R. 39] *Semble*.—That there is nothing to prevent a mortgagee relinquishing, for some reason or other, his claim against a portion of the hypotheca and, if the sale of such part is insufficient to pay the amount due, getting an order under s. 90 against other property of the mortgagor. SHEO PRASAD v. BEHARI LAL, **25 A. 79=A.W.N. 1902, 203.** [*Diss*, 33 C. 890=10 C.W.N. 862. 33 C. 613=10 C.W.N. 551=3 C. L. J. 576; *F.*, 29 A. 369=A.W.N. 1907, 83; *R*, 28 A. 174=A.W. N. 1905, 244=2 A. L. J. 630, 6 C.L.J. 46.]

(1011)—*Ss.* 89 *and* 90—*Mortgage—Release of portion of mortgaged property—Sale of remaining portion—Unsatisfied balance of mortgage-decree—Application for a personal decree—Condition precedent to such a decree.*—A mortgagee, released certain portions of the mortgaged property, without the consent of the mortgagor, upon receipt of a sum of money, in part-satisfaction of the mortgage-debt, from purchasers, to whom such portions had been transferred, and obtained a decree for the balance against the mortgagor, in pursuance of which, the unreleased portions of the property were sold. The proceeds being found insufficient to satisfy the decree, the mortgagee applied for a persoual decree for the balance against the mortgagor. *Held*—that the condition precedent to enable a Court to pass a decree under s. 90, *viz.*, the sale of the whole or a sufficient portion of the mortgaged property, had not been satisfied in this case. A mortgagee may not release a portion of the mortgaged property from the debt, without the mortgagor's consent, so as to impose upon the mortgagor a personal liability to which he would not otherwise be subject. There is nothing to show that, if the whole property had been sold, it would not have been sufficient to pay off the whole mortgage debt. A mortgagor may claim to have the entire mortgaged property sold before a personal decree can be passed against him. RAJA RAMRANJANCHAKRABUTTY v. INDRA NARAYAN DAS, **10 C. W. N. 862=33 C. 890.** (25 A. 79, *Diss.*) [*R.*, 6 C. L. J. 46; *D.*, 3 Ind. Cas. 443.]

(1012)—*Ss.* 89 *and* 90—*Separate suits on separate properties—Decree—Sale.*—A person held two mortgages over the same property, brought two separate suits on those mortgages and obtained two decrees. The first decree was made absolute and, in execution thereof, the decree-holder himself purchased the property. The sale-proceeds were more than sufficient to discharge the first mortgage, the surplus discharging the amount of the second decree in part. He then applied for a decree under s. 90, Transfer of Property Act, to realise the balance due under the second decree. *Held*, that no decree under s. 90 could be passed, as the second decree had not been made absolute under s. 89, and no sale had taken place in execution thereof, the proceeds of which had proved insufficient to discharge the second mortgage. KAMTA PRASAD v. SAYED AHMED, **6 A.L.J. 451=31 A. 373=1 Ind. Cas. 799.** (A.W.N. 1899, 208, 22 A. 404, *F.*)

(1013)—*Ss.* 89, 90—*Mortgage-decree—Application for sale of part of mortgaged property.*—

Transfer of Property Act (IV of 1882) —*continued.*

Although a mortgage decree-holder, by applying for the sale of a part of the mortgaged premises, undergoes a certain amount of risk, yet, in the absence of any evidence that his mortgage dues would not be realised by the sale of a part only of the property, the Court cannot direct him to proceed against the whole. KHITISH CHANDRA SANYAL v. HARI CHARAN DAS, **4 Ind. Cas. 398.**

(1014)—*Ss.* 89 *and* 90—*Private sale of part of mortgaged property by consent of parties—Sale-proceeds of all the mortgaged property insufficient to satisfy the mortgage-decree—Application for personal decree—S.* 305, *Civ. Pro. Code.*—Where, in a mortgage-decree for sale of the property, a part of the mortgaged property was sold privately by the consent of the decree-holder and the judgment-debtor and the consideration went towards the payment of the mortgage decree and it was found, after sale of all the property mortgaged, that the proceeds were insufficient to satisfy the mortgage debt: *held*, that this was a substantial compliance with the provisions of s. 90 and that the decree-holder was entitled to a personal decree under that section. The sale of the mortgaged property by public auction was not essential. UDIT NARAIN SINGH v. BAQUR SAJJAD, **A.W.N. 1905, 124=2 A.L.J. 353.**

(1015)—*Ss.* 89 *and* 90—*Execution of decree—Mortgage—Order absolute for sale of part only of the mortgaged property—Property sold insufficient to satisfy the mortgage-debt—Application for personal decree against mortgagor.* — A mortgagee in a suit for sale of the mortgaged property obtained a decree for sale of the whole; but, when applying subsequently for an order absolute for sale, relinquished his claim as against part of the mortgaged property and took an order for sale of part only, and that order became final. The property ordered to be sold was brought to sale, but realized an amount insufficient to satisfy the decre. *Held*, that the decree-holder was, under these circumstances, competent to apply for and obtain a personal decree against the mortgagor under s. 90 of the Transfer of Property Act, 1882. GHAFUR HASAN KHAN v. MUHAMMAD KIFAYATUL-LAH KHAN, **A.W.N. 1905, 165=2 A.L.J. 413=28 A. 19.** (25 A. 79, *F.*)

(1016)—*Ss.* 89 *and* 90—*Sale of part of mortgaged property with judgment-debtor's consent in England—Effect of suit in Chancery Court—Limitation.*—Certain shares in a Railway belonging to the defendant were ordered to be sold under s. 89 of the Act. At the request of the defendants, they were sent to England for sale through a broker. The defendant gave a power of attorney in favour of the Bank and also gave the stock certificate. The Railway Company declined to act on the power of attorney or the transfer in Bank. The Bank instituted a suit in the Court of Chancery in England and obtained a decree for sale and sold the stock. The proceeds of sale having proved insufficient, the Bank put in the present application for a decree under s. 90. *Held*, that the sale, which took place in England, must be treated to be a sale had, in connection with the decree passed in this country, but carried out by the parties independently of the Court in this country at the express instance of the defendants, judgment-debtors, and that they could not be heard to say that the sale was not in pursuance of the order for sale passed under s. 89. *Held*, further, that unless the Railway stock was sold, the defendants could successfully object to the application under s. 90. The stock having been sold, the decree under s. 90 should be passed. GAJADHUR LAL v. ALLIANCE BANK OF SIMLA, **3 A.L.J. 445=28 A. 660.** (A.W.N. 1899, 208, 22 A. 404, *R.*)

(1017)—*Ss.* 89 *and* 104—*Mortgage decree—Execution—Adjustment—Power of executing Court to enforce—Civ. Pro. Code, ss.* 244 *and* 258.—After the order absolute for sale was passed, the mortgagee agreed, upon receipt of certain sums of money, to give up his claim for compound interest and to allow a certain remission. *Held*, that the Court executing the decree was competent to give effect to the adjustment. (8 C.W.N. 684=31 C. 863, *Appl.*) *Quaere*—Whether s. 258 of the Civ. Pro. Code applies to proceedings in execution of a mortgage decree. HARISH CHANDRA MONDOL v. JAGABANDHU DUTTA, **12 C.W.N. 282=3 M.L.T. 202=7 C.L.J. 581.** (4 C.W.N. 474, 8 C.W.N. 102, *R.*)

(1018)—Ss. 89, 104—S. 291, Civ. Pro. Code (1882), not in conflict with s. 89, Transfer of Property Act—*See* CIV. PRO. CODE, 1908, O. XXI, r. 69, 14 C.W.N. 1019=6 Ind. Cas. 813.)

(1019)—*S.* 90—*Purchaser of equity of redemption—Personal liability—Meaning of "defendant" in s.* 90.—A mortgaged his property to C and subsequently sold it to B. C sued on foot of the mortgage and made both A and B parties. A did not defend. B defended and lost it even in the High Court. *Held*, that the decree of the High Court clearly awarding costs of that Court against B personally, and the costs of the Court of first instance being made part of the mortgagee's costs of the original suit recoverable from the mortgaged property, no decree under s. 90, Transfer of Property Act, could be passed against B. "Defendant" in s. 90 means "mortgagor defendant." AJKUMAR SINGH v. RAM SARAN, **3 Ind. Cas. 33.** (23 A. 439, *R.*)

(1020)—*S.* 90—"*Defendant,*" *meaning of—Defendants benefited by mortgage—Personal liability.*—S. 90 of the Transfer of Property Act contemplates a supplementary decree against the mortgagor alone, or his representatives, if he is dead. The word "defendant" in the section means the mortgagor defendant. S purchased a certain property in her own name and, not being able to pay the consideration money in cash, executed a mortgage of the purchased property in favour of the vendors, whose assignee brought this suit against S and the defendants

Transfer of Property Act (IV of 1882) —*continued.*

on the ground of their having been benefited by the mortgage, as the property was purchased for the joint family of which they were members and in which they lived under the guardianship of S. A joint decree was passed against all the defendants; the property was sold but the proceeds were insufficient to satisfy the decree. In the meantime S died and the decree-holder applied for a decree against the defendants under s. 90 of the Transfer of Property Act: *Held* that no decree could be made against the defendants under the section as they were not the mortgagors in the sense of being executants of the mortgage-deed and it was not shown that they got any assets from S so as to attract upon themselves the liability of S; that the meaning of the mortgage decree which was passed against them on the ground of benefit meant only that the mortgaged property was liable to sale, and that the personal liability must be made out on the terms of the mortgage bond. RAMOO SINGH v. MITERJIT MAHTON, **7 Ind. Cas. 784.** (23 A. 439, A.W.N. 1901, 131, 26 A. 507, A.W.N. 1904, 73, 1 A.L.J. 250, 13 C. W.N. 138, 1 Ind. Cas. 442, 9 C.L.J. 35, 34 C. 642, 11 C.W.N. 593, 5 C.L.J. 491, 2 M.L.T. 207, F.B., *R.*)

(1021)—*S.* 90—*Sale of property—Meaning of.* —The words 'such sale,' referred to in s. 90 of the Transfer of Property Act, mean a sale of property directed to be sold by the decree under s. 88 and the order absolute under s. 89. Hence, where the property mortgaged was *malikana* rights in certain zemindari, but by mistake the decree directed the sale of zemindari which was sold, *held* that the provisions of s. 90 were complied with and the decree-holder was entitled to a personal decree. SHIAM SUNDER LAL v. GANESH PRASAD, **3 A.L.J. 465=A.W.N. 1906, 205=28 A. 674.** (25 A. 79, *Appl.*)

(1022)—*S.* 90—*Sale of equity of redemption —Undertaking by purchaser to pay off mortgage, if imports personal liability to pay—"Balance legally recoverable."*—The purchaser of the equity of redemption is not personally bound to pay the mortgage-debt. Where the mortgagor left a portion of the purchase-money with the purchaser for redemption of the mortgage. *Held*, that the mortgagee, not having been a party to the sale, could not avail himself of the undertaking on the part of the purchaser to pay off the mortgage-debt, and the latter, therefore, was not a person from whom the unrealized balance of the mortgage-debt was legally recoverable within the meaning of s. 90 of the Transfer of Property Act. JAMNA DAS v. PANDIT RAM AUTAR PANDE, **16 C.W.N. 97, P.C.**

(1023)—*S.* 90 — *Mortgage — Construction— Unconditional promise to pay, if implies personal liability.*—If a person promises to pay a certain sum of money with interest, and hypothecates certain property as security, without any express covenant that he would be personally liable, or without stating any mode of payment, he is personally liable, and a decree under s. 90 of the Transfer of Property Act should be passed in such a case against the mortgagor, if the sale-proceeds of the mortgaged property do not satisfy the entire debt and the right to have such a decree is not time-barred. RAM KISHORE GIR v. SURAJDEO PERSHAD SINGH, **13 C.W.N 138=9 C.L.J. 5=1 Ind. Cas. 442.** (4 C.L.J. 246, *Appr.*; 10 C. 740, 16 C. 540, *R.*)

(1024)—*S.* 90—*Order under s.* 90, *not necessary when decree is personal.*—S. 90 of the Transfer of Property Act contemplates the making of a supplemental decree in the special case provided for by that section, namely, the nett proceeds of any sale of the mortgaged property proving insufficient to pay the amount due for the time being on the mortgage, and does not apply to a case where the original decree is a personal one against the mortgagor, under which the mortgagee can, in execution, proceed against any property of the mortgagor other than that comprised in the mortgage. A supplemental decree under s. 90 is unnecessary, when the decree-holder can obtain all he wants by putting in force an existing decree in his favour against the judgment-debtor. DINA NATH MITTER v. BEJOY KRISHNA DAS, **7 C.W.N. 744.** [*R.*, 33 C. 867=4 C.L.J. 141.]

(1025)—*S.* 90—*Decree for sale on mortgage— Money decree—Nature of decree under s.* 90.— By a decree under s. 90 of the Transfer of Property Act, 1882, a Court has no power to direct the sale of any specific property in satisfaction of it. It can under that section give simply a money decree for the balance of the mortgage-money, and nothing more. RUP RAM KUNWAR v. GOPAL DAS, **A.W.N. 1899, 125.**

(1026)—*S.* 90 *Personal decree against judgment-debtor mortgagor—Person entitled to such decree.*—*Held*, that the only person who can apply for a decree under s. 90 of the Transfer of Property Act, 1882, is the person in execution of whose decree for sale the mortgaged property has been sold. MUHAMMAD AKBAR v. MUNSHI RAM, **A.W.N. 1899, 208.** (14 A. 913 *R.*, and 15 A. 331, *D.*) [*F.*, 22 A. 404, 31 A. 373; *Diss.*, 26 A. 25; *R.*, 6 A.L.J 451, 28 A. 660=3 A.L.J. 445=A.W.N. 1906, 167; *D.*, A.W.N. 1907, 83, 29 A. 369.]

(1027)—*S.* 90—*Part of mortgaged property exempted—Application for decree over.*—Where the sale of part of the mortgaged property is forbidden by a decree of Court declaring the same to belong to a third person and not to the mortgagor, *held* that the decree-holder could get an order under s. 90 of the Transfer of Property Act after the sale of the remaining part of the hypotheca. KEDAR NATH v. CHANDU MAL, **26 A. 25=A.W.N. 1903, 179.** (A.W.N. 1899, 208, 22 A. 404, *D.*) [*R.*, 1 N. L.R. 39, 29 A. 369=A.W.N. 1907, 83; *D.*, 29 A. 260=4 A.L.J. 157=A.W.N. 1907, 69.]

Transfer of Property Act (IV of 1882) —*continued.*

(1028)—*S.* 90—*Decree for sale on mortgage—Property sold under different decree held by another mortgagee—S.* 90 *not applicable.*—An applicant under s. 90 of the Transfer of Property Act must have himself caused already the whole of the property mortgaged to him to be sold. It is not sufficient if some of the property comprised in the mortgage had been sold in execution of a decree on a prior mortgage held by a different person, and the rest sold by him. BADRI DAS v. INAYAT KHAN, **22 A. 404=A.W.N. 1900, 132.** (A.W.N. 1899, 208, *F.*) [*F.*, 6 A.L.J. 451=31 A. 373; *R.*, 28 A. 660 =3 A.L.J. 445=A.W.N. 1906, 167; *D.*, 26 A. 25=A.W.N. 1903, 179.]

(1029)—*S.* 90, *prior mortgagee not entitled to decree under, for costs against puisne mortgagee.*—With regard to the costs recoverable from a puisne mortgagee, a decree under s. 90 of the Transfer of Property Act cannot be given in favour of the prior mortgagee-plaintiff, such costs not constituting money due upon the mortgage. The persons affected by the section are the mortgagee who has brought the property to sale, and the mortgagor whose property on being sold, has not sufficed to satisfy the decree, and it cannot be said, of the puisne mortgagee that any property of his was sold, or was, when sold, insufficient to discharge the decree. RAM LAL v. SIL CHAND, **23 A. 439=A.W.N. 1901, 13.** [*F.*, 26 A. 507=A.W.N. 1904, 73, 3 Ind. Cas. 33; *R.*, 6 A.L.J. 427.]

(1030)—*S.* 90— *Execution of decree—Decree against assets in hands of mortgagor's sons—Mitakshara Law—Property coming by survivorship, if assets.*—A mortgage was executed by a Hindu father governed by the *Mitakshara* law In a mortgage suit against his sons, the mortgagee applied for a decree under s. 90 of the Transfer of Property Act, and a decree was made against "the assets of the mortgagor which might be in the hands of his sons." *Held*, that property, which is not the self-acquired property of the sons, but has come to them by survivorship, is liable to satisfy the debt, and that the decree may be executed against such property. RAMLAL SINGH v. MAHARAJAH PASWATI BEJOY PATI GAJAPATI, **5 Ind. Cas. 146=11 C.L.J. 362.** (34 C. 642, 11 C.W.N. 593, 5 C.L.J. 491, 2 M.L.T. 207, F.B., *Rel.*)

(1031)—*S* 90 – *Mortgage—Personal covenant to pay—Limitation.*—A mortgage bond provided that for the payment of the amount borrowed, the immoveable property mentioned in it should be held as collateral security, and that, "in case of the hypothecated property being insufficient for the satisfaction of the entire amount of the bond, the creditors would be at liberty to realize the amount remaining due from the obligors personally and from their other property." About 10 years later, the mortgagee brought a suit and obtaining a decree under s. 8 of the Transfer of Property Act brought the property to sale. The proceeds of the sale having proved insufficient, the mortgagee applied for a decree under s. 90. This application was within three years from the date of the sale. *Held* that on the date on which the plaintiff brought his suit upon his mortgage, his claim for a personal remedy was time-barred, because the cause of action for both the personal liability and the liability of the property was a single one, *viz.*, a breach of the conditions of the bond, and no fresh cause of action could arise at the time when the property was found insufficient to completely satisfy the bond; and therefore, the balance of the amount of the mortgage was not legally recoverable on the date of the application under s. 90. CHATTAR MAL v. THAKURI, **20 A. 512=A.W.N. 1898, 132.** (14 A. 513, 12 C. 389, *R.*) [*R.*, 15 C.P.L.R. 29, 6 O.C. 30, 33 C. 867=4 C.L.J. 141, 4 L.B.R. 88=14 Bur. L.R. 161.]

(1032)—*S.* 90—*Act No.* XV *of* 1877 (*Indian Limitation Act*), *sch.* II, *art.* 178—*Limitation—Decree improperly directing sale of non-hypothecated property—Amendment of decree*—Terminussa quo *for limitation in respect of an application under s.* 90 *of the Transfer of property Act.*—The decree granted to a successful plaintiff in a suit for sale upon a mortgage by mistake directed the sale of certain property of the judgment-debtor which was not covered by the mortgage in suit. Under this decree the mortgaged property was brought to sale, and subsequently an application was made for the sale of the non-hypothecated property included in the decree. No objection on the score of the incorrectness of the decree was taken at the time by the judgment-debtor, but two applications were made by the judgment-debtor for postponement of the sale and were granted. At a later date the judgment-debtor applied under s. 206 of Code of Civil Procedure for amendment of the decree by striking out of it the non-hypothecated property. This application was granted and the decree limited to the hypothecated property, which had already been sold. The decree-holder thereupon applied for a decree under s. 90 of the Transfer of Property Act. *Held* that the period of limitation for such an application must, under the circumstances, be deemed to start from the time when the decree was amended. FAZL HUSAIN KHAN v. SHOHRAT SINGH, **A.W.N. 1902, 50.**

(1033)—*S.* 90—*Application for recovery of balance due after sale of mortgaged property limitation for—Limitation Act, sch.* II, *art.* 116—*Decree for mortgage-debt by sale of mortgaged property.*—The respondents executed a mortgage-deed in favour of appellant on February 25th, 1888. It provided that the respondents should pay the sum secured within two years. The appellant filed his suit on the mortgage in January 1897 and obtained a decree for sale of the mortgaged property. The sale took place and the proceeds proved insufficient to pay the amount due on the mortgage. It was admitted that the interest on the debt had been paid as

Transfer of Property Act (IV of 1882) —continued.

such within the prescribed period of limitation. The respondent's contention was that notwithstanding the payment of interest the balance was not legally recoverable against any of them, because the time to be regarded in considering whether the balance was legally recoverable was not the date of the suit but the date of the application for a decree under s. 90 of the Transfer of Property Act. *Held*, that, in considering whether the recovery of the balance remaining due after the sale of the mortgaged property was barred by limitation prescribed by art. 119 of sch. II of the Limitation Act, regard should be had to the date of the suit and not to the date of the application under s. 90 of the Transfer of Property Act; that that article applied to suits and not to applications and that an application under s. 90 of the Transfer of Property Act, was not a plaint in a suit and could not be regarded as the institution of a suit. BISHESHUR DAYAL v. MAHAMMAD IBRAHIM KHAN, **6 O.C. 30.**

(1034)—*S.* 90—*Application for a personal decree against mortgagor—Limitation—Act No.* XV *of* 1877 (*Indian Limitation Act*), *sch.* II, *art.* 116.—*Held* that the fact that there is no express personal covenant to pay the mortgage money is no bar to the mortgagee obtaining a personal decree under s. 90 of the Transfer of Property Act, 1882, against the mortgagor if the requirements of the section are otherwise fulfilled; a personal covenant to pay is implied in and is an essential part of every simple mortgage (11 B 475, *N F.*; 21 M. 242, *R.*). *Held* also that on an application under s. 90 of the Transfer of Property Act it is the date of filing the suit which has to be looked to in considering the question whether the balance is legally recoverable from the defendant. JANGI SINGH v. CHANDER MAL, **A.W.N. 1908, 161 = =30 A. 388 = 5 A.L.J. 670.** (20 A. 386, *F.*)

(1035)—*S.* 90 — *Application for personal decree for balance of judgment debt not realised at mortgage-sale—Limitation—Limitation Act* (XV *of* 1877), *sch.* II, *arts.* 116 *and* 178.—In making a supplemental decree under s. 90, Transfer of Property Act, the Court has to consider, if any question of limitation arises, whether the personal remedy was barred at the date of the institution of the suit, and not whether it would be barred at the date of the application under s. 90. Art. 178 of sch. II of the Limitation Act does not apply to an application under s. 90, Transfer of Property Act. (22 C. 924, *F.*) The mortgage suit having in this case been brought within the period of limitation provided by art. 116 of sch. II of the Limitation Act, *held*, that the application under s. 90, Transfer of Property Act, was not barred though made more than three years after the date of the decree for sale. SHEIKH RAHAMAT KARIM v. SHEIKH ABDUL KARIM, **11 C.W.N. 674 = 6 C.L.J. 119 = 34 C. 672.** [*R.*, 12 C.W.N. 145 = 7 C.L.J. 658.]

Transfer of Property Act (IV of 1882 —continued.

(1036)—*S.* 90—*Balance "legally recoverable" —Limitation—Act No.* XV *of* 1887 (*Indian Limitation Act*), *sch. II, art.* 116.—Every suit on a mortgage containing an express or implied covenant to pay the mortgage money otherwise than out of the mortgaged property must be regarded as impliedly, if not expressly, a suit claiming such relief, the point being that the plaintiff, instead of being obliged to include a prayer for such relief in the plaint, may wait until it appears that the sale-proceeds are insufficient, and then make the prayer in an application under s. 90 of the Transfer of Property Act. BADRI MAN v. RAJA RAM, **A.W.N. 1899, 72.** (14 A. 513, 15 A. 331, 20 A. 386, A.W.N. 1898, 133, *R.*)

(1037)—*S.* 90—*Application under—Subsequent proceedings are continuation of original suit—Dismissal of such application under s.* 102, *Civ. Pro. Code, debars a fresh application.*—The proceedings following on an application under s. 90 of the above Act are a continuation of the original suit. The dismissal of such an application, under s. 102, Civ. Pro. Code, precludes the mortgagee from making a fresh application. RAMDAYAL SURAJMAL v. MAHAMMAD GHOUSE, **1 N.L.R. 143.** (21 A. 453, *Diss.*; 25 M. 244, *Not F.*) [*R.*, 4 N.L.R. 158.]

(1038)—*S.* 90—*Execution of mortgage decree —Sale of property other than that mortgaged—Objection*—Res judicata.—An application for sale of property other than that mortgaged was made by a mortgage decree-holder and execution was granted after notice to the judgment-debtor. Subsequently the property was sold and the auction-purchaser filed a petition for the confirmation of the sale. This petition the judgment-debtor opposed and his objection was that the decree was a mortgage-decree, that the sale was of property not comprised under the decree and that such sale could not be held in the absence of a decree under s. 90 of the Transfer of Property Act. *Held* that such objection could not be allowed to prevail in the face of the order granting execution after notice to the judgment-debtor. LAKSHMI AMMAL v. SUBRAMANI PILLAI, **14 M.L.J. 103.**

(1039)—*S.* 90—*Mortgage-decree—Decree for costs, if a personal decree.*—A decree had been passed on appeal in a mortgage suit upholding the mortgage and ordering that the appellant, who was a transferee of a portion of the mortgaged property from the mortgagor, do pay costs to the respondent, the mortgagee. The mortgaged property having been sold in execution of the decree, the decree-holder applied for execution of the decree for costs against the transferee personally: *Held*—On a construction of the decree, that there was a personal liability imposed by the decree. In such cases, regard should be had to what decree was passed, rather than to what decree ought to have been passed. MOHENYE OJHA v. RAM BAHADUR SINGH, **16 C.W.N. 731 = 15 Ind. Cas. 23.**

Transfer of Property Act (IV of 1882) —*continued.*

(1040) —*S.* 90 —*Mortgage decree —Decree directing sale and personal liability—Second personal decree, if can be passed —S.* 90, *decree under, when can be passed.*—A mortgage-decree which was not merely a decree for sale but also a personal decree against the mortgagor in the event of non-satisfaction of the mortgage dues by sale of the mortgaged properties, was not in strict conformity with the provisions of the Transfer of Property Act. (26 C. 166, 33 C. 890, 31 B. 244, 22 A. 404, 32 M. 534, *R.*) A proceeding under s. 90 of the Transfer of Property Act is a proceeding in a pending suit for a supplementary decree. A decree passed under s. 90 of the Transfer of Property Act against infants, whose proposed guardian did not accept the office though duly served with notice, and no effective steps were thereafter taken for their representation, was absolutely null and void. (15 C.L.J. 3, *R.*) Three essential elements must be established before a decree under s. 90 of the Transfer of Property Act can be obtained, namely, *first*, that, though there has been a decree for sale and the mortgage property has been exhausted thereunder the sale proceeds have proved insufficient to pay the amount due to the plaintiff ; *secondly*, that the balance is legally recoverable from the mortgagor otherwise than out of the property sold ; and, *thirdly*, that a personal decree has not previously been made. (4 C.L.J. 141, 33 C. 867, *F.*) If the mortgagee-decree-holder had obtained a personal decree against the judgment-debtor, he could not subsequently invite the Court to repeal the operation already performed and thus obtain a second personal decree against the mortgagor. DINABANDHU NANDI v. MASHUDA KHATUN, **16 C.L.J. 318**. (7 C.W.N. 744, 29 A. 12, *R.*)

(1041)—*S.* 90 —*Mortgage—Entire mortgaged property not sold—Whether money-decree obtainable—Civ. Pro. Code* (1908), *O.* XXXIV, *r.* 6.—A mortgagee decree-holder, may obtain a money decree under s. 90 of the Transfer of Property Act, corresponding to O. XXXIV, r. 6 of the Code of Civil Procedure, 1908, where, for one reason or another, he has been unable to bring to sale the whole of the mortgaged property. But a mortgagee cannot obtain a money decree under either s. 90 or O. XXXIV, r. 6, where no portion of the mortgaged property has been sold either by the Court or by private treaty. An application for a money-decree of the kind in question is governed in the matter of limitation by art. 188, Limitation Act (1908), which corresponds with art. 178, Limitation Act (1877). Time begins to run against the applicant as soon as his right to apply for a money decree accrues, and under O. XXXIV, r. 6, the right to apply accrues when the proceeds of the sale are found to be insufficient. BIHARI LAL v. BISHESHAR DAYAL, **9 A.L.J. 569 = 14 Ind. Cas. 591.**

(1042)—*S.* 90—*Civ. Pro. Code* (*Act* V *of* 1908), *O.* XXXIV, *r.* 6 —*Mortgaged property encumbered beyond its value—Abandonment of claim by mortgagee against such property—Right to obtain personal decree against mortgagor—Puisne mortgagee not bound to redeem prior mortgages.*—A mortgagee obtained a decree for sale and in pursuance thereof caused a portion of the mortgaged property to be put to sale, but no one came forward to bid because the property was subject to several prior mortgages, the amount due on which exceeded the value of the property, and he thereupon withdrew the property from sale and applied for a decree under s. 90 of the Tr. P. Act ; *Held*, that, under the circumstances, the mortgagee decree-holder was entitled to apply for and obtain a personal decree against the mortgagor on abandoning all claim against the property. *Obiter.*—It is not *incumbent* on a puisne mortgagee to redeem the prior mortgage. He can do so if he likes. But if he does not elect to redeem, the prior mortgagee's right to sell the property is paramount as against him. LALA RAM RAGHUBIR v. MUSAMMAT IMAMI BEGAM, **9 Ind Cas. 403.** (A.W.N. 1899, 208, 22 A. 404, 13 A. 432, 29 A. 385, 4 A.L.J. 273, A.W.N. 1907, 97, 2 M.L.T. 248, 29 A. 369, A.W.N. 1907, 83, 29 A. 260, 4 A.L.J. 157, A.W.N. 1907, 69, 26 A. 25, A.W.N. 1903, 179, 25 A. 79, *R.*)

(1043)—*S.* 90—*Mortgage of land by an occupancy tenant—Decree for sale—Dismissal of application for sale on the ground that property was not saleable--Application for personal decree, maintainability of Civ. Pro. Code, O.* XXXIV, *r.* 6.—The predecessor of the respondents executed a mortgage deed of certain lands held by him as an occupancy tenant in favour of the appellant who obtained a decree for sale which was made absolute. The application for sale of mortgaged property was dismissed on objection taken by the zemindar that the respondents had no saleable interest in the property. The appellant then applied for a decree under O. XXXIV, r. 6 of the Civ. Pro. Code. *Held*, that the mortgaged property having been found to be unsaleable, the decree-holder was, under the circumstances, entitled to maintain the application for a personal deree. SHEO DIN v. BHAWANI BAKSH, **14 O.C. 62 = 9 Ind. Cas. 752.** (26 A. 25, 29 A. 369, *R.*)

(1044) --*S.* 90—*Decree for sale on a mortgage —Right given by the decree to proceed against other property, in default — Assignment of the decree—Registration of the assignment not effected—Registration Act* (III *of* 1877), *s.* 17—*Election to treat it as a decree for money.*—A decree on mortgage entitled its holder to recover its amount from the property of the judgment-debtor other than that mortgaged, in case the whole of that amount could not be recovered from the latter property. The decree was assigned by the decree-holder under an unregistered instrument. The assignment was held to be inoperative so far as the decree was one on a mortgage. The assignee, thereupon, waiving the first part of the decree, applied for execution of the decree, treating as a decree for

Transfer of Property Act (IV of 1882) —*continued.*

money : *Held*, that the right of election given by the decree could not convert a mortgage-decree into a money-decree for the purposes of registration. The decree in the present case directed that its amount should be recovered from the mortgaged property first, and that other property should be proceeded against only in the event of the former property failing to satisfy the decree fully. There were two rights given by the decree ; the second depended upon the exercise of the first, which was that arising out of a mortgage decree. The two could not be separated, and if, for the exercise of that right, registration was necessary, it was equally so for the exercise of the other right. HEPTULLA ABDUL HUSSEIN v. MAHOMED BALA, **11 Bom.L.R. 336=2 Ind. Cas. 516.** (29 A. 369, *Expl.*)

(1045)—*S.* 90—*Mortgage — Purchaser from mortgagor — Mortgage-money part of purchase money left in purchaser's hands — Personal liability of purchaser - Assumption of mortgage —Sale of mortgage rights.*—A mortgaged to B certain property and sub-mortgaged certain other property by one and the same deed. A subsequently sold the whole of this property to C, and left with him the bulk of the consideration for the sale, for redemption of the mortgage and sub-mortgage. B obtained a decree for sale of the mortgaged property, but not of the sub-mortgaged property, the Court considering itself bound by some rulings to refuse such a decree under s. 88, Transfer of Property Act but remarking : "If the rest of the mortgaged property does not prove of sufficient value to satisfy the plaintiff's mortgage in full, it will be open to him to apply in execution for a sale of the mortgage rights in question." The proceeds of the sale directed under ss. 88 and 89 proving insufficient, the decree-holder applied for a decree under s. 90 against C and the personal representative of A. *Held*, that, by detaining in his hands part of the purchase money and expressly or impliedly agreeing to pay the amount to B, C did not become personally liable, and a decree under, s. 90, Tr. Pro. Act, could not be made against him. JAMNA DASS v. RAMAUTAR PANDE, **6 A.L.J. 427=31 A. 352=2 Ind. Cas. 460.**

(1046)—*S.* 90, *decree under—Charge-holder—Unpaid vendor—Charge - Personal decree—Civ. Pro. Code, s.* 13, *application of.*—*Per Banerji, J.* —The holder of a charge is, like a mortgagee suing for sale, entitled to ask for and obtain a decree under s. 90 of the Act, provided the balance due to him is legally recoverable from the defendant personally. (21 A. 454, 22 B. 846, *R.*) An unpaid vendor has not only a charge on the property sold in execution of his decree, but he has also a personal remedy under s. 90 of the Act against the vendees. S. 13 of the Civ. Pro. Code does not apply to an application under s. 90 of the Act. (14 A. 513, *F.*) *Per Richards, J.* (*dissentiente*).—S. 100 of the Act does not enable the owner of a charge, as distinguished from a mortgage, to obtain a personal

Transfer of Property Act (IV of 1882) —*continued.*

decree under s. 90 against the owner of the property charged, even where there is a balance recoverable from the defendant otherwise than out of the property sold. UTTAM ISHLOK v. PHULMAN RAI, **2 A.L.J. 379=A.W.N. 1905, 144.** [*R.*, 3 A.L.J. 171=28 A. 365 = A.W.N. 1906, 44.]

(1047)—*S.* 90—Ex parte *decree under section —Inherent power of Court to set it aside—Personal decree for large sum should not be* ex-parte *decree—When such decree can be passed —S.* 4, *Succession Certificate Act.*—A decree under s. 90 of the Transfer of Property Act was passed *ex parte* in a suit to enforce a mortgage. *Held* that there was inherent jurisdiction in the Court to set it aside. (32 C. 253, F.B., *F.*,) and that if the decree be a personal decree for a large sum, it ought not to have been made *ex parte*, as the person against whom it was passed had a right to be heard as to his personal liability for this sum, and whether his property was liable for the debt claimed, and whether the amount was correct. A decree can only be passed under s. 90 against a defendant, from whom the balance is legally recoverable. Having ragard to s. 4 of the Succession Certificate Act, the Court cannot pass any decree under s 90, Transfer of Property Act, in favour of the representative of the mortgagee, where no certificate had been granted to him under any of the Acts mentioned in that section, and a certificate which is granted after the passing of the decree under s. 90 is not sufficient to get rid of the difficulty in his path created by the clear language of s. 4 of the Succession Certificate Act. ABDUL SATTAR v. SATYA BHUSHAN DAS, **35 C. 767.**

(1048)—*S.* 90—*Compromise--Mortgage-decree —Reduction of security—Application to sell property not mortgaged.*—The plaintiff sued for Rs. 795 on a mortgage, in which 16 bighas of land were hypothecated. The parties came to terms and a mortgage decree was passed for Rs 450 to be realised from the sale of 2 *bighas* 16 *cottahs* of the land only. There was nothing to show that the parties intended to contract themselves out of s. 90 of the Transfer of Property Act. The plaintiff, not being able to realise the amount of the decree by the sale of the limited security, applied for a decree under s. 90. *Held*, that he was entitled to get the decree. LAKSHMI NARAYAN MAITY v. GOPAL CHANDRA MAITY, **3 Ind. Cas. 443.** (33 C. 390, 10 C.W.N. 862, *D.*)

(1049)—*S.* 90—*Decree for sale on a mortgage —Property ordered to be sold in part not susceptible of sale—Abandonment of claim to sell such part.*—*Held* that, on the true construction of the provisions of the Transfer of Property Act, 1882, a mortgagee is entitled, at any stage, to abandon his claim against any portion of the mortgaged property, and then obtain a decree under s. 90 for any balance due after crediting the amount realized by the sale of the property

Transfer of Property Act (IV of 1882) —*continued.*

actually sold. PIRBHU NARAIN SINGH v. AMIR SINGH, **A.W.N. 1907, 83=29 A. 369.** (A.W.N. 1899, 208, *D.*; 25 A. 79, 26 A. 25, 28 A. 19, *R.*)

(1050)—*S.* 90—*Mortgage of occupancy rights—Rights not saleable—Personal decree not given.*—The remedy given by s. 90 of the Transfer of Property Act is an extraordinary remedy and should be applied with great care and Zeal. Where, therefore, an occupancy holding was mortgaged to the plaintiff who could not sell it in execution of his decree, *held*, that a personal decree against the mortgagor should not be given, the mortgagee not having sold the property mortgaged. PARBH NARAIN SINGH v. BALDEO NARAIN, **4 A.L.J. 157=A.W.N. 1907, 69=29 A. 260.** (26 A. 25, *D.*)

(1051)—*S.* 90 — *Mortgage-decree—Right of decree-holder to apply for fresh decree against judgment-debtor's person on mortgaged property proving insufficient to pay decree-debt.*—Where the mortgaged property proved insufficient to satisfy the debt due under a mortgage decree, the decree-holder was entitled to apply for a fresh decree against the person and other properties of the judgment-debtor, provided the formal remedy had not become barred at the date of the institution of the suit. MALIAPERUMAL v. NACHIAPPA, **5 M.L.J. 294.** [*R.*, 32 M. 534=5 M.L.T. 246.]

(1052)—*S.* 90—*Mortgage decree—Order for sale—Costs—Costs if can be recovered from the mortgagor personally.*—The costs awarded by a decree directing the sale of mortgaged property form part of the mortgage decree and the decree-holder must proceed to recover the costs by a sale of the mortgaged property in the first instance, and it is only when the mortgaged property is found to be insufficient (14 C. 185, 10 A. 179, *D.*; 20 A. 523, *F.*) to satisfy the decree that the decree-holder can proceed against the other properties of the mortgagor in the manner provided by s. 90 of the Transfer of Property Act. RAJ KUMAR SINGH v. SHEO NARAIN SINGH, **12 C.W.N. 364=35 C. 431=8 C.L.J. 152.** [*D.*, 13 C.W.N. 742.]

(1053)—*S.* 90—*Mortgage—Entire mortgaged property not sold—Whether money-decree obtainable—Civ. Pro. Code (Act V of 1908), O. XXXIV, r. 6.*—A mortgagee, decree-holder, may obtain a money-decree under s. 90 of the Transfer of Property Act, corresponding to O. 34, r. 6, of the Code of Civil Procedure, 1908, where, for one reason or another, he has been unable to bring to sale the whole of the mortgaged property. But a mortgagee cannot obtain a money-decree under either s. 90 or O. 34, r. 6, where no portion of the mortgaged property has been sold either by the Court or by private treaty. An application for a money-decree of the kind in question is governed in the matter of limitation by art. 181, Limitation Act (1908), which corresponds with art. 178, Limitation Act (1877). Time begins to run against the applicant as soon as his right to apply for a money-decree accrues, and under O. 34, r. 6, the right to apply accrues when the proceeds of the sale are found to be insufficient. BIHARI LAL v. BISHESHAR DAYAL, **9 A.L.J. 569.** (A.W.N. 1907, 69, *F.*)

(1054)—*S.* 90—*Mortgage-decree—Sale of the property after the usual period of six months—Personal liability for the unpaid balance—Mortgage-decree should only reserve liberty to apply—Attachment of property—Son born to mortgagor after the sale of the mortgaged property but before the sale of the other property under the personal decree—Son entitled to have exempted his share in the property from sale.*—On the 8th March 1902, a decree on a mortgage was passed in favour of D directing that the mortgaged property should be sold on failure to pay the money within six months and that if the sale proceeds were insufficient to pay off the amount the balance was to be recovered from G personally. In June 1908 the mortgage property was sold in execution of the decree. On the 19th idem D purporting to proceed under the personal decree for the balance, got attached a house belonging to G, which was not comprised in the mortgage. On the 4th August 1903, the sale was set aside on G's application, G then applied on the 17th August 1903 to have the attachment of the house raised. The Court directed the attachment to be maintained but ordered that the property should not be sold until the proceeds were found insufficient. In September 1904, G's son V was born. On the 26th November 1904 the mortgaged property was again sold; and on the 5th January 1905, D applied for sale of the house, whereupon V applied to have the attachment removed from his one-half share in the house: *Held*, (1) that the decree in so far as it directed personal payment by G was passed in disregard of the provisions of s. 90 of the Transfer of Property Act. It was clear from the words of the section that that direction should have been in a supplemental decree to be passed when the net proceeds should be found to be insufficient. The original decree should merely have reserved to the plaintiff liberty to apply for a decree under s. 90; (2) that the personal decree was contingent on the ascertainment of balance and only became operative and capable of execution when that balance was ascertained. It was, therefore, open to V to establish any circumstance which affected the validity of the attachment as against his interest in the house: (3) that, therefore, the house to be extent of V's interest therein should be released from attachment. DAMODAR v. VYANKU, **9 Bom.L.R. 199, 31 B. 244.**

(1055)—*S.* 90—*Mortgage decree is not a money-decree until it reaches the stage shown by s.* 90 *of Transfer of Property Act—Mortgagee in possession not a trespasser till his accounts taken—Procedure in case of mortgage-decree—*

Transfer of Property Act (IV of 1882) —continued.

Civ. Pro. Code, s. 209—S. 209 of the Civil Pro. Code, 1882, relates to a decree for money, and a mortgage-decree, until it reaches the stage shown by s. 90 of the Transfer of Property Act, 1882, cannot be so termed. When a mortgagee is in possession of mortgaged property, the mortgage decree should direct an account of the rents and profits of the property, and that what should be found due on that account should be deducted from what is found due on the general account from the mortgagor to the mortgagee. *Held*, further, that where the decrees in mortgage suits were not drawn up in the form contemplated by the Civ. Pro. Code and the Transfer of Property Act, a Court would not be justified in the assumption that the mortgagees were not entitled to interest according to the terms of the mortgage bonds until the realization of the mortgage debt. *Held*, also, that a mortgagee in possession cannot be a trespasser till his final account is taken. HARGOANDAS v. MOHANBHAI, **2 Bom. L.R. 225**

(1056)—*S. 90—Mortgage—Suit for sale of mortgaged property—Personal remedy against mortgagor or his other property in the event of the mortgaged property not realising sufficient amount—Civ. Pro. Code (Act XIV of 1882), Ss. 43, 50—Allegations to be set out in the plaint.*—The plaintiff sued on the 18th April, 1899, to recover Rs. 1,999 on a mortgage, dated the 18th April, 1877, by sale of the mortgaged property, and balance if any from the remaining unhypothecated property of the defendant. The decree passed was against the mortgaged property alone. The amount realised by the sale of the mortgaged property having been insufficient to satisfy the decree, the plaintiff applied under s. 90 of the Transfer of Property Act for a further decree against the other property of the mortgagor. The first Court found that the claim for personal decree was time-barred. Before the lower appellate Court it was contended that the mortgagors had paid Rs. 200 as interest which avoided the bar of limitation, and that the plaintiff should have been allowed to adduce proof. The Court negatived the contentions on the ground that they were not mentioned in the original plaint. On second appeal: *Held*, (1) that the mortgage in suit being of the year 1877, and the suit of the year 1899, the plaintiff's right to a personal decree against the mortgagor was time-barred, the plaintiff having failed to show in the plaint the ground on which exemption from the law of limitation was claimed, (2) that the plaintiff could not be allowed at a very late stage of the suit, to bring forward, for the first time, allegations which it was necessary to prove in order to show that he was entitled to a further decree against the defendant personally. GULAM HUSSEIN TYABALLI v. MAHAMADALLY IBRAHIMJI, **12 Bom. L.R. 631=7 Ind. Cas. 455=34 B 540.**

(1057)—*S. 90—Mortgage-decree—Decree provided no personal remedy unless and until remedy against property was exhausted—Sale or attempt to sell property condition precedent to passing of money-decree in execution.*—A mortgagee brought a suit to recover the mortgage-debt and recovered judgment. But the mortgage-decree provided that no personal liability could attach to the defendant unless and until the remedy against the property was exhausted. The plaintiff, instead of bringing the property to sale, applied for a money-decree in execution under s. 90 of the Act. *Held*, that a sale, or at least an attempt to sell, is a necessary condition precedent to the passing of the money-decree under s. 90, unless something happened subsequently to the passing of the conditional decree which had the effect, wholly or in part, of extinguishing or casting a cloud over the title of the mortgagor. GULAM ABUS v. BRIGBHAN JAGANNATH, **1 N.L.R. 39.** (17 M. 309, 28 C. 12, 26 A. 25, *R*; 25 A. 79, *F.*)

(1058)—*S. 90—Mortgage decree—Proceeds of the sale of mortgaged property—Appropriation—Costs—Principal and interest.*—There is no rule that the proceeds of the mortgaged property sold under a decree for sale shall be applied in the first place towards the principal and interest, and shall be applied towards the payment of costs only after the satisfaction of the principal and interest. JASWANT RAI v. SADIG ALI, **8 Ind. Cas. 32.** (23 A. 439, *F*; 20 A. 523, *D.*)

(1059)—*S. 90—Civ. Pro. Code, s. 206—Decree under s. 90 alleged to be at variance with the judgment—Order modifying decree—Appeal.*—The holders of a decree for sale under s. 88 of the Transfer of Property Act, 1882, subsequently applied for and obtained a decree under s. 90 of the Act. Not being satisfied with the amount allowed to them by this decree they applied to the Court which had passed it to have it brought into accordance with the judgment, and the Court accordingly modified the terms of the decree. *Held*, that no appeal would lie to High Court from such last mentioned order. KISHAN PRASAD v. RADHA MADHO PRASAD, **A.W.N. 1904, 268=1 A.L.J. 701.**

(1060)—*S. 90—Execution of decree—Decree against hypothecated property and also against the person of the judgment-debtor—Act IV of 1882 (Transfer of Property Act), s. 90.*—Where a decree for enforcement of lien by sale of hypothecated property provides also for the personal liability of the judgment-debtor in case the property hypothecated is insufficient to satisfy the decree, it is not necessary, in order to get execution against the person of the judgment-debtor, to obtain a decree under s. 90 of the T.P. Act, but if such a decree is applied for and obtained such proceedings will be regarded as equivalent to an application for execution of the original decree against the person of the judgment-debtor. RAHIM BAKHSH v. THE UNCOVENANTED SERVICE BANK, LTD., **A.W.N. 1891, 163.** (13 A. 356, *F.*)

Transfer of Property Act (IV of 1882) —*continued.*

(1061)—S. 90—*See* CIV. PRO. CODE, 1908, s. 34, 2 Bom. L.R. 225.

(1062)—S. 90—*See* CIV. PRO. CODE, 1908, s. 47, 13 Bom. L.R. 661.

(1063)—S. 90—Decree against legal representative—Ancestral property whether liable to be attached—*See* CIV. PRO. CODE, 1908, s. 53 9 Ind. Cas. 631.

(1064)—S. 90, application to set aside *ex-parte* decree under—*See* CIV. PRO. CODE, 1908, O. IX, r. 13, 9 O.C. 288.

(1065)—S. 90—*See* DECREE — DECREE, CONSTRUCTION OF, A.W.N. 1898, 44.

(1066)—S. 90—*See* ESTOPPEL—ESTOPPEL BY CONDUCT, 2 C.W.N. 254.

(1067)—S. 90—Applicability of principle of *res judicata* to proceedings under—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 14 A. 513=A.W.N. 1892, 80.

(1068)—S. 90, application under—Balance legally recoverable—Limitation—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 20 A. 386=A.W.N. 1898, 83.

(1069)—S. 90—*See* EXECUTION OF DECREE—MODE OF EXECUTION, 26 C. 156=3 C.W.N. 8, 13 A. 356=A.W.N. 1891, 104, 15 A. 331=A.W.N. 1893, 120.

(1070)—S. 90—*See* EXECUTION OF DECREE—MISCELLANEOUS, 4 C.L.J. 246.

(1071)—S. 90—*See* HINDU LAW—JOINT FAMILY, A.W.N. 1903, 41.

(1072)—S. 90, application under—Bond payable by instalments—*See* LIMITATION ACT, 1908, art. 75, 3 A.L.J. 463=A.W.N. 1906, 193.

(1073)—S. 90—*See* LIMITATION ACT, 1908, arts. 181, 182, 21 A. 453=A.W.N. 1899, 166.

(1074)—S. 90, effect of decree under for purposes of limitation—*See* LIMITATION ACT, 1908, art. 182—GENERAL, 3 C.L.J. 291.

(1075 & 1076)—S. 90—Application for decree under, by usufructuary mortgagee, not given possession—Limitation for application, when commences—*See* LIMITATION ACT, 1908, ART. 182—PERIOD FROM WHICH LIMITATION RUNS, 18 A. 371=A.W.N. 1896, 107.

(1077)—S. 90—Application by heir of mortgagee for supplementary decree—Succession certificate if necessary.—*See* SUCCESSION CERTIFICATE ACT, 1889, s. 4, 12 C.W.N. 145 =7 C.L.J. 658.

(1078)—S. 90—*See* Nos. 563, 589, 865 946, 947, 948, 951, to 963, 1010 to 1016, *supra*.

(1079)—*Ss.* 90, 92, 93—*Prior and subsequent incumbrancers—Suit by latter for redemption—Sale of mortgaged property—Personal liability of puisne mortgagee.*—In a suit for redemption of a prior mortgage brought by the puisne mortgagee, the Court passed a decree in the terms of s 92, Transfer of Property Act. The puisne mortgagee failing to pay the sums found due on the prior mortgage, the property was sold, but realized an amount less than that due on the prior mortgage. *Held* that the puisne mortgagee canot be made personally liable for the recovery of the balance due to him. MATA AMBER v. SRIDHAR, **26 A. 507=A.W.N. 1904, 73=1 A L.J. 250.** (23 A. 439, *R.*)

(1080)—*Ss.* 90, 97—*S.* 90, *costs recoverable under—Mortgagee holding a single decree on two mortgages—Appropriation of sums recovered in execution—Transfer of Property Act, ss.* 96 *and* 97.—*Held*, that costs decreed are recoverable under s. 90 of Act IV of 1882. (30 M. 464, 14 C. 185, 20 A. 523, *R.*) *Held* further, that s. 97 of Act XV of 1882 applies directly only to proceedings under s. 96 of the said Act. *Held* also, that where a mortgagee holds a single decree on two mortgages, he cannot be precluded, whether by the alleged analogy of s. 97 or otherwise, from appropriating sums recovered by him in execution towards the satisfaction of whichever mortgage he finds most convenient. JWALA SAHAY v. DHANAU, **11 O.C. 377.**

(1081)—Ss. 90, 100—*See* RES JUDICATA—ADJUDICATIONS, A.W.N. 1906, 44=3 A.L.J. 171=28 A. 365.

(1082)—*S.* 91—*Suit for redemption by puisne mortgagee—Parties.*—When a puisne mortgagee seeks to redeem a prior encumbrance, the mortgagor or his representative is a necessary party to the suit. CHINNAN v. RAMACHANDRA, **15 M. 54.**

(1083)—*S.* 91—*Redemption of mortgage—Reversionary heirs of deceased husband of Hindu widow not entitled to redeem mortgage made by husband.*—*Held*, that the reversionary heirs of the deceased husband of a Hindu widow, in poesession as such of her husband's property, are not persons who, within the meaning of s. 91 of the Transfer of Property Act, 1882, have such an interest in the mortgaged property, as would entitle them during the lifetime of the widow to redeem a mortgage made by the husband. RAM CHANDAR v. KALLU, **A.W.N. 1908, 225=5 A.L.J. 631.**

(1084)—*S.* 91—*Daughter-in-law of a Hindu, her right to redeem—Maintenance, whether an interest in property—Interest in property.*—A daughter-in-law of a Hindu entitled to maintenance has not such an interest in the family property within the meaning of 91 of the Transfer of Property Act as would entitle her to redeem. GAJADHAR SINGH v. MUSAMMAT THULA KUNWAR, **12 O. C. 37=Ind. Cas. 690.** (22 A. 191, 2 B. 494, 3 M. 184, *R.*)

(1085)—*S.* 91—*Mortgage by a majority of temple trustees without consulting minority, whether valid—Redemption by some of trustees whether can be allowed*—A demise of temple property granted by a majority of the trustees

Transfer of Property Act (IV of 1882) —*continued.*

of a temple without consulting the minority is invalid and not binding on the temple. Where a mortgage of temple properties was executed by some of the temple trustees without consulting the co-trustees, redemption, under s. 91 of the Transfer of Property Act, cannot be allowed on the application of some of the trustees, when the question whether such redemption was in the interest of the temple was not considered by all the trustees as a body. ISTOOP v. AYPAPPEN, **16 Ind. Cas. 435.**

(1086)—*S.* 91—*Equity of redemption split up —Right of redemption of whole or part of mortgaged property.*—S. 91 of the Transfer of Property Act does not lay down that a person who is entitled to a share only of the equity of redemption has, under all circumstances, the right to insist on redeeming the whole of the mortgage and recovering possession of the whole of the mortgaged property. Where there are several persons in whom the equity of redemption is vested, there is no reason why one of them and the mortgagee acting together should not be held to be entitled to deal with his interest in the equity of redemption and the mortgagee's right as against him, provided the rights of the other owners of the equity of redemption are not thereby injuriously affected. The objection to a mortgagee's splitting up of a mortgage is entitled to weight only where the owner of the part of the equity of redemption is prejudicially affected by the splitting. The question whether the Court will allow redemption of the whole of a mortgage at the instance of a person entitled to a part only of the equity of redemption must depend on the circumstances of each case and the rights acquired by the mortgagee or by third persons subsequent to the mortgage. RATHNA MUDALI v. PERUMAL REDDY. **12 M.L.T. 484 =M.W.N. 1912, 1168=23 M.L.J. 576.**

(1087)—*S.* 91—*Mortgage—Fixed rate tenant —Suit by zemindar to redeem, a mortgage made by a fixed rate tenant on the death of the tenant without heirs.—Held* that the zemindar is not within the meaning of s. 91 of the Transfer of Property Act, 1882, a person having an interest in the mortgaged property so as to entitle him to redeem a mortgage of his holding made by a tenant at fixed rates who has died without heirs. RAM DIHAL ROY v. THE MAHARAJA OF VIZIANAGRAM, **A.W.N. 1908, 210 =5 A. L.J. 578.** (3 I.A. 92, *R.*)

(1088)—*S.* 91—*Decree for revenue payable under sub-settlement—Creation of charge.*—Where a superior proprietor obtained a decree against the inferior proprietor for revenue payable under a sub-settlement the decree operates as a charge on the land included in the sub-settlement. SETH RATAN LAL v. RANI UMED KUAR, **11 C P.L.R. 95.** [*Rel. on*, 1 N. L.R. 117; *R.*, 3 N.L.R. 81; *Appr.*, 14 C.P.L. R. 17; *Not doubted*, 16 C.P.L.R. 52.]

(1089)—*S.* 91 (*b*)—*Transfer by mortgagee of his interest in mortgaged property by means of a sub-mortgage—Right of sub-mortgagee to redeem a prior mortgage.*—A mortgagee created a sub-mortgage, in favour of the plaintiff of land mortgaged to him. In the mortgage deed, the sub-mortgagor, in express terms, transferred his interest in the land to the sub-mortgagee. Further, the sub-mortgagor left a portion of the consideration-money in the hands of the sub-mortgagee for redeeming a prior mortgage in respect of the property. As the prior mortgagee refused to accept the sum due to him under the mortgage and deliver up possession of the property, the plaintiff brought the present suit for redemption against the prior mortgagee. *Held*, the sub-mortgagee is entitled to redeem the prior mortgage. RAMSUBHAG v. NARSINGH, **A.W.N. 1905, 58=2 A. L.J. 162=27 A. 473.** (18 A. 113, *D.*; A.W.N. 1901, 153, *Overruled*: 20 M. 35, 13 A. 432, *R.*)

(1090)—*S.* 91 (*cl. b*)—*Hindu widow—Reversioner—Right to redeem—Burden of proof—* Ism farzi.—A Hindu widow mortgaged her husband's property to the respondent. The plaintiff appellant as the next reversioner of the husband of the widow brought the present suit for redemption, during the widow's lifetime. *Held*, that the plaintiff, as the reversioner, has an interest in the right to redeem within the meaning of s 91, cl. (*b*) of the Transfer of Property Act and is entitled to redeem as such. (S. C. No. 271, *Appr. and F*; 7 O. C. 98, *R.*) *Held*, further, that the burden of proving a particular transaction to be *ism farzi* lies on the person alleging it. GUMANI SINGH v. CHAKKAR SINGH, **8 O.C. 349.**

(1091)—S. 91—*See* CIV. PRO. CODE, 1908, s. 47. O. XXI, r. 69, 11 C.W.N. 495=5 C.L.J. 45. Note.

(1092)—S. 91—*See* REGISTRATION ACT, 1908, ss. 2, 17, 49, 8 Ind. Cas. 520.

(1093)—S. 91—*See* RIGHT OF SUIT—MISCELLANEOUS, 17 M.L.J. 84=30 M. 207.

(1094)—S. 91—*See* Nos. 461, 541, 716, 822, 823, *supra.*

(1095)—*S.* 92—*Decree for redemption, not executed—Second suit for redemption not maintainable—Civ. Pro. Code*, 1882, *s.* 13.—Where there has once been a suit for redemption and a decree for redemption has been passed therein but not executed, a subsequent suit for redemption of the same mortgage cannot be maintained. VEDAPURATTI v. VALLABHA VALIYARAJA, **25 M. 300, F.B.=12 M.L.J. 128.** [*F.*, 6 O C. 367; *R.*, 27 M. 40, 13 M.L.J. 266, 6 O.C. 239, 5 C.L J. 289, 43 P.R. 1907=101 P.W.R. 1907=169 P.L.R. 1908, 17 M.L.J. 66, Note, 31 M. 354=18 M.L.J. 259=3 M.L.T. 281, 8 C.L. J. 547=13 C.W.N. 36, Note=36 C. 122, 2 Ind. Cas. 662.]

(1096)—*S.* 92—*Jurisdiction of Civil Court.—Lease by mortgagee—Lease expires on redemption.*—When a mortgage is redeemed, a

Transfer of Property Act (IV of 1882) —*continued.*

mortgagee is bound to retransfer the property free from the mortgage and all other incumbrances created by him. Where, therefore, he has transferred a portion of the mortgaged land under a lease, the lease comes to an end when the mortgage is redeemed. The relation of landlord and tenant does not exist between the mortgagor and the mortgagee's lessee, and a suit to eject the mortgagee's lessee lies in a Civil Court. RAM CHAND v. RAJ HANS, **3 A.L.J. 517=A.W.N. 1906, 241.**

(1097)—S. 92 — Obligation of mortgagee under—*See* LIMITATION ACT, 1908, s. 23, arts. 115, 116, 6 M.L.T. 239=33 M. 71.

(1098)—S. 92—*See* Nos. 216, 327, 461, 543, 949, 1079, *supra.*

(1099)—*Ss.* 92, 93—*Decree for redemption—Failure to pay by mortgagor—Subsequent suit for redemption*—Res judicata.—A decree passed under s. 92 of the Transfer of Property Act becomes a final decree, even though no order under s. 93 has been passed, when the time limited in it for the payment of the mortgage amount has expired, without the mortgagor taking any steps. No subsequent suit for redemption of the same mortgage will lie. RAMASAMI v. SAMI, **17 M. 96=4 M L.J. 29.** [*Cons.*, 25 M. 300, F.B.; *R.*, 19 M. 40, F.B., 25 M. 244, 21 A.W.N. 194, 24 A. 44, 27 M. 40, 6 O.C. 114.]

(1100)—*Ss.* 92 *and* 93—*Mortgagee and mortgagor's application for execution—Conditional judgment—Non-fulfilment—Waiver—Application for redemption—Decrees under the Transfer of Property Act—Mortgagee's failure—Redemption suit—Dismissal—Deliberate omission—Decree for redemption—No second suit—Mortgages in India and England—Similarity.*—Although s. 93 of the Transfer of Property Act deals only with a mortgagee's application for an order for sale, there could be no objection to a mortgagor applying for execution under s. 92 and obtaining an order for sale. (25 M. 300, *F.*; 19 A. 40, *R.*) The rule that a person obtaining a judgment on condition and not fulfilling it should be held to have waived the judgment cannot be applied to decrees for redemption under the Transfer of Property Act The Transfer of Property Act has deliberately omitted to provide that a suit for redemption should be dismissed where the mortgagor fails to pay the mortgage-amount. English law (*contra*) (24 A. 44, *R.*) The mortgagor after obtaining a decree for redemption cannot institute a second suit for the same purpose. Mortgages in India, except the class called English mortgages, are not regarded as similar in all respects to mortgages in England. GOVINDA TARAGAN v. VEERAN, **2 M.W.N. 1911, 323.**

(1101)—*Ss.* 92, 93—*Suit for redemption—Dismissal for non-payment of mortgage-money before suit—Second suit for redemption on full payment not barred.*—A decree in a suit for redemption of a usufructuary mortgage, not being a conditional decree for redemption under s. 92 of the Transfer of Property Act, 1882, but simply dismissing the suit on the ground that the mortgagor had not prior to its institution, paid or tendered the whole of the mortgage-money at a time authorised by the deed, cannot have the effect of foreclosure or of *res judicata* so as to bar a second suit for redemption, where the deed has expressly authorized redemption on payment of the mortgage-money in a particular month in any future year after due date, and the mortgagor has tendered the whole of such money in that month between the dismissal of the first suit and the institution of the second. DONDH BAHADUR RAI v. TEK NARAIN RAI. **21 A. 251=A. W. N. 1899, 50.** (21 M. 18, 22 W. R. 172, 11 A. 386, N. W. P. 1871, 62, 19 A. 202, *D.*) [*R.*, U. B. R. 1897—1901, 582, 3 O. C. 371, 24 A. 44=21 A. W.N. 194, 7 A.L.J. 185; *D.*, 25 M. 300.]

(1102)—*Ss.* 92, 93—*Execution of mortgage decree.*—The Court executing a decree is bound by it and cannot question its validity of any part of it in execution proceedings; but the Court executing a decree is bound to ascertain the effect and intention on the decree; in any case, a decree under s. 92 of the Transfer of Property Act, is in the nature of a decree *nisi* and it does not foreclose the decree-holder until an order to that effect has been made under s. 93; until an order has been made under s. 93, the decree-holder may at any time redeem the mortgage (subject to the law of limitation); in this case, as no order was made or could properly be made under s. 93, the decree-holder was entitled to redeem the mortgage notwithstanding the direction in the decree. MAUNG LU THA v. MAUNG HMAN, **U. B. R. 1897—1901, Vol II, 582, 11 A. 386.** (19 A. 180, 20 A. 446, 21 A. 251, 22 B. 771, 16 C. 246, 22 M. 133, 1, B.L.R. 821, U.B.R. 1897—1901, Vol. II, 514, *R.*)

(1103)—*Ss.* 92 *and* 93—*Application to pay redemption-money after the time allowed by the preliminary decree—Duty of mortgagee to proceed under s.* 93—*Effect of failure to do so—Effect of pendency of appeal.*—The principles of ss. 92 and 93 of the Tr. P. Act must be followed in mortgage suits, even in places where the Act is not in force. The proviso to s. 93 gives a discretion to the Court to extend the time for payment, and the proviso applies not only to an application made within the period fixed under s. 92, but also to an application made after that time as expired. It extends up to the time of the passing of any order of the nature contemplated by the section. Pendency of appeal by the mortgagee is sufficient reason for delay in payment by the mortgagor. MAUNG AUNG BAN v. MA NAN KO, **8 Ind. Cas. 961.** (22 B. 71, *F.*; 19 M. 40, *Diss.*)

Transfer of Property Act (IV of 1882) —*continued.*

(1104)—*Ss.* 92, 93—*Usufructuary mortgage—Extension of time for payment after decree—Good cause—Foreclosure.*—Where a decree is passed for the redemption of lands held in usufructuary mortgage and a date fixed for redemption, and the mortgagors apply for extension of time for payment on the grounds of poverty and the difficulty of raising money during the pendency of an appeal by the mortgagees, they are entitled to an extension of time if they show good cause. In deciding whether good cause for extension of time has been shown, all the circumstances of the case must be looked at. Thus, where the mortgagor tendered the mortgage-money to the mortgagee prior to suit, which was instituted in consequence of the refusal to accept it on the part of the mortgagee who claimed to have bought it outright, and an appeal had been filed by the mortgagee against the decree for redemption, and in asking for extension of time the mortgagor alleged poverty and difficulty of raising money pending the appeal, it was *held* that a good cause for extension of time had been made out. MAUNG PYE v. MA THAU, **8 Ind. Cas. 582.**

(1105)—*Ss.* 92, 93—*Application for enlargement of time—Application to be made to the Court of first instance, not to an Appellate Court.*—Under s. 93, Transfer of Property Act, an application for extension of the time for payment of money, in a decree under s. 92 of that Act by the appellate Court, must be made to the Court of first instance and not to the appellate Court. RAM DHANI SAHU v. LALIT SINGH, **6 A.L.J. 251=31 A. 328=2 Ind. Cas. 220.** (23 A. 88, *F.*; 26 A.W.N. 203, *Diss.*) [*F.*, 6 Ind. Cas. 323.]

(1106) *Ss.* 92, 93—*Mortgage—Decree for redemption—Application for extension of time fixed by decree—Court to which to apply.*—An application under the last paragraph of s. 93 of the Transfer of Property Act, 1882, for postponement of the day fixed for payment of the amount due under a decree in a redemption suit passed by a Court of appeal under s. 92 of the Act, should be made not to such appellate Court, but to the Court of first instance. It has been *held* that "the Court" mentioned in paragraph 4 of s. 93 to which an application for an order for sale should be made is the Court of first instance and not the appellate Court, and so also the Court mentioned in the last paragraph is the same Court and therefore an application for enlargement of the time fixed by the decree for payment will have to be made to the Court of first instance and not to the appellate Court SHEONARAIN v. CHUNNI LAL, **23 A. 88=A.W.N. 1900, 209.** (23 M. 521, *F.*; 13 A. 278, *R.*) [*F.*, 31 A. 328=6 A.L.J. 251=2 Ind. Cas. 220; *Expl.*, 3 A.L.J. 828=A.W.N. 1906, 203.]

(1107)—*Ss.* 92 *and* 93—*Usufructuary mortgage—Redemption—Form of decree in a suit for redemption*—An order, declaring that the plaintiff's right to redeem shall be extinguished, upon non-payment, within the time limited by a decree for redemption, of the amount found to be due, is not a proper order, when the mortgage sought to be redeemed, is a usufructuary mortgage. Nevertheless, where such an order has been made and the decretal money has not been paid within the time limited, and the decree has been allowed to become final, the plaintiff cannot thereafter bring a second suit for redemption. LACHMAN SINGH v. MADSUDAN, **A.W.N. 1907, 137=4 A.L.J. 447=29 A. 481.** (24 A. 44, *R.*)

(1108)—*Ss.* 92, 93—*Decree—Foreclosure—Sale.*—The applicability of s. 93 of the Transfer of Property Act is not taken away merely because the decree is not drawn up in the terms of s. 92 of the Act. MURLIDHAR v. PARASHARAM, **2 Bom. L.R. 633=25 B. 101.**

(1109)—*Ss.* 92, 93—*Decree for redemption—No provision in case of failure of payment within fixed time—Effect.*—Where a decree for redemption does not declare that the right of redemption should be absolutely barred unless the amount was deposited within the day fixed, *held* that the non-deposit of the amount within that time would not affect the right. KARAMAT ALI v. INAYAT HUSAIN, **A.W.N. 1884, 329.** [*R.*, 14 A. 350=A.W.N. 1892, 40.]

(1110)—*Ss.* 92, 93—*See* EXECUTION OF DECREE—APPEAL, REVIEW, ETC., EXECUTION OF DECREE AFTER. 15 M. 170=2 M.L.J. 23.

(1111)—*Ss.* 92, 93 *and* 87—*Mortgage by conditional sale, decree for redemption of—Right of mortgagee to foreclosure—Enlargement of time to mortgagor for payment, application for, if entertainable after due date—Power of Court to grant enlargement, distinction as to, between suits for foreclosure and those for redemption—Duty of mortgagor, to show cause for enlargement of time.*—It was contended, in this case, that a mortgagor, who in a redemption suit allows the time fixed for payment to pass, without paying the decretal amount or applying for postponement of that date, becomes *ipso facto* debarred from redeeming, (19 M. 40, 25 M. 44, *Disc.*) and it was *held* that s.s 93 of the Act compels the Court—once the date originally fixed for payment has passed without payment in full—to make an order of foreclosure absolute, but at the same time allows it, upon good cause shown and upon such terms, if any, as it thinks fit, from time to time, to postpone the date. Since, in such a case, the mortgagee has, *prima facie* an immediate right to foreclosure absolute, where the mortgagor comes with the money after the due date, the burden is upon him to explain satisfactorily why he did not bring it punctually. In any other view, a mortgagor, who wilfully allows the due date to pass would be in a better position than one who applies before due date. (25 M. 244, *R.*) So, a mortgagor, who meets an application for an order of foreclosure absolute,

Transfer of Property Act (IV of 1882) —*continued.*

is bound to show good cause for his failure to pay on due date and obtain an order extending the time so as to include the actual date of lodgment. The proviso to s. 93, properly construed, cannot support the contention that the power to enlarge time for payment can be exercised by Courts only before the day fixed for payment, by the decree itself. The language of the whole proviso does not demand that a limited meaning should be attached to it and, as the procedure prescribed by it is borrowed from the practice of the English Courts, it must be construed by the light of that practice, according to which applications for enlarging the time fixed in the decree for redemption are entertained even after the expiry of the prescribed period. (22 B. 771, 26 B. 121, 28 B. 103, *F.*) In England, the time fixed for payment will not, as a rule, be enlarged in a redemption action ; unless *special* grounds for such indulgence are shown (19 A. 180, 16 C. 246, 27 C. 705, *R.*) while in an action for foreclosure, the Court is more lenient and will enlarge the time *on terms* pending an appeal. Though this distinction is not to be found on comparing s. 87 with s. 93 of the Act (19 M. 40, 21 C. 618, 22 M. 133, 24 A. 479, 25 A. 231, 16 C.P.L.R. 111, *R.*) yet it would be in accord with the principles of equity to grant indulgence less readily to mortgagors who have sued for redemption, than to those against whom a suit for foreclosure has been brought. NAND LAL v. RAM RATAN LODHI, **2 N.L.R. 137.** [*F.*, 3 N.L.R. 146, 3 N.L.R. 55.]

(1112)—Ss. 92 and 94—Decree in redemption suit—Nature and effect—*See* RES JUDICATA, MATTERS IN ISSUE, 4 A.L.J. 763=A.W.N. 1907, 281=30 A. 36.

(1113)—*Ss.* 92, 95—*Co-mortgagor redeeming the entire property, position of—Limitation Act, arts.* 144 *and* 148 *—Adverse possession—Redemption from the co-mortgagor, who has redeemed the entire property.—Held*, that, when one of the several co-mortgagors redeems the entire property, it cannot be said that he has the same rights and stands exactly in the same position as the mortgagee with regard to the share of his co-mortgagors. The debt in the case of such a payment is entirely discharged and the mortgage is redeemed ; and the redeeming co-mortgagors has no right in the shares of his co-mortgagors other than that of a charge on those shares for the money paid for redemption and the proper costs incurred in so redeeming. (14 A. 1, *Diss.*; 26 B. 500, *F.*) *Held*, further, that the limitation for redeeming the property from the hands of such a cosharer is that of 12 years provided for by art. 144 of the Limitation Act and the limitation runs from the date when the redeeming co-mortgagor sets up his adverse possession. MAKHDUM KHAN v. MUSAMAT JADI, **9 O.C. 91 (b).**

(1114)—*S.* 93—*Redemption, Suit for.*—The provisions of s. 93, Transfer of Property Act, 1882, apply only to a suit for redemption, and are not applicable to a suit for sale. TANIRAM v. GAJANAN, **1 Bom. L.R. 821=24 B. 300.**

(1115)—*S.* 93—*Redemption and sale, suit for, by subsequent mortgage—Purchaser in execution of prior mortgage decree in possession, possession of—Redemption money, deposit of, after date fixed, but before order absolute—Deposit accepted by Court—No formal order extending time.*—Defendant purchased a certain property in execution of decree on a suit by a first mortgagee in which the plaintiff, a third mortgagee, was no party. He (the defendant) redeemed the second mortgage and was in possession of the property. The plaintiff sued to enforce his mortgage as also to redeem prior incumbrances : *Held*, that s. 93 of the Transfer of Property Act did not, in its literal terms, apply to a case where there was no prior mortgage still in existence, but the principles there laid down ought to be followed in dealing with such a case. The plaintiff, who did not deposit the redemption money within the time allowed by Court, can redeem afterwards before a final order is made under cl. (2) of s. 93 of the Transfer of Property Act, that is, before the decree is made absolute. (25 M. 300, *F.*; 22 B. 771, 16 C. 246, 24 A. 479, *R.*) The position of the defendant, who is in possession of the property under an obligation to re-transfer it, if the redemption money is paid on a fixed date, is analogous to that of a mortgagee by conditional sale. If a deposit of the redemption money is accepted by the Court before the final order under cl. 2 of s. 93 of the Transfer of Property Act, but after the date fixed for payment, it becomes an effectual deposit, although no formal order extending the time was passed. BEPIN BEHARY SHAHA v. MUKUNDA LAL GHOSH, **8 C.L.J. 547=36 C. 122=1 Ind. Cas. 780.**

(1116)—*S.* 93—*Redemption decree—Period for redemption—Enlargement of the period—Order declining the enlargement—Appeal—Civ. Pro. Code* (XIV *of* 1882), *s.* 244—The plaintiff brought a suit to redeem certain property. The Court of first instance decreed the suit in his favour, and allowed six months' time within which the redemption was to be made. An appeal was taken to the lower appellate Court, who confirmed the decree of the Court of first instance, without, however, enlarging the time originally fixed for redemption. More than six months after the first decree but shortly after the appellate decree, the plaintiff presented two applications to the first Court, one for enlargement of the time and the other for execution of the decree for redemption : *Held*, that the time should be enlarged and the decree should be allowed to be executed. An application for enlarging the time fixed in a decree for redemption can be entertained even after the expiry of the prescribed period, under proviso to s. 93 of the Transfer of Property Act, 1882. An order

Transfer of Property Act (IV of 1882) —*continued.*

declining to enlarge the time fixed for redemption is appealable under s. 244, Civ. Pro. Code, 1882. RANGO v. BHOMSHETTI, **3 Bom. L.R. 554=26 B. 121.**

(1117)—*S.* 93—*Mortgage — Redemption — Enlargement of time—Jurisdiction of appellate Court.*—Although the Court of first instance is the proper Court for dealing with applications under the last paragraph of s. 93 of the Transfer of Property Act, 1882, the appellate Court nevertheless has jurisdiction to allow the enlargement of time in cases where there has been an appeal. BABU PRASHAD v. KHIALI RAM, **A.W.N. 1906, 203=3 A.L.J. 823.** [*Diss.*, 31 A. 328, 6 A.L.J. 251.]

(1118)—*S.* 93—*Usufructuary mortgage—Suit for redemption—Expiry of time fixed for depositing money—Extension thereof.*—Where, in a suit for redemption of a usufructuary mortgage under s. 93 of the Act, the Court passed a decree conditional upon the plaintiff's depositing the money within a fixed period, and that period expired, *held*, that the time might, as a matter of course, be extended by the Court, upon an application made preferably in writing, even after the expiry of the time. RAMBRICHH RAI v. SARBANAND RAI, **6 A.L.J. 537=5 M.L.T. 390=2 Ind. Cas. 466.** (26 B. 121, *R.*)

(1119)—*S.* 93—*Redemption-decree—Failure to pay money within time fixed—Enlarging of time.*—Where in a redemption-decree the mortgagor fails to pay the amount of the decree to the mortgagee within the period fixed therein, the mortgagor does not lose his right to obtain possession on the payment of the redemption money after that period: the Court may, under s. 93 of the Transfer of Property Act, 1882, on good cause shown, enlarge the time to pay money and impose such terms as it thinks fit. ISHWAR v. GOPAL, **5 Bom. L.R. 719=28 B. 102.**

(1120)—*S.* 93—*Decree—Execution — Decree nisi—Decree absolute—Civ. Pro. Code, (Act XIV of 1882), s. 244.*—An application for redemption or foreclosure under a decree *nisi* is not an application in execution under the Civ. Pro. Code, but must be made in Court under the Transfer of Property Act; and until a decree *nisi* is made absolute there is no decree capable of execution. SIR JEHANGIR C. JEHANGIR v. THE HOPE MILLS, LTD., **10 Bom. L.R. 1057=33 B. 273.**

(1121)—*S.* 93—*Decree for payment and redemption within six months—Decree passed before Act—Whether application for execution of decree can be made after six months had expired.*—The Transfer of Property Act, IV of 1882, is not retrospective; and it does not apply to decrees made before the passing of the Act, or before the Act is put into force in any particular province. In the present case, a decree was passed for redemption of certain property by payment of the money within six months from the date of the decree:

Transfer of Property Act (IV of 1882) —*continued.*

and this decree was made before the Act was put into force in the Province. The decreeholder applied to execute the decree after the expiry of the six months; and wanted to show cause under s. 93 of the Act for extending the time allowed by the decree for redemption. *Held* that the execution of the decree was barred; and that s. 93 could not be applied to a decree passed before the Act was put into force. CHENNAYA v. MALKAPA, **20 B. 279.** [*R.*, L.B.R. 1893—1900, 420.]

(1122)—*S.* 93, *proviso—Mortgage decree—Time fixed for redemption—Application for extension of time subsequent to expiry of time originally fixed.*—The proviso to s. 93 of the Transfer of Property Act IV of 1882 does not require that an application to extend the time fixed for redemption by the original decree should be made during the time mentioned in the decree. The Court has power to give effect to the proviso whenever the application for postponement has been made at any time before the final decree—the decree absolute—is made. A decree passed in a suit for redemption under s. 92 of the Transfer of Property Act is only in the nature of a decree *nisi*, and it is the order passed under s. 93 which is in the nature of a decree absolute, and it is for the mortgagee to get the order made absolute under the latter section. NANDRAM v. BABAJI, **22 B. 771.** [*F.*, 2 N.L.R. 137, 10 Bom. L.R. 1057=33 B. 293=2 Ind. Cas. 296, 5 L.B.R. 219=8 Ind. Cas. 961; *Appr.*, 1 A.L.J. 300; *R.*, U.B.R. 1897—1901, 582, 25 B. 101. 26 B. 121=3 Bom.L.R. 554. 25 M. 244, 25 M. 300, 28 B. 102, 16 C.P.L. R. 111, 36 C. 122=8 C.L.J. 547=13 C.W.N. 36, N=1 Ind. Cas. 780, 8 Ind. Cas. 592=3 Bur. L.T. 2; *D.*, 24 B. 300.]

(1123)—S. 93—*See* CIV. PRO. CODE, 1908, s. 47, 10 Bom. L.R. 1057=33 B. 273.

(1124)—S. 93—*See* Nos. 327, 543, 851, 885, 950, 1079, 1099 to 1111, *supra.*

(1125)—S. 94—*See* Nos. 863, 964, 1112, *supra.*

(1126)—*S.* 95—*Purchaser of equity of redemption—Suit for contribution after redemption—Necessity for obtaining possession by person redeeming.*—The term "mortgagor" in s. 95 of the Act cannot be held to exclude purchasers of equity of redemption who stand, for all other purposes, in the same position as mortgagors. (8 B. 497, *R.*) The section must be read as if the words "obtains possession" ran as follows— "obtains possession when the mortgagee had possession under his mortgage." Therefore, the section must not be limited in its application to the case of usufructuary mortgages only. (26 A. 227, *F.*) Where a purchaser of equity of redemption of a mortgage by conditional sale, the mortgagee not having possession, redeems the property, he may sue the mortgagors for contribution and bring their shares to sale. MOHAN SEITH v. KASHINATH, **3 N.L.R. 92.**

Transfer of Property Act (IV of 1882) —*continued.*

(1127)--*S.*95—*Scope and construction of.*—S. 95 of the Act should not be so strictly construed as to limit its operation to mortgages under which possession passes, and, therefore, no redemption, properly repasses. It is more reasonable to construe the section distributively, to make the condition of obtaining possession apply only to the cases in which its fulfilment is, from the nature of the mortgage, possible, and in other cases to make the charge follow upon redemption. MALIK AHMAD WALI KHAN v. MUSSAMAT SHAMSI JAHAN BEGAM, **10 C.W.N. 626, P.C. = 3 C.L.J. 481 = 8 Bom. L.R. 397 = 3 A L.J. 360 = 1 M.L.T. 143 = 16 M.L.J. 269 = 28 A. 482 = 33 I.A. 81 = 8 Sar. 918.**

(1128 & 1129)—S. 95—*See* LIMITATION ACT, 1908, art. 132, 26 A. 227.

(1130)—S. 95—*See* Nos. 431, 538, 542, 717, 718, 819, 1113, *supra.*

(1131)—S. 96—*See* DECREE — DECREE, FORM OF, 23 C. 795.

(1132)—S. 96—*See* Nos. 461, 590, 671, 824, 825, *supra.*

(1133)—Ss. 96, 97—*See* CIV. PRO. CODE, 1908, s. 73, 30 C. 953.

(1134)—S. 97—*See* Nos. 461, 590, 965, 966, 1080, 1133, *supra.*

(1135)—*S.* 98—*Anomalous mortgage—Simple and usufructuary mortgage combined—Mortgagee suing to recover money advanced on mortgage.*—Under the terms of a mortgage-deed the mortgagee was put in possession of the mortgaged-property, and was authorized to retain possession until payment of the mortgage-money, the mortgagors being given credit for all profits recovered from the land over and above the Government assessment. The deed further contained a personal covenant by the mortgagor to pay the mortgage-money and an implied agreement that in the event of non-payment the property should be sold: *Held*, that the transaction evidenced by the deed was an anomalous mortgage: and the rights and liabilities of the parties should be determined by the contract as appearing in the mortgage-deed, and so far as such contract did not extend by local usage. In a suit, upon the above bond, by the mortgagee to recover the debt and in default of payment by the mortgagors for foreclosure and possession: *Held*, (1) that the mortgagee was not entitled to the reliefs sought, because he lost possession by leasing the land to his mortgagors for a term, and if he meant to regain possession he must sue as a landlord on the determination of the tenancy: (2) that the fact that the mortgagor went into possession as a tenant did not affect the distinct and independent right of the mortgagee to sue for the mortgage-money. AMARCHAND v. KILA MORAR, **5 Bom. L.R. 537 = 27 B. 600.**

(1136)—S. 98—*See* Nos. 471, 583. 966, *supra.*

Transfer of Property Act (IV of 1882) —*continued.*

(1137)—*S.* 99—*Suit to enforce lien under unregistered mortgage.*—An unregistered instrument cannot be used to enforce a lien of more than Rs. 99. MT. SARDAR BAHU v. GOPAL, **6 C.P.L.R.75** (3 A. 1. *F.*) [*R.*, 10 C.P.L.R.10.]

(1138)—*S.* 99, *Scope of.*—The section applies equally to mortgagees and to holders of charges. Apart from limitation the question whether by a certain instrument a mortgage or a charge is effected is immaterial so far as the rights or remedies of the parties are concerned. MOHAMMAD AMIN v. JAN PATEL, **12 C.P.L.R. 26.** (16 A. 415, 17 A. 520, *F.*; 10 C.P.L.R. 21, *D.*; 21 C. 34, *R.*) [*R.*, 1 N.L.R. 76, 1 N.L.R. 117, 6 N.L.R. 20, 2 N.L.R. 106; *Expl.*, 14 C.P.L.R. 17.]

(1139)—*S.* 99—*Scope and object of.*—This section was enacted with the object of preventing a mortgagee bringing the mortgaged property to sale except in pursuance of the decree obtained in a suit allowed by s. 67. Prior to the passing of Act IV of 1882, it was the constant custom for mortgagees to obtain, on other causes of action than their mortgages, decrees for money against the mortgagor, to bring the mortgaged property to sale in execution of those money decrees, and to have it sold, reserving their rights as mortgagees. The result of that was that, in such cases, the sale being notified as one in which the property to be sold was subject to a mortgage, purchasers would not come forward to run the risk of harassing litigation with the mortgagee in future suits, and the mortgagee or his *benamidar* was left in possession of the field, and in too many instances purchased the mortgagor's interest in the property for a mere song, and having got by such sale the mortgagor's interest for practically a trifling price, the mortgagee got the whole property into his hands. It was also found that such a state of things encouraged litigation, and it was to provide a remedy and to prevent the recurrence of such a state of things that s. 99 was enacted. MAHABIR SINGH v. SAIRA BIBI, **17 A. 520 = A.W.N. 1895, 116.** [*R.*, 10 C. P.L.R. 21, 35 C. 61, F.B. = 11 C.W.N. 1011 = 6 C.L.J. 320.]

(1140)—*S.* 99—*Applicability.*—S. 99 of the Transfer of Property Act was never intended to apply to decrees already obtained declaring a lien over, and authorizing a sale of mortgaged properties. It was evidently intended to apply to other decrees not being mortgage decrees. DINENDRA NATH SANNYAL v. CHANDRA KISHORE MUNSHI, **12 C. 436.** [*F.*, 19 M. 382; *R.*, 10 M. 129; *D.*, 21 C. 34.]

(1141)—*S.* 99, *if applicable in the cases of mortgages more than one.*—S. 99 of Act IV of 1882 applies to cases where there is more than one mortgage. ARUMUGA MUDALIAR v. YOGAMMAL BOI AMMANI AMMAL, **5 M.L.T. 248.**

(1142)—*S.* 99, *Transfer of Property Act*, 1882, *scope and applicability of—Zuripesghi mortgage*

Transfer of Property Act (IV of 1882) —*continued.*

—*Mortgaged property sold otherwise than by suit under s. 67.* — The words of s. 99 are general and uncontrolled. That section applies to all mortgages, *zuripeshgi* mortgage not being excepted. It prohibits the sale of the mortgaged property in all case save in a suit brought under s. 67 of the Act. S. 99 applies to all cases, whether a suit, under the terms of the mortgage can or cannot be brought under s. 67. S. 99 does not contemplate merely a matter of procedure, and a sale wrongly made would not be merely irregular. Such sale would be void. SHEODENI TEWARI v. RAM SARAN SINGH, **26 C. 164=3 C.W.N. 290.** [*F.*, 33 C. 113, 33 C. 283 ; *R.*, 4 O.C. 231 ; *Not F.*, 27 A. 517=2 A.L.J. 210=A.W.N. 1905, 80 ; *Diss.*, 8 O.C. 327, 11 C.W.N. 1011, F.B.=6 C.L.J. 320=35 C. 69.]

(1143)—*S.* 99—*Mortgage-decree giving power to sell by execution—Applicability of s.* 99.—S. 99, Transfer of Property Act, can have no application to a case, in which the same decree both creates the mortgage and gives power to sell in execution. HASOMAL GIANCHAND v. DULAHMAL DHOLOMAL, **3 S.L.R. 120=4 Ind. Cas. 606.** (22 C. 859, *Dist.*)

(1144)—*S.* 99—*Interest due on mortgage-decree —Sale of mortgaged property.*—The provisions of s. 99, Tr. P. Act, do not apply to a case in which the decree to be executed is a mortgage-decree, *i.e.*, one obtained in accordance with the terms of the mortgage-bond for sale of the property mortgaged subject to the mortgage, and obtained with respect to interest due on the mortgage. KASHI PERSHAD SINGH v. JAMUNA PERSHAD SAHU, **31 C. 922.**

(1145)—*S.* 99—*Sale, confirmation of—Effect on subsequent application.*—Confirmation of sale would not necessarily be a bar to a later application, if the applicant were able to show that the fact that the sale was voidable under s. 99, was kept from his knowledge until after the confirmation of the sale. SAMINATHA PILLAI v. SAMINATHA IYER, **5 M.L.T. 84.**

(1146)—*S.* 99—*Mortgagee seeking to realize his mortgage-debt by sale of mortgaged property —Necessity for bringing suit for sale.*—A mortgagee must bring a suit for sale, if he wishes to sell the mortgaged property in order to realize his mortgage debt. BHOORESAO KHEMCHAND v. MAHOMED SYED KHAN, **1 C.P. L.R. 38.**

(1147)—*S.* 99—*Decree for rent obtained by mortgagee on the responsibility of the mortgaged land—Attachment and sale of equity of redemption—Purchase by mortgagee, effect of.*—A usufructuary mortgagee who had given possession of the property mortgaged to the mortgagor under a lease deed, got a decree against him for arrears of rent on the responsibility of his mulgeni right in the plaint property. In execution of the above decree, the mortgagee attached and brought to sale and himself purchased the equity of redemption.

Transfer of Property Act (IV of 1882) —*continued.*

He sued for possession, and it was held that he could not recover, as the sale was invalid under s. 99 of the Transfer of Property Act, 1882. DURGAYYA v. ANANTHA, **14 M. 74.** [*Diss.*, 35 C. 61=11 C.W.N. 1011=6 C.L.J. 320; *F.*, 30 C. 463; *Expl.*, 22 M. 347; *R.*, 22 C. 859, 18 A. 325, 22 M. 372, 14 C.P.L.R. 17; 8 O.C. 327, 4 C.L.J. 533 ; *D.*, 23 B. 119.]

(1148)—*S.* 99—*Money-decree held by mortgagee against mortgagor, attachment and sale of mortgaged property under, invalidity of.*—Where, on a usufructuary mortgage without covenant for repayment, the mortgagee obtained a money-decree against the mortgagor, and at the sale of the property after its attachment in execution of the decree, his undivided son purchased it, the sale was held to be illegal under s. 99 of the Transfer of Property Act. The suit contemplated by the section is not one by a usufructuary mortgagee, *as such*, but by a decree-holder, who also happens to be a mortgagee, and s. 67 of the Act only prohibits a suit for sale by a usufructuary mortgagee "as such." VIGNESWARA v. BAPAYYA, **16 M. 436=3 M.L.J. 216.** [*R.*, 22 C. 859, 22 M 372, 35 C. 61=11 C.W.N. 1011=6 C.L.J. 320; *D.*, 18 A. 325.]

(1149)—*S.* 99—*Civ. Pro. Code*, 1882, *s.* 244 —*Sale of mortgaged property by mortgagee in execution of money decree—Suit by mortgagor to set aside sale—Maintainability.*—Suit to set aside a sale to a mortgagee in execution of a money-decree obtained by him against the mortgagor. The suit was instituted after confirmation of the sale. *Held* that the provisions of s. 99, Tr. P. Act, having been introduced for the benefit of a particular class of persons and not for the protection of public interests, the sale was not void but voidable only. But the question of setting aside a sale being one arising between the parties to the suit wherein the sale took place, and relating to execution, could not be raised and determined in a suit. It should be raised and tried only in execution proceedings taken under s. 244, Civ. Pro. Code. However, as the Court in which the suit was brought was the tribunal wherein the execution proceedings should have been taken, the plaint could be treated as an application under s. 244, Civ. Pro. Code, if it was possible to do so. But it was not. The sale had been confirmed. The order confirming the sale, being final, precluded the plaintiffs from seeking the relief to which they would otherwise have been entitled. *Held*, also that the mortgagors were entitled to redeem the mortgage on payment of the amount the mortgagee gave credit for, out of the decree debt due by them in consideration of the purchase in question. MAYAN PATHUTI v. PAKURAN, **22 M. 347=9 M.L.J. 98.** [*F.*, 22 A. 121, 33 C. 283; *Appr.*, 23 M. 377, 27 A. 517=2 A.L.J. 210=A.W.N. 1905, 80; *R.*, 5 Bom. L.R. 1036, 17 C.P.L.R. 178, 8 O.C. 327, 35 C. 61=11 C.W.N. 1011=6 C.L.J. 320, F.B., 3 S. L. R. 17, 32 M. 425 ; *D.*, 30 M. 313=17 M.L.J. 163=2 M.L.T. 181.]

Transfer of Property Act (IV of 1882) —*continued.*

(1150)—*S.* 99—*Decree on simple bond for the interest due under a mortgage—Sale of the mortgaged property in execution of the decree invalid.*—A mortgagee instituted a suit on a money bond executed by two out of several brothers for the interest due under his mortgage, obtained a personal decree against the two brothers, the executants, and, in execution of such decree, brought the mortgaged property to sale. The sale was held to be invalid under s. 99 of the Transfer of Property Act. SATHUVAYYAN v. MUTHUSAMI, **12 M. 325**. [*R.*, 14 M. 74, 18 A. 325, 22 M. 312, 6 C.L.J. 320 = 11 C.W.N. 1011 = 35 C. 61, F.B.]

(1151)—*S.* 99—*Sale by Court of Revenue in contravention of, suit for partition maintainable at the Civil Court by purchaser at the sale.*—The auction purchaser at a sale of a house held by the Revenue Court in contravention of s. 99 of the Transfer of Property Act, brought this suit in the Civil Court for partition and possession of the interest in the house purchased by him. *Held*, that, as between the judgment-debtor and the judgment-creditor in the rent suit, the decision of the Court of Revenue was final and that, notwithstanding s. 99 of the Transfer of Property Act, the judgment-debtor's interest was lawfully saleable, in execution of a decree for rent, by the mortgagee. The plaintiff purchased in execution of that decree and neither the judgment-debtor nor the judgment-creditor can dispute the title which he obtained by the purchase. Nor could the other co-sharers in the house be heard to say, in the suit for partition, that the plaintiff had not got that title by the auction sale which neither the judgment debtor nor the judgment-creditor could dispute TARA CHAND v. IMDAD HUSAIN, **18 A. 325 = A.W.N. 1896, 94.** [*F.*, 5 A.L.J. 121 = A.W.N. 1908, 48; *Appr.*, 27 A. 517 = A.W.N. 1905, 80 = 2 A.L.J. 210; *R.*, 24 A. 549, 1 A.L.J 360, 8 O.C. 327, 35 C. 61 = 11 C.W.N. 1011 = 6 C.L.J. 320.]

(1152)—*S.* 99—*Sale of mortgaged property in execution of money decree obtained by mortgagee—Right of mortgagee to enforce mortgage against purchaser—Right of co-mortgagees.*—A mortgagee, who has brought to sale the mortgaged property in execution of a money-decree, cannot subsequently enforce his mortgage against the purchaser at the Court sale. But if the mortgaged property be sold at the instance of one of several mortgagees, the other mortgagees are not affected by the sale and they can enforce their interests in the mortgage against the purchaser. SADASHEO TAMBOLI v. MT. KAREEMAN, **3 C.P.L.R. 15**, [*Principle app.*, 7 C.P.L R. 15; *R.*, 1 N.L.R. 24, 2 N.L.R. 106.]

(1153)—*S.* 99—*Rule in s.* 99—*Non-applicability to decrees by consent—Mortgagor's benefit — Mortgagor consenting to money-decree — Waiver of benefit of s.* 99.—The rule embodied in s. 99, Transfer of Property Act, does not extend to decrees by consent. The rule in s. 99 is meant only for the benefit of the mortgagor. (22 M. 347, 30 M. 313, 35 C. 61, *R.*) A mortgagor consenting to a money decree being passed waives his right to the benefit of s. 99. APPANDA MUDALY v. RAGHUMABAI AMMANI, **9 M.L.T. 261.**

(1154)—*S.* 99—*Mortgage—Sale of mortgaged property at the instance of mortgagee in execution of decree for rent—Purchase by mortgagee—Right to possession as purchaser.*—The defendant mortgaged a house to the plaintiffs. The mortgage-deed contained no condition for right of entry in default of payment, and no undertaking to repay the principal. The sole conditions were for payment, by the mortgagor, of a certain sum per annum as rent for the occupation of the house, and, in default of payment of rent for one year, for payment of interest at a certain rate on the rent due, and that the mortgagees could recover interest from year to year from the mortgaged property and from the other property of mortgagor. The mortgagees obtained a decree on a compromise in respect of arrears of rent, and in execution the property was sold and purchased by the mortgagees after obtaining permission to bid at the auction. Possession was received by a certificate signed by the mortgagor who remained in possession as tenant. Subsequently, the mortgagor having refused to vacate, the mortgagees sued for possession. It was pleaded that the sale was a nullity and the plaintiffs mortgagees were not entitled to sue for possession otherwise than by filing a suit on their mortgage. *Held*, that the plea had no force and the plaintiffs were entitled to possession. That s. 99 of the Tr. Pr. Act has not been extended to this province and was disapproved of as a legislative mistake by the Select Committee appointed to consider the amendment of the Civ. Pro. Code. MOTI RAM v. HARBHAGWAN DAS, **30 P.L.R. 1911 = 15 P.R. 1911 = 9 Ind. Cas. 549.** (2 Ind. Cas. 265, 2 P.R. 1907 = 157 P.L.R. 1906, 1 Ind. Cas. 952, 10 C.L.J. 91, 32 C. 296, P.C., 35 C. 61, 22 B. 119, 22 B. 624, 22 M. 372, 30 M. 363, 13 A. 332, F.B., *R.*)

(1155)—*S.* 99—*Transfer of prior mortgage to subsequent mortgagee—Right of such mortgagee to bring property to sale under his mortgage.*—The decree-holder was the assignee of another mortgage upon the property, which was prior in date to the second mortgage on which he had obtained his decree. He wished to bring the property to sale and to sell it subject to the first mortgage. *Held* that there was nothing in the language of s. 99 of the Transfer of Property Act to justify a refusal of execution till the decree-holder obtained a decree on that other mortgage. The object of the section was to check the practice on the part of mortgagees of suing their mortgagors on the debts as such, and in execution selling their mortgagor's interests in the property and thus defrauding purchasers, who were strangers to the mortgages, by enforcing the security against

Transfer of Property Act (IV of 1882) —*continued.*

the property, of the existence of which security they were kept in ignorance. ABDUL RAKMIAN v. MAHOMED, **2 M.L.J. 188.**

(1156)—*S.* 99—*Mortgagee purchasing property mortgaged at sale in execution of decree obtained against mortgagor on account of another debt—Accounts between mortgagor and mortgagee—Mortgagee's liabilities.*—If a mortgagee holding a mortgage of certain property, causes the mortgaged property to be sold in execution of a decree obtained against the mortgagor on account of another debt, and purchases the same himself in contravention of the provisions of s. 99, T.P. Act, such purchase is null and void and confers no title on the mortgagee (purchaser). (14 M. 74, *F.*) He is liable to account for the profits derived by him from the mortgaged property during the period of his enjoyment under such purchase. Credit will be given to him for the price paid by him for the purchase of the mortgaged property. (19 M. 249, P.C., *R.*) *Quaere.*—Whether the mortgagee (purchaser) is entitled to interest on the amount paid by him as price. SHIB DASS DASS v. KALI KUMAR ROY, **30 C. 463=7 C. W.N. 532.** [*F.*, 4 A.L.J. 787=(1908), A.W.N. 1=3 M.L.T. 13; *R.*, 33 C. 283; *Diss.* 7 O.C. 314, 8 O.C. 327, 35 C. 61=6 C.L.J. 320=11 C.W.N. 1011, F.B.]

(1157)—*S.* 99—*Assignee of a money decree obtained by the mortgagee, right of, to sell in contravention of s.* 99 *of the Transfer of Property Act—Estoppel—Civil Procedure Code, s.* 232.—*Held*, that s. 99 of the Transfer of Property Act applies as much to the transferee of a money decree obtained by the mortgagee as to the mortgagee himself SRIPAL SINGH v. GOURI SHANKAR, **11 O.C. 231 B.** (31 B. 462; 31 M. 33, *F.*; 27 A. 450, 7 Bom. L.R. 816, *D.*)

(1158)—*S.* 99—*Mortgage by way of conditional sale—Money-decree on mortgage—Sale of equity of redemption—Purchase by mortgagee confers no title on him—Civ. Pro. Code, s.* 244—*Execution of decree—Sale—Suit for possession—Plea that sale was illegal—Revision—Civil cases—Material irregularity—Regulation* XVII *of* 1806, *Ss.* 7 and 8.—The plaintiff, instead of proceeding to foreclose his mortgage by way of conditional sale under Regulation XVII of 1806, brought to sale the equity of redemption of the mortgaged property, in execution of a decree for money obtained by him on the mortgage, and purchased it himself and obtained formal possession through the execution Court. Afterwards, he brought the present suit for possession of the property as owner. It was pleaded that the suit was bad, for the plaintiff should have proceeded under the Regulation XVII of 1806. The plea was accepted on appeal, and the suit was dismissed, among others, on the ground that the sale was held in contravention of the provisions of s. 99 of the Transfer of Property Act. It was contended on revision that the order of dismissal of the suit was wrong, for (1) the plaintiff was not bound to foreclose the mortgage under the Regulation, and Transfer of Property Act was not applicable to the case and (2) that the plea was barred by s. 244 of the Civ. Pro. Code. *Held*, that the contentions had no force and there was no material irregularity for the exercise of revisional powers by the Chief Court. Though the Transfer of Property Act was not in force in the Punjab, the principle of s. 99 of the Act was of general application. JAGAN NATH v. BUDHWA, **157 P.L.R. 1906=2 P.R. 1907.** (24 A. 549, 10 M.L.J. 110, 26 C. 777, 22 B. 624, 22 M. 372, *R.*)

(1159)—*S.* 99, *Sale in contravention of—Effect of purchase by stranger—Suit to set aside sale—Suit for redemption—Civ. Pro. Code, s.* 244.—If a mortgagee brings the mortgaged property to sale in contravention of s. 99, Transfer of Property Act, the mortgagor, when he is a party to the suit, ought to object to the sale by proceedings in execution of the decree and not by means of a separate suit, to which s. 244, Civ. Pro. Code, is a bar. If the mortgagee himself becomes the purchaser in execution, the mortgagor may preserve his right to redeem the property (22 M. 347, 22 B. 624, 23 M. 377, *R.*) on the ground that the mortgagee cannot, by such a sale and purchase in contravention of law, be allowed to free himself from the liability to be redeemed. No such equity, however, arises where the auction-purchaser is not the mortgagee and was no party to the suit. A sale in violation of s. 99, Transfer of Property Act, is voidable only and not void. MUTHU v. KARUPPAN, **17 M.L.J. 163=2 M.L.T. 181=30 M. 313.** (22 M. 347, *R.*) [*R.*, 35 C. 61=11 C.W.N. 1011=6 C.L.J. 320, F.B., 3 S.L.R. 17; *D.*, 30 M. 362=17 M.L.J. 325.]

(1160)—*S.* 99—*Civ. Pro. Code, s.* 311—*Mortgage—Simple money decree accepted by mortgagee—Sale of mortgaged property in execution of such decree.*—Even though the mortgagee disclaims all interest in his mortgage and ask for and obtains a simple money-decree, he is precluded, by s. 99 of the T. P Act, 1882, from bringing the mortgaged property to sale in execution of the simple money-deeree. (A.W.N. 1905, 152, *F.*) But if such a sale does in fact take place and is confirmed and a certificate is granted to the auction-purchaser, the sale cannot afterwards be impeached, upon the ground that it was in violation of s. 99 of the Transfer of Property Act. (A.W.N. 1908, 48, 12 C.W.N. LX, 10 M. L.J. 110, 26 C. 727, 29 A. 612, *R.*; 33 C. 293, *D.*) Any irregularity in publishing a sale is a matter to be dealt with under s. 311, Civ. Pro. Code. KRISHAN LAL v. UMRAO SING, **A.W.N. 1908, 49=5 A.L.J. 121=30 A. 146.**

(1161) *S.* 99—*Mortgage—Sale of mortgaged property in execution of a decree for costs—Sale confirmed—Subsequent suit for redemption.*—Part of property, the subject of a mortgage, was sold in execution of a decree for costs, otherwise than in accordance with the provisions of s. 99 of the Transfer of Property Act, 1882,

Transfer of Property Act (IV of 1882) —*continued.*

and was purchased by the assignees of the mortgagee decree-holder, and this sale was confirmed. *Held*, that the mortgagor could not obtain redemption of the portion of the property so sold (18 A. 325, *Appl.*) although—the integrity of the mortgage having been broken up—it was possible for him to obtain a decree for redemption of the unsold portion. MADAN MAKUND LAL v. JAMNA KAULAPURI, **A.W.N. 1908, 48.** [*R.*, A.W.N. 1908, 49.]

(1162)—*S. 99—Sale of mortgaged property by mortgagee in execution of his money-decree—Void sale—Voidable sale—Civ. Pro. Code*, s. 244 *—Plaint treated as an application under s. 244 —Redemption, suit for.*—The plaintiff mortgaged his share with possession to the defendant on the 23rd May, 1885. He sued to redeem his share on payment of Rs. 200. The main defence was that the defendant, in execution of a money decree, not on the mortgage bond, had attached and subsequently put up the mortgaged property to sale and having obtained the permission of the Court to bid at the auction sale, had himself bought the property in dispute on 20th May, 1901 and thereby having purchased the equity of redemption, the plaintiff had no subsisting title to redeem (that the sale was duly confirmed without any apparent objection on the part of the plaintiff) and that having regard to clause (*c*) of s. 244, C.P.C., no suit could be maintained to set aside the sale and that therefore the suit for redemption could not lie. *Held*, (*per Ryves, A.J.C.*), that having regard to the provisions of s. 99 of the Transfer of Property Act the sale was not void and could have been avoided at the option of the mortgagor ; that the sale could have been impugned in execution-proceedings under s. 244, C.P.C., and not by a separate suit ; and that the sale not having been impugned but having been confirmed and the order confirming the sale having become final, it could not be set aside under that section. *Held* further, that the plaint in the suit could be treated as if it had been an application under s. 244, Civ. Pro. Code. *Held*, (*per Scott, J.C.*), that the purchase of the equity of redemption by the mortgagee in execution of a money-decree held by him would not be a cause of nullity for want of jurisdiction but a cause of irregularity in procedure only. In s. 99 of the Transfer of Property Act the words " the mortgagee—shall not be entitled to bring such property to sale otherwise than by bringing a suit under s. 67, etc ," must be held to mean that the mortgagee has not the right to bring the property to sale in execution of a mere money-decree, but that, if the mortgagor consents, he may do so and in any case the sale is valid until set aside in proceedings properly taken for that purpose. BASDEO v. ARJUN, **8 O.C. 327.** [*Cons.*, 8 O. C. 409.]

(1163)—*S. 99, provisions of, not to be given retrospective effect—Purchase of equity of redemption by mortgagee at Court-sale—Old law.*—Prior to the passing of the Transfer of Property Act, the purchaser of a mortgagor's right of redemption by the mortgagee at a Court-sale brought about by the latter in respect of a claim independent of the mortgage had the effect of vesting in the mortgagee-purchaser the whole of the right, title and interest of the judgment-debtor, his mortgagor, in the property mortgaged. The restriction of the rights of, and the disabilities imposed on, the mortgagee purchasing "in execution of a decree for the satisfaction of any claim whether arising under the mortgage or not " by the provisions of s. 99 of the Act are applicable only in the case of proceedings governed thereby. The section cannot be given retrospective effect so as to affect such purchases by mortgagees in judicial sales perfected before Act came into force since the effect of applying it retrospectively will be to unsettle innumerable well-established titles acquired on the faith of the mortgagee's purchase in Court-sale being valid and competent to extinguish the mortgagor's equity of redemption. NANUVIEN v. MUTHUSAMY DIKSHADAR, **15 M.L.J. 445=29 M. 421.** (22 M. 372, 22 B. 624, *R.&D.*) [*R.*, 6 C.L.J. 320, F.B=11 C.W.N. 1011=35 C. 61, 17 M.L.J. 325=30 M. 362.]

(1164)—*S. 99— Sale independently of the section — Sale for money decree— Party to decree and sale—Effect of such sale.*—Where a mortgagee, independently of s. 99 of the Act, purchases the mortgaged property, in execution of a money-decree for an instalment of the mortgage-debt, the sale is only voidable and not void ; and a person, who was a party to the suit and order for sale, will not be subsequently allowed to redeem the property treating the sale as void. VENKAYYA v. SURAYYA, **17 M.L.J. 325=30 M. 362.** (22 M. 372, *F.* ; 5 B.L.R. 450, 22 B. 624, *Diss.* ; 32 C. 296, P.C., *Expl.* ; 16 C 682, P.C., 17 M.L.J. 163, *D.* ; 19 M. 382, 29 M. 421, 27 A. 517, *R.*) [*R.*, 3 S.L.R. 17.]

(1165)—*S. 99—Equity of redemption, sale by mortgagors of major portion to third parties and minor portion to mortgagee—Subsequent purchase by mortgagee of equity of redemption in execution of a decree against third party-purchasers for costs and mesne profits—Suit for redemption of mortgage brought by third party-purchasers—Non-joinder of mortgagees representatives — Maintainability of suit.* — The equity of redemption in major portion of certain mortgaged property was sold by the mortgagor to third parties and a minor portion to the mortgagee. In execution of a decree for costs and mesne profits against the third party purchasers, the equity of redemption in their hands was brought to sale by the mortgagee and purchased by himself. More than twenty years after the sale, the third party purchasers brought a suit for redemption against the purchasers of the rights of the mortgagee in the property, without making the representatives of the mortgagee parties to the suit. The suit was instituted on the footing that the purchase by the mortgagee in the execution-sale was null and void. *Held*, a sale held in contravention

Transfer of Property Act (IV of 1882) —*continued.*

of s. 99 of the Act, is voidable only, and not void. After the lapse of twenty years, the plaintiffs cannot successfully set up the case that the sale was a nullity. (18 A. 325, 22 M. 347, *Appr.*; 22 B. 624, 26 C. 164, 1 C. 371; *D.*; 2 A.L.J. 71, P.C. *R.*) Further, the suit must fail on the ground of non-joinder of parties alone. Independently of the provision in s.99 of the Act, a mortgagee is not precluded by law from purchasing the equity of redemption and freeing himself from the liability to be redeemed, provided that the purchase is carried out in complete good faith and no advantage is taken by him of his position as mortgagee. There is no principle upon which such a sale can be impeached merely on the ground that the purchaser was a mortgagee of the purchased property. *Obiter dictum.*—As the integrity of the mortgage was broken by the purchase, by the original mortgagee, of the equity of redemption in part of the mortgaged property, the plaintiffs would, if they had made the mortgagee's representatives parties to the suit, be entitled to redeem their share in the mortgaged property. MUHAMMAD ABDUL RASHID KHAN v. DILSUKH RAI, **2 A.L.J. 210=A.W.N. 1905, 80=27 A. 517.** [*R.*, 35 C. 61=11 C.W.N. 1011=6 C.L.J. 320. 17 M.L.J. 163=2 M.L.T. 181, 30 M. 362=17 M.L.J. 325.]

(1166)—*S.* 99—*Mortgagee holding a simple money-decree against the mortgagor—Decree not in respect of the mortgage—Assignment of decree—Execution by assignee—Attachment of equity of redemption—Rights of the assignee—S.* 233, *Civ. Pro. Code.*—In this case, the holder of a usufructuary mortgage obtained a simple money-decree against the mortgagor, the decree making no reference to the mortgage or the debt secured by the mortgage. The assignee of the decree applied, in execution, for attachment and sale of the equity of redemption of the mortgagor. The mortgagor contended that his rights in the property mortgaged could not be sold (s. 99 of the Act and s. 233, Civ. Pro. Code). *Held*, that there is no difference between the position of a third person obtaining a simple money-decree against the mortgagor and that of an assignee of a money-decree obtained by the mortgagee not in his capacity as mortgagee, that the assignee, having acquired no rights in respect of the mortgage, does not, in any way, transgress the provisions of s. 99 of the Act by seeking a sale of the equity of redemption. S. 233, Civ. Pro. Code, would not help the mortgagor unless there has been an assignment of the mortgage. BANH BAI v. MANNI LAL, **A.W.N. (1903). 42=2 A.L.J. 121=27A 450,** (22 C. 813, *D.*)

(1167)—*S.* 99—*Mortgagee holding a money-bond from mortgagor—Transfer of money-bond—Transferee suing upon the money-bond can bring the mortgaged property to sale subject to mortgage.*—In 1875, B held a mortgage of certain property. In 1892, B advanced to the mortgagor some money, for which a simple money bond was passed. In 1903 B assigned the bond to the plaintiff, who sued the mortgagor and got a money-decree. In execution of this decree the plaintiff attached the property which formed the subject of mortgage and applied to the Court to sell the property subject to the said mortgage. The judgment-debtor objected to this on the ground that the sale of the property was barred by s. 99 of the Transfer of Property Act, 1882: *Held*, (1) that the plaintiff was not barred by s. 99 of the Transfer of Property Act, 1882, from bringing the property to sale; (2) that the plaintiff as transferee of the money bond did not take it subject to any liability or equity to which his transferor, the mortgagee, was subject with regard to the mortgaged property. NARHAR v. SHIVRAM, **7 Bom. L.R. 816.**

(1168)—*S.* 99—*Splitting up of remedies—Splitting up of claims—Bar—Mortgagee—Conflict between the two sections considered and harmonized.*—S. 99 of the Transfer of Property Act, aims at the hardship inflicted on mortgagors by mortgagees by proceeding to realize their claim by execution of money decrees passed in respect of the mortgagors' personal liability; the section, therefore, provides that mortgaged property cannot be sold in execution of a decree otherwise than by an ordinary mortgagees' suit. The primary purpose of s.99 of the Transfer of Property Act is to relieve a mortgagee from the restriction placed on the splitting up of his remedies by s. 43 of the Code of Civil Procedure, the rest of the restriction imposed by the latter section remains unimpaired. GOVIND v. PARASHARAM, **2 Bom. L.R. 864=25 B. 161.**

(1169)—*S.* 99—*Attachment of mortgaged property—Sale in execution—Separate suit.*—S. 99 of the Transfer of Property Act, 1882, forbids the sale of the mortgaged property in execution of the decree at the instance of the mortgagee; but it is no bar to an attachment of the property. KAJI INUS KAJI BAPU v. KAJI INUS KAJIBA. **8 Bom. L.R. 576.**

(1170)—*S.* 99—*Mortgagee—Attachment by mortgagee—Application—Suit.*—S. 99 of the Transfer of Property Act contemplates attachment by judgment-creditor (even if he be a mortgagee): and he is entitled to do so by an application in execution of the decree. NATHUBAI MOTILAL v. BAI UJJAM, **10 Bom. L.R. 274=32 B. 203.**

(1171)—*S.* 99—*Usufructuary mortgage—Simple money decree—Sale of mortgaged property.*—Certain property was mortgaged to the plaintiffs. The mortgage was a usufuctuary mortgage for eight years. The plaintiffs did not obtain possession. After the expiry of eight years, they sued for sale upon their mortgage but obtained a simple money decree only. They then attached the property mortgaged to them. *Held*, that s. 99 of the Transfer of Property Act prevented the sale of property mortgaged to them in execution of a simple money decree.

Transfer of Property Act (IV of 1882) —*continued.*

NARSINGH DAS v. MUSAMMAT MUNNA, **6 A. L.J. 731=6 M.L.T. 182=3 Ind. Cas. 537.** (A. W.N. 1905, 152, *F.*) [*D.*, 32 A. 377=7 A.L.J. 321=5 Ind. Cas. 419.]

(1172)—*S.* 99—*Mortgage—Suit for sale—Compromise resulting in a money-decree—Mortgagee not competent to sell mortgaged property in execution of such decree.*—A mortgagee brought a suit for sale on his mortgage. The suit was compromised, and the mortgagee took a money decree in which, however, the property originally hypothecated to him was set out as being charged. *Held*, that the mortgagee decree-holder could not bring the mortgaged property to sale in execution of this decree, but if he wished to do so, he would have to institute a suit under s. 67 on the decree. HEM BAN v. BIHARI GIR, **A. W. N. 1905, 189=2A. L. J. 479=28A. 58**, (22C. 859, *F.*)

(1173)—*S.* 99—*Trusts Act, s.* 90—*Purchase by mortgagee of equity of redemption in Court sale—Fraud—Misconduct—Scope of s.* 90 *of the Trusts Act.*—S. 99 of the Transfer of Property Act does not lay down as a general principle that a purchase by the mortgagor's equity of redemption is invariably and in all cases invalid, even in the absence of fraud, misrepresentation or misconduct. S. 90 of Trusts Act, only applies to a case where the mortgagee or other qualified owner of any property has availed himself of his position and has thereby gained an advantage in derogation of the right of other persons. RAMAKRISHNA CHATRAIYA v. PUSHPATI YIJAYARAMA, **15 Ind. Cas. 589.**

(1174)—*S.* 99—*Execution-sale in violation of—Confirmation of sale—Objection to the validity of the sale, when to be taken—Suit for redemption, effect of sale on.*—A usufructuary mortgagee, who had not obtained possession of the property mortgaged, brought a suit and obtained a decree for possession and costs. He, then, assigned the decree as well as the mortgage. In execution of the decree for costs, the equity of redemption of the mortgagors in respect of a portion of the mortgaged property was sold by Court-auction and purchased by the assignee himself. Subsequently, the legal representative of the mortgagors sold their equity of redemption; and the purchaser of the equity of redemption brought a suit against the assignee-purchaser for possession of the mortgaged property by redemption of the mortgage. *Held*, so far as the portion of the mortgaged property, which was sold in Court-auction, was concerned, the plaintiff could not have any remedy. For, even though the sale was held in violation of the provisions of s. 99 of the Transfer of Property Act, it was the duty of the mortgagors (judgment-debtors) whom the plaintiff now represents, to object to the sale or to the confirmation of the sale, before the sale was confirmed. Now that the sale was confirmed, the plaintiff who was the representative of the judgment-debtors could not question its validity. But so far as the property, not included in the auction-sale, was concerned, the plaintiff was given a decree for redemption. MADAN MUKUND LAL v. JAMNA KAULAPURI, **2 A.L J. 123.** [*Appl.*, 30 A. 146=A.W.N. 1908, 49=5 A.L.J. 121; *R.*, 11 C.W.N. 1011=6 C.L J. 320=35 C. 61.]

(1175)—S. 99, sale in execution in violation of—Suit to set aside not maintainable—*See* CIV. PRO. CODE, 1908, s. 47, 3 A.L.J. 456=A.W.N. 1906, 206=28 A. 681.

(1176)—S 99—*See* CIV. PRO. CODE, 1908, s. 73, 22 M. 241=9 M.L.J. 179.

(1177)—S. 99—*See* CIV. PRO. CODE, 1908, O. II, r. 2, 2 Bom.L.R. 864=25 B. 161.

(1178)—S. 99—*See* CIV. PRO. CODE, 1908, O. XXXIV, r. 14, 13 Bom.L.R. 245.

(1179)—S. 99 - *See* EXECUTION OF DECREE—MODE OF EXECUTION, 2 C.W.N. 33.

(1180)—S. 99—*See* LIMITATION ACT, 1908, art. 12, 5 Bom.L.R. 952.

(1181)—S. 99—*See* LIMITATION ACT, 1908, art. 182, Miscellaneous, 12 A. 64=9 A. W.N. 200.

(1182)—S. 99—Order for sale after notice to judgment-debtor—Sale in contravention of s. 99 of the Transfer of Property Act—Right of judgment-debtor to have sale set aside—*See* SALE—SALE IN EXECUTION OF DECREE—SETTING ASIDE SALE, 10 M.L.J. 110.

(1183)—S. 99—*See* Nos. 47, 48, 50, 472, 562, 587, 588, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 967, *supra.*

(1184)—*Ss.* 99, 67—*Money-decree in favour of mortgagee, sale of mortgaged property in execution of—Sale void—Civ. Pro. Code, s.* 244, *applicability of.*—The decree-holder, who was a co-sharer landlord having obtained a decree for rent, brought to sale the holding of the judgment-debtor and the appellant became the purchaser. The judgment-debtor applied to have the sale set aside on the ground that since the decree-holder had a subsisting mortgage of a portion of the holding, he was not entitled to bring it to sale except by a suit under s. 67 of the Transfer of Property Act and the application was opposed by the appellant. *Held*, that the sale was void as in contravention of the provisions of s. 99 of the Transfer of Property Act. The sale was on the whole undivided property which could not be split into parts though only a portion of it happened to be under mortgage and it would not make any difference that the appellant, a third party, and not the mortgagee himself (26 C. 164, 30 C. 463, *R.*) was the purchaser at the sale. *Held* also, that such a sale could be set aside in execution-proceedings under s. 244 of the Civ. Pro. Code. SONU SINGH v. BEHARI SINGH, **33 C. 283.** (22 M. 347, *F.*) [*R.*, 35 C. 61, F. B.=11 C.W.N. 1011=6 C.L.J. 320, 30 A. 146=5 A.L.J. 121=A.W.N. 1908, 49.]

Transfer of Property Act (IV of 1882) —*continued.*

(1185)—*Ss.* 99 *and* 67—*Mortgage—Money decree by mortgagee—Transfer of the decree—Assignee bound by provisions of s.* 99. The transfer of a money decree obtained by a mortgagee against his mortgagor is bound by the restriction imposed upon the mortgagee by s 99 of the Transfer of Property Act. He can, therefore, in execution of his decree, attach the property, but he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit under s. 67 of the Act. CHHAGAN v. LAKSHMAN, **9 Bom. L.R. 728 = 31 B. 462.**

(1186)—*Ss.* 99 *and* 67—*Sale of a holding by a landlord having a mortgage thereon—Validity thereof.*—A landlord, who holds a mortgage over his tenant's holding cannot, in execution of a decree obtained by him against the tenant for rent bring the holding to sale. He cannot, under s. 99 of the Act, cause a sale of the holding except by means of a suit under s. 67 of that Act. A sale held otherwise would be void. BASIRUDDI v. KAILAS KAMINI DEVI, **33 C. 113.** (26 C. 164, *F.*) [*Diss.*, 35 C. 61 = 6 C.L.J. 320 = 11 C.W.N. 1011.]

(1187)—*Ss.* 99 *and* 67—*Mortgagee not entitled to sell mortgaged property to satisfy claim not arising under mortgage—Limiting right of decree-holder.*—Where the question is whether a person who holds the mortgage of any property can sell that property in execution of an ordinary money decree in satisfaction of a claim not arising under the mortgage, *held*, that he cannot do so. S. 99 of the Transfer of Property Act limits the right of the decree-holder in such a case and provides that he shall not bring the mortgaged property to sale otherwise than by instituting a suit under s. 67 of that Act. (12 C. 436, *D.*) *Quære.*—Whether the suit required to be instituted by s. 99 is a suit on the mortgage, or is one on the charge created by attachment. JADUB LALL SHAW CHOWDHRY v. MADHUB LALL SHAW CHOWDHRY, **21 C 34.** [*F.*, 17 A. 520, 4 A.L.J. 787 = 3 M.L.T. 132 = A.W.N. 1908, 1; *R.*, 16 A. 415, 22 C. 859, 10 C.P.L.R. 21, 12 C.P.L.R. 26, 7 O.C. 314, 35 C. 61, F.B. = 6 C.L.J. 320 = 11 C.W.N. 1011; *D.*, 29 M. 424 = 16 M.L.J. 285.]

(1188)—Ss. 99 and 100 — Maintenance charged on family property—Sale of property in execution of maintenance decree—*See* MAINTENANCE, 17 M.L.J. 217.

(1189)—*S.* 100—*Charge on immoveable property—Suit to recover money upon document not creating "charge"—Limitation.*—A document, to create a charge on immoveable property under s. 100 of the Transfer of Property Act, must create such charge immediately on its execution, and not operate as such only at some future time, *e.g.*, upon the non-payment of the money secured by the document, in which case it creates only the possibility of a charge ultimately arising on the land, and not a "charge" under the section. In the case of such a document (not creating a charge under

Transfer of Property Act (IV of 1882) —*continued.*

s. 100 of the Act), a suit to recover the money was *held* barred after three years. MADHO MISSER v. SIDH BINAIK UPADHYA, **14 C. 687.** [*R.*, 1 N.L.R. 76, 2 A.L.J. 754.]

(1190)—*S.* 100— *Covenant by vendee with vendor to pay certain quantity of rice—Effect.*—A covenant by the vendee with the vendor to pay the plaintiff a certain quantity of rice annually, whereon the plaintiff relied, would not give rise to charge. PUTTANNA v. KORAPOLU, **5 M.L.T. 78 = 2 Ind. Cas. 617.** (31 C. 57, *R.*)

(1191)—*S.* 100—*Mortgage—Clog on equity of redemption—Bond tacked on to mortgage deed—Charges.*—In a suit for redemption of a prior usufructuary mortgage, the mortgagee set up four other bonds which had to be redeemed. These bonds were described as bonds "tacked on to the mortgage deed." They were stamped as possessory mortgages and contained the full specification on the mortgaged property as in a regular mortgage. *Held*, that, upon a true construction of the deeds in question, a charge within the meaning of s. 100, Transfer of Property Act, had been created, and that they were not clogs on the equity of redemption. BIKHAM SINGH v. SHANKAR DAYAL SINGH, **6 A.L.J. 255 = 1 Ind. Cas. 345.** [*F.*, 2 Ind. Cas. 144; *R.*, 31 A. 482 = 6 A.L.J. 654 = 2 Ind. Cas. 859.]

(1192)—*S.* 100—*Charge—None in case of contingency—Covenant in sale deed—Construction of deed.*—A sale-deed contained the following covenant:—"If, in the future, any person appear as a claimant of the property sold and make a claim, in consequence of which there is an injury to the property sold or we do not give possession. . . . then the purchaser may recover the money from our persons or sold property. . ." *Held*, that the covenant did not create a charge in favour of the purchaser. A document, which creates a charge within the meaning of s. 100 of the Act, must be a document which creates a charge at the time and not merely the possibility of a charge. HARJAS RAI v. NAURANG, **3 A.L.J. 220 = A.W.N. 1906, 82** [*D.*, 3 A.L.J. 551 = 28 A. 655 = A.W.N. 1906, 165.]

(1193)—*S* 100—*Charge* — Haq chaharum Qabuliat—*Transfer.*—A *qabuliat* provided:—"The burden of the liability for paying *zar parjote* and *zar chaharum* shall remain first upon the materials of the house." *Held*, that these words, standing as they are, are not sufficient to constitute a charge upon the property within the meaning of s. 100 of the Act. *Quere*:—Whether these words do even create the possibility of a charge which might arise out of the land? RAJESHWAR SWAMI JANGAM v. BIHARI LAL, **2 A.L.J. 764.** (14 C. 687, 16 M. 429, *R.*)

(1194)—*S.* 100, *charge, meaning of, in, and in s.* 65 *of the Bengal Tenancy Act—Equity, can it override law?—Difference between a mortgage and a charge.*—The charge referred to in s. 65 of the Bengal Tenancy Act is not such

Transfer of Property Act (IV of 1882) —*continued.*

a charge as that defined by s. 100 of the Transfer of Property Act, and does not require to be enforced in the same manner, the only consequence, which follows from the provisions that rent is a first charge upon an under-tenure, is, that a sale, held in execution of a decree for arrears of rent, produces the effect described in Ch. XIV of the Bengal Tenancy Act. A mortgage does, whereas a charge does not, involve a transfer of an interest in specific immoveable property. (25 M. 220, *R. & F.*). A mortgagee can follow the mortgaged property in the hands of a transferee from the mortgagor, whereas a charge can be enforced against a transferee, only if it is shown that he has taken with notice of the charge. (13 A. 23, *R.*) Where an instalment bond provided that the executant would be personally responsible for the payment of the money, and that, in case of default, it would be competent to the person, in whose favour it was executed, to institute a suit to obtain a decree and to recover the dues by attachment and sale of an under-tenure. *Held*—that, upon the terms of the bond, it did not create a mortgage, but merely effected a charge. The words "and the transaction does not amount to a mortgage," in s. 100 of the Transfer of Property Act, signify that, if the relation created by the instrument is not that of a mortgagor and mortgagee and immoveable property has been made security for the payment of money, there is a charge on the property; they do not mean that, if the transaction on the face of it purports to be a mortgage, but the instrument is not operative as such, by reason of defective execution or non-compliance with the formalities prescribed by the law, the transaction is converted into a charge. (26 C. 78, 26 C. 246, 32 C. 729, 7 Bom. L.R. 934, *R. & F.*; 10 M. 509, 24 M. 337, *Disappr.*) Equity will not contravene the positive enactment or requirements of law and defeat its policy by supplying, under the guise of amending defective instruments, those deficient elements of form, without which the agreement is absolutely void, even as between the parties to it. In the face of the statutory provision contained in s. 100 of the Transfer of Property Act, the Courts in India will not, and cannot, apply indiscriminately the general equitable principle of English rule, namely, that a mortgage which is defective and is inoperative as such, operates as a good equitable lien, if it shows an intention to create a charge. ROYZUDDI SHEIKH v. KRITARTHANATH MUKERJEE, **4 C.L.J. 219=33 C. 985.** [*F.*, 31 M. 337.]

(1195)—S. 100—Suit for recovery of arrears of rent under Central Provinces Tenancy Act—Charge—*See* C. P. ACT XI OF 1898, 3 N.L.R. 164.

(1196)—S. 100—*See* DEED — CONSTRUCTION OF DEEDS, 10 Bom. L. R. 575=32 B. 386.

(1197)—S. 100—Suit for redemption converted into suit for property on payment of a charge—*See* PLEADINGS, 10 O.C. 17.

Transfer of Property Act (IV of 1882) —*continued.*

(1198)—S. 100—*See* Nos. 170, 329, 463, 464, 465, 466, 473, 474, 475, 516, 517, 518, 519, 520, 605, 629, 714, 718, 719, 720, 1081, 1188, *supra.*

(1199)—*S.* 101—*Charge, keeping alive of—Intention on date of acquisition—Pre-emption—Money due upon mortgage not allowed in pre-emption suit—Price.*—In considering the question whether an incumbrance should be deemed to continue to subsist on the ground that the continuance of it was for the benefit of the person who has acquired the property, the point of time to be regarded is the date of the acquisition of the property. If an intention to keep alive a charge on property is inconsistent with real intention of the parties to the deed by which the purchaser of the property takes an assignment of it, the charge cannot be treated as still subsisting, simply because the purchaser afterwards finds that it would have been better for him to have kept the charge alive. Plaintiff, who held a mortgage of 8th January, 1884, over certain property, purchased it by means of two sale-deeds. A suit for pre-emption was brought in respect of it, and the plaintiff claimed the amount due upon his mortgage. By a mistake the date of the mortgage was written as 11th January, 1894. Plaintiff's claim in respect of this amount was disallowed. In a suit for sale upon foot of the mortgage of 8th January, 1884, *held* that the mortgage became merged in the sale and had not been kept alive for the plaintiff's benefit. A pre-emptor must pay the price actually and in good faith paid for the property by the purchaser, however the price may be made up. JUGAL KISHORE v. v. RAM NARAIN, **9 A.L.J. 226=13 Ind. Cas. 619.**

(1200)—*S.* 101—*Mortgagee purchasing mortgaged property along with other properties and jointly with other persons in undivided shares—Lien not extinguished.*—On a mortgagee purchasing the mortgaged property along with other properties and jointly with other persons in undivided shares, his mortgage lien is not extinguished by the purchase. The mortgage should be regarded as existing, it being evidently for the benefit of the mortgagee within the meaning of s 101, Transfer of Property Act, that it should be so regarded. GUMINDRA PROSAD v. BAIJNATH SINGH, **31 C. 370.**

(1201)—*S.* 101—*Mortgage—Purchaser of the equity of redemption paying off prior incumbrance—Equities between him and puisne incumbrancers.*—S. 101 of the Transfer of Property Act provides that, where the owner of a charge or other incumbrance or immoveable property becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit. It protects a purchaser against the claims of puisne incumbrancers, where, holding a prior mortgage, he has purchased the mortgaged property. Where, therefore, a purchaser

Transfer of Property Act (IV of 1882) —*continued.*

of hypothecated property pays off a prior incumbrance on the same with the money left with him that money being part of the sale consideration of the property, he can hold up that mortgage as a shield against the claims of puisne incumbrancers. BALDEO PARSHAD v. UMAN SHANKAR, **6 A.L.J. 987=32 A. 1=4 Ind. Cas. 810.**

(1202)—S. 101—*See* BEN. ACT VIII OF 1885, s. 65, 6 C.W.N. 834.

(1203)—S. 101—*See* BEN. ACT VIII OF 1885, ss. 165 & 167, 28 C. 12=4 C.W.N. 735.

(1204)—S. 101—*See* NOS. 430, 659, 693, *supra.*

(1205)—*S.* 104—*Rules framed by High Court—Applicability of provisions of Civ. Pro. Code, to sales under mortgage decree.*—S. 104, Transfer of Property Act, is an enabling section and the rules made by the High Court under the provisions of that section do not limit the applicability of the provisions of the Civ. Pro. Code, regarding sales held in execution of mortgage decrees. DAKSHINA MOHAN ROY v. SRIMATI BASUMATI DEBI, **4 C.W.N. 474.** (25 C. 703, *Expl.*) [*R.*, 25 M. 244, F.B., 12 C.W.N. 282=7 C.L.J. 581=3 M.L.T. 202.]

(1206)—S. 104—Rules made by the High Court—Execution—Mortgage decree—Effect of—S. 248, Civ. Pro. Code, 1882—*See* CIV. PRO. CODE, 1903, O. XXI, rr. 22, 14. 5 Ind. Cas. 101.

(1207)—S. 104—*See* CIV. PRO. CODE, 1908, O. XXI, r. 89, 25 C. 703, F.B.=2 C.W.N. 353.

(1208)—S. 104—*See* Nos. 1017, 1018, *supra.*

(1209)—*S.* 105, *Lease—Consideration consisting of past advance—"Price paid" whether may be an outstanding debt—S.* 41, *Central Provinces Tenancy Act*, 1898—*Whether notice necessary in case of simultaneous mortgage and lease to one and the same person—Construction of s.* 41 (2), *C.P. Tenancy Act.*—*Held*, a document may amount to a lease of immoveable property, though the consideration partly consists of an advance made long before the date of execution; for there is nothing in the definition of "lease" given in s. 105, inconsistent with the view that the price paid may be an outstanding debt. (25 A. 115, P.C. *F.*; 11 B. 462, 7 M. 203, 12 C.P.L.R. 96, 16 C.P.L.R. 49, 26 B. 252, 22 A. 149, *R.*) S. 41 (2), Tenancy Act, being restrictive of a natural right, must be strictly continued. *Held*, also, that, where an absolute occupancy tenant transfers his holding by simultaneous mortgage and lease to one and the same person, he need not give notice to his landlord of his intention to do so, since neither transaction, when taken alone, comes within the operation of s. 41 (2) of the Tenancy Act. BENI PRASAD v. MULCHAND, **6 N.L.R. 65=6 Ind. Cas. 817.** (15 C.P.L.R. 135, 4 N.L.R. 45, *R.*)

(1210)—*S.* 105—*Patta tendered to, and refused by, tenant, whether a lease—Registration.*—Where a patta is tendered to, but is not accepted by, a tenant, it is not a lease for the purpose of the Registration Act. BANGAT SINGH v. BOLAMA REDDI, **8 M.L.T. 371.** (3 M. 358, *R.*)

(1211)—S. 105—Sale by Malguzar of lands belonging to his Malguzari—Such sale, a lease within the definition of—*See* C.P. ACT XVII OF 1889, 8 C.P.L.R. 33.

(1212)—S. 105—*See* EVIDENCE—SECONDARY EVIDENCE, 4 Bom. L.R. 839.

(1213)—S. 105—*See* SERVICE TENURE, 1 Bom. L.R. 61=23 B. 602.

(1214)—S. 105—*See* NOS. 77, 721, *supra*, and No. 1266, *infra.*

(1215)—*Ss.* 105, 106—*Agreement to render services as Medical Practitioner in lieu of rent of a house, is 'lease'—Notice to quit, form of*—The owner of a house allowed a Medical Practitioner to occupy a house and premises, in consideration of the latter's rendering services, as a Medical Practitioner, to the former and the members of the family. Some years after, disputes arose between them, and the owner gave a notice to the other to quit the premises on the first of the following month. Between the date of service of the notice and the last day of the month, there were not 15 clear days. *Held*, in a suit by the owner for possession of the house and the premises, that the agreement amounted to a 'lease' within the meaning of s. 105, and clear 15 days' notice expiring with the end of a month of tenancy not having been given as is required by s. 106 of the Act, the suit was premature. The suit was dismissed. JYOTISH CHANDRA MUKERJEE v. RAMANAT BHADRA, **32 C. 243.**

(1216)—*Ss.* 105 *and* 107—*Landlord and tenant—Arrears of rent*—Kabuliat *whether equivalent to lease—Lease requirements of a valid unregistered* Kabuliat *for more than one year—Oral agreement to execute lease for seven years, admissibility of—Evidence Act, s.* 91 *—Compensation for use and occupation of land.*—In a suit for arrears of rent, the plaintiff alleged that the defendant has been in possession and enjoyment of her share since 1307 *Fasli*, and had been paying rent, at the rate of Rs. 167 a year, to the plaintiff and that the sum claimed was due from him at that rate for the years in suit. The defendant denied that he had been in possession of the share. From the record it appeared that the plaintiff further stated that she agreed to give the defendant a lease of the land for seven years at the rate of Rs. 167 a year, and that the defendant executed an unregistered *kabuliat* to that effect but no lease was written or registered. *Held*, that a *kabuliat* is not a lease or the equivalent of a lease, although, for the purposes of the Stamp Act, a lease includes a *kabuliat*, and that, having regard to the provisions of ss 105 and 107 of the Transfer of Property Act, an agreement to execute a lease of immoveable property, for any term exceeding

Transfer of Property Act (IV of 1882) —*continued.*

one year, was inadmissible in evidence and that its terms could not be proved by oral evidence under s. 91 of the Evidence Act. *Held*, further, that the plaintiff was at liberty to prove that she gave, and the defendant accepted a lease of the property in suit for one year at a certain rent and that the defendant obtained possession in accordance with the agreement. If this was proved and also that the defendant held over after the expiry of the first year, he was liable to pay rent, at the same rate, for the period he remained in possession. Even if this was not proved, plaintiff was entitled to a decree for the amount claimed as compensation for use and occupation of the land by the defendant. MUSSAMMAT RAJ KUAR v. NABI BAKHSH, **9 O.C. 296.** (5 O.C. 222, 7 O.C. 166, 9 M. 142, 9 C. 908, *R.*) [*R.*, 9 O.C. 362, 12 O.C. 140.]

(1217)—*Ss.* 105, 107—*Lessee, suit by, to recover rent from tenant—Lease, execution of*—Kabuliat—*Transfer of Property Act—Stamp Act—Registration Act* (III *of* 1877), *s.* 3.—The plaintiff obtained a lease of a village from the lessor whose tenant the defendant was. In a suit for recovery of rent, the defendant admitted in his statement that the plaintiff was lessee of the village but subsequently contended that no lease was executed by the lessor in favour of the plaintiff who had merely executed, a *kabuliyat* which was registered. *Held, per Scott, J.C.*, that the defendant could not be allowed to deny that the plaintiff was lessee of the village. *Held, per Wells, A.J.C.*, that under the Stamp Act and s. 3 of the Registration Act, "lease" includes *kabuliyat*, and that it need not be executed by the lessor under the Transfer of Property Act. BHOPAL v. CHHATAR SINGH, **8 O.C. 197.**

(1218)—Ss. 105, 107—Lease from month to month—Oral lease—Registration—*See* HINDU LAW—JOINT FAMILY. 7 M.L.T. 116=5 Ind. Cas. 826.

(1219)—Ss. 105, 107—Kabuliat—Not lease—*See* KABULIAT—GENERAL, 2 Ind. Cas. 994 =10 C.L.J. 555=14 C.W.N. 73.

(1220)—Ss. 105, 107—*See* LEASE—GENERAL, 20 M.L.J. 298=6 Ind. Cas. 201=8 M.L.T. 69.

(1221)—Ss. 105, 108, 111—*See* LANDLORD AND TENANT—FORFEITURE, 24 C. 440=1 C. W.N. 321.

(1222)—*S.* 106—*Ejectment suit—Notice to quit—Denial of landlord's title—Purchase by mortgagee in Court-sale—Attornment and payment of rent by lessee to lessor's assignee whether amounts to denial of the title of the purchaser in Court-sale.*—Payment of rent by a lessee to the lessor's assignee, who took the property on usufructuary mortgagee from the lessor, and attornment to him do not amount to the denial of the title of a purchaser of the property at Court-sale held after the date of the said assignment, so as to dispense with the necessity of giving notice to quit, prior to an action in ejectment by the said purchaser to the lessee. MANIYAM PATTER v. LAKSHMANA NATTAMA KARAN, **15 Ind. Cas. 52.**

Transfer of Property Act (IV of 1882) —*continued.*

(1223)—*S.* 106—*Lessee for a fixed term—Notice to quit delivered at a shop where defendant did not reside—Validity of notice to quit—Lessee holding over—Notice, whether necessary.*—A notice to quit, sent by post and delivered by the postal-peon to a person other than the defendant at the shop from which the defendant was sought to be ejected, but where the defendant did not reside, is not a good notice within the meaning of s. 106 of the Transfer of Property Act. If a lessee for a fixed term of years remains in possession of a house after the expiration of the term of the lease in defiance of the authority of the lessor, he is not entitled to a notice to quit under s. 106 of the Transfer of Property Act. GOKUL CHAND v. SHIB CHARAN, **13 Ind. Cas. 59=9 A.L.J. 574.**

(1224)—*S.* 106—*Notice terminating lease other than agricultural or manufacturing—Fifteen days' notice expiring with end of tenancy.*—Under s. 106 of the Act, in the absence of a contract or local law or usage to the contrary, a lease of immoveable property other than agricultural or manufacturing, is terminable with fifteen days' notice terminable with the end of a month of tenancy. A month of tenancy means a period of one month reckoned with reference to the commencement of the lease. UPASIA KOSHTI v. JAGO KOSHTI, **7 C.P.L.R. 150.**

(1225)—*S.* 106—*Service of notice through post by registered letter, whether sufficient—Fifteen days' notice.*—Service of notice by a registered letter through the post office is not necessarily bad, and is not necessarily a non-compliance with the provisions of cl. 2, s. 106, provided it is proved that the post-peon tendered or delivered the notice either personally to the party, or to one of his family, or to his servant. (4 C.W.N. 572, *F.*) The fifteen days' notice referred to in s. 106 means 15 clear days. SUBADINI v. DURGA CHARAN LAL, **28 C. 118=4 C.W.N. 790.**

(1226)—*S.* 106—*Presumption as to monthly tenancies—Notice to quit when to be given.*—In this country, the practice of letting on monthly tenancies is so widespread as to warrant the Legislature in raising a presumption in favour of monthly tenancies. When the tenant's entry takes place in the middle of a calendar month, and rent is payable from the date of entry, but the parties agree that the rent should be payable at the end of the calendar month, the reasonable inference is that they intended that the monthly tenancy should coincide with the calendar month. In such cases, the 15 days' notice to quit must be so given as to expire with the end of the calendar month (7 A. 899, *R.*) and not with reference to the date of the entry or the lease, unless the intention of the parties appears to be countary

Transfer of Property Act (IV of 1882) —*continued.*

Obiter :—Where the interest of the lessor determines altogether, and the title passes to the remainderman, and the lessee goes on holding under the remainderman, although in law a new tenancy is created, yet in giving notice to quit, the commencement of the former tenancy must be looked to. ARUNACHELLA CHETTIAR v. RAMIAH NAIDU, **16 M.L.J. 533=30 M. 109.** (9 C. 181, *R.*)

(1227)—*S.* 106—*Landlord and tenant—Notice to quit—Notice "expiry with the end of a month of the tenancy."*—The plaintiffs as owners of a house served notice of ejectment on the defendants, their tenants. The notice was served on the 2nd of January, and it directed the defendants to vacate the house on the 6th of February. *Held* that this was not a good notice within the meaning of s. 106 of Act No. IV of 1882, not being a notice "expiring with the end of a month of the tenancy." SAHTAWAN v. MOHAN SINGH, **A.W.N. 1896, 51.** (7 A. 899, *F.*)

(1228)—*S.* 106—*Lease—Notice—Service by post—Post-peon tendering notice—Non-acceptance by lessee, effect of—Descent of lease-hold property for one generation—Possession at uniform rate—Election of masonry buildings—Persumption of permanency—Contention as regards admissibility of document—Rejected by first Court—No objection in appeal—Objection cannot be raised in second appeal.*—A notice, under s. 106 of the Transfer of Property Act, may be delivered at his residence to a member of the family of the person intended to be bound by it or to his servants. Certain notices under s. 106 were sent by post; and the post-peon went to the family dwelling house of the tenants with notices for all the tenants; several of the latter were present, they saw the covers but refused to accept them. *Held*, that the requirements of s. 106 had been fulfilled. The fact that lease-hold property has descended for one generation does not, as a matter of law, give rise to the presumption that the lessees have a permanent interest. Where evidence is excluded by an original Court and such exclusion is not objected to in the first appellate Court, such objection cannot be raised in second appeal. The fact that masonry buildings, costing a few hundred rupees, have been erected upon lease-hold property by sub-lessees of the lessee, would not give the lessees a permanent right to the property. MOHIM CHANDRA v. RUP MANJARI DASI, **16 Ind. Cas. 213.** (13 Ind. Cas. 606= 15 C.L.J. 220=16 C.W.N. 567, *D.*)

(1229)—*S.* 106—*Transfer of Property Act* (VI *of* 1904)—*Lease from month to month not valid unless registered—Pleadings—Suit for rent only—Amendment of plaint—Civ. Pro. Code* (1908), *O.* VI, *r.* 17.—Since the passing of the Act VI of 1904, a lease of immoveable property from month to month is not a valid document if it is not duly registered. In order that a plaintiff may get a decree for use and occupation on his failure to get a decree for rent, the claim must be specifically laid for rent and, in the alternative, for use and occupation. Where the claim is for rent only, no damages will be decreed for use and occupation. *Obiter dictum*—An amendment of a plaint will not be allowed so as to convert a suit for rent into a suit for damages for use and occupation. LEARY v. MAUNG ON GAING, **11 Ind. Cas. 863.**

(1230)—*S.* 106—*Landlord and tenant—Lease—Stipulation for surrender on demand—Notice to quit.*—A condition in a deed of lease, whereby the lessee agrees to surrender the property demised to the lessor *on demand*, is "a contract to the contrary" within the meaning of s. 106 of the Transfer of Property Act, and no notice to quit is necessary. P. K. KELU v. AMMAD KULLY, **8 Ind. Cas. 362.**

(1231 & 1232)—*Ch.* V, *s.* 106—*Lease—Grove—Transferability of.*—Where a plot of land is let for the purpose of planting a grove thereon, the lease is one which comes so nearly within the description of lease in Ch. V of Act IV of 1882 that the incidents thereof may be attached to it, and it is not governed by the provisions of the Tenancy Act. A grove, therefore, as such, is transferable by the holder of it, and the relationship between the contracting parties is not put an end to thereby. ISMAIL KHAN v. MITHU LAL, **9 A.L.J. 483=14 Ind. Cas. 799.**

(1233)—S. 106—*See* BEN. ACT VIII OF 1885, ss. 5, 49, 8 C.W.N. 454.

(1234)—S. 106—*See* BEN. ACT VIII OF 1885, s. 49, cl. (*b*), 28 C. 308.

(1235)—S. 106—*See* FISHERY, 2 O. C. 446.

(1236)—S. 106—*See* LANDLORD AND TENANT—EJECTMENT, 17 A. 45=A.W.N. 1894, 196, 7 A. 899, F.B.=A.W.N. 1885, 288, 2 C.W.N. 383.

(1237)—S. 106—Application of—*See* LANDLORD AND TENANT—HOLDING OVER, 12 O.C. 279=3 Ind. Cas. 873.

(1238)—S. 106—*See* RIGHT OF SUIT—GENERAL, 22 B. 754.

(1239)—S. 106—*See* No. 1215, *supra*.

(1240)—Ss. 106 and 107—Unregistered annual lease—Notice to quit—*See* LANDLORD AND TENANT—EJECTMENT. 11 C.W.N. 1124.

(1241)—Ss. 106, 108—Presumption as to tenancy pnd assignability—*See* BURDEN OF PROOF—LANDLORD AND TENANT, 13 M. 60.

(1242)—*Ss.* 106 *and* 108, *cl.* 8 (*j*)—*Ejectment—Notice to quit—Tenancy—Purchaser.*—Under s. 108, cl. (*j*) of the Transfer of Property Act, a lessee, in the absence of a contract or local usage to the contrary, may transfer absolutely the whole or any part of his interest in the property. A purchaser of the tenancy from the

Transfer of Property Act (IV of 1882) —*continued.*

legatee of a deceased tenant, is not a trespasser, but is a lessee within the meaning of s. 108, cl. (*j*) of the Transfer of Property Act, and is entitled to a notice to quit, as provided in s. 106 of the Act. HABUL *alias* PRIYA NATH CHANGA v. KASHIMANI DEBI, **5 C.L.J 205.**

(1243) -Ss. 106, 108(*o*), 111 (*g*)—*See* CHARIRAMNA HOLDINGS, 14 C.W.N. 372=5 Ind. Cas. 783.

(1244)—*Ss.* 106, 111—*Suit in ejectment—Tenancy determined by efflux of time—Tenancy on sufferance—Assent of landlord necessary to convert it into a tenancy from year to year—Ejectment—Notice to quit.*—Where a tenancy has determined by efflux of time and the tenant or his heirs hold over, the tenancy is only on sufferance unless it is converted into a tenancy from year to year by the landlord's assent. After the efflux of time, the tenant or his heirs may be ejected without any notice to quit being given. NANDIKOLLA GOPALAN v. MANYAM MAHALAKSHMI, **7 Ind. Cas. 8=8 M.L.T. 230.** (31 M. 163, 3 M.L.T. 256, 18 M.L.J 26, *R.*)

(1245)—Ss. 106, 111—*See* LANDLORD AND TENANT— EJECTMENT, 7 A. 596= A.W.N. 1885, 289.

(1246)—*Ss.* 106, 111, *cl.* (*h*)—*Notice of termination of lease of immoveable property—Tenancy, notice of termination of, when to be given.*—The giving of such notice as is required by s. 106 of the Transfer of Property Act for the termination of a lease of immoveable property is a condition precedent to the maintenance of a suit for ejectment of the lessee. HARBANSI v. BHOLAI, **A.W.N. 1890, 175.** (7 A. 899, *F.*)

(1247)—*Ss.* 106, 116—*Lease of land for purposes other than manufacturing or agricultural purposes—Lessee holding over, effect of.*—Where a lease of land, for a purpose other than agricultural or manufacturing purposes is granted for a term of years and the lessee holds the land over after the expiration of the term, such holding over must be deemed to be a lease from month to month terminable on the part of either lessor or lessee by 15 days' notice, expiring with the end of a month of the tenancy. TROILOKYA NATH ROY v. SARAT CHANDRA BANERJEE, **32 C. 123=8 C.W.N. 901.**

(1248)—Ss. 106, 117—*See* LANDLORD AND TENANT—MISCELLANEOUS, 23 M. 318.

(1249)—*S.* 107—*S.* 2, *cl.* 5, *General Clauses Act* (1868)—"*Hat,*" *immoveable property—Lease of Hat—S.* 53, *Civ. Pro. Code,* 1882—*Suit for rent not allowed to be amended into one for use and occupation in second appeal.*—A *hat* is a benefit arising out of land, and, therefore, within the definition of immoveable property as given in s. 2, cl. 5 of the General Clauses Act (1868). [*R.*, 13 C.W.N. 596=36 C. 665.] The lease of a "*hat,*" consequently, comes within s. 107 of the Transfer of Property Act,

Transfer of Property Act (IV of 1882) —*continued.*

and can be effected only by a registered instrument. A suit for rent ought not, in second appeal, to be allowed to be amended into one for use and occupation, because such amendment would raise issues of an entirely different character from which the trial as a suit for rent has been held and necessitate a new trial of the case by the lower Court on fresh evidence. SURENDRA NARAIN SINGH v. BHAI LAL THAKUR, **22 C. 752.** (13 B.L.R. 243, 11 M.I.A. 20, Marshall 70, *R.*) [*F.*, 27 C. 239; *R*, 2 P.R. 1905=129 P.L R. 1904, 10 C.L.J. 538; *D.*, 12 O.C. 183.]

(1250)—*S.* 107—*Qabuliat, whether lease of immoveable property.*—*Per Blair* (*Banerji, J., doubting*).—A *qabuliat,* though registered, is not a lease of immoveable property by a registered instrument within the meaning of s. 107, Transfer of Property Act, although there is something in the nature of recital purporting to transfer property, which may have been assented by the landlord. NAND LAL v. HANUMAN DAS, **26 A. 368=1 A.L.J. 96= A.W.N. 1904, 46.** [*F.*, 27 A. 136=1 A.L.J. 516, 10 C.L.J. 555=2 Ind. Cas. 994=14 C.W.N. 73; *R.*, 6 A L.J. 437=31 A. 368, 30 M. 322=2 M.L.T. 270=17 M.L.J. 395, 20 M.L.J. 298.]

(1251)—*S.* 107—*Lease of houses—Oral agreement not accompanied by possession—Amendment of plaint—Inconsistent claim—Rent—Damages for breach of agreement to take on lease—Material irregularity.*—A lease of a house by oral agreement is not valid unless the oral agreement is accompanied by delivery of possession. A mere agreement is not sufficient to establish the relation of landlord and tenant. A claim for rent is quite inconsistent with a claim for damages for breach of the agreement to take on lease, and a plaint cannot be allowed to be amended so as to convert a claim for rent into one for damages. A Court, which overlooks the provisions of a Legislative enactment, commits a material irregularity. KARAM CHAND v. HURDIAL, **11 Ind. Cas. 849.**

(1252)—*S.* 107—*Transfer of Property Act* (VI *of* 1904)—*Lease from month to month not valid unless registered—Pleadings—Suit for rent only—Amendment of plaint—Civ. Pro. Code* (*Act* V *of* 1908), *O.* VI, *r.* 17.—Since the passing of the Act VI of 1904, a lease of immoveable property from month to month is not a valid document if it is not duly registered. In order that a plaintiff may get a decree for use and occupation on his failure to get a decree for rent, the claim must be specifically laid for rent and, in the alternative, for use and occupation. Where the claim is for rent only, no damages will be decreed for use and occupation. *Obiter dictum.*—An amendment of a plaint will not be allowed so as to convert a suit for rent into a suit for damages for use and occupation. LEARY v. MAUNG ON GAING, **11 Ind. Cas. 863.**

Transfer of Property Act (IV of 1882) —continued.

(1253)—*S.* 107—*Registration Act*, III *of* 1877, *ss.* 3 *and* 17 (*b*)—*Immoveable property —Right to gather* lac.—A *Kararnama* by which the right to gather *lac* from the trees in a forest is leased for Rs. 300 for 5 years, is a lease of "immoveable property" which requires registration. A lease "to collect *lac*" from trees transfers an interest in "immoveable property" as defined in s. 3 of Act III of 1877. So, the instrument, if unregistered, cannot be *received* in evidence. PARAMANANDY v. BIRKHU, **5 N.L.R. 21=1 Ind. Cas. 903.** (5 C.P.L.R. 6, 9 C.P.L.R. 53, 20 M. 58, 29 M. 353. 4 N L.R. 104, *D.*; 12 W.R. 366, 13 C. 262, 72 P.R. 1884, 11 C.P.L.R. 87, 13 C.P.L.R. 43, 1 N.L.R. 47, *R.*)

(1254)—*S.* 107—*Lease in writing registered —Signature of lessor—Whether necessary to validate lease — Signature by lessee only—Whether lessee can repudiate liability.*—The registered instrument referred to in s. 107, Transfer of Property Act, need not necessarily be signed by the lessor. If such instrument is signed by the lessee only, he is not precluded from denying his liability thereunder. (30 M. 322=2 M.L.T. 270=17 M.L.J. 395, 32 M. 532=6 M.L.T. 175=4 Ind. Cas. 1039, *Overruled*; 26 A. 368, A.W.N. 1904, 46, 27 A. 136=A.W.N. 1904, 189=1 A.L.J. 516, 27 A. 190=A.W.N. 1904, 212, 14 C.W.N. 13=10 C.L.J. 555=2 Ind. Cas. 994, *Diss.*) If a registered instrument signed by the lessee and accepted by the lessor is not a lease, the mere fact that the instrument is signed by the lessee does not preclude him from denying his liability thereunder. (*Per White, C.J., and Ayling, J.*) If no lease is created by the instrument because the lessor's signature is wanting and it is signed only by the lessee, the question of the lessee's liability depends upon the existence of consideration for his undertaking to pay. If the lease is the consideration, it fails because no valid instrument has been executed by the owner of the property. If the lessee had obtained possession of the property, he would be liable as for use and occupation, and his covenant to pay would be evidence of the measure of his liability. If no possession had been obtained, the signatory to the instrument is not liable merely because he has covenanted to pay. SYED AJAM SAHIB v. MADURA SREE MEENATCHI SUNDARESWARAR DEVASTANAM, **8 M.L.T. 437, F.B.=8 Ind. Cas. 668.**

(1255)—*S.* 107—*Lease of immoveable property for more than one year inadmissible without registration*—Kabuliyat *not a lease.*—Under s. 107 of the Act, a lease of immoveable property for more than a year could not be created, or proved, by the production of a *Kabuliyat*; such a lease or *patta* must be duly executed and registered, and except by the production of such document, no lease could be proved in a Court of Justice. KASHI GIR v. JOGENDRONATH GHOSE, **27 A. 136=A.W.N. 1904, 189=1 A.L.J. 576.** (26 A. 368, *R.*) [*Appr.*, 14 C.W.N. 73=2 Ind. Cas. 994=10 C.L.J. 555; *R.*, 30 M. 322=17 M.L.J. 395=2 M.L.T. 270, 31 A. 276=6 A.L.J. 167=5 M.L.T. 247; *D.*, 5 Ind. Cas. 350.]

Transfer of Property Act (IV of 1882) —continued.

(1256 & 1257)—*S.* 107—*Lease—Registration—Evidence Act, s.* 91—*Oral evidence—Admissibility—Practice—Parties—Admissions—Estoppel.* —The plaintiff's interest in certain salt pans was leased during her minority by her guardian and her co-sharer who owned the remaining two-thirds share, on a rental of Rs. 500 a year, for a period of three years. At the expiration of the period the plaintiff, having attained majority, let her interest to the same lessees (defendants) for two years more on a rental of Rs. 1,000 a year; the rent-note passed to her was not registered. She sued to recover the rent of the two years at the rate of Rs. 1,000 and also Rs. 653 as rent due on the previous lease. The defendants admitted the plaintiff's ownership and also their tenancy under her and her co-sharer, but disputed the amount of rent: *Held*, (1) that the plaintiff could not be allowed to rely on the lease set up by her because it was not registered; nor could she be allowed to give oral evidence of the lease. (2) That the defendants having admitted the plaintiff's ownership and their tenancy, proof of the relation of landlord and tenant became unnecessary. (3) That the plaintiff could only recover as for use and occupation for the two years of the tenancy admitted; and that she could recover the amount claimed by her, as it was shown on evidence not to be excessive. RAMCHANDRA SHIVJIRAM v. TAMA RAGHO MANGLYA, **14 Bom. L. R. 390=36 B. 500=15 Ind. Cas. 830.**

(1258)—S. 107—*See* DEEDS—CONSTRUCTION OF DEEDS, A.W.N. 1897, 69.

(1259)—S. 107—*See* LANDLORD AND TENANT—RELATIONSHIP OF LANDLORD AND TENANT, 1 C.W.N. 142.

(1260)—S. 107—Lease of right to enter upon certain lands and collect dues—Immoveable property—Benefit to arise out of land—Necessity for registration—*See* REGISTRATION ACT, 1908, *ss.* 2, 17, A.W.N. 1905, 48=2 A.L.J. 208=27 A. 462.

(1261)—S. 107—Registered lease—Document varying its terms—Registration—*See* REGISTRATION ACT, 1908, s. 17, 14 C.L.J. 411, F.B.

(1262)—S. 107—Leases falling within—*See* REGISTRATION ACT, 1908, s. 17-*d*, 21 M. 109.

(1263)—S. 107—*See* RENT, 7 O.C. 169.

(1264)—S. 107—*See* Nos. 77, 78, 79, 1216 to 1220, 1240 to 1243, *supra.*

(1265)—*Ss.* 107, 4—*Registration Act*, 1877, *s.* 3 —*Kabuliyat alone, if constitutes a lease—Acceptance by lessor and registration—Mistake, mutual inclusion in lease of lands not belonging to lessor, by—Remedy—Specific Relief Act, ss.* 26, 28.—

Transfer of Property Act (IV of 1882) —*continued.*

If the lessor and the lessee agree that the lessee is to have a right to enjoy a property on certain terms and that the fact of the transfer of such right is to be embodied in an instrument to be executed by the lessee only and accepted by the lessor, the lease can be effected by such an instrument, provided it is registered as required by s. 107, Transfer of Property Act. A valid lease may, therefore, be created by a kubuliyat only, which is accepted by the lessor and registered according to law. Where a comparatively small portion of the demised land was found to have originally belonged to the lessee and to have been included in the lease by mutual mistake: *Held*, that the whole lease should not be set aside, but that there should be an apportionment of rent for the remaining land. ROIMONI DASSI v. MATHURA MOHON DEY, **16 C.W.N. 606=15 C.L.J. 665=14 Ind. Cas. 540=39 C. 1016.**

(1266)—*Ss.* 107 *and* 105—*Lease—Signature of the lessor—Necessity for.*—The written instrument by which a lease of immoveable property is made is to be signed by the lessor, although no special mention is made of the lessor's signature in the section. For a lease according to s. 105 of the Act is a kind of transfer; and a transfer can only be made by the person in whom the property to be transferred is vested, *i.e.*, the lessor. TURAF SAHIB v. ESUF SAHIB, **2 M.L.T. 270=17 M.L.J. 395=30 M. 322** (19 M. 52, 25 M. 55, *D.*; 26 A. 368, 27 A. 136, 27 A. 190, *F.*) [*F.*, 2 Ind Cas. 994=10 C.L.J. 555=14 C.W.N. 73, 5 M.L.T. 222, 32 M. 532=6 M. L.T. 175; *R.*, 6 A.L.J. 167=31 A. 276=5 M.L. T. 347; *D.*, 18 M.L.J. 44 N, 7 M.L.T. 116.]

(1267)—Ss. 107, 108—*See* NOTICE TO QUIT, 5 C.W.N. 801.

(1268)—*Ss.* 107, 110, 116—*Lease—Tenancy, agreement of—Presumption—Holding over—'Agreement to the contrary'—Agreement to hold over from year to year—Acceptance of rent for one quarter, effect of.*—Where there is no proof of any contract between the parties, the presumption of law that the possession of one is held under an agreement of tenancy from the other, is not applicable. (1818) 1 Sw. 172 (181), (1829) 11 Q.B.D. 123 (131), (1883) 8 App. Cas. 469, (429), *D.*) Where a person in possession of land executed an unregistered document containing an agreement for a lease for fifteen years, and continued in occupation upon payment of rent: *Held*, that there was no valid lease for a term of fifteen years; that the lease was not from year to year, nor reserving a yearly rent. An agreement to the contrary in s. 110 of the Transfer of Property Act means an agreement as to the terms of the holding over. The agreement need not be express; it may be an implied agreement (32 C. 123, *F.*) An agreement that a tenant should hold over from year to year is in essence an agreement to grant a lease from year to year and should be by a registered instrument. An acceptance of rent for a quarter does not imply a promise by the landlord to the tenant that the latter would be allowed to stay for the whole year. MATI LAL v. DARJEELING MUNICIPALITY, **17 C.L.J. 167.**

(1269)—*Ss.* 107, 117—"*Lease*" *for agricultural purposes—Reclamation lease granted for removal of jungle—Necessity for registration—Tenure for agricultural purposes—Whether interest heritable.*—A reclamation lease granted expressly for the purpose that the jungle and wild trees might be removed and the land brought under cultivation, is a lease for agricultural purposes within the meaning of s. 117 of the Transfer of Property Act. It is immaterial whether the grantee did the work himself, by his servants and hired labourers, or by under-tenants whom he settled on the land. Consequently, such a tenancy can be created without a registered instrument notwithstanding the provisions of s. 107. As the grantee becomes a tenure-holder for agricultural purposes, the interest is heritable and does not lapse upon his death. JAGDISH CHANDRA v. LAL MOHAN, **7 Ind. Cas. 864.**

(1270)—Ss. 107, 117—*See* REGISTRATION ACT, 1908, s. 17, cl. (*d*), 24 M. 421.

(1271)—Ss. 107 and 130—*See* LEASE—MISCELLANEOUS. 10 Bom. L.R. 1146=33 B. 610.

(1272)—*S.* 108—*Landlord and tenant—Liability of lessor and lessee.*—In the absence of an express covenant in the lease as to how far a lessor is bound to make structural repairs during the continuance of the lease or on its renewal when such option is given; the lessor is not bound to make such repairs. Although the lessee is bound to yield up the premises in good repair after the expiry of the lease, except in cases of damage done by act of God or inevitable accident, a corresponding liability is not imposed on the lessor. No such obligation is imposed by the Transfer of Property Act, nor does any principle of equity require such a result. If, by any act of God or inevitable accident, any material portion of the property became unfit for the purpose for which it was let, the lessee had the option to avoid the lease but no right to claim damages against the lessor. CHARLES STUART v. PATRICK PLAYFAIR, **2 C.W.N. 34.**

(1273)—*S.* 108—*Landlord and tenant—Lease for a period—Sub-letting by the lessee—Destruction of premises by fire—The premises remaining in the sub lessee's occupation—Vacant possession not delivered to the landlord—Sub lessee's liability to pay rent till vacant possession delivered to the landlord.*—The plaintiffs rented a godown for a period of one year from the 1st April 1908 at a monthly rental of Rs. 1,100; and re-let it on the same terms to defendant from the 1st May, 1908. The latter used it for storage of sugar bags. A fire broke out in the premises on the 5th December 1908, when a portion of the building and sugar were destroyed. The plaintiffs wrote to the landlord on the 10th

Transfer of Property Act (IV of 1882) —*continued.*

December, 1908, advising payment of rent for November and saying that the lease terminated as the godown has been burnt down. The landlord replied that the plaintiffs would continue liable to pay the rent until the godown was cleared and its vacant possession was given to him. The godown remained in the possession of the defendant's insurers, who used it as a storage of salvage, which was not cleared till the 16th February, 1909, and who were consequently not able to give its vacant possession till then. On further correspondence between the plaintiffs and the landlord, the latter insisted upon his right to levy rent till the 16th February 1909. The plaintiffs thereupon sued the defendant to recover the rent for the first five days of December 1908 and rent for use and occupation of the godown from the 6th December 1908 to the 15th February 1909 at the rate of Rs. 1,100 per month. *Held*, (1) that the plaintiffs could not exercise their option to terminate their lease until they put the landlord in possession of the godown since, if the avoidance of the lease under s. 108 (*e*) of the Transfer of Property Act, 1882, was effectual without surrender of vacant possession, the plaintiffs, by failing to give vacant possession, were holding over after the termination of their lease and were liable for rent under an implied monthly tenancy on the same terms as before; and if the avoidance was ineffectual, the lease continued until put an end to by mutual consent. (2) That the defendant continued liable to pay rent to the plaintiffs as long as it was in his occupation on account of his salvage, inasmuch as the abandonment to the insurers by the defendant was effected for his benefit, and in the absence of evidence that the insurers kept the sugar in the godown in spite of protests of the defendant, the latter must as between him and the plaintiffs, be taken to have been in occupation either under his original tenancy or under a similar one resulting from his holding over. (3) That the respective tenancies of the plaintiffs and the defendant terminated upon the landlord entering into possession on the 16th February 1909 by the consent of all parties interested. (4) That, therefore, the defendant was liable to pay to the plaintiffs the amount claimed. SIDICK HAJI HOOSEIN v. BRUEL & CO., **12 Bom. L.R. 1055=8 Ind. Cas. 1049.**

(1274)—S. 108—*Lessor and lessee—Duty of lessor to put lessee in possession on request—Agricultural lease—Land in possession of third person—Duty of lessor to remove the third person.*—S. 108 imposes an obligation on the lessor to put the lessee in possession, on a request being made to him to that effect, and the principle of law is applicable to leases of agricultural land as well. But if the land is already in possession of a third person to the knowledge both of the lessor and the lessee, it would be the duty of the lessor to make it possible for the lessee to take possession by removing the third person from the possession thereof, even though no express request for the purpose is made by the lessee. NARAYANASAMI NAIDU GARU v. VEERAMILLI RAMAKRISHNAYYA, **7 M.L.T. 119=5 Ind. Cas. 479.** (25 M. 587, 9 W.R. 582, *F.*)

Transfer of Property Act (IV of 1882) —*continued.*

(1275)—S. 108—*Landlord and tenant--Liability for repairs—Construction of lease.*—The lease of a house contained a clause imposing upon the lessee the liability to keep the premises in a good and substantial repair. It contained no express covenant whereby the landlord bound himself to make any repairs or to keep the house fit for habitation. *Held*, that the lessor was not liable to make good damage caused to the demised premises by earthquake, hurricane or the like. The lessor in a letter to the lessee stated :—" When a house is rented on a repairing lease, the lessee is the person that any mishap to the building is at the risk of the lessee (*sic*) except damage done from an earthquake and the like," *held*, that this was no admission that the lessor of his liability to execute repairs made necessary by hurricane, earthquake, and the like ; at most it might indicate that the parties understood that the repairing clause of the lease did not impose upon the tenant a liability to execute structural repairs rendered necessary by any extraordinary cause, such as an earthquake and the like. BOLTON v. DONALD, **A.W.N. 1906, 56=3 A.L.J. 134.**

(1276)—S. 108—*Lease—Assignment—Apportionment of rent—Right of assignee from lessee to claim, against lessor.*—S. 108, Transfer of Property Act, does not enact any rule regarding the liability of the assignee, but, as the assignee becomes lessee from the date of the assignment, according to the section, he must be held liable for rent accruing after the assignment. An assignee is liable for all breaches of express covenants running with the land accruing after the date of assignment. A covenant to pay rent is one running with the land. The assignee is liable for rent, even though he may not have taken possession, for possession is not the ground of his liability, but privity of estate which is created by the assignment itself. The liability to pay rent is one that can be apportioned, and the assignee can claim apportionment of rent and hold himself liable only for the apportioned rent that became due from the date of assignment in his favour. RANDUPURAZIL KUNHI SOW v. ALUKANDIYAL PARKUM MULLOLI CHATHU, **12 M.L.T. 605=23 M.L.J. 695.** (4 Ex D. 94, 70 L. T. 381. 62 L.J. Q.B. 628, 632. 17 Ch. D. 161, (1895) 1 Q.B. 844, (1902) 2 Qr. R. 660, *R.*)

(1277)—S. 108—*See* CIV. PRO. CODE, 1908, O. XXI, r. 89, 6 C.W.N. 336.

(1278)—S. 108—Notice to quit, addressed to tenant as trespasser, if legal—*See* EJECTMENT, SUIT FOR, 7 C.L.J. 107.

(1279)—S. 108 — Act X of 1870 (Land Acquisition Act). Buildings erected by tenants —Rights of landlord and tenant—Tenant's

Transfer of Property Act (IV of 1882) —*continued.*

right to compensation—*See* LANDLORD AND TENANT — COMPENSATION FOR IMPROVEMENTS, 22 C. 820.

(1280)—S.108—*See* LANDLORD AND TENANT —NATURE OF TENANCY. 1 Bom. L.R. 400.

(1281)—S. 108—*See* LANDLORD AND TENANT—TRANSFER OF TENANT'S INTEREST, 22 C. 494.

(1282)—S. 108—*See* LEASE—GENERAL, 23 B. 15.

(1283)—S. 108—Accession to leased land by alluvion—Right of lessee—*See* LEASE—MISCELLANEOUS, 2 S.L.R. 1.

(1284)—S. 108—*See* LEASE—MISCELLANEOUS, 2 S.L.R. 1.

(1285)—S. 108—*See* REGISTRATION, 8 Ind. Cas. 725.

(1286)—S. 108 (1)—Lessee's right only to remove buildings, and not to any compensation —*See* LEASE—GENERAL, 5 M.L.T. 220=19 M.L.J. 208.

(1287)—S. 108-A—Lease in perpetuity—Mineral rights of landlord—*See* LANDLORD AND TENANT—GENERAL, 14 C.L.J. 361.

(1288)—S. 108 (cl. 6)—*See* LANDLORD AND TENANT—TENANT'S LIABILITY FOR RENT, 9 C.L.J. 595.

(1289)—*S.* 108 (*c*)—*Lessor—Lessee "without interruption"—Implied covenant by the lessor.*—T, a lessee, sued G, her lessor, K 1 the lessor's vendor and K 2 a paramount title-holder who ejected T in execution of her decree, for possession of certain lands held by her under a lease by G. The first Court rejected the claim for possession but held that the proper relief to be given her was compensation for the loss of possession for the years provided by the lease, and compensation from her lessor G was accordingly granted. G appealed to the District Court which held that T could not claim compensation as she was rejected by a paramount title-holder and as no compensation was claimed in the plaint. *Held*, that the words "without interruption" in cl. (*c*) of s. 108 of the Transfer of Property Act implied an unqualified covenant of title on the part of the lessor and the lessor is bound to give compensation to his lessee in case of eviction by a paramount title-holder. TAYAWA v. GIRSHIDAPPA, **2 Bom. L.R. 1070=25 B. 269.**

(1290)—*S.* 108, *cl.* (*c*)—*Tenant's possession and enjoyment of holding—Obstruction by landlord—Liability for rent—Scope and effect of s.* 108, *cl.* (*c*)—*Payment of rent—Whether condition precedent for possession—Rent service—Nature and incidents of.*—S. 108, cl. (*c*) of the Transfer of Property Act, 1882, notwithstanding its conditional form, was not intended to make the right to the benefit of the covenant for quiet enjoyment conditional on the actual payment of rent. Even if the clause is to be read as importing a condition it can only be so read in ases where the lessee claims actually to enforce his right to damages for breach of the covenant for quiet enjoyment. The clause does not purport to confer any right or cast any liability on the lessor or the lessee as a matter of law, but to state that a certain contract shall be taken to have been entered into between the parties. S. 108 does not deal with the defence to an action for rent. It enacts that the lessor is bound on the lessee's request to put him in possession of the property, but does not say that, if he does not do so, the lessee is not bound to pay the rent. But there can be no doubt that the Transfer of Property Act has made no change in the rule that non-delivery of possession is a good answer to a suit for rent. Where a tenant is evicted from his holding he becomes entitled to suspension of rent during the period of eviction. There is constructive eviction where the landlord, without turning the tenants out of possession, commits unlawful and wrongful acts which deprive the tenant of the beneficial enjoyment and use of the property; such wrongful acts amount in law to constructive eviction, and the tenant enjoys immunity, from the payment of rent until the landlord again permits him to have quiet enjoyment. The law is the same under the Transfer of Property Act also. A rent-service is something given by way of retribution to the lessor for the land demised by him to the tenant, and consequently the lessor's title to the rent is founded on this, that the land demised is enjoyed by the tenant during the term included in the contract; for the tenant can make no return for the thing he has not; if therefore the tenant be deprived of the thing, the obligation to pay rent ceases; because such obligation had its force only for the consideration, which was the enjoyment of the thing demised. The rule of English law that, where there has been such material obstruction by the landlord of the tenant's enjoyment as would be regarded as tantamount to eviction, the landlord should not be entitled to recover any portion of the rent, is not applicable to India. It is difficult to hold on principle that a landlord is not entitled to any portion of the rent if the tenant remains in possession of a portion of the land let. He must be held entitled to it on the contract of lease, since the tenant prefers not to throw up the lease during the period of eviction, or as compensation for use and occupation. It is reasonable to hold that the tenant where he retains possession of a portion of the land, must be estopped from pleading that he is not liable for the rent of that portion. Strictly speaking, where the tenant has once been let into occupation of the premises leased to him, his right in law, where he is deprived of possession of a part thereof, is only to damages, while he is liable to pay the rent; and it is only a rule of convenience that he should be allowed to enforce his right to damages by setting them off in the landlord's action for rent. MEENAKSHI SUNDRA NACHIYAR v. CHIDAMBARAM CHETTY, **12 M L.T. 124=23 M L.J 119=M.W.N. 1912, 813=15 Ind. Cas. 711.**

Transfer of Property Act (IV of 1882) —*continued.*

(1291)—S. 108, cl. (c)—*See* LANDLORD AND TENANT—MISCELLANEOUS, 7 O.C. 351.

(1292)—*S.*108 (*e*)—*Lessor and lessee—Subject of lease damaged by earthquake—Liability of tenant for rent—Permanently and substantially unfit for occupation.*—The lessee of a house can avoid the lease, if the house be rendered substantially and permanently unfit for the purpose for which it was let by reason of the earthquake. A house, which was let out to the defendant, was damaged by earthquake. The Engineer, who examined the house, certified that the house was not in imminent danger but that it required immediate repairs in some portions. *Held*, that the building had not been rendered by the earthquake substantially and permanently unfit for occupation. J. O. BRIEN DONAGHEY v. GEORGE WEATHERDON, **7 Ind. Cas. 201.**

(1293)—*S.* 108, *cl.* (*e*)—*Lease, expiry of, on the premises demised being destroyed by fire.*—A tenant has no right to retain possession of the premises till such time as it suits him, and then make the destruction of premises by fire or other causes the ground for putting an end to the lease so far as the remainder of the term is concerned. Both under the provisions of the Transfer of Property Act and under the common law governing the relations between landlord and tenant, on the determination of a lease, it is the duty of the tenant to put his landlord in vacant possession of the premises let to him. So far as this obligation imposed by law on the tenant is concerned, it does not matter whether the lease came to a termination by an efflux of time or by operation of law on the happening of events contemplated in cl. (*c*) of s. 108 of the Transfer of Property Act. The true construction to be placed on cl. (*e*) of s. 108 of the Act is, that, on the demised premises being destroyed or rendered substantially and permanently unfit for the purposes for which they were let, the lessee would have an option by notice to terminate the lease, and that, on such notice being given, the lease should be deemed to have come to an end. On the occurrence of the fire and the destruction of premises let to a tenant, the contract of letting becomes voidable at the option of the tenant, and on that option being exercised it becomes void. The lease does not become void *ab initio*. BRUEL & CO. v. HAJI SIDICK HAJI IBRAHIM **12 Bom. L.R. 474.**

(1294)—S. 108 (*e*)—*See* LANDLORD AND TENANT—TENANT'S LIABILITY FOR RENT, **1 Bom.L.R. 739.**

(1295)—S. 108 (*f*)—Tenant's right to deduct expenses of repairs—Set-off—*See* LANDLORD AND TENANT—PAYMENT OF RENT BY TENANT, 6 Ind. Cas. 131=12 C.L.J. 351.

(1296)—*S.* 108 (*h*)—*Superstructure erected by tenant—Expiry of lease—Right to remove superstructure or to get compensation—Equity, rule of—Estoppel against owner—Perpetual occupation, creation of, by—Essentials.*—*Per Chief Justice.*—A claim to remove fixtures after the expiration of the lease may be founded on contract or local usage. But s. 108 (*h*), Transfer of Property Act, does not recognise it or the alternative right of compensation. (B.L.R. Sup. 593, 27 M. 211, *R.*) In order to raise an equitable estoppel against the owner, it is incumbent upon the tenants to show that the conduct of the owner, whether consisting in abstinence from interfering or in active intervention, was sufficient to justify the legal inference that they had by plain implication contracted that the right of tenancy under which the lessees originally obtained possession of the land should be changed into a perpetual right of occupation.—*Per Sankaran Nair, J.* (*dissenting*) :—S. 108 (*h*) only enables tenant to remove his building during the term of the tenancy. But it does not thereby impliedly negative the right to receive any compensation or to remove the same afterwards, if such a right existed prior to its enactment. (27 M. 211, 21 A 496, 6 M. H. C. 245, 22 M 116, 27 M. 517, 5 C. 688, 8 C. 582, 27 C. 570, 6 B.H C. A.C.J. 80, 20 B. 1, 24 M. 47, 10 M. 112, *R.*) Where a building is constructed with the consent of the owner, an agreement to pay compensation ought to be implied. (27 M. 211. 21 A. 496, 6 M.H.C. 245, 22 M. 116, 27 M. 517, 5 C. 688, 8 C. 582, 27 C. 570, 6 B.H.C.A.C.J. 80, 20 B. 1, 24 M. 47, 10 M. 112, *R.*) The fact that a rule of equity will work injustice in scarcely any case and that in majority of cases it will prevent hardship, is the foundation of the English Equity Jurisprudence. ANGAMMAL v. MALIC MUHAMMAD SAEED ASLAMI SAHIB, **10 M.L.T. 193.**

(1297)—*S.* 108 (*j*), *whether retrospective.*—S. 108, cl. (*j*) of the Transfer of Property Act, is not retrospective, and does not apply to transfers which took place before the Act. HARI NATH KARMAKAR v. RAJ CHANDRA KARMAKAR, **2 C.W.N. 122.** (7 B.L.R. 152, *F.*) [*F.*, 7 C.L.J. 553=12 C.W.N. 72.]

(1298)—*Notice—S.* 108 (*j*)—*Limitation Act* (XV *of* 1877), *sch.* II, *arts.* 110 *and* 116—*Royalty, suit for.*—Where it was stipulated that a certain notice was to be given two months before the 30th of Chaitra. *Held*, that a notice dated 1st Falgoon (=13th February) was not a valid notice when the 30th Chaitra fell on 12th April, as it was not a full two months' notice but fell short of it by one day. In view of the provisions of cl (*i*) of s. 108 of the Transfer of Property Act, all lessees including lessees holding under permanent leases are liable for rent even after they have transferred their rights. A suit for recovery of royalty upon a registered document is governed by art. 116 and not art. 110 of sch II of the Limitation Act. BHOLANATH DAS v RAJA DURGA PROSAD SINGH, **12 C.W.N. 724.** (19 C. 489, *F.*)

(1299)—*S.* 108 (*j*)—*Lease—Liability of assignee for rent after transfer by him of his purchased interest—Privity of estate, ground of*

Transfer of Property Act (IV of 1882) —*continued.*

liability.—The liability of an assignee of lease-hold interest to the lessor being founded wholly upon privity of estate, ceases upon transfer of such interest by the assignee to another. R. D. MEHTA v. GADADHAR RAI, **14 C.W.N. 831 = 12 C.L.J. 256 = 37 C. 683 = 7 Ind. Cas. 198.**

(1300)—S. 108, cl. (*j*)—*See* LANDLORD AND TENANT—TRANSFER OF TENANT'S INTEREST, 17 M. 296.

(1301)—S. 108, cl. (*i*)—Scope of the Act—Whether it deals with cases of succession—*See* LEASE—GENERAL, 5 Ind. Cas. 500 = 11 C.L.J. 401 = 37 C. 377.

(1302)—*S.* 108, *cl.* (*m*)—*Lease—Covenant by the lessee—Damage caused by earthquake.*—Where a lessee covenanted to "keep the premises wind and watertight and in habitable condition," and the premises were subsequently damaged by an earthquake, *held* :— (*a*) that the lessee's covenant was absolute, and that he was bound by it even though the damage was caused by an irresistible force, (*b*) that the covenant was "a contract to the contrary" within the meaning of s. 108, and so cl. (*m*) of that section had no application to the case, (*c*) that the lessee was not bound to execute all and every repair rendered necessary by the earthquake, but was bound only to make good the damage caused to the premises by the earthquake to the extent of making them wind and watertight and putting them in habitable condition. J. H. HECHLE v. S. J. TELLERY, **4 C W.N. 521.**

(1303)—S. 108—*See* Nos. 51, 235, 236, 433, 434, 1221, 1267, *supra*.

(1304)—Ss. 108, 114—*See* LEASE—CONSTRUCTION OF LEASE, 5 C.L.J. 203 = 11 C.W.N. 587 = 34 C. 358.

(1305)—*Ss.* 108, 117—*Lease of coffee garden—Agricultural lease.*—A lease of a coffee garden is not an agricultural lease within the meaning of s. 117, Transfer of Property Act, KUNHAYEN HAJI v. MAYAN, **17 M. 98 = 4 M.L.J. 21.** [*Not F.*, 24 M. 421 ; *R.*, 25 M. 627.]

(1306)—Ss. 108, cl. (*a*) and 117—The clause has no application to agricultural leases as laid down in s. 117 of the Act—*See* MINING RIGHTS, 3 C.L.J. 59 = 33 C. 54 = 10 C.W.N. 425.

(1307)—Ss. 108, (*h*) (*o*), 117—*See* MAD. ACT. I OF 1887, ss. 2, 3, 4, 6, 24 M. 47, F.B. = 10 M.L.J. 321.

(1308)—S. 109—*See* Nos. 163, 1268, *supra*.

(1309)—S. 110—*See* Nos. 141, 1268, *supra*.

(1310—Ss. 110 and 111, cl. (*g*)—Forfeiture of tenancy— *See* SERVICE TENURE, 3 C.L.J. 274 = 33 C. 329.

(1311)—*S.* 111—*Landlord and tenant—Claim by tenant to hold adversely against landlord—Determination of tenancy.*—A tenant, who occupied a dwelling house, claimed to hold it adversely against its owner, a Hindu widow. In a suit by the reversionary heir of the widow, the question for determination was whether the tenancy became determined by virtue of the claim of the tenant to hold adversely against the landlord. *Held*, that, in the absence of any evidence to the contrary, the property being a dwelling house, the tenancy was presumed to be one from month to month, and until the tenancy was legally determined in one of the modes specified in s. 111 of the Transfer of Property Act, limitation did not run against the landlord or his representative in interest, though the tenant might have professed to hold the property adversely to the landlord. RAMASWAMI NAICK v. THAYAMMAL, **26 M. 488.** (24 M. 246, 25 M. 507, *F.*)

(1312)—*S.* 111—*Forfeiture—Denial of landlord's title—Pleading.*—Where, after the denial of landlord's title, he received rent from the tenant, he cannot rely upon the denial as a ground of forfeiture. *Semble* :—S. 111 of the Transfer of Property Act deals with the whole lease of the immoveable property comprised therein and not with a part or moiety of it ; a denial of title by one of several joint lessees cannot therefore entail forfeiture. *Held*—That a suit for *khas* possession for denial of landlord's title by one of two joint tenants is not maintainable when the other tenant has not been made a party. When the tenants did not repudiate their lease but rather stuck to it, and only questioned the right of the plaintiffs as transferees from their lessor, the alleged transfer appearing to be of a prior date to the lease. *Held*—That there was no denial of landlord's title to cause a forfeiture of the tenancy. Where the tenants could not obtain possession of the whole area leased to them, and on reference to their lessors got no satisfaction from them, and then took a lease of the portion of which they could not get possession, from a stranger whom they found in possession. *Held*, —that there was no renunciation by the tenants of their character as such so as to entail forfeiture. SRIMATI FARMAN BIBI v. SHEIKH TAŚHA HADDAL HASAIN, **12 C.W.N. 587 = 7 C.L.J. 648.**

(1313)—*S.* 111—*Forfeiture of tenancy—Service tenure—Tenant renouncing character as service tenant—No notice necessary.*—Where the defendants, service tenants, renounced their character as service tenants, by claiming the lands as their occupancy *jote* not only in the present suit, but also in a previous case under s. 9 of the Specific Relief Act, and they denied the title of the plaintiff to resume these lands, *held*, that the lease to the defendants had determined, and no notice was necessary to eject them. SHEIKH ABDUL v. CHABIL JAN BIBI, **2 Ind. Cas. 993.**

(1314)—*S.* 111—*Lease for a term—Lessee's failure to renew lease at end of term—No forfeiture—Lessee's liability to pay rent—Determination of lease by lessor, a condition precedent.*—The failure by tenant to renew a lease for a

Transfer of Property Act (IV of 1882) —*continued.*

term in compliance with the provision for renewal contained therein does not operate as a forfeiture, determining the tenancy *ipso facto* and relieving the tenant from liability to pay rent under the lease. A lease becomes determined by forfeiture only when the lessor does some act showing his intention to determine the lease. BOURAMMIAH v. MALLAMMAL, **4 M. L.T. 315.**

(1315)—S. 111— Joint lessors, putting an end to tenancy—Intention to determine lease —Ejectment—*See* LANDLORD AND TENANT —EJECTMENT, 7 C.L.J. 483=35 C. 807.

(1316)—S. 111—Suit against tenant withdrawn with liberty to bring fresh suit—Effect—*See* LANDLORD AND TENANT—FORFEITURE, **6 Ind. Cas. 264=8 M.L.T. 99.**

(1317)—S. 111—Mortgage and perpetual lease of same property.—*See* MERGER, 7 N.L.R. 154, 36 C. 802=3 Ind. Cas. 994.

(1318)—S. 111—*See* SERVICE-TENURE, **11 Ind. Cas. 695.**

(1319)—*S.* 111 *(g)—Lease—Breach of condition--Re-entry and determination of lease—Mode of—Suit for arrears of rent—Limitation—Right to recover compensation for use and occupation—Cancellation of lease—Restoration thereafter—Whether operates as surrender, implied or express—Forfeiture—Waiver of—Arrangement to share lease between lessee and stranger—Whether requires to be embodied in registered document — Endorsement by landlord approving tenant's assignment— Whether amounts to an interest in immoveable property - Registration Act, s.* 17—*Suit for rent—Limitation Act,* 1877, *sch.* II. *arts.* 110, 115, 116.—This suit was instituted on 29th June 1903 for the recovery of arrears of rent due for faslis 1305 to 1311. In 1894 the first defendant had obtained a lease of certain villages from the Zemindar of Kalahasti for a period of nine years. In October 1897, the lease was cancelled, and the same was notified by means of takids and beat of *tom tom* in the villages, and in December 1897, the cancelled leases were restored. The second defendant was let into possession by an arrangement made in February 1898 between his father and the first defendant and sanctioned by the plaintiff. *Held, per Munro, J.*—That the leases were properly determined. Under s. 111 *(g)*, Transfer of Property Act, 1882, a lease of immoveable property determines by forfeiture, if there is a breach of condition which entitles the lessor to re-enter and if the lessor does some act showing his intention to determine the lease. *Per Munro, J.*—According to the common law of the land which specially prevails in zamindaris and similar estates, the delivery of possession is by the issue of orders or notices to the karnams and the other village officers whose duty it is to collect rents from persons in occupation of the land, and also, though not invariably by a general proclamation addressed

Transfer of Property Act (IV of 1882) —*continued.*

to the royts and others occupying the land giving information of the transfer of possession in question and requiring them to attorn and pay rent to the person giving notice. (25 M.592, *R.*) *Held also (per Munro, J.)*, that, in this case, the plaintiff was entitled, even in the absence of a prayer for such relief in the plaint, to recover compensation for use and occupation, as the defendants were again let into possession, and that the rent fixed in the leases afforded a fair basis for the amount to be decreed, and that the limitation was three years under art. 115, Limitation Act, 1877. (31 A. 276, *F.*; 27 C. 239, 22 C. 752, 13 B.L.R. 243, *D.*) *Held, per Abdur Rahim, J.*—(1) that the arrangement by the first defendant, lessee, to give a half share of the lease to the second defendant's father, a stranger, did not amount to a surrender impliedly or by operation of law, of a moiety of the lease (2) that the contract between the first defendant and the second defendant's father was one of partnership, and was not a transaction which must be embodied in a registered instrument. *Held* that an endorsement, by which the landlord waived his objection to the assignment of a portion of his interest by the tenant in favour of a stranger, cannot be said to create an interest in immoveable property, and need not be registered under the terms of s. 17, Registration Act. (25 M. 7, 27 M. 348, *R.*) If the tenant never acquiesced in the landlord's act determining the tenancy, and the landlord afterwards changes his mind at the request of the tenant himself, one cannot see why he should not be able to waive the forfeiture, so long as the question is one exclusively between him and the tenant. Art. 110 is applicable to suits for rent generally, but art. 116 specially provides for a suit which is based on a contract in writing registered, including a lease. M. CHENGIAH v. UMADAI RAJAH RAJA DAMARA KUMARA THIMMA NAYANIM BAHADUR, **7 M.L.T. 419=6 Ind. Cas. 766.** (26 A. 138, *Not F.*; 3 M. 77, 15 C. 221, *F.*)

(1320)—*S.* 111, *cl. (g)—Forfeiture — Denial of landlord's title—Intention to determine the lease.*—The denial of landlord's title by the tenant, in order to work as forfeiture, under s. 111, cl. *(g)*, Transfer of Property Act, must be an unequivocal and unambiguous denial. *Held*, therefore, that mere non-payment of rent or mortgaging of land stating that the land belongs to the mortgagor is not sufficient to work as a forfeiture of a tenant's interest. The lessor must do some act showing his intention to determine the lease, before he can file a suit for ejectment. The mere filing of the suit by a landlord against a tenant does not amount to doing some act showing the intention of the landlord to determine the lease, within the meaning of s. 111 *(g)* of the Act. PRAG NARAIN v. KADIR BAKSH, **11 A.L.J. 115=35 A. 145.**

(1321)—S. 111 *(g)*—*See* LANDLORD AND TENANT—EJECTMENT, A.W.N. 1889, 176.

Transfer of Property Act (IV of 1882) —*continued.*

(1322)—S. 111 (*g*)—Right of landlord to eject a tenant transferring his dwelling-house and the site thereof in *abadi*—*See* LANDLORD AND TENANT—TRANSFER OF TENANT'S INTEREST, 10 O.C. 31.

(1323)—S. 111 (*h*)—*Lease for definite term—Clause forbidding surrender—Surrender before expiry of term.*—Where a lease is entered into for a definite term, and there is a clause in it expressly forbidding surrender by the tenant, he cannot surrender before the expiry of the term. S. 111 (*h*) of the Act has no application to such a case. It can only apply to leases which can be surrendered. MAHARAJA SIR JOTINDRA MOHUN TAGORE v. EMAM ALI, **9 C.L.J 632=2 Ind. Cas. 633.**

(1324)—S. 111—*See* Nos. 52, 53, 54, 142, 606, 637, 1221, 1243 to 1246, 1310, *supra.*

(1325)—*Ss.* 111, 112, 116—*Lease—Forfeiture condition—Election by landlord to avail himself of forfeiture, whether revocable—Subsequent agreement to revive the tenancy—Lessee again put in possession—Compensation for use and occupation.*—Where, under the terms of a lease, a right of forfeiture accrues to the lessor, he is put to his election, and, if he manifests and communicates to the lessee his intention to enforce the forfeiture, that is an election to determine the tenancy, the election is irrevocable, and the parties cannot, by a subsequent agreement, revive the old tenancy. Similarly, if he elects not to enforce the forfeiture, and manifests and communicates to the lessee his intention accordingly, that is, elects to waive the forfeiture, his election is irrevocable. If lessees are re admitted, after the determination of tenancy, by exercise of the right of forfeiture, the old tenancy is not revived and the lessees are liable to pay compensation for use and occupation. CHENGIAH v. DAMARA KUMARA THIMMA, **15 Ind. Cas. 445=24 M.L.J. 263.**

(1326)—*Ss.* 111, 116--*Lease—Non-payment of rent--Forfeiture—Covenant for re-entry—Meaning of "express condition".*—What is meant by an express condition is, not that the wording of it should be in any particular form, but that the condition can be gathered from the words of the instrument giving to them their ordinary meaning, so that the Court may be certain that such condition was part of the stipulation between the parties and was understood to be so by them. If a clause in a lease is so expressed that it can only be read as reserving the right of forfeiture to the landlord in certain circumstances, that is, sufficiently express within the meaning of the law. Where the lease contains an express provision for re-entry on breach of the conditions of the lease, and the condition as to payment of rent is broken, the non-payment operates as a forfeiture of the lease. If, instead of exercising his right of forfeiture, the landlord allowed the tenant to continue in possession of the premises and treated him as tenant, he must be held to have

Transfer of Property Act (IV of 1882) —*continued.*

waived the forfeiture already incurred. MUSSA KUTTI v. RANGACHARIAR, **8 M.L.T. 238=8 Ind. Cas. 309.**

(1327)—*Ss.* 111, 116—*Retrospectivity—Notice to quit—Law as to notice before Transfer of Property Act—Disclaimer of landlord's title after suit—Notice if unnecessary.*—The provisions of the Transfer of Property Act IV of 1882 should not be given a retrospective effect. S. 2 of the Act expressly provides that nothing contained in the Act shall be deemed to affect any right or liability arising out of a legal relation constituted before the Act came into force. S. 6 of the General Clauses Act (I of 1868) also contains the same reservation. Accordingly, in a suit by a landlord to eject the defendant, his tenant, filed before the coming into operation of the Tr. P. Act, *held* that ss. 111 (*b*) and 116 of the Act did not apply and no notice to quit was necessary. Before the Tr. P Act came into force in Bombay, a tenant other than a monthly tenant, holding over on the terms of his lease, was entitled to a reasonable notice to quit. What is a reasonable notice is always a question of fact dependent on custom and contract, but in the absence of an express stipulation or local usage to the contrary, it has been held that six months' notice is reasonable in the case of lands. (9 C. 48, 6 B. 70, *R.*) Disclaimer of the plaintiff's ownership after the institution of the suit for ejectment, and in the written statement, has not the effect of dispensing with the obligation of giving reasonable notice. For the disclaimer to have such effect, it must have been made before the institution of the suit for ejectment. AMBABAI v. BHAN, **20 B. 759.**

(1328)—*Ss.* 111 *and* 116—*Malabar Tenant's Improvement Act* (I *of* 1900), *ss* 5 *and* 6—*Tenant holding over—No adverse possession until paid—Limitation*—The Transfer of Property Act does not apply to agricultural leases in Malabar. According to the customary or common law of Malabar, a *Kuzhikhanam* lease is a lease of waste land granted for 12 years (or such period as may be stipulated) on condition that the tenant shall make improvements and shall be paid for them before he is ejected. The right to hold possession remains with the tenant until he has been paid the value of his improvements, and till paid there can be no adverse possession. KUMMATHA VITTIL KUNHI KUTHALAI HAJI v. REVEREND ANTONI GOVEAS, **M.W.N. 1913, 389=24 M.L.J 472=13 M.L.T. 350.**

(1329)—*Ss.* 111, 117—*Agricultural leases granted by mortgagee in possession, determination of—Redemption of mortgage, effect of, on leases granted by mortgagee.*—*Held*, that agricultural leases granted to tenants by a mortgagee in possession do not determine as soon as the mortgagee's interest comes to an end by reason of redemption. GOBRE SINGH v. JWALA PRASAD, **14 O.C. 204.**

Transfer of Property Act (IV of 1882) —*continued.*

(1330)—S. 112—*See* Nos. 53, 1325, *supra.*

(1331)—*S.* 114—*Tender of rent—Payment into Court—Effect.*—Where the defendant has made a tender of the amount of rent due to the plaintiff and subsequently paid it into Court, and the plaintiff nevertheless proceeds with his suit in ejectment, he does so at his risk under s. 114 of the Transfer of Property Act. KRISHNASAMI CHETTI v. THE NATAL EMIGRATION BOARD, **17 M. 216=4 M L J. 70.**

(1332)—*S.* 114—*Relief against forfeiture in cases not governed by.*—S. 114, though it does not in terms apply, may be taken as a correct statement of the law even in cases of forfeiture not governed by it. PARAPURATH KALLIANI AMMA v. A. CHINNAN *alias* MAMMAD ROWTHEN, **8 M.L.T. 250=7 Ind. Cas. 565.** (15 M. L.J. 210, *R.*)

(1333)—*S* 114—*Forfeiture, relief against—Grace, reasonableness of—Permanent lease—Covenant to pay rent—Grace allowed—Cancellation for default—No relief against forfeiture.*—Under s. 114 of the Act, the exercise of the discretion to relieve against forfeiture for non-payment of rent will depend upon whether the lease allowed a period of grace and, if so, the reasonableness of such period. Where, in a lease creating a permanent tenancy, a certain time is fixed for the payment of rent in every year with a promise that, if rent is not paid within a further period of three months allowed as a period of grace, the lease shall stand cancelled: *held*, that no relief could be given against forfeiture for non payment of rent. NARAYANA NAICKA v. VASUDEVA BHATTA, **15 M.L J. 208 =28 M 389.** (15 M.L J 210, *R.*) [*F.*, 6 Ind. Cas. 438=20 M.L.J. 914=8 M.L.T. 103.]

(1333-*a*)—S. 114—*See* No. 1301, *supra*

(1334)—*S.* 116—*Consent, effect of, of lessor on position of tenant holding over and on that of tenant's representatives—Death of tenant by sufferance—Position of representatives.*—S. 116 of the Transfer of Property Act which enables the lessor or his representative by his assent to convert a tenant by sufferance into a yearly or monthly tenant does not enable him by his mere assent, to convert the representative of a tenant by sufferance into such a tenant without the latter's own consent. If a tenant by sufferance dies and his representative holds on, he holds as trespasser. VADAPPALLE NARASIMHAM v. DRONAMRAJU SEETHARAMAMURTHY, **18 M.L.J. 26=3 M L.T., 256=31 M. 163.** (8 M. 424, 3 B.H.C. 27, *R.*; 18 B. 256, *D.*, and *Diss* in 22 B. 893, 24 B. 504. *R.*) [*Diss*, 19 M.L J. 732=6 M.L.T. 289; *F.*, 6 A.L.J. 584=31 A. 514=3 Ind. Cas. 566; *Doubted*, 33 M. 260=7 M.L.T. 289=19 M.L.J. 732=4 Ind. Cas. 1080; *R.*, 7 Ind. Cas. 8=8 M.L.T. 230.]

(1335)—S. 116—Position of tenant holding over—Applicability of the Act. *See* C.P. ACT IX OF 1882, s. 94 (11), 6 N.L.R. 95=6 Ind. Cas. 37.

Transfer of Property Act (IV of 1882) —*continued.*

(1336)—S. 116—Co-tenants holding over—Liability of deceased co-tenant's estate for holding over by other tenants—*See* LANDLORD AND TENANT—HOLDING OVER, 9 C.W.N. 340.

(1337)—S. 116—*See* LIMITATION ACT, 1909, art. 139, 1 A.L.J. 201.

(1338)—S. 116—*See* Nos. 606, 1247, 1268, 1325 to 1329, *supra.*

(1339)—*Ss.* 116, 117—*Agricultural tenant holding over.*—When an agricultural tenant holds over, his tenancy is renewed from year to year. ADMINISTRATOR GENERAL OF BENGAL v. ASRAF ALI, **28 C. 227.** (W.R. 1864, p. 42, 16 W.R. 185, 22 W.R. 31, 25 W.R. 234, 24 C. 37, 2 C.W.N 303, 525, *R.*) [*R.*, 31 C. 647=8 C.W.N. 446, 13 C.W.N. 541=10 C.L. J. 110.]

(1340)—S. 117—*See* BOM. ACT V OF 1879, s. 84, 20 B. 354, F.B.

(1341)—S. 117—*See* MINING RIGHTS, 3 C.L.J. 59=33 C. 54=10 C.W.N. 425.

(1342)—S. 117—*See* Nos. 54, 1269, 1270, 1305 to 1307, 1329, 1339, *supra.*

(1343)—*S.* 118—*Exchange—Co-owners*—When some of the co-owners possessing an undivided share in several properties take, by arrangement, a specific property in lieu of their shares in all, the transaction effected is not an exchange within the meaning of s. 118, Tr. P. Act but amounts to a partition. GYANNESSA v. MOBARAKANNESSA, **25 C. 210=2 C. W. N. 91.** [*D.*, 5 C.W.N. 724: *R.*, 10 C.L.J. 503=3 Ind. Cas. 247.]

(1344)—*S.* 118—*Transfer, without writing or registration—Exchange or partition.*—Where plaintiff and defendants were joint owners of a certain property A, and plaintiff alone was owner of another property B, and by an oral agreement plaintiff got the former property A in its entirety and gave to the defendants his share in the other property B. *Held* that the transaction was an exchange, under s. 138 of the Transfer of Property Act and not a partition and was invalid in not being in writing and registered. RAJ NARAIN v. KHOBDARI RAI, **5 C.W N. 724.** (25 C. 210, *D.*)

(1345)—*S.* 118—*Exchange*—Aposhnama *setting off one decree against another—Registration—Admissibility in evidence—Registration Act* III *of* 1877, *ss.* 17 *and* 49.—The plaintiff and the defendant, having obtained decrees against each other, settled their differences by an *aposhnama*, by which the former gave up certain jotes to the latter, the decrees obtained by the plaintiff were set off against the decrees obtained by the defendant, and the parties gave up their claims under their respective decrees. *Held*, that the transaction embodied in the *aposhnama* did not amount to an exchange within the meaning of s. 118 of the Transfer of Property Act, the essence of such a

Transfer of Property Act (IV of 1882) —*continued.*

transaction, *viz.*, the mutual transfer of two things being wanting in this case. It was, therefore, not necessary to register the document, that s. 49 of the Registration Act was no bar to the document, which was unregistered, being used, as evidence to prove that the decrees had been satisfied, notwithstanding that it also purported to convey immoveable property. DINA NATH DAS v. MATIMALA DASSYA, **11 C.W.N. 342.**

(1346)—S. 118—Exchange—Transfer by co-occupant of a divided share in a survey number partly for cash and partly in exchange for another land—Right of pre-emption— *See* BERAR LAND REVENUE CODE, ss. 69 and 205, 3 N.L.R. 138.

(1347)—S. 118—Partition is not an exchange —*See* PARTITION—GENERAL, 3 Ind. Cas. 247=10 C.L.J. 503.

(1348)—*See* No. 383, *supra.*

(1349)—*Ss.* 118, 119—*Landlord and tenant—Exchange—Surrender.*—Where a tenant surrendered voluntarily certain lease-hold rights and took from the landlord lease-hold rights of some other property, *held* that the transaction was not an exchange. Where the tenant was not deprived of the enjoyment of the lease-hold rights in the latter property but voluntarily surrendered them, his rights in the original property would not revive and s. 119 of the Transfer of Property Act would not apply. No formal deed is necessary for effectively surrendering lease-hold rights. SARUM NARAIN SINGH WALIUL HASSAN v. MAHARAJ-KUMAR GOPAL, **6 C.W.N. 905.** (14 C. 109, *R.*)

(1350)—*S.* 119—*Implied covenant—Exchange* —A party to an exchange, who has been evicted from a portion of the property received by him in exchange, in availing himself of the implied covenant under s. 119 of the Transfer of Property Act, must put an end to the transaction as a whole so as to be placed in the position he was in before the exchange but cannot seek to recover an equivalent portion of the lands he gave. (*Per Subramania Ayyer, J., Obiter.*) VEERA PILLAI v. POONAMBALA PILLAI, **9 M.L.J. 137.**

(1351)—*S.* 119—*Deed of exchange, subsequent express covenant between parties to, exclusion of implied covenants by.*—Where the parties to a transaction have entered into any contract respecting matters to which the covenants, implied therein by law relate, the covenants in law cease to have any force, and in such a case, it is the contract alone that regulates and governs the nature of the party's obligation and the extent of his liability. Consequently, an express stipulation by means of mutual covenants subsequently entered into between the parties to an exchange of lands, that in case of want of title and consequent ouster, certain compensation alone was payable to the party so ousted, was held to prevail over the right of recovering back possession, to which the party would otherwise be entitled by reason of the provisions of s. 119 of the Transfer of Property Act. SUBRAMANIA AYYAR v. SAMINATHA AYYAR, **21 M. 69=7 M.L.J. 319.**

(1352)—S. 119—*See* LIMITATION ACT, 1908, s. 10, art. 143, 17 M.L.J. 149=30 M. 316.

(1353)—S. 119—*See* No. 1349, *supra.*

(1354)—*S.* 122—*Gift—Dedication of idol and land for public religious purpose—No gift to ascertained or ascertainable person or persons.*—The dedication of an idol and land for the construction of a temple to locate the idol in, made in favour of the public, is not a gift within the definition of that term in s. 122 of the Transfer of Property Act. The word "donee" in the section is not applicable to the public. It must denote an ascertained or ascertainable person or persons by whom or on whose behalf the gift can be accepted or refused. PALLAYYA v. RAMAVADHANULU, **13 M.L.J. 364.**

(1355)—*S.* 122—*Gift of immoveable property —Deed registered after the donor's death.*—A gift of immoveable property duly made by means of a registered deed is not invalid merely because registration of the deed of gift may have taken place after the death of the donor. KHUSHABA MANSINGH v. CHANDRA BHAGABAI, **10 Bom. L.R. 536=32 B. 441.**

(1356)—*Ss.* 122 *and* 123—*Gift of immoveable property — Acceptance of gift— Registration against wish of donor— Validity—"Registered," meaning of — Per Karamat Husain, J.*— Under the Transfer of Property Act, registration is essential to complete a gift of immoveable property, and registration of a deed of gift against the wishes of the donor is not sufficient to complete the gift. In order to make a gift complete, it is well-settled both in England and British India that the donor must do all he can to make the gift complete.

Per Chamier, J.—A gift duly made and accepted is not invalid merely because it was registered afterwards against the wishes of the donor. Registration is not the act of the donor, but the act of an officer appointed by law to register documents. A document need not even be presented for registration by the executant. Consent to the registration of a deed of gift is not part of the gift. The expression "registered instrument" in s. 123 of the Transfer of Property Act means an instrument registered in accordance with the provisions of the Registration Act, and not necessarily an instrument registered with the consent of the executant donor. PARBATI v. BAIJNATH PATHAK, **9 A.L.J. 300=14 Ind. Cas. 61.**

(1357)—Ss. 122 and 123—*See* GIFT, 20 A. 392=A.W.N. 1898, 88.

(1358)—*S.* 123—*Gift—Unregistered instrument— Donor's tenant for term attorning to donee —Limitation Act, s.* 144—*Donee's possession when adverse—Change in pleading.*—Where a *stridhanam* grant is effected, not by means of a registered instrument as required by s. 123

Transfer of Property Act (IV of 1882) —*continued.*

of the Transfer of Property Act, but by a written direction given by the donor to his tenant for term, requiring him to pay the rent to the donee, such grant is invalid. A defendant, alleging in her written statement that a certain gift was made to her as *stridhanam*, should not afterwards be allowed to change her case, and to allege that the gift was for maintenance. Where a tenant for a term attorns to a person having no right to the property leased and pays rent to him, this circumstance does not make the possession of the other person, during the term of the lease, adverse to the lessor or to any person claiming under him (21 M. 153, *F.*) *Secus*:—Where the tenant determines the tenancy by surrendering his rights under the lease. ACHARATH BAPPAN v. MATHAMMAL CHOVI, **4 M.L.T. 327=19 M.L. J. 255=6 M.L.T. 166=3 Ind. Cas. 122.**

(1359)—*S.* 123—*Transfer not in accordance with section invalid.*—A transfer not effected in the manner required by s. 122 of the Act will not confer a valid title on the transferee—*Per Batty, J.* BAI MOTIVAHOO v. PURSHOTAM DAYAL, **29 B. 306.**

(1360)—*S.* 123—*Gift of land not in writing registered—Plea that gift not valid—Burden of proof.*—Where the validity of a gift of land was impeached on the ground of its not being in writing registered, as required by s. 123 of the Transfer of Property Act, the burden lay on the person who impeached the gift to show that it was made after the Transfer of Property Act came into force. In the absence of such evidence, the Court could not treat the gift as invalid. KONE GOWNDAN v. BOLA NAICKEN, **12 M.L.J. 387.**

(1361)—*S.* 123—*Gift by Hindu—Necessity for delivery of possession to donee—No alteration of law in this respect.*—S. 123 does not alter the Hindu law as to gifts of immoveable property so as to dispense with the necessity for delivery of possession. GOVINDA v. MALHARI, **3 C.P. L.R. 37.** [*Cons. and D.*, 5 C.P.L.R. 63]

(1362)—*S.* 123—*Deed of gift—Attesting witnesses—Donor's signature not witnessed by attestators—Validity of gift.*—A deed of gift attested by witnesses, who did not themselves see the donor sign, is not legally enforceable. *In re* VELAVALAPATTI PEDA, **8 Ind. Cas. 887.** [31 M. 215, 3 M L.T. 300, 18 M.L.J. 219, *F.*]

(1363)—*S.* 123—*Gift--Registration--Registration not with the consent of the donor, effect of.*—A document, registered in accordance with the provisions of the Registration Act, is a registered instrument, and if a gift is in fact duly registered in accordance with those provisions, it is a complete and valid gift. The law does not require that the registration should be at the instance of the donor or with his consent. MUSSAMMAT PARBATI v. RAIJ NATH PATAR, **16 Ind. Cas. 406.**

(1364)—S. 123—*See* U. P. ACT I OF 1869, ss. 13, 16, 17, 22, 9 O.C. 113.

Transfer of Property Act (IV of 1882) —*continued.*

(1365) — S. 123 — *See* ATTACHMENT — SUBJECTS OF ATTACHMENT, 6 A. 634=A.W. N. 1884, 210.

(1366)—S. 123—*See* CONTRACT ACT, 1872, s. 25, 1 Bom.L.R. 495.

(1367)--S. 123—Registered deed of gift—Possession delivery of, under registered deed of gift—*See* GIFT, 5 O.C. 89.

(1368) — S. 123 — Delivery of possession whether necessary—*See* HINDU LAW—GIFT, 25 A. 358=A.W.N. 1903, 70.

(1369)—S. 123—*See* HINDU LAW—GIFT, 20 C. 464.

(1370)—S. 123—*See* HINDU LAW—WILL, 29 B. 306.

(1371)—S. 123—*See* MAHOMEDAN LAW—GIFT, 24 M. 513=11 M.L.J. 227.

(1372)—S. 123—Negotiable instrument if may be transferred by registered deed of gift—Mode in which transferee may enforce his rights—*See* NEGOTIABLE INSTRUMENTS ACT, 1881, ss. 46, 47, 48, 50, 16 C.W.N. 666.

(1373)—S. 123—Deed of gift registered—Delivery of possession not essential—Erroneous opinion of Courts of Central Provinces, effect of—*See* SPECIAL OR SECOND APPEAL, 11 C. W.N. 956=6 C.L.J. 233=34 C. 853.

(1374)—*S.* 123, *para.* 1, *meaning of—Registered deed—Delivery of possession.*—S. 123, para. 1 of the Act means that a gift of immoveable property can be effected by the execution of a registered instrument only, nothing more being necessary. *Semble.*—A gift of moveable property also may be made by a registered deed alone, without delivery of possession. DHARMODAS v. NISTARINI DASI, **14 C. 446.** [*F.*, 6 C.L.J. 233=11 C.W N. 956=34 C. 853 ; *R.*, 5 O C. 89, 10 C.W.N. 765=3 C.L.J. 616=33 C. 1119.]

(1375)—S. 123—*See* Nos. 65, 147, 197, 384, 439, 521, 1356, 1357, *supra.*

(1376)—*Ss.* 123, 129—*Moveable property, gift of—Delivery of possession—Registration of deed of gift—Effect of.*—The rule of Hindu Law that delivery of possession is essential to complete a gift has been abrogated by s. 123 read with s. 129 of the Transfer of Property Act (IV of 1882). BAI RAMBAI v. BAI MANI, **23 B. 234.** [*F.*, 5 O.C. 89 ; 34 C. 853=11 C.W.N. 956=6 C.L J. 233.]

(1377)—Ss. 123, 129—*See* MAHOMEDAN LAW—GIFT, 8 Ind Cas. 38.

(1378)—S. 126—Grounds on which voluntary deeds could be set aside—Burden of proof —*See* GIFT, 14 Bom. L.R. 340.

(1379)—S. 126—*See* No. 139, *supra.*

(1380)—S. 127—*See* GIFT, 20 M. 147.

(1381)—S. 129—*See* Nos. 385, 1376, 1377, *supra.*

Transfer of Property Act (IV of 1882) —*continued.*

(1382)—*S.* 130—*Actionable claim, transfer of—Instrument in writing.*—Under s. 130 of the Act, the transfer of an actionable claim can only be made by an instrument in writing. VELAYUTHAM v. PILLAIYAR CHETTI, **9 M L. T. 102=9 Ind. Cas. 287.**

(1383)—*S.* 130—*Transfer by Hindu reversioner of his interest in inheritance—Actionable claim—Misjoinder of parties and causes of action.*—On the death of one N.S. his nearest reversioner B sold a six annas share in the estate left by N. S. to two vendees for a certain sum by a registered deed, which was to the effect that B had by inheritance acquired a right to the estate of N S. that the defendants had illegally taken possession of the estate ; that it was necessary that he should sue for its recovery ; that he had not sufficient means to institute and conduct the suit ; that he therefore sold absolutely six-annas share in the estate to the vendees for a certain sum of money and transferred to them the same proprietary rights as he himself had, etc., etc. B and his vendees jointly brought a suit against the defendants for the possession of the estate of N.S. *Held*, that, although B was not in possession of the six-annas share, he was quite competent to convey it to the vendees, and that the sale of the said share was not the sale of an actionable claim within the meaning of s. 130 of Act IV of 1882. *Held* further, that the vendees were properly joined as co-plaintiffs, and that there was no mis-joinder of parties or of causes of action. *Held* further, that any transfer of his interest, in the estate of N.S. made by B in favour of a third party previous to the execution of his deed in favour of the vendees, was no bar to the institution of the suit by himself and the vendees against the defendant. MATA PRASAD v. MUSSAMMAT AUDAN KUAR, **3 O.C. 215.**

(1384)—*S.* 130—*Suit, maintainability of—Partnership, debt due to—Release by partners—Persons in whose favour release executed, if can sue.*—Title cannot pass by admission or relinquishment when the statute requires a deed of transfer. Plaintiffs claimed a sum of money due by the defendant to a partnership whereof A and B were members. A executed a deed of release before the institution of the suit, whereby he gave up his claim to the business and declared that thenceforth the partnership would be conducted by the plaintiffs, the father and uncle of B:—*Held*, that no title vested in the plaintiffs, under s 130 of the Transfer of Property Act and they were not entitled to maintain the suit. DHARAM CHAND BAID v. MAUJI SAHU, **16 C.L.J. 436=16 Ind. Cas. 440.**

(1385)—*S.* 130—*Bond—Delivery of—Separate letter requesting debtor to pay—Chose-in-action—Assignment—Validity.*—M delivered a bond to A without any endorsement on it, and also gave him a letter in which he requested B who was the debtor under the bond to pay the whole of the principal and interest due under it to A. *Held*, that the letter constituted an assignment within s. 130, Transfer of Property Act. KONJETI VEERASAWMY v. VARADA VEERASAWMY NAIDU, **13 M L.T. 77=16 Ind. Cas. 708.**

Transfer of Property Act (IV of 1882) —*continued.*

(1386)—S. 130—Actionable claim—Assignment of, should be unqualified—*See* HINDU LAW—JOINT FAMILY, 14 Bom. L.R. 237.

(1387)—*S.* 130 (1)—*Actionable claim—Form of notice.*—Where the following endorsements were separately made on the back of two contracts—(i) "As to the whole of my right (and) interest in this contract I have sold the same to —" ; (ii) "I have sold the whole of my right and interest in this contract and in the goods mentioned therein to." *Held*, that what was transferred thereby was property ; that none of the exceptions to s. 6 of the Transfer of Property Act applied ; and that the subject of transfer was an actionable claim to which s. 130, cl. (1), applied. Where the notice given by the transferor did not contain the address of the transferee it was held that such notice was not sufficient under s. 131 of the Transfer of Property Act. S assigned the benefits under contracts entered into by him with H for the purchase of gunny bags to N. No notice as required in s. 131 was given to H, and H refused to recognize the claim of N. S never brought or sent purchase money to H at the due date of the contract. *Held*, that the non-delivery of the bags to S was due to the latter's default, and that as H was able and willing to deliver the bags there was a dealing by him with the actionable claim which was valid as against the transfer, and that such readiness to deliver was as complete an answer to the transferee's claim as if there had been an actual delivery to S. HUNSRAJ v. NATHOO, **9 Bom. L.R. 838.**

(1388)—*S* 130, *sub-s.* 1 *(as amended by Act II of 1900)—Actionable claim—Transfer thereof by way of security—Creation of a charge on a policy of insurance—Deposit of the policy.*—S. 130, sub-s. 1 of the Transfer of Property Act (IV of 1882 as amended by Act II of 1900) covers transfers of actionable claims by way of security as well as absolute transfers thereof. A charge on a policy of insurance can only be created by a written document, and a person with whom a policy of insurance is deposited acquires no right whatever to the policy or its proceeds by reason of the deposit. MULRAJ KHATAU v. VISVANATH PARABHURAM VAIDYA, **(1912) M. W. N. 1247, P. C.=12 M. L T. 652=11 A.L J. 7=24 M.L J. 60=17 C.W.N. 201=15 Bom. L.R. 9=17 C L J. 162.**

(1389)—S. 130—*See* Nos. 67, 123, 127, 1271, *supra.*

(1390)—Ss 130 and 131—*See* ASSIGNMENT, 4 Ind. Cas. 420=7 M.L.T. 97=33 M. 123.

(1391)—*Ss* 130, 131, 132, 133—*Actionable claim—Transfer—Chose in action—Notice—Subsequent transferees—Priority—Equitable charge*

Transfer of Property Act (IV of 1882) —continued.

—*Money due on Insurance policy—Debt.*—V (the plaintiff) held two policies upon the life of D (issued by two different companies), which had been deposited with him by D as security for pecuniary liabilities incurred by V from time to time on D's behalf. Those liabilities amounted in April 1909 to Rs. 75,000. Before they fell due, D committed suicide on the 28th August 1909 without meeting any of the liabilities. V had, therefore, to deposit security in September 1909 with the creditors against his obligations. On the 4th September 1909, V gave notice to the agents of the Insurance Company issuing one of the policies that he held that policy on D's life as security for the advances made by him to D. The agents informed V that, on the day before D's death, they had received for registration a deed of assignment of that policy in favour of M (the defendant). The deed was dated the 13th August 1909. In a suit by V to recover the amount of the policy from the company, M claimed payment of the money in preference to V. The lower Court dismissed the suit, holding that M, who had a legal estate in the policy in virtue of the assignment, had priority over V who had only an equitable charge on the policy. On appeal: *Held*, (1) that the policy moneys were a debt not secured by hypothecation of property: they did not constitute a debt payable *in praesenti* before the death of the assured, but a conditional and contingent debt within the meaning of the Transfer of Property Act, the contingency being the death of the assured and the condition the proof of death and of title to the policy. (2) That the defendant was, by his assignment, the transferee for consideration of an actionable claim against the Insurance Company, subject, however, to the conditions imposed by the terms of the policy upon his transferor and, as provided by s. 132 of the Act to all other liabilities and equities to which his transferor was subject in respect thereof at the date of the transfer. (3) That the plaintiff did, by the deposit of the policy and the obligation incurred by him on the security thereof, acquire a charge on the policy and the money secured by it. (4) That, under the amended chap. VIII of the Transfer of Property Act, the validity of the transfer in no way depended upon the giving of notice to the debtor, although notice was necessary to prevent the debtor from dealing with the debt to the prejudice of the assignee. (5) That transferees under the Act took in order of date and acquired no priority by giving notice; the defendant, therefore, could take no advantage by his notice of the 27th August 1909 to the company. (6) That, assuming that V could acquire a charge by virtue of the deposit of the policy the defendant could only prove title to the policy subject to that charge, as he was in effect in no better position than his assignor D. VISHVANATH VAIDYA v. MULRAJ KHATAU, **13 Bom. L R. 590.**

(1392)—*Ss.* 130, 135—*Assignment of rights under simple mortgage before date for payment, not a transfer of an actionable claim.*—"Actionable claim" in s. 130 of the Transfer of Property Act refers only to claims capable of enforcement, at the time of assignment, by suit in the Civil Court. It does not include a claim, in respect of which the cause of action had not arisen at the time of the transfer, but which, in future, will mature into a claim so as to be enforceable at once; in other words, a claim could not be treated as an actionable one unless, at the date of the transfer, an action could have been brought thereon. Consequently, where an assignment of a simple mortgage took place before the debt for which the mortgage was security became due and payable, and consequently before a suit could have been maintained for the payment of that debt and for the enforcement or discharge of the debt, by sale of the mortgaged property, such an assignment would not constitute a sale of an actionable claim within the meaning of s. 135 of the Transfer of Property Act. SHIB LAL v. AZMAT ULLA, **18 A. 265. F.B. = A.W.N. 1896. 80.** (16 A. 315. *R. and Expl.*) [*R.*, 30. M. 235 = 17. M.L.J. 87.]

(1333)—Ss. 130, 137 — *See* NEGOTIABLE INSTRUMENTS — PROMISSORY NOTES—GENERAL, 17 M.L.J. 393 = 3 M.L.T. 7.

(1394)—Ss 130, 137—Promissory note—Allocation in partition—Want of endorsement—Right of person to whose share it falls to sue. *See* NEGOTIABLE INSTRUMENTS —PROMISSORY NOTE—GENERAL, 8 Ind. Cas. 33 = 8 M. L.T. 449.

(1395)—Ss. 130, 137—Oral assignment of negotiable instrument—Validity— *See* PARTNERSHIP—GENERAL, 11 M.L.T. 246.

(1396)—*S.* 131—*Notice of assignment of debt, object and effect of.*—In this case, the mere absence of the service of an express notice on the debtor was held not to render the action by the assignee unmaintainable, on the ground that, after the institution of the suit, the debtor became aware of the assignment, and the transfer came into operation when he so became aware of it. Notice is not a condition precedent to the validity of the transfer of a debt contemplated by s. 131 of the Transfer of Property Act. The section has not the effect of vitiating the transfer, but only postpones its operation in accordance with the date of the knowledge of such transfer reaching the debtors. KALKA PRASAD v. CHANDAN SINGH, **10 A 20 = A.W.N. 1887. 270.** (12 C. 505, *R.*) [*R.*, 7 C.P. L.R 82, 21 B. 60, 144 P.R. 1906 = 106 P.L.R. 1907.]

(1397)—*S.* 131—*Notice of assignment—Operation.*—The assignment of the interest of a mortgagee in mortgaged property comes into operation when the debtor becomes aware of it. The assignee of the mortgage interest, may recover the whole amount due under the mortgage, though he has paid only a smaller sum

Transfer of Property Act (IV of 1882) —*continued.*

on account of the assignment. SUBBAMMAL v. VENKATARAMA, **10 M. 289.** [*Overruled*, 13 M. 225, F.B.; *F.*, 18 C. 510; *R.*, 7 C.P.L. R. 82, 21 C. 568, F.B., 16 A. 315, F.B., 21 B. 60.]

(1398)—*S.* 131—*Transfer of debt—Necessity for express notice of transfer to debtor—Right of transferee to sue—Discharge of debtor by payment to original creditor.*— Where a debtor did not receive express notice of the transfer of the debt within the meaning of s. 131 of the Act he was not bound to pay the debt to the transferee and a payment by him to his creditor discharged him of the liability. The words "otherwise aware of the transfer" in s. 131 of the Act meant "aware of the transfer in some way similar to that of being a party to it." The section did not however, take away the right of a transferee to sue in equity, but only stated that a transfer of a debt had not any operation against the debtor until express notice thereof was given to him. So then the result was that the transferee had a right to sue for the debt, but the debtor could plead payment to the original creditor, in which case, the transferee, if he said that payment was invalid as having been made after the transfer, was bound to show that the debtor had express notice, or was a party to or otherwise aware of the transfer. ABA BALAJI v. NILKANT SEETARAM, **2 C.P.L.R. 1.** [*R.*, 7 C.P.L.R. 82.]

(1399)—*S.* 131—*Debt—Transfer of decree—Notice.*—A decree is not debt within the meaning of that word as used in s. 131, Transfer of Property Act, 1882, so as to make the transfer void without express notice. DAGADU v. VANJI, **2 Bom. L.R. 414=24 B. 502.**

(1400)—*S.* 131—*Assignment of mortgage—Notice to mortgagor, if necessary.*—S. 131 of the Transfer of Property Act makes inoperative any assignment of any interest in moveable property, only when made without notice of assignment to the debtor, and it has no application to an assignment of a mortgage security by the mortgagee. So, the assignee can bring a suit to enforce the lien without giving notice to the mortgagor. VILAYAT ALI v. GULLO, **A.W.N. 1885, 282.** [*R.*, 16 A. 315.]

(1401)—*S.* 131—*Mortgage-debt, assignment of—S.* 131, *before amenament—Payment to mortgagee after assignment without notice, if valia.*—The validity of an assignment of a mortgage-debt by the mortgagee is to be tested with reference to the law as it stood at the time when it was made. (27 M. 131, 6 C.L.J. 572, *F.*) The provision of s. 131 of the Transfer of Property Act, before its amendment in 1900, was applicable to cases of assignment of mortgage debts. Under that section, the assignment could have no operation against the mortgagors, so long as express notice of the transfer was not given to them, unless they were parties to or otherwise aware of such transfer (21 C. 568, *F.*) Although it is not

Transfer of Property Act (IV of 1882) —*continued.*

necessary to give notice to the mortgagor, to validate a transfer by the mortgagee, any payment to the mortgagee, after assignment without notice, is a good payment as against the transferee. ISMAIL MOLLAH v. JADUNATH SRIMANI, **13 C.L.J. 641.**

(1402)—*S.* 131—*Suit by assignee of actionable claim—Denial of transfer by debtor—Necessity for proving transfer.*—Where in a suit by the assignee of an actionable claim the debtor pleaded that he had no knowledge of the transfer, the debtor's denial did not in any way affect the question of the interpretation of s. 131 of the Act; it merely imposed on the plaintiff the obligation of proving the transfer. The suit could not be dismissed on that account. ALISHA PARDHAN v. ZITOO RAJPUT, **7 C.P.L.R. 82.** (2 C.P.L.R. 1, 10 A. 20; 12 C. 506; 10 M. 290, *R.*)

(1403)—S. 131—*Decree—No debt.*—A decree is not a "debt" within the meaning of that word as used in s. 131 of the Transfer of Property Act, so as to make the transfer of the decree void without express notice. A debt under the section is an actionable claim, and not a claim that has already passed into a decree. S. 131 does not apply to decrees. AFZAL v. RAM KUMAR BHUDRA, **12 C. 610.** [*F.*, 24 B. 502.]

(1404)—*S.* 131—*Mortgage before Transfer of Property Act—Assignment of mortgage after the Act—Applicability of the Act—Assignment of mortgage — Notice — Assignment by mortgagee without notice — Liability of mortgagor to assignee.*—To an assignment, made after the Transfer of Property Act, of a mortgage executed before it came into force, the provisions of the Transfer of Property Act are applicable. [*R.*, 21 C. 568, F.B., 16 A. 315, F.B., 18 A. 265, F.B.] The notice of an assignment of a mortgage under s. 131 of the Transfer of Property Act is only to protect the assignee, whose title as against third parties would not be complete without it; an assignment would, however, be perfectly valid without such notice. [*F.*, 10 A. 20; *R.*, 2 C.P.L.R. 1, 7 C.P.L.R. 82.] A suit by the assignee of a mortgagee against the mortgagor and the mortgagee, where no notice of the assignment had been given to the mortgagor under s. 131 of the Transfer of Property Act, was *held* wrongly dismissed merely on account of the want of notice, as the transfer would come into operation on the institution of the suit, when the mortgagor would have become aware of the transfer. [*F.*, 10 M. 289. 21 B. 60.] This section enacts the English law on the subject; the first branch of the section fixing the time when the assignment comes into operation, and the other branch providing for the protection of the debtor, if he deals with the debt before that time. LALA JUGDEO SAHAI v. BRIJ BEHARI LAL, **12 C. 505.**

(1405)—S. 131—*See* ASSIGNMENT OF CHOSE IN ACTION, 12 P.R. 1894.

Transfer of Property Act (IV of 1882) —*continued.*

(1406)—S. 131—*See* DECREE — MISCELLANEOUS, 2 Bom. L.R. 414=24 B. 502.

(1407)—S. 131—*See* Nos. 1390, 1391, *supra.*

(1408)—Ss. 131 and 135—*See* MORTGAGE—REDEMPTION, 4 O.C. 210.

(1409)—S. 132—*Notice of assignment of debt, assignee whether bound to give—Knowledge of assignment through writ in suit, binding on debtor.*—Before the passing of the T. P. Act, it was the assignee of the debt upon whom it was incumbent for his own protection to give notice of the assignment to the debtor. In the Act, no provision is made for the assignee giving notice in any particular way. All that is required is that the debtor shall become aware of the transfer. When he becomes aware of it, it is binding on him. Accordingly, if the assignee, the moment before suit, makes the debtor aware of the transfer, the latter must give effect to it. So, when the debtor is, by the service of the writ in the suit against him, made aware of the transfer, it becomes binding on him. RAGHO v. NARAYAN, **21 B. 60**

(1410)—S. 132—*See* No. 1391, *supra.*

(1411)—S. 133—*See* No. 1391, *supra.*

(1412)—S. 134—*Actionable claim, transfer of—Right to recover subscriptions, assignment of—Right of holder of a charge.*—The holder of a charge on a debt due to his debtor by way of security for his own loan is a transferee of an actionable claim, and entitled to recover the debt from the transferor's debtor. Where an assignment of the right to recover the subscriptions received by A from B has been made by the latter in favour of C, and a suit was brought by C against A to recover the debt due and B was also made a party thereto, *held* that, though the plaintiff as chargee may not be entitled to the whole debt assigned by way of security, still, as the original creditor is a party to the suit, there can be no objection to his recovering. RAMASAWMY PILLAI v. MOTHOO CHETTY AND OTHERS, **7 M L T. 125=5 Ind. Cas. 834.** (20 M. 35, *R.*; 14 C W.N. 165, 33 B. 610, *F.*)

(1413)—S. 135, *Scope of.*—S. 135 refers to claims for money of some kind or the like, although the money claim may be a charge on immoveable property. MODUN MOHUN DUT v. FUTTARUNNISSA, **13 C. 297.** [*R.*, 21 C. 568, F.B.]

(1414)—S. 135—*Actionable claim—Transfer.*—The first paragraph of s. 135, Act IV of 1882, has no application to a case, in which the debtors deny the existence of the debt altogether, and the purchaser of the debt has to obtain judgment affirming the claim, before any satisfaction is made or tendered. Cl. (*d*) of the section is not limited to cases where the judgment of a Court affirming the claim has been delivered, or where the case is made clear by evidence before the sale of the claim. (*Following*

Transfer of Property Act (IV of 1882) —*continued.*

13 C. 145, 15 C. 436 and 10 M. 289 and *dissenting from* 9 A. 476.) RAJENDRA NARAIN BAGCHI v WATSON AND CO., **18 C. 510.** [*Appr.*, 21 C. 568, F.B., 4 C.L J. 334; *Cons.*, 23 C. 713.]

(1415)—S. 135—*Actionable claim—Tender.*—Where in a suit by an assignee of an actionable claim, for its enforcement, the defendant, who had no notice of the assignment, prayed to be discharged from liability by paying the price paid by the plaintiff *plus* costs and all incidental expenses, and asked for a month's time to pay the money, *held*, (*a*) that the plaintiff was entitled to a decree for the full amount of his claim, and not simply the purchase amount with costs and incidental expenses, inasmuch as there was neither any payment before judgment was delivered, nor was any tender of payment made at the time. (*b*) that an offer to pay after judgment is neither a payment within the meaning of s. 135 nor a proper tender. PANDIT CHARAN SIRKAR v. GANGADHAR DAS, **2 C W.N. 147.** (23 C. 713, *R.*)

(1416)—S. 135—*Right of mortgagee under mortgage, not actionable claim.*—In the case of the transfer of a mortgagee's rights under his mortgage, the subject-matter of the assignment, that is, the mortgagee's interest in specific immoveable property, constitutes a legal estate and cannot be treated as an actionable claim subject to the rule of s. 135 of the Transfer of Property Act that the assignee thereof can recover only a sum limited to the consideration which he has paid for the assignment MOTI RAM v. JETH MAL, **16 A. 313.** [*R.*, 16 A. 315, 18 A. 265.]

(1417)—S. 135—*Right of assignee of actionable claim, to recover only price actually paid.*—The object of s. 135 is the prevention of speculation in actionable claims, or, in other words, the buying cheap of the right of action of one person against another. If a person, having an actionable claim against another, chooses to sell it cheap, or for less than its actual value, the person who buys embarks more or less on a speculation, which on the plain terms of s. 135 can be defeated by the payment to him of the price he had actually paid for it. The mere fact that the party liable to the claim has put the assignee in the position of proving his case in Court cannot be taken to put the latter in any higher or better position. The Legislature could not have intended any difference in the status of the assignee after suit and decree and before the same. What cl. (*d*) of s. 135 really means is that, if a creditor or party having an actionable claim against another, has put it into Court and has proceeded to proof of it to the point at which judgment has been delivered affirming it, or the liability of the defendant has been so clearly established that judgment must be delivered against him, then the mischief or danger of any trafficking or speculation in litigation disappears, and the defendant can suffer no

Transfer of Property Act (IV of 1882) —*continued.*

prejudice by any arrangement between the plaintiff and a third person, as to who is to enjoy the fruits of the decree. JAM BEGAM v. JAHANGIR KHAN, **9 A. 476 = A.W.N. 1887, 67.** (13 C. 145, *Diss*; 1 I.A. 241 = 13 B.L.R. 509, 2 App. Cas. 186 = 4 I.A. 23, *R.*) [*Diss.*, 18 C. 510; *F.*, 13 A. 102; *Appr.*, 21 C. 568; *R.*, 13 M. 225, 5 C.P.L.R. 13, 19 B. 290, 22 B. 761, 20 A. 327, 3 O.C. 18; *D.*, 16 A. 313.]

(1418)—*S.* 135—*Right to set aside a document —Actionable claim.*—Where a minor, who has, after attaining majority, sued his co-sharers in family property along with their perpetual lessees, for a declaration that the lease, executed during his minority, was not binding upon him, and for possession of his share in the property, sold his interest in the suit, *held*, the purchase was an actionable claim (inasmuch as it was merely a right to set aside a document on the ground that the person by whom it was executed exceeded his powers) under s. 135 of the Transfer of Property Act. RAJANI KANTH NAG RAI CHOWDHURI v. HARI MOHUN GUHA, **12 C. 470.** [*R.*, 16 A. 315 F.B., 3 O.C. 215.]

(1419)—*S.* 135—*Usufructuary mortgagee not put in possession, transfer of rights of by—Transfer of actionable claim.*—Where, on a usufructuary mortgage, the mortgagors failed to deliver possession to the mortgagee and the latter, never having obtained possession, assigned his interest under the mortgage the transfer was held to be one of an actionable claim under s. 135 of the Transfer of Property Act. RANI v. AJUDHIA PRASAD, **16 A. 315, F B. = A.W.N. 1894, 100.** [*F.*, 20 A. 327; *R.*, 18 A. 265, 3 O.C. 215.]

(1420)—*S.* 135—*Actionable claim—Payment price paid by assignee need not necessarily be before judgment.*—The object with which s. 135 was enacted was to discourage trafficking in litigation by precluding the purchaser of an actionable claim from recovering anything beyond the actual price paid by him and the incidental expenses of the sale together with interest. That object would be defeated if it is held that a debtor could not avail himself of the provisions of the section, if he put the assignee to proof of the price paid by him and waited till the amount of the price had been determined and declared by the Court. The section provides, no doubt, that the debtor is discharged by payment to the assignee of the price and incidental expenses and interest on the price, but it does not limit the period within which the payment must be made in order to secure a discharge. And there is nothing, therefore, in the section, which would preclude the debtor from securing his discharge by payment after decree. PHUL CHAND v. CHHOOTE LAL, **20 A. 327 = A.W.N. 1898, 54.** (16 A. 315, 21 C. 568, 9 A. 476, 13 A. 103, 13 M. 225. *R.*)

(1421)—*S.* 135—*Purchase of mortgagor's interest—Actionable claim.*—The purchase of a mortgagor's interest in land subject to a mortgage is not a purchase of an actionable claim under s. 135 of the T. P. Act. This is a totally different thing and bears no analogy whatever to the purchase of a mortgagee's interest in a mortgage after the mortgage has become due and payable. TOTA RAM v. LALA, **20 A. 468 = A.W.N. 1898, 113.**

(1422)—*S* 135—*Assignment of mortgage for less amount—Right of assignee to lien for larger amount.*—The assignee of a mortgage is not entitled to a lien on the mortgaged property for more than the amount paid by him for the assignment. RAMA SASTRI v. NARASIMHA AYYAR, **22 M. 301.**

(1423)—*S.* 135—*Assignee of mortgage, entitled only to price paid by him to assignor—Conditional tender, not sufficient payment—Mortgage for cash advanced—Interest payable in grain—Applicability of the rule of* damdupat.—S. 135 of the Transfer of Property Act, enables a person against whom an actionable claim exists, whether disputed or not, to free himself from his obligation for its fulfilment by paying to the assignee by purchase of the claim, the price and incidental expenses of the sale with interest on the price from the day that the buyer paid it. The time within which an obligation when assigned can thus be got rid of, is not limited by the Act; and hence payment into Court after suit brought to recover the claim fulfils its conditions, if made before the claim is made clear by evidence and is ready for judgment. In this case, the question had to be decided whether the defendants had made proper payment within the meaning of s. 135 of the Act. They had (without admitting the mortgage debt upon which they were sued, in their representative capacity, or that anything was due under it) brought into Court the amount which the plaintiff had paid for the assignment of the mortgage, but said that they did not admit that the plaintiff's assignor was the person entitled to the mortgage, or the assignment to the plaintiff, and were only willing that the amount should be paid to the plaintiff if it be proved to the satisfaction of the Court that he was the person entitled to recover the mortgage debt. This tender by payment into Court amounted only to a conditional tender, and did not constitute such a payment as is contemplated by s. 135. Further, the rule of *damdupat* being held to be applicable to the mortgage in this case—the advance having been in cash though the interest was to be paid in grain—the first Court's decree was restored with the variation that the interest must be limited to the amount of the mortgage debt. ANANDRAO v. DURGABHAI, **22 B. 761.**

(1424)—*S.* 135—*Construction—Actionable claim, assignment of—Assignee, suit by—Recovery of full amount of debt*—V owed a sum of Rs. 483 to G. who assigned the debt to the plaintiff for Rs. 200. The plaintiff gave due

Transfer of Property Act (IV of 1882) —*continued.*

notice of the assignment to V and brought this suit against him to recover the amount. *Held*, that under s. 135, T.P.A., the plaintiff was entitled to recover the whole amount of the debt. VISHNU MAHADEV SONAR v. DAGADU, **19 B. 290.** [*R.*, 3 O.C. 18.]

(1425)—*S.* 135—*Assignment of bond from debtor to creditor—Question of payment of consideration.*—In the case of an assignment of a bond by a debtor to his creditor, no question arises as to how much was paid for the transfer. SUBRAMANIA CHETTI v. SATTAYA PATHAN, **10 M.L.J. 213.**

(1426)—*S.* 135—*Actionable claim—Assignee's rights.*—The assignee of an actionable claim suing to recover such claim, is, under s. 135 of the Transfer of Property Act, entitled to recover from the debtor, only the amount actually paid by him (the assignee) for it, together with interest and the incidental expenses of sale. NILAKANTA v. KRISHNASAMI, **13 M. 225, F.B** (9 A. 476, *Appr.*) [*Diss.*, 21 C. 563, F.B.; *F.*, 5 C.P.L.R. 13; 20 A. 327; *R.*, 19 B. 290, 22 B. 761, 3 O.C. 18, 23 M. 449; *D.*, 16 A. 313.]

(1427)—*S.* 135—*Assignment of actionable claim—Right of assignee to recover more than amount actually paid by him for assignment.*—An assignee of an actionable claim suing to recover such claim has not the right to recover the whole amount of such claim and is precluded by s. 135 of the Act from recovering more from the debtor than the amount actually paid by him (the assignee) for it together with interest and the incidental expenses of the sale. DEOCHAND v. MANIRAM, **5 C.P.L.R. 13.** [*F.* 13 M. 225; *R.*, 13 C. 145, 15 C. 436.]

(1428)—*S.* 135—*Adjudication on claim.*—Neither a decree by consent obtained by the obligee against the obligor for an instalment due on a hypothecation-bond, nor the order passed in favour of the obligee in claim proceedings between him and the attaching creditors of the obligor, operates as an adjudication of the claim within the meaning of the fourth proviso to s. 135, Transfer of Property Act, so as to enable an assignee for value from the obligee, to recover more than the sum paid by him for the assignment, with interest thereon. RAMA CHANDRA v. VENKATARAMA, **13 M. 316.** [*R.*, 21 C. 568, 18 A. 265, F. B.]

(1429)—*S.* 135—*Transfer of claim for less than its value—Recovery of full amount of debt.*—S. 135 does not apply where the money is recovered by suit after a contest as to the liability of the defendant. If, however, the money paid by the plaintiff for the claim, with interest and expenses, were paid into Court immediately on the suit being brought, that would be a payment within the meaning of the section, and would release the defendant from further liability. KHOSDEB BISWAS v. SATAR MUNDAL, **15 C. 436.** (13 C. 145, *F.*) [*R.*, 18 M. 225, 18 A. 102, 21 C. 568, 19 B. 290, 18 C. 510, 23 C. 713, 5 C.P.L.R. 13.]

Transfer of Property Act (IV of 1882) —*continued.*

(1430)—*S.* 135—*Transfer of foreclosure decree, without obtaining possession—Suit by transferee to enforce decree—Actionable claim—Defendant cannot impeach assignment as unconscionable.*—A executed a conditional deed of sale of certain property in favour of B for a consideration of Rs. 400. B obtained an order for foreclosure therein under Regulation XVII of 1806, which was then in force. B having died without obtaining possession of the property, his heirs also, without obtaining possession, assigned their rights under the order for foreclosure to C for a consideration of Rs. 200. C brought a suit for a declaration of his title and for possession of property, impleading both A, and his assignors, the heirs of B. The latter made no defence. *Held*, (*a*) that the assignment was one of an actionable claim, (*b*) that the assignee acquired a good title under the deed so as to maintain the present suit, (*c*) that A was not entitled to plead that the assignment, being only for half the original consideration, was an unconscionable bargain and consequently invalid, (*d*) but that A could take advantage of s. 135 of Act IV of 1882, and take the bargain off the plaintiff's hands by paying to him Rs. 200 and the incidental expenses of the assignment together with interest thereon from the date on which the plaintiff paid the amount to the date of its repayment to him. HAKIM-UN-NISSA v. DEONARAIN, **13 A. 102.** (9 A. 476, *F.*; 13 C. 145, 15 C. 436, *Diss.*) [*R.*, 21 C. 568, F. B. 18 A. 265, 20 A. 327.]

(1431)—*S.* 135—*Transferee of claim for smaller value—Recovery of full amount of debt.*—S. 135 of the Transfer of Property Act does not absolutely prevent the transferee, who has purchased a claim for a smaller value, from recovering the full amount of the debt due from the debtor. GRISH CHANDRA v. KASHISAURI DEBI, **13 C. 145.** [*F.*, 10 M. 289, 15 C. 436, 18 C. 510, 23 C. 713; *Appr.*, 19 B. 290, 21 C. 568 F.B.; *Diss.*, 9 A. 476, 13 A. 102, 13 M. 225, F.B. 5 C. P.L.R. 13.]

(1432)—*S.* 135—*Mortgage, an actionable claim—How mortgagor can obtain benefit of s.* 135.—A mortgage debt is an actionable claim within the meaning of s. 135 of the Act. The mortgagor is not released by the section of any portion of his liability, unless he pays into Court the price and incidental expenses, etc., with interest either when or before a suit is brought. RUSSICK LALL PALL v. ROMANATH SEN, **21 C. 792.** (21 C. 568, *F.*) [*R.*, 23 C. 713, 22 B. 761.]

(1433)—*S.* 135—*Voluntary liquidation of Company—Sale by liquidator of Company's assets—Suit by purchaser to recover money due under bond sold to him—Liability of obligor to pay entire amount due under bond.*—Plaintiffs purchased the outstandings of a Banking Association which went into voluntary liquidation, and sued the defendants upon a bond executed by them to the Bank. The defendants contended that, under s. 135 of the

Transfer of Property Act (IV of 1882) —*continued.*

Transfer of Property Act, they were liable to pay only the amount actually paid by the plaintiffs and not the entire amount due under the bond as claimed in the plaint. *Held*, that s. 135 of the Transfer of Property Act did not apply to the case. The defendants could not, in any case, ask for the benefit of the section unless they showed that in its terms they "paid the buyers the price" paid by them. This they had not done. THEVANNA CHETTI v. RAMACHANDRA RAO, **7 M.L.J. 250.**

(1434)—*S.* 135—*Sale of actionable claim—Discharge by payment to buyer.*—Under s. 135 when an actionable claim is sold, he against whom it is made is wholly discharged by paying to the buyer the price and incidental expenses of the sale with interest on the price from the day that the buyer paid it, and the payment must be made before the claim has been made clear by evidence or is ready for judgment. RAGHUNATH DASS v. BAJI RAO, **3 C. P.L.R. 137.**

(1435)—*S.* 135 (*b*), *in applicability of the section where the entire consideration is not the debt alone.*—The question in this case was whether, under s. 135 (*b*) of the Act (in its chapter VIII as it stood prior to its amendment by Act II of 1900, s. 4) the plaintiffs could recover, on account of a legacy assigned to them, only the amount actually paid, with interest. One part of the consideration for the transfer was a debt due by the transferor to the transferees but the other part was cash paid. *Held*, the case could not be brought within the exception in the said s. 135 (*b*), *viz.*, "where it is made to a creditor in payment of what is due to him." Those words could only apply to cases where the entire consideration is the debt. To hold otherwise would, in effect, be varying the language materially and would make the clause run as if the words were "in payment wholly or in part of what is due to him." CHINNAM RAJAMANNAR v. TADIKONDA RAMACHANDRA RAO, **29 M. 155.**

(1436)—*S.* 135 (*d*)—*Assignment of foreign judgment—Right of assignor to whole amount of judgment debt—Transfer of Property Act* IV *of* 1882, *s.* 135, *cl.* (*d*), *foreign judgment whether covered by.*—Plaintiff, claiming under an assignment made to him, in British India, of a judgment passed against the defendant by the Supreme Court at Mauritius sued to recover the amount awarded by the judgment with interest. Objection was raised to the validity of the assignment on the ground that it was opposed to public policy as intended to encourage speculative litigation but it was held not to be void for that reason because inasmuch as the right transferred by the assignment had, after contest, been established by a judicial tribunal, it could not be regarded as a transaction entered into with the object of stirring up unrighteous litigation. On the other question as to whether the assignee was entitled to the whole amount decreed by the Mauritius Court or only to the

Transfer of Property Act (IV of 1882) —*continued.*

amount, if any, which he had actually paid, the law of Mauritius having to be applied, the defendant was held to be bound to pay the whole amount decreed by that Court. In the case of judgment-debts, so far as any locality can be ascribed to them, they are generally deemed to be incurred in the place where the judgments were passed, and consequently the law of that place must regulate the liabilities of the judgment debtor, wherever the assignment might have been made and the debtor cannot seek to lessen his liability, as it cannot be increased, by recourse to the law of the place of assignment. Assuming that the provisions of s. 135, Transfer of Property Act was applicable to the case, the foundation on which the rule in that section rests, *viz.*, the preventing of commerce in litigation to the detriment of the debtor was absent here. Also the word 'judgment' in cl. (*d*) may well be taken to include foreign judgments. Where the words in a statute are wide enough and the giving effect to them in their wide sense would be in harmony with the rules of international law, those words ought to be construed in such wide sense. VYTHILINGAM PADAYACHI v. SITHRAM AIYAR, **23 M. 449 = 10 M.L.J. 77.**

(1437)—*S.* 135 (*d*)—*N.W.P. Rent Act* (XII *of* 1882), *ss.* 42, 95, 206.—*Assignment of rights under award—Actionable claim*—Cl. (*d*) of S. 135 of the Transfer of Property Act provides that where the judgment of a competent Court has been delivered affirming the claim, the provision as to the discharge of actionable claims does not apply. Where, therefore, a right to recover money under the award of an Assistant Collector acting under s. 95 (*g*) of act XII of 1881 was assigned to a third party, *held* that it was not an assignment of an actionable claim. MATHURA DAS v. MURLIDHAR **24 A. 517 = A.W.N. 1902, 50.**

(1438)—*S.* 135, *cl.* (*d*) —*Transfer of Property Act, s.* 135, *cl.* (*d*)—*Actionable claim.*—Cl. (d) of s. 135, Transfer of Property Act, refers to the point of time at which the actionable claim is sold and not to the time at which the claim may be discharged. The claim or debt which has been affirmed by the judgment of a competent Court, or a claim which has been made clear by evidence and is ready for judgment is altogether excluded from the operation of that section. AZIM ALI KHAN v. CHOWHARJA BAKHSH, **3 O.C. 18.**

(1439)— *S.* 135 (*d*), *right of transferee of actionable claim under, to the entire consideration mentioned in the assignment.*—On a transfer to the plaintiff of the rights of his assignor in certain moneys claimed by, and due to her, plaintiff urged that he was entitled to recover from the defendant, who was in possession of the money, the whole amount mentioned in the assignment-deed as its consideration, and it was held that it would be so if the case fell under cl. (*d*) of s.135 of the Transfer of Property Act, but, in the absence of any previous

Transfer of Property Act (IV of 1882) —*continued.*

adjudication as to the assignor's title to the money, her claim remained only an actionable claim, and the plaintiff was therefore entitled to recover only the price actually paid by him to his assignor along with the incidental expenses and costs relating to the assignment. SURYANARAYANA SASTRI v. RAMAMURTHI PANTULU, **21 M. 253.**

(1440)—*S.* 135, *cl. (d).—When is a debtor claiming benefit of s.* 135 *discharged of his liability?*—A debtor claiming the benefit of s.135, T. P. Act, is discharged of his liability, if he pays or offers to pay at any time before the final judgment the consideration plus the expenses and interest. DEBENDRA NATH MULLICK v. PULIN BEHARY MULLICK, **24 C. 763.** (21 C. 568, *F.*) [*R.*, 3 O.C. 18]

(1441)—*S.* 135, *cl. (d)—Right to recover loan secured by mortgage of immoveable property, "an actionable claim."—Held by the Full Bench (Prinsep, J., contra).*—The right to recover a loan secured by a mortgage of immoveable property is an "actionable claim," within the provisions of s. 135, Transfer of Property Act. (12 C. 505, 13 C. 297, 15 C. 436, 18 C. 510, 10 M. 289, 11 M 56, *R.*) On an assignment of an actionable claim, the debtor may be discharged from all liability, if he pays to the purchaser the price and expenses of the sale, with interest on the price from the day on which it was paid. Such payment must be made at any time before a judgment of a competent Court affirming the claim has been delivered, or before the claim has been made clear by evidence and is ready for judgment. If such payment is not made before the specified period, the assignee has the right to get judgment for the whole debt. (*Per Petheram, C. J., Norris and Ghose, JJ.; per Prinsep, J., contra*). (13 C. 145, 15 C. 436, 18 C. 510, *R.*) S. 135, cl. (*d*), refers to a state of things existing at the time of the assignment, and not at the time of the enforcement of the payment of the debt. (9 A. 476, 13 M. 225, *Appr.*; 18 C. 510, *R.*) *Per Prinsep J.* Cl. (*d*), s. 135, refers to circumstances arising before the transfer of the actionable claim. Cls. (*a*), (*b*), and (*c*) refer to circumstances coming into existence at the time of the transfer. *Per O' Kinealy, J.* MUCHIRAM BARIK v. ISHAN CHUNDER CHUCKKERBUTTY, **21 C. 568, F.B.** [*F.*, 21 C. 792, 24 C. 763; *R.*, 18 A. 265 (F.B.), 23 C. 713, 2 C.W.N. 147, 22 B. 761, 3 O. C. 18; *Diss.*, 20 A. 327; *D.*, 4 O.C. 210.]

(1442)—*Cl. (d), s.* 135—*Transferee of claim for smaller value—Recovery of full amount of debt.*—Where, without denying the claim, the debtor offers to pay the buyer the actual price paid by him, together with interest and expenses incidental to the sale, and merely disputes the amounts of these items, the first paragraph of s. 135 applies to the case. Such a case does not come under the exception in cl. (*d*) of the section. (13 C. 145, 15 C. 436, *F.*; 18 C. 510, *Cons.*; 21 C. 732, *R*). In order to have the benefit of s. 135, it is not necessary to deposit the money in Court. DEBENDRA NATH MULLICK v. PULIN BEHARI MULLICK, **23 C. 713.** [*Expl.*, 2 C.W.N. 147; *R.*, 22 B. 761, 3 O.C. 18]

(1443)—S. 135—*See* HINDU LAW—WIDOW, A.W.N. 1890, 24.

(1444)—S. 135—*See* LIMITATION ACT, arts. 62, 120, 15 M. 382.

(1445)—S. 135—*See* MORTGAGE—USUFRUCTUARY, 8 M.L.T. 420=7 Ind. Cas. 871.

(1446)—S.135—*See* STAT. 11 AND 12 VIC., C. 21, s. 86, 21 B. 572.

(1447)—S. 135—*See* Nos. 127, 1392, 1408, *supra.*

(1448)—*S.* 136—*Officer of Court becoming the transferee of a bond - Jurisdiction.*—A clerk in the District Court purchased a mortgagee's rights and filed a suit in the Court of the District Munsif subordinate to the Court where he worked. *Held*, he should succeed and s. 136 of Transfer of Property Act applied only to cases in which the claim is necessarily and immediately litigated in the Court in which the person affected exercises his functions. SINGARACHARLU v. SIVABAI, **11 M. 498.** [*R.*, 16 A. 315, F.B., 18 A. 265.]

(1449)—*S.* 136—*Purchase of elephant not in possession of owner.*—S. 136 of the Transfer of Property Act does not apply to cases in which there has been a transfer of ownership of moveable property by an owner not in possession, just as s. 135 does not affect a similar transfer of ownership of immoveable property. RAMAKRISHNA v. KURIKAL, **11 M. 445.** [*R.*, 18 A. 265, F.B.]

(1450)—*S.* 136—*Scope and construction of.*—The true construction of s. 136 appears to be, that the officers mentioned in it, habitually exercising their functions in a particular Court, are precluded from bringing any actionable claim cognizable by that Court. The scope and object of the last chapter of the Transfer of Property Act discussed. RATHNASAMI v. SUBRAMANYA, **11 M. 56.** [*R.*, 13 M. 225, F.B., 21 C. 568, F.B., 16 A. 315, F.B., 18 A. 265, F. B., 11 M. 498.]

(1451)—*S.* 137—*Equitable mortgage created prior to the Act—Effect of the Act on such mortgage—S.* 137, *Applicability of, to negotiable instruments.*—N. executed certain promissory notes, and along with them deposited his title deeds by way of equitable mortgage, with the promisee. The notes were endorsed to the plaintiffs and the title deeds were handed over along with the notes. In a suit by the plaintiffs for a mortgage decree, it was contended that, as there was no written transfer, plaintiffs could not enforce the mortgage. *Held*, that the equitable mortgage, which was validly created before the Act was made applicable to

Transfer of Property Act (IV of 1882) —*concluded.*

Burma, stood on the same footing as an equitable mortgage in the town of Rangoon, and could be assigned by delivery of the title deeds. AW NIN v. V. A. R. RAMAN CHETTY, **5 L.B. R. 93=4 Ind. Cas. 288.**

(1452)—S. 137—Delivery order—Passing of title—Assignment not necessary—Indorsement enough—*See* DELIVERY ORDER, 38 C. 127.

(1453)—S. 137—*See* Nos. 1393, 1394, 1395, *supra.*

(1454)—*S.* 138—*Not applicable to sub-mortgage—Realization of money in suit by mortgagee—Payment of money so realised to money decree-holders of mortgagee—Right of sub-mortgagee to recover money paid to such decree holders.*—S. 138 of the T.P. Act relates to the transfer of a debt and has no application to the case of a sub-mortgage. Where, in execution of a decree for sale obtained by the mortgagee, money was realized, the sub-mortgagee could not claim any interest in the money so realized. Similarly, where the money so realised was paid to the holders of money decrees against the mortgagee, the sub-mortgagee could not compel the decree-holders to refund the money received by them. SINGARAVELU UDAYAN v. RAMAIYER, **13 M.L.J. 306**. [*Diss.*, 33 M. 429=20 M. L.J. 330=7 M.L T. 143=5 Ind. Cas. 92.]

Transfer of Property Act.

See ACT II OF 1900.

Transfer of Property Act (1882) Amendment Act (1885).

See ACT III OF 1885.

Transfer of Rent Suits.

This circular calls for information regarding the increase required in the Subordinate Judicial Agency in consequence of the transfer of rent suits to the Civ. Courts. **Civ. Cir. No. 34, dated 10th December, 1870, 14 W.R. Civ. Cir. 47.**

Transfer of Small Cause Court Decree.

—to original side how effected—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF —GENERAL, 9 B. 237.

Transit Duties.

(1)—*Transit duties for Holkar's Government—Collection in British territory.*—Where an agent of H. H. the Holkar who received payments of transit duties for the Holkar's Government in British territory was charged with and convicted of the offence of disobeying the order of a public servant (the Collector) prohibiting the receiving of the same, *held* that, as nothing was done by the accused within British territory to compel the payment, but there was only a voluntary payment, the order, so far as it prohibited any person from receiving a payment so made, was beyond the power of the Collector. REG. v. VITHAL LAKSHUMAN, **5 B.H.C. Cr. 13.**

Translation.

(1)—*Acts, translations of--Legislative sanction.*—Official translations of Legislative Acts do not possess any legislative force or sanction. JETHA PARKHA v. RAMACHANDRA VITHOBA, **16 B. 689.** [*R.*, 21 B. 588.]

(2)—*Copyright.*—Translations are not copies, and the defendant by translating the books had not infringed the plaintiff's copyright. MACMILLAN v. KHAN BAHADUR SHAMSUL ULAMA M. ZAKA, **19 B. 557.**

Act XXV of 1867, books registered under—Copy-right—Whether infringement of copy-right under s. 7—*See* COPY-RIGHT, 14 B. 586.

Punjab Record—Urdu—Copy-right—Infringement—*See* COPY-RIGHT, 15 P. R. 1893.

See COSTS, SPECIAL CASES, 10 C. 106.

Fees for—*See* COURT FEES ACT, 1870, sch. II, cl. (*a*), 6 B.L.R. App. 137.

Translation of document by Court interpretor, Authority of—*See* EVIDENCE—MISCELLANEOUS DOCUMENTS, Bourke, O. C. 8 =Cor. 94.

Unauthorised—Of the Code Napolean—*See* EVIDENCE ACT, 1872, s. 38, 26 C. 931=3 C.W. N. 614.

Solicitor's lien—of papers—*See* LEGAL PRACTITIONERS—ATTORNEY AND CLIENT, 4 B. 355.

Of judgment—Extreme delay in furnishing copy--*See* LIMITATION ACT, 1908, ss. 4, 5, 12. 145 P.R. 1883.

See PRACTICE AND PROCEDURE, 10 W.R. P.C. 17=1 B.L.R. P.C. 1=12 M.I. A 397.

Translation of Papers.

Appeal to High Court—Application for—When to be made—*See* PRACTICE AND PROCEDURE, 1 M.H.C. 130.

Transmission of Records.

(1)—*Appeal to Privy Council—Transmission of records.*—A document being impeached as being forged on the face of it, the case was directed to stand over for the original document to be transmitted from India for inspection at the hearing of the appeal. RANEE SURNOMOYEE v. MAHARAJAN SUTTEESCHANDER ROY BAHADOOR, **10 M.I.A. 123=W.R.P.C. 13 =2 Sar. 60.**

This circular explains a previous Circular, and states that the charge for sending records should be borne by the Courts, and not by the Post Office. **Civ. Cir. No. 21, dated 7th July 1871, 16 W.R. Civ. Cir. 6.**

This circular calls for information regarding the transmission of records of Munsifs' Courts &c., to the Appellate Courts in the several districts, with a view to carrying out the provisions of Circular No. 17, dated 23rd May last. **Civ. Cir. Memo No. 5, dated 11th September, 1871, 16 W.R. Civ. Cir. 9.**

Transmission of Records—*concluded*.

This circular instructs officers to arrange with the Accountant-General, Bengal, for funds for transmitting judicial records through the post. **Civ. Cir. No. 1, dated 4th January 1871, 15 W.R. Civ. Cir. 1.**

This circular deals with the transmission of records in Civil suits appealed to the High Court. **Cir. No. 6, dated the 18th Feb. 1867, 7 W.R. Civ. Cir. Orders, p. 2.**

Transportation for Life.

Husband under—Right to the custody of wife—*See* CUSTODY OF WIFE, 47 P. R. 1892.

Transportation of Term Convicts.

This circular forwards a Resolution of the Home Department relative to the transportation of term-convicts—**Crim. Cir. Ord. No. 4, 24 W. R. Rules and Ors. of the H C., p. 10.**

This circular forwards a letter of the Government of India forbidding the transportation to the Andamans of female term-convicts. **Crim. Cir. Ord. No. 5, 24 W. R. Rules and Ords. of the H. C., p. 13.**

Transport of Native Labourers.

See BEN. ACT III of 1863.

See BEN. ACT VI OF 1865.

Travelling Allowance.

This circular deals with the travelling allowance bills of Small Cause Court Judges. **Cir. Memo. No. 16, dated the 16th May 1867, 7 W.R. Civ. Cir. Orders, p. 8.**

This circular circulates Memo. from Accountant-General, Bengal, regarding Bills for the travelling allowances of officers of Small Cause Court. **Civ. Cir. Memo No. 6, dated 12th July 1869, 12 W.R. Civ. Cir. 1.**

This circular draws attention to Financial Department Notification ruling that no travelling allowance can be drawn for a journey to a place not more than 5 miles distant from travelling officers' Head Quarters. **Civ. Cir. Memo No. 6 of 4th March 1874, 21 W.R. H.C. Rules and Ords. 15.**

This letter circulates copy of correspondence laying down that the limitations governing the travelling allowances of Deputy Collectors apply also to Sub-Deputy Collectors. **Rev. Cir. No. 1 dated 19th June, 1874, 22 W.R. Rev. Cir. 1.**

This circular lays down a rule as to travelling and halting allowances to officers, &c., employed by managers of Court of Wards' Estates. **Rev. Cir. No. 40, 22 W.R. Rev. Cir. 10.**

Treasurer.

Principal and agent—Liquidator of Company—Advances and disbursements by Secretaries and—of Company—Lien on property of Company as against other creditors—*See* CONTRACT ACT, 1872, ss. 171, 217, 222, 13 B. 314.

Treasure Trove.

See HIDDEN TREASURE.

(1)— *Reg.* XI *of* 1832—*Finder of property—Ownership of property undiscovered—Property hidden in chamber specially appropriated to that purpose—Trespasser—Notice.*—A Zemindar has no title to what has been hidden in former times in the soil now belonging to him. Where certain idols were accidentally found by a person and it was found that the idols were hidden in a stone chamber appropriated specially to that purpose, and not accidentally buried in the position which they would ordinarily occupy in a Hindu temple, the Zemindar could not claim a title to the idols as owner so as to defeat the rights of the finder under Reg. XI of 1832. [*R.*, 19 B. 668, 31 M. 397 = 4 M.L.T. 219.] It may be that the Legislature did not intend that the right under Reg. XI of 1832 should arise to the finder if the discovery were made in the course of a wilful trespass upon the lands of another with an immediate view to such discovery. But where the finding is accidental, there is nothing in the language of the Regulation to restrict the benefit it holds out to cases in which the property is found hidden in the soil of the finder. Though the Regulation requires immediate notice by the finder, yet, where it was found that within 3 or 4 days of the property being discovered it was in the hands of the authorities, they might be said to have supplied the necessary notice, which if given on the third or fourth day after the discovery, would probably be early enough to satisfy the requirements of the Regulation. RANI KATTAMA NACHIAR v. MUHAMMAD MIRA RAVUTHAN, **7 M.H.C. 150.**

(2)—*Ornament found hidden in house, right of owner of house to possession of—Reg.* V *of* 1817, *ss.* 2 *and* 6—On the evidence in this case the respondent had altogether failed to prove his right to the bracelet that was the subject of dispute. With regard to the right of the appellant it was held that she had the right to it under s. 2, Reg V of 1817 as "valuable property" found by her concealed in her house and handed over by her as soon as found to the proper authority. There was no reason why the appellant should not be given the benefit of s. 6 and be allowed to retain possession of that to which no one else had substantiated any claim. PREM MOYEE BEWAH v. NOBIN CHUNDER CHOWDRY, **4 W.R. Mis. 7.**

(3)—*Reg.* V *of* 1817—*Hidden treasure.*—Certain persons, while digging in a field belonging to a zemindar, found some coins in an earthen pot. Dispute arose between them and the zemindar's servant about the coins. *Held* that the finders were not entitled to the property, as they had not complied with the provisions of s. 8, Reg. V of 1817, that the zemindar was not entitled to it, as he was not the finder, and as he did not give any notice to the Zilla Judge as required by the Regulation. The property escheated to the Government. *In the matter of the petition of* UMA CHARAN BANERJEE, **7 B.L.R. App. 3 = 15 W.R. 526.** [*R.*, 19 B. 668.]

Treasure Trove Act.

See ACT VI OF 1878.

Treasury.

This letter circulates instructions regarding the escort of remittances to Collectorate Treasuries, **Civ. Cir. No. 9, dated 13th July 1868, 10 W R. Civ. Cir. 3.**

This circular deals with the proper examination of treasure and accounts, **Rev. Cir. No. 3, 25 W.R. Rev. Cir. 21.**

Treasury Account.

This circular directs the punctual submission to the Accountant-General of Munsifs' Treasury Accounts. **Civ. Cir. No. 11, dated 13th April 1871, 15 W.R. Civ. Cir. 19.**

Treasury Inspection.

This circular deals with the report as to inspection of Treasuries. **Rev. Cir. No. 7, 24 W.R. Rev. Cir. p. 4.**

This circular deals with the revised questions for Treasury inspections. **Rev. Cir. No. 4, 22 W.R. Rev. Cir. 1.**

Treaty.

(1)—*Treaty—Bombay Revenue Jurisdiction Act, s. 4 (a).*—The term "treaty" in s. 4 (*a*) of the Bombay Revenue Jurisdiction Act, 1876, is to be strictly construed and is to be confined to an agreement between two or more independent Sovereign Powers or States. KALABHAI v. SECRETARY OF STATE FOR INDIA, **6 Bom. L.R. 648=29 B. 19.**

Meaning of the word—*See* BOMBAY ACT X OF 1876, 29 B. 19.

See LAND TENURE IN BOMBAY, 4 B.H.C. O.C. 1.

Treaty, Construction of.

Arrangement between two Sovereign powers—Taking effect as treaty—Construction of treaty—Perpetual pensions by payments—Construction of the word "issue"—Effect of subsequent correspondence.—Where, although a settlement of pensions in perpetuity could not be validly made by a private individual, under the Mahomeden Law, an arrangement, between the King of Oudh and the East India Company (two Sovereign powers), by which the members of the Royal Family of Oudh had secured to them and to their issue perpetual pensions took effect as a treaty between the powers, *held*, on the construction of the treaty made in 1838 between those Sovereign powers, (1) that it was the intention to provide pensions for certain members of the Royal Family in perpetuity; (2) that, in the case of any of the pensioners dying without issue, his or her pension reverted to the King; (3) that the words "heirs" and "issue" were used as convertible or equivalent terms; (4) that they meant persons who would be heirs according to the Mahomedan Law of inheritance; (5) that the

Treaty, Construction of—*concluded.*

King intended in 1842 to provide an additional pension for the plaintiffs' ancestor, of the same nature as that provided for her in 1838; (6) and that, according to the King's letter of 1842 to the East India Company, after her death, provided she should leave issue, the additional pension should be paid to such of her issue as should be her heirs, according to the rules of the Mahomedan Law of Inheritance. MARIAM BEGAM v. MIRZA, **17 C. 234 =16 I.A. 175 (P.C.)=5 Sar. 422.** [*R.*, 18 C. 216, P.C.; 9 C.W.N. 817=2 C.L.J. 57=27 A. 383=32 I.A. 135=15 M.L.J. 327=6 O.C. 210=7 Bom. L.R. 850=3 A.L.J. 64, P.C.]

Trees.

See LANDLORD AND TENANT—PROPERTY IN TREES, ETC., ON LEASED PREMISES.

(1)—*N.W.P. Rent Act* (XII *of* 1881), *s.* 56—*Trees, if "produce of land."*—Trees are not "the produce of the land" within the meaning of s. 56 of the N.W.P. Rent Act XII of 1881. BECHAI LAL v. TIKA, **A.W.N. 1884, 135.** KHAMAN SINGH v. BALA BAKHSH, **A.W.N. 1884, 152.**

(2)—*Growing tree, suit for—Immoveable property—Limitation.*—A tree standing on land is immoveable property, and a suit for the possession of such tree is governed by the 12 years' rule of limitation. SAKHARAM MULSHET MHADIK v. VISHRAM, **19 B. 207.** [*R.*, 7 C.L.J. 152.]

(3)—*Jurisdiction—Trees on agricultural holding—Whether part and parcel of land held for agricultural purposes—Execution of decree—Attachment and sale of such trees—Jurisdiction of Civil Courts—Ouster.*—Trees of all kinds, standing on an agricultural holding, are part and parcel of land used for agricultural purposes, at least in those cases where the property in them has not been expressly severed from the property in the soil on which they stand (*vide* Revenue Book Circular No. IV-9, Central Provinces Revenue Manual, Vol. III. p. 76). And no Civil Court has jurisdiction to attach and sell such trees in execution of the decree. SUKHANANDAN v. MANAK CHAND, **7 N.L.R. 63.**

(4)—*Limitation Act* (IX *of* 1908), *sch.* I, *art.* 132—*Registration Act* (III *of* 1877), *s.* 3—*Standing trees—Moveable or immoveable property—Mortgage—Transfer of Property Act* (IV *of* 1882), *s.* 3 (*a*), 59.—A mango grove, apart from the land on which it stands, is not immoveable property for the purposes of registration. For the purposes of limitation, however, such grove comes within the meaning of immoveable property as used in art. 132 of the Limitation Act. MANGAL SEN v. NAOLI, **9 Ind. Cas. 478.** (A.W.N. 1887, 59, *F.*)

(5)—*Moveable or immoveable—Determination of question for purpose of Registration Act.*—The question whether a tree should be regarded as timber for the purposes of any transaction

under the Act depends upon the nature of the transaction and the intention of the parties thereto. SAKHARAM VINAYEK v. GOPAL KALAR, **9 C.P.L.R. 53.** (6 M.H.C. 71, *R.*) [*F.*, 5 N.L.R. 21.]

(6)—*Waste land between two adjacent fields—Right of owner of one field to restrain the other owner from planting trees thereon.*—The strip of land lying waste between two adjoining fields is presumed to belong to the owners of the fields up to the middle thereof. Each owner can plant trees up to the middle of the waste land on his side and the other owner cannot restrain him from so doing. MAHIPATI KUNBI v. LAL BIHARI BANIA, **15 C.P.L.R. 93.** (17 C. 814, 19 B. 420, *R.*)

(7) — *Fruit growing upon trees — whether moveable or immoveable property—Act* XI *of* 1865 (*Mofussil Small Cause Courts*), *s.* 6—*Registration Act*, 1877, *s.* 3—Fruit growing upon trees is moveable property, and a suit for damages for the wrongful taking of such fruit is one of a nature cognizable by a Small Cause Court. In *the matter of the petition of* NASIR KHAN v. KARAMAT KHAN, **3 A. 168.** [*Cons.*, 11 M. 193; *R.*, 5 A. 564, F.B.]

(8)—*Trees, right to cut and appropriate—Fruit trees grown by tenant of holding when tenancy was created before Transfer of Property Act—Bengal Tenancy Act* (VIII *of* 1885), *s.* 23—*Transfer of Property Act* (IV *of* 1882), *ss.* 2. 108, *cl.* (*b*).—A tenant of homestead land has the right to cut and appropriate fruit trees grown by him or his predecessor's interest on the holding, when it is established that the tenancy was created before the Transfer of Property Act came into operation. MOFIZ SHEIKH v. RASIK LAL GHOSH, **6 Ind Cas. 796=14 C.W.N. 952=12 C.L.J. 246=37 C. 815.**

(9)—*Easement, if a right to plant trees on another's land can be acquired by—Tenant's right to claim rent in respect of such trees—Amount of rent.*—A prescriptive right to plant and keep trees on other's land cannot be acquired in law. To grow trees on another's land is not an easement. An agricultural tenant has got a right to claim ground-rent for the use and occupation of the land by trees of another, who is not his landlord. The mere fact that no objection was taken to the presence of the trees for a number of years and no claim for renumeration was made does not perpetually bar him from claiming ground-rent afterwards. In calculating the ground-rent, the amount of damage caused to the crops by the shade of the trees and the yield of the trees may be taken as the *criteria*. UDEISING v. GANERAM, **5 N.L.R. 52=2 Ind. Cas. 230** (4 N.L.R. 104, 20 W.R. 237, 19 B. 420, *R.*)

(10)—*Owner may chop off penetrating roots—No notice necessary, if he does not trespass on the other's land.*—Every owner is under an obligation not to allow the boughs of his tree to grow so as to overhang, or the roots of his tree

to extend so as to penetrate, his neighbour's land, to the detriment of the latter. The owner of a land which is overhung by trees may, without notice, if he does not trespass on his neighbour's land, cut the branches, so far as they overhang and however long previously they have overhung his land. (*Lemmon* v. *Webb*, 1895, A.C. 1, 19 B. 420, *R.*) No prescriptive right can be acquired to compel a man to submit to the penetration of his lands by the roots of a tree planted on his neighbour's soil, and a man may consequently abate any such encroachment upon the property by cutting the roots in the same manner that he may remove the overhanging branches, (*Norris* v. *Baker*, 1 Roll. Rep. 393, *R.*) LAKSHIMI NARAIN BANERJEE v. TARA PROSANNA BANERJEE, **31 C. 944=8 C.W.N. 710.**

(11)—*Trees standing on a plot within* Zemindari *pass with the* Zemindari.—Trees standing on a plot of land within a *Zemindari* are appurtenant to the *Zemindari* and, in the absence of evidence to the contrary, pass on along with it. ONKAR DAS v. CHOTE LAL, **11 Ind. Cas. 192.**

(12)—*Landholder and tenant - Trees—Respective rights of both in trees growing on tenant's holding.*—A tenant, who takes land for agricultural purposes, commits a breach of contract when he, without the zemindar's permission, plants trees thereon; and cases to remove such trees and cancel sales of such trees have been heard and decided by the Civil Courts. In the absence of a custom to the contrary, the property in timber growing on a tenant's holding vests in the zemindar, and neither party has the right to cut and remove the timber without the consent of the other. LACHMAN DAS v. MOHAN SINGH, **9 A.L.J. 672.**

(13)—*Hereditary cultivator—Zemindar if entitled to cut down trees in hereditary holding.*—The *wajib-ul-arz* in this case contained a provision to the effect that a hereditary cultivator, though at liberty to cut trees growing on the holding for the manufacture of implements of husbandry and the repair of his house, shall not be entitled to sell them to others. The object of such a provision is to secure an asset in case of default by the tenant and to prevent waste by him. It was therefore held that from such a provision it cannot be inferred that the zemindar can cut and sell the trees without the tenant's consent. Such right cannot be claimed by the zemindar in the absence of a provision in the *wajib-ul-arz* or of proof of custom in his favour. NIKKA v. LUKHA, **95 P.R. 1867.** [*F.*, 61 P.R. 1881; *R.*, 61 P.R. 1873, 9 P.R. 1904, Rev.=45 P.L.R. 1905; *D.*, 4 P.R. 1875.]

(14)—*Hereditary cultivator, and proprietor, rights of, to cut and use trees on land.*—As a general rule the tenant can only cut trees for agricultural purposes and the trees belong to the proprietor; the tenant, save for repairs, &c.,

Trees—*continued.*

cannot cut them and cannot sell them. Similarly the proprietor cannot, unless the *wajib-ul-arz* or custom empowers him so to do, cut down trees on the land in the occupation of the hereditary cultivator, without his consent. Where, however, the trees happen to be fruit trees planted and nourished under the care of the proprietor and in his possession, he could appropriate them to his own use if he liked, being possessed of the entire use and the proprietary right in the trees, such case being different from the one where hereditary cultivator nas an interest in the preservation of the trees to use for his agricultural occasions and needs by custom. JANI v. GULAM FARID KHAN, **4 P.R. 1875.** [*R.*, 94 P.R. 1877, 61 P.R. 1881, 52 P.R. 1906 =102 R.L.R. 1906.]

(15)—*Custom—Property in trees—Rights of cultivators.*—Where the adminstration paper of a village in Jallundhur tehsil laid down that one who was not owner of land could not mortgage or sell a tree and that a cultivator may only with the consent of the landlord cut a tree from his land or dwelling place for the repair of his house, *held* that a tenant could not recover from his landlord the value of a tree cut by him from the tenant's house, inasmuch as the tenant had no proprietary right in the tree. BAJA v. FATTEH JANG, **13 P R. 1877.**

(16)—*Ownership—Land belonging to shrine—Decree against* mutawali — *Attachment of trees—Presumption.*—In execution of a money decree against a *mutawali*, the decree-holder cannot attach a tree planted by the predecessor of the *mutawali* on land admittedly belonging to the shrine. A *mutawali* cannot acquire any property in a tree planted by him on land belonging to a shrine. Nor can any benefit which he might have derived, by taking the fruit of the tree, enable him to acquire any right of ownership in the tree as against the shrine. When the land admittedly belongs to the shrine, the tree must have that character until the contrary is proved, NURBIBI v. MAGAN LAL PARBHUDAS, **16 B. 547.**

(17)—*Execution of decree—Sale of agricultural land—Trees—Sanction of Financial Commissioner.*—When the Financial Commissioner had refused to sanction the sale in execution of decree of agricultural land described as a garden, held that the Civil Courts were not competent either to sell the land, or to sell the trees upon the land. LEHNA v. DEVI DITTA, **59 P.R. 1891.**

Suit to establish right to use and cut trees—*See* BEN. ACT VIII OF 1869, 2 Agra. 217.

Grant of, apart from the land—Grantor reserving every forest right but the one granted—Grant of forest right within the meaning of s. 193 of Bengal Tenancy Act—Growing—Immoveable property—Transfer of moveables. *See* BEN. ACT VIII OF 1885, ss. 144, 184, 193, sch. III, art. 2, 7 C.L.J. 152.

See BOM. ACT X OF 1876, s, 4, cl. (*a*), 18 B. 319.

Trees—*continued.*

Trees, cutting of, from an assessed occupied number—*See* BOM. ACT V OF 1879, s. 214, 4 Bom. L R. 625.

Puttah for palmyra—can be tendered—*See* MAD. ACT VIII of 1865, 4 M.H.C. 398.

See MAD. ACT VIII of 1865, ss. 1, 11, 17 M. 54.

See MAD. ACT VIII OF 1865, s. 9, 15 M 47.

See MAD. ACT V OF 1982, s. 11, 3 M.L.J. 231.

Right to trees planted by kanomdar—*See* MAD. ACT I OF 1887, ss. 2, 3, 4, 6, 24 M. 47, F.B. =10 M.L.J. 321.

Right of landlord to cut—Suit by tenant for share of price of trees cut—*See* PUN. ACT XVI OF 1887, s. 77 (3) (*i*), 45 P.L.R. 1905.

Suit against tenant for demolition of house and removal of trees—Jurisdiction of Civil Court—*See* U. P. ACT XVIII OF 1873, ss. 93 (*b*), 149, A.W.N. 1882, 102.

Suit for fruit on trees in Cantonment—*See* U.P. ACT XII OF 1881, ss. 3 (2), 93 (*a*), A.W.N 1881, 162.

Orchard land—Possession of planter of trees—*See* BURDEN OF PROOF—LANDLORD AND TENANT, 2 Agra 361.

Suit for possession of certain trees—No bar by suit for damages for loss of fruits or for declaration of title to such trees—*See* CIV. PRO. CODE, 1908, s. 11, 7 C.P.L.R. 63.

Standing trees are not moveable property—Act IX of 1887—Jurisdiction of Provincial Small Cause Court—*See* CIV. PRO. CODE, 1908, s. 102, 9 Ind. Cas. 133.

Prevention by one party of completion of Contract—Contract to cut trees—Right of action—*See* CONTRACT—BREACH OF CONTRACT, Cor. 71 =2 Hyde 153.

Suit by co-sharer for removal of—Joint possession—Injury—*See* CO-SHARERS—SUITS BY CO SHARERS, A.W N. 1887, 116.

Right to cut and appropriate—Landlord and tenant—Putni—*See* CUSTOMARY RIGHT, 11 C.L J. 209 =14 C.W.N. 487 =5 Ind. Cas. 243 =37 C. 322.

Easement—Trees overhanging neighbour's land—Nuisance—*See* EASEMENTS ACT, 1882, 19 B. 420.

See IMMOVEABLE PROPERTY, 66 P.R. 1900.

Right to cut branches of, over-hanging one's roof—Tree held sacred by neighbours—Whether right affected—Injunction—*See* INJUNCTION—SPECIAL CASES, 24 A. 499 =A.W.N. 1902, 169.

See JOINT PROPERTY, 109 P.R. 1879.

Trees—*continued.*

Suit regarding plantain—Tahsildar not competent to try suit—*See* JURISDICTION—QUESTION OF JURISDICTION, 11 C.P.L.R. 89.

Partition of trees—*See* JURISDICTION OF CIVIL COURTS, A.W.N. 1882, 13.

Suit for removal of in tenant's holding—*See* JURISDICTION OF CIVIL COURTS, 20 A. 519=A.W.N. 1898, 133.

See JURISDICTION OF CIVIL COURTS, 2 B. L.R. App. 19=11 W.R. 52.

Landlord and Tenant—Suit for mandatory injunction against tenant for removal of trees, not cognizable by Civil Court—*See* JURISDICTION OF REVENUE COURTS, 23 A. 486, F.B. =A.W.N. 1901, 164.

Declaratory suit that occupancy tenants are entitled to cut trees for making agricultural implements only — *See* JURISDICTION OF REVENUE COURTS, P.L.R. 1900, p. 165.

Planting of new trees—Patta prohibiting such planting, validity of—*See* LANDLORD AND TENANT—GENERAL, 9 M.L.J. 146.

Digging well or planting trees without permission—Ejectment—Forfeiture of lease as for breach of Condition—*See* LANDLORD AND TENANT—ALTERATION OF CONDITIONS OF TENANCY, Agra F.B., 119=Ed., 1874, 89.

Tenant's right in trees planted during continuance of tenancy—*See* LANDLORD AND TENANT—EJECTMENT, 2 O.C. 280.

Planting trees—Liability to ejectment—Consent of landlord—*See* LANDLORD AND TENANT—FORFEITURE, Agra, F.B., 125=Ed., 1874, 94.

See LANDLORD AND TENANT—FORFEITURE, 3 N.W.P. 322.

Lease of land—Purchase of plantain trees on land by lessee—Mortgage of plantain trees by lessee—Termination of lease—Rights of mortgagee—*See* LEASE—GENERAL, 11 M.L.J. 340.

See LEASE—CONSTRUCTION OF LEASE, 10 W.R. P.C. 13=11 M.I.A. 295.

See LIMITATION ACT, 1908, s. 28, 3 A. 435.

Limitation for removal of—*See* LIMITATION ACT, 1908, art. 32, 11 O.C. 379.

Suit by Zemindar for removal of trees planted by trespasser—*See* LIMITATION ACT. 1908, arts. 32, 120, 10 A. 634=A.W.N. 1888, 257.

Interest in immoveable property—Trees are immoveable property—*See* LIMITATION ACT, 1908, art. 144, 2 Agra 300.

Suit for possession of Mango trees—Adverse enjoyment by taking fruits—No easement—*See* LIMITATION ACT, 1908, art. 144, s. 26, 16 B. 353.

Trees—*continued.*

Suit for possession—*See* LIMITATION ACT, 1908, arts. 144, 55, 112 P.R. 1884.

Mortgage by grove-holder—Right to redeem—*See* MORTGAGE—REDEMPTION, 12 O.C. 197 =3 Ind. Cas. 519.

Persons holding patta for—On land whether entitled to patta for the land itself—*See* POTTA, 21 M. 433. F.B.

Enjoyment of fruits of trees with permission of owner—No adverse possession—Suit for possession—No plea of limitation—*See* POSSESSION—ADVERSE POSSESSION, 3 C.P.L.R. 160.

Easement—Accessory right—Overhanging—Right of way for owner of trees for picking up fruit—Prescriptive right—*See* PRESCRIPTION—EASEMENTS—RIGHT OF WAY, 17 B. 745.

Suit for damages for cutting—Defendant alleging non-existence of Jurisdiction — *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, sch. II, cl. (2), 5 Ind. Cas. 322.

Landlord and tenant—Suit by landlord for damages for breach of covenant not to cut and carry away trees—Waiver of jurisdiction—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, sch. II, art. 31, 26 M. 176=12 M.L.J. 264.

—Lease of—Registration whether necessary —*See* REGISTRATION ACT, 1908, s. 2, 5 M. L.J. 27.

Right to juice of trees if immoveable property—*See* REGISTRATION ACT, 1908, s. 50, 3 B.L.R.A.C. 394=12 W.R. 366.

Suit for removal of—*See* RES JUDICATA—COMPETENCY OF COURT, 1 Agra 27.

—*See*—RIGHT OF OCCUPANCY—ACQUISITION OF RIGHT, 5 N.W.P. 155.

Suit for removal of—Contingent damage. Present cause of action—*See* RIGHT OF SUIT—INJURY TO ENJOYMENT OF PROPERTY, 5 A. 369=A.W.N. 1883, 58.

Deed of sale of land—Trees standing on land, whether pass to purchaser as legal incident thereof—*See* SALE—GENERAL, 22 B. 610.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 3 M.H.C. 237.

Fruit of a tree severed and removed—Suit for—*See* SMALL CAUSE COURT, MOFFUSSIL JURISDICTION OF—GENERAL, 28 P.R. 1891.

Suit for value of trees—Question of title. Presentation—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL, 4 P.R. 1883.

Suit for damages for branches of a—Cut and misappropriated—Cognizance by Small Cause

Trees—*concluded.*

Court—*See* SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, A.W.N. 1888, 43.

Mortgage of fruit of growing plantain trees—Mortgage of moveable property—Small Cause nature — Second Appeal—*See* SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 11 M.L.J. 343.

Landlord and tenant—Suit for fruit of or share of proceeds—*See* SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, A. W.N. 1885, 299.

See SPECIAL OR SECOND APPEAL—SMALL CAUSE COURT SUITS, 5 N.W.P. 24.

Contract for sale of standing—Chargeable as an agreement and not a conveyance — *See* STAMP ACT, 1879, s. 3, cl. 9, sch. I, art. 21, 22 B. 785.

Lease for planting cocoanut trees—If lessee, cultivator—*See* STAMP ACT, 1879, sch. II, art. 13 (*b*), 15 B. 73.

Penetration of—On neighbour's wall—Continuing actionable nuisance—Threatened injury—Injunction—*See* SPECIFIC RELIEF ACT, 1877, s. 55, 31 C. 944=8 C.W.N. 710.

Tree Tax.

(1) *Inam—Temple—Inam when extinguished.*—Where the right to the tree-tax alone was assigned as inam to a temple, the inam becomes extinct when the trees cease to exist. But when the inam consisted of the land on which the trees stood, the temple is entitled to the melvaram on the land. JAGANNATHA PANDIAJIAR v. MUTHIA PILLAI, **14 M.L.J. 477.**

Trespass.

See TRESPASSER.

(1)—*Trespass, what constitutes—Whether damage necessary—Exemplary damages, whether can be given.*—Trespass is the infringement of a right, and gives a cause of action even when no damage results, and not only substantial, but exemplary, damages may be given if the circumstances require. NGA TUN NYO v. NGA THA HMAT, **U.B.R. 1907, 3rd Qur., Tort 1.** (U.B.R. 1904—1906, II Tort, p. 9, *R.*)

(2)—*Chur and Jungle lands—Ouster, what amounts to—Trespass.*—A mere trespass without claim of right, as in the case of a squatter, does not amount to an ouster of the true owner. MADHABI SUNDARI DASSYA v. GAGANENDRA NATH TAGORE, **9 C.W.N. 111.** (3 W.R. 75, *R.*)

(3)—*Action for trespass—Damages—Assessment of.*—In an action for trespass, a wide latitude is no doubt permissible in assessing damages, but nothing can be claimed on account of actual loss unless such loss is actually traceable to the wrong and its natural and necessary consequence. VENKATASA NAIKER v. SRINIVASA CHARIYAR, **4 M.H.C. 410.**

Trespass—*continued.*

(4)—*Trespasser—Account—Damages.*—A trespasser is not liable to account, but is liable for damages. SRINIBASH ADAK v. NOGENDRA NASH DASS KOLAY, **4 C.W.N. 195.**

(5)—*Cultivation of land not evidence of wrongful possession.*—This appeal was based on the ground that the lower Court ought to have given distinct finding of evidence, whether defendant was a trespasser as alleged by plaintiff, or was in the relation of a tenant paying rent to the plaintiff, which rent was accepted by plaintiff as landlord from defendant as tenant. *Held* that the lower Courts should have clearly stated whether, as a matter of fact, and irrespective of the only point found,—*viz.*, that defendant cultivated, he cultivated as tenant of plaintiff or as a trespasser. Merely because the defendant was a cultivator, the lower Courts should not have taken it that it would follow as a legal and logical consequence that the defendant could not be a trespasser. SHEIK GOLAM NUJEEF v. SUN SAR RAJAH, **2 W.R. 219.**

(6)—*Trespass—Long possession by trespasser—Acquisition of title.*—A trespasser can acquire title to property by long possession thereof. MAHARAJAH BEER CHUNDER MANICKA BAHADOOR v. ABJUL GOONIN, **22 W.R. 355.**

(7)—*Trespass—Land taken by Government without formality prescribed by Beng. Reg. I of 1825—Right of owner to maintain suit against Government for rent.*—Lands were occupied by the Government for the purpose of making an embankment without the observance of the formality required by Regulation I of 1825. *Held* that the owner of the land was entitled to maintain a suit against Government for the rent of the land during the time he was kept out of possession. JOYNARAIN BOSE v. COLLECTOR OF 24 PERGUNNAS, **Marsh. 56=U. R. F.B. 18=1 Hay 122.**

(8)—*Trespass—Encroachment on plaintiff's wall—Absence of proof of damage—Injunction, right to*—De minimus non curat lex—*Specific Relief Act* (I *of* 1877), *ss.* 54, 55.—Where it was found that defendant encroached on plaintiff's wall but the plaintiff was not able to prove any particular damage. *Held, per Phillips, J.*, that plaintiff was not entitled to a mandatory injunction, but only to some damages. Though a plaintiff is generally entitled to injunction in addition to damages in a case of trespass on his immovable property, yet where he has not proved the extent of the encroachment or that he has suffered any material injury, an injunction should be refused. (13 Ch. D. 324, 28 W.R. 552, *D.*; 14 C. 189, 16 C. 252, *R.*) *Per Abdur Rahim, J.*—Though an injunction is a remedy in equity that can be granted or refused at the Court's discretion, in a case of continuous trespass on plaintiff's immoveable property amounting to an ouster of the plaintiff from the land encroached upon and where plaintiff has not been guilty of laches, the plaintiff would be entitled to ejectment of defendant and mandatory injunction

Trespass—*continued.*

in addition to damages, even though there was no material injury suffered by him. An appellate Court, which finds that there was some encroachment on plaintiff's land, is bound to find the least extent of the encroachment, if it could not find the actual extent of the encroachment. The maxim '*de minimus non curat lex*' has no application to the law of trespass. SOMASUNDARAM CHETTY v. BAPPU, **12 Ind. Cas. 635=10 M.L.T. 473.** (16 C. 252, 22 M. 251, *Considered.*)

(9)—*Injunction—Suit to close doors opened by a person in his own wall—Possibility of committing trespass—Possibility of injury.*—A suit to close doors opened by a person in his own wall, on the ground of the possibility of his committing trespass on the plaintiff's land or of his having actually committed trespass, is not maintainable. Unless the opening of the doors is in itself such an irremediable injury to the plaintiff that he would not be sufficiently compensated for by money damages, the Court would, under no circumstances, order the doors to be closed up. GIBBON v. ABDUR RAHMAN KHAN, **3 B. L. R. A. C 411.** [*R.*, 10 A. 358=A. W. N. 1888, 135]

(10)—*Suit to close door—Trespass apprehended—Injury.*—In a suit for the closing of a door opened in a wall adjoining certain land, over which the plaintiffs claimed certain right allowed them by the zamindars, in whom the property in the land was said to be vested, it was *held* that the wall being the wall of the defendant's house, they had *prima facie* a right to make a door-way in it, and so long as no injury was done to the plaintiffs' rights, they could have no ground of action. If the door were so turning on its hinges that when opened it disturbed the enjoyment by the plaintiffs of their rights in the land, they might bring a suit to have the obstruction removed. But no suit for the closing of the door would lie simply on the ground that the plaintiffs apprehended trespass on their land. PARUM SOOKH v. SEETA RAM, **2 Agra 119.**

(11)—*Opening doors on one's wall—Another's land running up to and bordering on wall—Inference—Trespass.*—Under ordinary circumstances, a man may open a door or a window in his wall. But where A opens a door in his wall, and it appears that the land up to the wall of A's house is B's land which runs up to and borders on the wall of A, and that, if a person comes out of the new door of A's house, he must pass on and over B's land, and similarly any person going into the house would have to pass over that land, the necessary inference is that A's object in opening the door is to use it and to walk therefrom over B's land, and B is perfectly entitled to protect himself from this being done. AMRIT LAL v. GOPI, **A.W.N. 1887, 216.**

(12)—*Tort—Trespass—Police officer—Trespass on person—Master and servant—Loss of service.*—If a Police officer, in order to arrest

Trespass—*continued.*

suspected person, enters into a building, his action would be *prima facie* justifiable. In order to maintain an action for trespass to the person of a servant, it must be shown that the plaintiff was, by reason of defendant's conduct, deprived of the benefit of the servant's service. BRAJENDRA KISSORE ROY CHOWDHURI v. M. A. LUFFEMAN, **13 C.W.N. 485=4 Ind. Cas. 520.**

(13)—*Trespass—Acts done under orders of lawful superior, responsibility for—House search—Trespass ab initio—Trespass on person—Master and servant—Loss of service.*—A person cannot be held responsible for acts done by him under the orders and directions of his lawful superior. If a police-officer, whilst lawfully conducting a search, assaults some person on the premises, his entry on the premises does not necessarily become unlawful from the outset. In all cases of action for trespass to the person of the servant, it is necessary for the master to prove that he has, to some extent at least, been deprived of the services of his servant, owing to the wrongful act of the alleged trespasser. BROJENDRA KISSORE ROY CHAUDHURI v. M. A. LUFFEMAN, **12 C.W.N. 982.**

(14)—*Trespass—Action in ejectment—Right to sue—Persons in possession of property—Parsi Anjuman of Surat—Agiary property.*—Persons, who are actually in possession of property for a long period of time (extending in this case to sixty years), with the tacit acquiescence of the true owners, though they hold under no informal deed of appointment, can sue to eject a trespasser from the property. JIVANJI JUMSHEDJI LAKDAWALLA v. BURJORJI NASERWANJI VAKIL, **11 Bom. L.R. 726=33 B. 499=3 Ind. Cas. 770.**

(15)—*Immoveable property—Dedication to charity—Agiari—Man in possession—Right to sue.*—A person, who dedicates his immoveable property to charity (*e.g.*, for constructing and maintaining an *Agiari* for Parsees), can maintain an action with respect to trespass to the property. PESTONJI v. NEMCHJND. **9 Bom. L.R. 1301.**

(16)—*Landlord—Tenure in India—English rule.*—The rule of English law that a landlord, who has parted with his possession to a tenant, cannot sue in trespass for damage to the property, unless the wrongful act complained of imports a damage to the reversionary interest, does not apply to India, where tenures are in the nature of a partnership in which he, to whom the land belongs, participates with the cultivators in the crop. VENKATACHALLAM CHETTY v. AUDIAPPAN AMBALAM, **2 M. 232.** [*R.*, 19 M. 335, 6 M.L.J. 136.]

(17)—*Trespass—Non-joinder of parties.*—A person who has trespassed, cannot plead as a defence that some one else has trespassed along with him and that, therefore, he alone cannot be sued. KHANDERAO v. SAKHARAM, **2 Bom. L.R. 283.**

Trespass—*continued.*

(18)—*Suit for damages—Small Cause Court—Jurisdiction—Civ. Pro. Code* (*Act V of* 1908), *s.* 102—*Second appeal.*—A suit for damages on the allegation that the defendant had in plaintiff's absence entered his house with police and strangers, gone into his inner apartments and obliged his wife and others to remain secluded and thereby humiliated the plaintiff, is clearly a suit for damages for trespass and therefore cognizable by a Court of Small Causes. When therefore the value is below Rs. 500, no second appeal lies. BHOLA NATH SAHA v. KRISHNALAL SANA, **10 C.L J. 198=1 Ind. Cas. 592.** (12 M.L J. 349, *F.*)

(19)—*Setting fire to and destroying pepper-vines on plaintiff's land—Trespass Suit for damages Limitation Act, arts.* 36, 39.—Trespass certainly includes the mischief which the trespasser commits after entering on the land. Art. 39, Limiation Act, applies to a suit for damages for unlawfully setting fire to and destroying pepper-vines on plaintiff's land. Art. 36 can apply only to cases of malfeasance, etc., not provided for by other articles. BAYAKOOL NATUV, LAPURAYIL MOIDIN KUTTI v. POTTARKLUR KOMAN NAIR, **12 M L T. 538=23 M L J. 618=M.W.N. 1912, 1229.** (25 C. 692, 22 C. 877, 3 C.L.R. 509, *R.*)

(20)—*Tort—Trespass—House-search by Magistrate—Statutory justification—Indian Arms Act* (XI *of* 1878), *s.* 25—*Arms, general search for—Grounds of belief, recording of—Code of Criminal Procedure* (*Act V of* 1898), *ss.* 96, 105, 165—"*Court,*" *when a Magistrate is—Judicial Officers' Protection Act* (XVIII *of* 1850), *s.* 1—*Acts, executive or judicial—Malice*—Bona fides—*Damages—Costs of appeal—Cross objections.*—*Held,* (*Brett, J., dissentient*). When a statute creates a special right, but certain formalities have to be complied with, antecedent to the exercise of that right, a strict observance of the formalities is essential to the acquisition of that right. In a general search for arms under s. 25 of the Indian Arms Act, 1878, the Magistrate, holding such search, must first record the grounds of his belief as directed therein in order to avail himself of the protection of that section from the consequence of his action. A Magistrate can only conduct a search under s. 105 of the Code of Criminal Procedure when he is competent to issue a search warrant under s. 96 of that Code which applies to the issue of a search warrant by the Court. *Per Maclean, C.J.*—Where there are special provisions in an Act of Legislature dealing with the case of a search for arms and laying down what are the conditions precedent to making such a search and there are general provisions in another Act of the Legislature dealing with searches generally, and in point of fact, the search was one made for arms, it ought—in the absence of evidence to show that the search was made under the general as opposed to the specific legislation—to be taken that the search was not made under the general provisions authorising searches, and, especially so, when the search was made by one who

Trespass—*continued.*

in the circumstances, had no power of search under the general provisions as to searches. The scheme as regards searches under the Code of Criminal Procedure is as follows:—(1) The Court can issue a search warrant under s. 96, or (2), in lieu of that, the Magistrate may himself search under s. 195, and (3) s. 165 deals with searches by a police officer and not by a Magistrate. The duties of a Magistrate in this country are at once executive and judicial. If a search is conducted by a Magistrate in his executive capacity, he cannot rely on Act XVIII of 1850 as a protection from the consequences of holding a search. *Per Hamington, J.*—Where a statute authorises the doing of an act which is *prima facie* a wrong to an individual, the doer must comply strictly with the conditions imposed by the statute, if he desires to rely on the statute as a justification for his act. A Magistrate cannot be said to be acting judicially in directing a search to be made without any proceeding having been instituted before him, which he would be called on to determine judicially. The respondent, though successful, was not allowed his costs, for pressing charges of malice against the appellant which were held to be unfounded. L. O. CLARKE v. BRAJENDRA KISHORE ROY CHOWDHURI, **13 C. W.N. 458=9 C.L.J. 298=36 C. 433=5 M.L.T. 367=2 Ind. Cas. 436.**

(21)—*Civil not criminal—Indian Penal Code, s.* 448—*Crim. Pro. Code, s.* 522, *applicability of.*—When, during the absence of the complainant, the accused took possession of the house in her occupation and established there a boy alleged to be the adopted son of the complainant's father, *Held*—that the accused could not be convicted of an offence under s. 448, I.P.C., as the house trespass which they committed was not a criminal, but a civil trespass: *Held,* also, that no order could be passed by the trying Magistrate under s. 522, Crim. Pro. Code, for the delivery of possession of the house to the complainant, as the accused had not been convicted by the Magistrate of any offence attended by criminal force, and that the house should be restored to the accused, who were found in possession of it. SOITA BISWAL v. DOCHHI STRI, **12 C.W.N. 261.**

(22)—*Trespass—Conversion*—A trespass on a piece of land is by itself no proof of any trespass to, or conversion of, any moveables to be found on the land at the time the trespass took place. KHOTTATHIL AHMAD v. MUTHEDATH AVUTHRAMAN, **8 M.L.J. 273.**

(23)—*Action of trespass against Judge—Defect of jurisdiction—Burden of proof—Knowledge.*—An action of trespass will not lie against a Judge for acting judicially, unless he knew or had the means of knowing, of the defect of jurisdiction, and it lies upon the plaintiff, in every such case, to prove that fact. CALDER v. HALKET, **2 M.I.A. 293=3 Moo. P.C 28=4 State, Tr. N. S. 491=Morton 396=1 Sar. 191.**

Trespass—*continued.*

Suit for damages for trespass—*See* CAUSE OF ACTION, 1 B.L.R. O.C. 42.

Suit by managers of mosque for trespass in respect of property of mosque—*See* CIV. PRO. CODE, 1908, ss. 92, 93, A.W.N. 1892, 9.

Suit for—Against co-sharer—Maintainability—*See* CO SHARERS—SUIT BY CO-SHARERS, 2 C.P.L.R. 72.

Committed by subordinate official under superior official's order—Liability—*See* COURT OF WARDS, 12 C.W.N. 1065=36 C. 28=1 Ind. Cas. 514.

See DAMAGES — DAMAGES, SUITS FOR 1 N.W.P. 24, 9 C. 116=12 C.L.R. 89, 7 N.W. P. 47, 8 B.H.C A.C. 177.

Damages—House trespass with intent to commit adultery—Adultery not committed—Right to compensation for house-trespass—*See* DAMAGES — MEASURE AND ASSESSMENT, 10 M.L.J. 230.

See DEBTOR AND CREDITOR, 2 Ind. Jur. O.S. 7.

Suit for land and compensation for trespass—Decree for compensation, by way of rent—Whether proper decree—*See* DECREE—MISCELLANEOUS, A.W.N. 1982, 57.

See INJUNCTION—SPECIAL CASES, 8 B.H. C. O.C. 85.

See JURISDICTION OF CIVIL COURTS, 1 M. L J. 682, 5 W.R. Act X, Rul. 81.

Zemindar himself in possession during period for which he claimed arrears of rent from patnidars—Zemindar purchaser at a sale — Sale subsequently set aside at the instance of patnidar Zemindar not to be treated as trespasser while he was in possession— *See* LANDLORD AND TENANT—MISCELLANEOUS, 19 C. 267.

Limitation—Right to compensation for—*See* LIMITATION ACT, 1908, art. 39, 6 M. 176.

See MAHOMEDAN LAW—DOWER, 1 O.C. Sup. 6.

See MASTER AND SERVANT, 2 B.L.R. A.C. 227=11 W.R 101, 2 B.L.R. O.C. 140.

See PLAINT—FORM AND CONTENTS OF PLAINT, 3 C.L.R. 509.

By shebait—Liability of idol for mesne profits—*See* RELIGIOUS ENDOWMENTS, 12 C.W N. 550=7 C.L J. 514=35 C. 691.

Suit for rent and eviction—Waiver of trespass—Decree for use and occupation—*See* RENT, SUIT FOR, 9 C. 908=13 C.L.R. 69.

See RENT, SUIT FOR, 2 B.L.R.P.C. 10=11 W.R.P.C. 5=12 M.I.A. 244.

Trespass—*concluded.*

Trust property—Suit in ejectment—Set-off by trespasser—Equitable defence—*See* RIGHT OF SUIT—TRUSTS, SUITS RELATING TO, 18 B. 721.

See ROAD, 3 B.L.R.A.C. 351=12 W.R. 275.

Owner may chop off penetrating roots—No notice necessary if he does not—on the other's land—*See* TREES, 31 C. 944=8 C.W.N. 710.

Trespass, Cattle.

See ACT I OF 1871.

Trespasser.

See TRESPASS.

(1)—*A person entitled to claim a right of occupancy in the* sir-*land attached to a mahal not a trespasser.*—A proprietor of a mahal, who has parted with, or lost, his proprietary rights in it, and who, being in possession, even though constructively, is entitled to claim the occupancy as an ex-proprietary tenant, cannot be treated as a trespasser, and a suit to eject him cannot be maintained. BAKHAT RAM v. WAZIR ALI, **1 A. 448.**

(2)—*Trespasser—Ejectment—Suit by single co-sharer.*—Any one or more of several joint co-sharers is entitled to sue to eject a trespasser upon the land held in common. JAIGOPAL SINGH v. KAULESHAR RAI, **A.W.N. 1882, 132.** [*D.*, 16 A. 420=A.W.N. 1894, 154.]

(3)—*Liability of—Profits of land in possession of trespasser.*—*Held* that trespassers in actual occupation of land are *prima facie* bound to account for the profits of the land, and not merely to pay a sum equivalent to that for which the land might have been let to others. SRI RAM v. RAM PRAGASH, **12 O.C. 154=2 Ind. Cas. 835.** (2 A. 651, *Diss.*)

(4)—*Trespasser, suit against, by person dispossessed—Plaintiff entitled to recover on the strength of previous possession—Hindu Law—Unchastity after husband's death, no ground for exclusion after inheritance.*—Where the plaintiff has been in possession for many years and is dispossessed by the defendant, he is entitled to recover possession on the strength of his previous possession as against the defendant who is a mere trespasser. A widow does not lose her right of inheriting land left by her husband simply because after his death she lived as the mistress of her husband's brother. NAGESHAR v. PURAN DEI, **11 Ind. Cas. 279.**

(5)— *Trespasser— Plea— Whether holding transferable or not.*—In a suit for the recovery of a holding, if the defendant be a trespasser, it is not open to him to raise the question of transferability—a question which can be raised only by the landlord or by persons deriving title from the landlord or by judicial proceedings held at his instance. (2 C.W.N. 279, 6 C.W.N. 624, *F.*; 24 C. 355, 1 C.W.N. 396, 26 C. 727, 11 C.W.N. 76, 27 C. 187, *R.*; 11 C.W. N. 83, 6 C.L.J. 43, *D.*) Where the plaintiff

Trespasser—*continued.*

purchased only a portion of the holding, no question of transferability could arise. NARAIN KAMILA v. DINA BANDHU SINGH, **2 Ind. Cas. 96.** (20 C. 590, *R.*;

See BEN. ACT VIII OF 1885, s. 50, 7 C.W. N. 132.

Recovery of possession from—Suit by occupancy raiyat—Limitation—*See* BEN. ACT VIII OF 1885, art. 3, 15 C. 317.

Prohibitory assessment—Land Revenue—*See* MAD. ACT II OF 1864, 27 M. 386.

Under-tenant of *sir* land — Rights of—Suit against trespassers—*See* U.P. ACT XII OF 1881, s. 8, A.W.N. 1882, 63.

See U.P. ACT XII OF 1881, ss. 93, 95, 23 A. 360=A.W.N. 1901, 127.

The co-sharer's lessee is not a—*See* U P. ACT II OF 1901, s. 197, A.W.N. 1906, 222=3 A.L.J. 767.

See BURDEN OF PROOF—EJECTMENT, 19 B. 83.

Decree for mesne profits against trespasser in possession—Costs of collection of rents not to be deducted in calculating amount of mesne profits—*See* CIV. PRO. CODE, 1908, s. 2 (12), O. XX, r. 12, 22 A. 262=A.W.N. 1900, 57.

See COMMON LAND, 105 P.R. 1901.

Joint family—Suit by member to eject trespasser—*See* CO-SHARERS—SUIT BY CO-SHARERS, 1 A.L.J. 543.

See CO-SHARERS - SUIT BY CO-SHARERS, 5 N.W.P. 182.

Declaration of right—Title not proved—Maintainability of suit on the strength of possession—*See* DECLARXTORY DECREE, SUIT FOR—GENERAL, A.W.N. 1887, 55.

See EJECTMENT, SUIT FOR, 19 B. 823.

Act XII of 1881, s. 36, service of notice under—Effect—Ejectment suit—*See* ESTOPPEL —ESTOPPEL BY CONDUCT, 15 A. 189=A.W. N. 1893, 93.

See LANDLORD AND TENANT—MIRASDAR, 19 B. 138.

See LANDLORD AND TENANT—RELATIONSHIP OF LANDLORD AND TENANT, 3 N.W.P. 179.

Trespasser granting thika lease—*See* LANDLORD AND TENANT — RELATIONSHIP OF LANDLORD AND TENANT, 1 C.W.N. 142.

Cultivating homefarm lands of landlord—Effect—*See* LANDLORD AND TENANT—RELATIONSHIP OF LANDLORD AND TENANT, 3 Ind. Cas. 431.

Trespasser—*concluded.*

Abandonment of holding by tenant—Right of person claiming through tenant—*See* LANDLORD AND TENANT—MISCELLANEOUS, 12 C. P.L.R. 160.

Suit by zemindar for removal of trees planted by trespasser—*See* LIMITATION ACT, 1908, arts. 32, 120, 10 A. 634=A.W.N. 1888, 257.

Auction sale—Property sold in possession of —Formal possession — Adverse possession—Tacking of the possession of two trespassers—*See* LIMITATION ACT, 1908, arts. 136, 137, 142, 144, 5 Ind. Cas. 273.

Independent trespassers—Adverse possession —Limitation—*See* LIMITATION ACT, 1908, arts. 137, 142, 144, 7 A.L.J. 1184.

Mortgage with possession—Redemption by trespasser — Mortgagor's right—*See* LIMITATION ACT, 1908, arts. 142, 144, 148, U.B.R. 1906, Limitation 9.

Mortgagee ousted by—Adverse possession by trespasser against mortgagee, when good also as against mortgagor— Onus of proof—*See* LIMITATION ACT, 1908, art. 144, 18 B. 51.

Decree got by one trespasser against another, effect of in computing period of twelve years—*See* LIMITATION ACT, 1908, arts. 144, 142, s. 28, 2 C.W.N. 315.

Mesne profits awarded against—Collection expenses when allowable to—*See* MESNE PROFITS—MODE OF ASSESSMENT, 23 A. 252=A. W.N. 1901, 80.

Mortgagee taking possession as—Redemption after 12 years—Limitation—*See* MORTGAGE —REDEMPTION, 232 P.L.R. 1911.

Suit to eject—from a village—Competence of one or more co-sharers to sue—*See* PARTIES TO SUIT—GENERAL, A.W.N. 1901, 36.

Whether constructive possession may be presumed in favour of—Effect of adverse possession of part—*See* POSSESSION—ADVERSE POSSESSION, 8 A.L J. 247.

Decree against owner—Attachment of property in execution—Running of time in favour of trespasser not arrested by attachment—Adverse possession—*See* POSSESSION—ADVERSE POSSESSION, 11 M.L.J. 344.

Possession is good title against—Suit against —*See* POSSESSION—SUITS FOR POSSESSION, 12 O.C. 129=2 Ind. Cas. 599.

See POSSESSION—SUITS FOR POSSESSION, 2 C.L.R. 292.

See SERVICE TENURE, 18 B. 22.

Suit by—to recover possession—*See* SPECIFIC RELIEF ACT, 1877, s. 9, 15 B. 685.

Usufructuary mortgage — Disturbance of possession by—Right to sue for mortgage-money—*See* TRANSFER OF PROPERTY ACT, 1882, s. 68 (*c*), 19 A. 191=A.W.N. 1897, 14.

Trespass to Goods.

(1)—*Compensation—Damage—Land Revenue Code—(Bom. Act V of 1879), s. 43, Rule 38—Natural product—Imposition of fees for excavated stones and earth—Trees.*—The plaintiff took a plot of land at Matheran from the Government (defendant), under a lease, the conditions of which were that he (plaintiff) should build one bungalow and that he should not carry on any excavation on the land without the previous permission in writing of the Collector. The plaintiff then applied for right to dig stones for building purposes. This permission was given. Later on, while the bungalow was in course of construction, the plaintiff was required by the Superintendent of Matheran to erect boundary pillars on his land: in constructing these he used stones which had previously been excavated under the permission already granted. Upon this the defendant called upon the plaintiff to pay for the stones so used and on his declining to do so, the sum (Rs. 2-8-0) was realized by attachment and sale of the plaintiff's moveable property. The plaintiff, thereupon, filed this suit praying, *inter alia*, for damages (Rs. 200) in recovering the amount realized from him: *Held*, (1) that the suit was one for damages in respect of trespass to goods, and that he was entitled to recover from the defendant Rs. 2-8-0; (2) that the plaintiff was not liable under s. 43 of the Land Revenue Code, 1879, for unauthorizedly removing "any other natural product" from the land, since the expression does not include excavated stones; (3) that under Rule 38 of the Land Revenue Code, 1879, the Collector was not justified in recovering fees for excavated stone used by the plaintiff in erecting boundary pillars. MADHAVADAS v. SECRETARY OF STATE, **6 Bom. L.R. 1117.**

Trial.

Suit for possession of property and also for mesne profits—Power of Court to order separate—*See* DECREE—DECREE, FORM OF, 14 A. 531=A.W.N. 1892, 164.

Tribunal of Appeal.

See BOM. ACT IV OF 1898, s. 48 (11), 7 Bom. L.R. 569=29 B. 514.

Tribunal of appeal *is not a Court of Justice* —*See* HIGH COURT, JURISDICTION OF—BOMBAY, 5 Bom. L.R. 431=27 B. 424.

Tributary Mehals.

(1)—*Tributary mehals—Mohurbhunj—Powers Government, extent of—Jurisdiction.*—The Tributary mehals are a portion of British India, which the Government of India has exempted from the ordinary law and jurisdiction of the Courts, and governs through special officials and enactments. The powers of Government as to the Mohurbhunj (one of the "estates" forming the Tributary mehals), whatever they may be, do not extend to empowering the legally constituted tribunals of a British District to follow, in that district, and in the

Tributary Mehals—*concluded.*

case of the residents in it, any procedure, and to exercise any jurisdiction, other than that created by the law. The Tributary mehals (and Mohurbunj) being British India and being excluded from the operation of all the laws in force in British India, unless specially extended to them, the orders of Government, conferring powers on particular officers over criminal offences committed within the Tributary mehals, are without authority. Where, on a British subject residing in Midnapore (and apparently a ryot of the Maharaja of Moburbhunj) being charged with defamation before the Maharaja of Mohurbhunj, the case against him was transferred, on an application by the accused himself, to the Midnapore Magistrate, who was also assistant superintendent of the Tributary mehals, and tried, *held* the proceedings were without jurisdiction. HURSEE MAHAPATRO v. DINOBUND PATRO, **7 C. 523=9 C L.R. 93.** [*R.*, 8 C. 985, F.B.=9 C. 288.]

Tributary Mehals of Orissa.

(1)—*Mayoorbunj.*—The tributary mehals of Orissa, of which Mayoorbunj is one, do not form part of British India, RATAN MAHANTI v. KHATOO SAHOO, **29 C. 400=6 C W.N. 573.**

Trichinopoly.

Suit for land situated within Pudukottah—Jurisdiction of Civil Court of—*See* JURISDICTION—SUITS FOR LAND, 2 M H.C. 437.

Trover.

(1)—*Action of trover—Sale of goods.*—Goods contracted to be sold and delivered "free on board," to be paid for by cash or bills, at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighterman employed by the sellers, who handed the same over to them. The seller, apprised the purchasers of the delivery, who elected to pay for the goods by a bill which the sellers having drawn, was duly accepted by the purchasers. The sellers retained the mate's receipts for the goods, but the master signed the bill of lading in the purchasers' names, who, while the bill they accepted was running became insolvent. In such circumstances, *held*, by the Judicial Committee of the Privy Council (reversing the verdict and judgment of the Supreme Court at *Bombay*), that *trover* would not lie for the goods, for that, on their delivery on board the vessel, they were no longer *in transitu*, so as to be stopped by the sellers; and that the retention of the receipts by the sellers was immaterial, as, after their election to be paid by a bill, the receipts of the mate were not essential to the transaction between the seller and purchaser. COWASJEE v. THOMPSON, **3 M.I.A. 422=5 Moo. P.C. 165=1 Sar. 298.**

(2)—*Action of trover—Bill of sale.*—A Bill of sale and assignment of goods, described as being in certain warehouses belonging to A, was given

Trover—*concluded.*

by him for the loan of a sum expressed to have been paid on the day of the date thereof. Upon an action of trover brought against the assignee of A., who had seized the goods, it appeared, in evidence, that a portion only of the goods was in the warehouse specified at the date of the sale, and that no part of the loan was paid on that day, the same being discharged, by instalments, a few days afterwards: whereupon, the Judges of the Supreme Court held that there had been no valid transfer, and consequently, no conversion, and gave an interlocutory judgment and verdict in accordance with such view. *Held*, by the Judicial Committee, on appeal from such judgment and verdict, and from an order refusing a new trial that the judgment and verdict were not justified by the evid nce, and must be reversed, and new trial granted. MUTYLOLL SEAL v. O'DOWDA, **4 M.I.A. 382=6 Moo. P.C. 324=1 Sar. 369.**

Action for—, of wife against husband—*See* ACT III OF 1874, ss. 7, 8, 1 C. 285.

Unauthorised pledge of goods by servant—Suit in trover—*See* CONTRACT ACT, 1872, s. 178, 4 C. 497=3 C.L R. 398.

See DAMAGES—DAMAGES, SUIT FOR, 13 M.I.A. 69.

Currency notes entrusted for a specific purpose—Notes lost by gambling loan—Bailment—Bona fide holder for value — Costs — *See* GAMBLING, 6 B.L.R. 581.

See LIMITATION—GENERAL, 5 M.I.A. 234.

See NEGOTIABLE INSTRUMENTS—HUNDIES, 18 B. 570.

See RIGHT OF SUIT—MISCELLANEOUS, 12 M.I.A. 507.

Trust.

See ACT XX OF 1863.

See CIV. PRO. CODE, 1908, ss. 92, 93.

See CIV. PRO. CODE, 1908, O. XXXI, rr. 1—3.

See HINDU LAW—RELIGIOUS ENDOWMENTS.

See LIMITATION ACT, 1908, s. 10.

See MAHOMEDAN LAW—WAKF.

See RELIGIOUS ENDOWMENTS.

See RIGHT OF SUIT—ENDOWMENTS, SUITS RELATING TO.

See RIGHT OF SUIT—TRUSTS, SUITS RELATING TO.

See TRUSTS ACT, 1882.

Trust—*continued.*

(1)—*Trusts in Hindu law—English Law, how far applicable.*—Trusts are no more strange to the Hindu than to the English system of law. But, while the substantive Hindu law insists as strongly as any on the suppression of fraud and the fulfilment of promises, it fails to furnish the detailed rules by which effect is to be given to its principles in cases of trust. It contemplates no such power and flexibility in the legal machinery as are an integral element of the English equity system. If, therefore, the Court is called on to give to a trust in any given case, it looks, indeed, to the Hindu law of property to determine the estate of the trustee; but, in many of the duties it annexes to that estate, the right it recognizes as arising from the position of beneficiaries, and the means by which their rights are made effectual, it is governed by the rules of English equity. There are no others that it can apply. It has to take care, in applying them, not to violate the "laws, manners, customs and usages" of the native community as these may subsist. It must not allow a trust to be made a means of conferring a gift either *inter vivos* or by testamentary disposition upon a person not in existence at the moment when the donation is declared. It must not allow it to effect a course of a devolution opposed to the Hindu law of property and succession. Thus, the operation of native laws is preserved as to the estates that may be taken in property and the purposes to which they may be applied, while it gains a flexible adaptation to new circumstances from the English system. In meeting an exigency, or taking cognizance of a form of right not provided for in the *shastras*, the Court in exercising its juritdiction under s. 41 of the Letters Patent (Bombay), may certainly apply the Hindu law. It must be careful not to overlook it, but, taking the Hindu law as one of its *data*, it applies "English law" also in the form of equity to all or nearly all the questions that arise. *In re* KAHANDAS NARRANDAS, **5 B. 154.**

(2)—*Trust of immoveable property—Declaration and acceptation of trust.*—Donatio Mortis Causa—[A declaration of trust accepted by the trustee and accompanied by the handing over of the title-deeds is a valid *donatio mortis causa* which must be accompanied by delivery of possession. The Statute of Frauds is not applicable here and a trust of lands may be declared by parol.] MAUNG KYAW v. MAUNG SHWE YO, **L.B.R. 1893—1900, 9.**

(3)—*Will, Construction of—Trust.*—Technical language is not necessary to create a trust. Words of recommendation, request, entreaty, wish or expectation, addressed to a devisee or legatee, will make him a trustee for the person or persons, in whose favour such expressions are used provided the testator has pointed out, with sufficient clearness and certainty, both the subject-matter and the object or objects of the intended trust. Where, therefore, a testator stated in his will "I give to my dearly beloved wife, the whole of my property, both real and personal including my-

Trust—*continued.*

G. P. Notes, Delhi Bank shares etc., feeling confident that she will act justly to our children, in dividing the same, when no longer required by her "and she, by her will, left the Bank shares to one of her children; *held*, that the first will gave the widow a life interest only in her husband's property, that she became a trustee of his estate, with a power of appointment in favour of her children and that the Bank shares devised to one of her children, could not be sold in execution of a decree against the executors of the widow's estate as portion of her estate. RAYNOR v. THE MUSSOORIE BANK, **2 A. 55.** (*Churnick* v. *Tucker*, Law Rep. 17 Eq. 320, *Knight* v. *Knight*, 3 Beav. 172=11 G. and F. 513, *Le Marchant* v. *LeMarchant*; *R.* Law Rep. 18 Eq. 414.)

(4)—*Handing over property in anticipation of death—Creation of trust (parol).* — Where a person in anticipation of his death, handed over his property to his brother and verbally directed him to pay certain specified debts and to apply the surplus for the necessity and support of his family, it was *held*, that, at any rate so far as the debts were concerned a good trust was created, since a trust might be created either by written instrument or by oral declaration. In India especially, a Court must require a transaction of this kind to be very completely proved before holding that a good trust has been created. The trust was not one in the nature of a testamentary disposition, though it certainly was created by reason of the anticipation of death and could not, after the death of the testator, be recalled or questioned by his representatives. SUDDA SOOK KOOTARY v. RAMCHUNDER, **17 C. 620.**

(5)—*Beneficiary's right to sue trustee for account—Discretion to trustee—Distinction between trust, condition and fiduciary power.*—A will ran:—"I bequeath Rs. 5,000 for the marriage expenses of my daughter S. to be paid when that event happens." *Held* that the case was one of trust and that the subject-matter of the trust was not the power only to spend out of the fund, but the fund itself. No discretion is given to the trustees under the will to spend what was necessary or legitimate, but they are directed to pay the whole amount. So, if the ceremonial expenses did not exhaust the fund, the trustees were under an obligation to present the balance to S, the beneficiary. S had therefore a right to sue for an account and for the balance. Distinction between trust, condition and fiduciary power explained. GHANDUMAL RAMRAKHIOMAL v. SITABAI, **1 S.L.R. 263.** (26 M. 497, *R.*)

(6)—*Transfer of trust property—Purchaser without notice.*—Where a person sentenced to transportation for life makes over his properties to be managed by his brother or other near relative, and requests the revenue authorities to have them transferred in the name of latter, such transfer is in the nature of a trust. But the real owner cannot follow the property

Trust—*continued.*

in the hands of an innocent purchaser for value without notice of such trust. HAIT RAM v. DURGA PRASAD. **5 A. 608=A.W.N. 1883, 161.** (2 A. 361, *Observed.*)

(7)—*Will—Construction—Uncertainty.* — No trust is created by the words in a will. "The executors should give my brothers, their wives, and children, according to their (executors') wishes." KUMARASAMI v. SUBBARAYA, **9 M 325.**

(8)—*Land given for certain purposes—No creation of trust—Donor entitled to recover back land where no longer used for purpose.*—Where land was given for the purpose of a temple being built thereon and the donee mortgaged to another the temple built by him on the land, there was no trust created and the donor could not recover the land so long as the temple stood on the land. But he had a reversionary right, when the land was no longer used for the purpose for which it was given. DEBI PRASAD v. RAM PRASAD, **2 C P.L.R. 70.**

(9)—*Co-sharer taking possession of relinquished property a Trustee.*—A co-sharer taking possession of on absconder's property under a clause in the administration paper of a village, stating in general terms that absconders from the village can receive back their property on their return, cannot be held to be a trustee for such absconder, unless there is evidence that he accepted the trust. And a vague statement in the administration-paper that absconders shall get back their property on their return, cannot be evidence of such acceptance. PIAREY LAL v. SALIGA, **2 A. 394.** [*R.*, 3 A. 458.]

(10)—*Wajib-ul-arz—Absent share-holders—Trust* —An entry in an administration-paper that absent share holders shall, on their return to the village, have their shares surrendered to them by their present occupiers, does not necessarily constitute a valid trust in favour of such absentees, though it may be evidence of such a trust. Such an entry cannot be regarded as evidence of a pre-existing trust or as an admission of such trust by the occupiers. HARBHAJ v. GUMANI, **2 A. 493.** [*R.*, 3 A. 458, 13 C.P.L.R. 99.]

(11)—*Entry in record of rights—Whether amounts to trust--Purchaser without notice.*—An entry in a village record-of-rights, caused by the recorded proprietors of a share to be made therein to the effect that a certain person claimed a portion of such share, and that they were willing to admit his right, whenever he paid them a certain amount of money, does not amount to a declaration of trust in favour of such person, and cannot be regarded as evidence of any such trust. Even if it could be held to be a trust, the property cannot be followed in the hands of a purchaser for value without notice. KAMAL SINGH v. BATUL FATIMA, **2 A. 460.** [*R.*, 9 A. 97=6 A.W.N. 303.]

Trust—*continued.*

(12)—*Suit for possession—Allegation of transfer by way of trust—Plaintiff to make out* prima facie *case of trust—Defendant's failure to substantiate defence—Plaintiff not entitled to decree by reason of.*—This was a suit for possession of lands with mesne profits. Plaintiff's case was that he and A, one of the defendants, being entitled to certain property in equal shares, he made over his share to K, the wife of A to be held by her in trust for him, K having died, her daughter, the appellant, was in possession, and plaintiff applied to her for what he was entitled to, but she refused to give up anything alleging that the plaintiff had sold his share to K who had made a gift of it to her. The defence thus set up was that plaintiff had sold his share to K for Rs. 3,000, and that she and the appellant claiming under her had been in possession for more than twelve years, and that there never was any trust whatever. The lower Court considered it proved that K did not purchase the plaintiff's share, but that the share had been made over to her as a trust and gave judgment for the plaintiff, but on appeal, the High Court *held* that the lower Court's decision was erroneous. Plaintiff, having wholly failed to prove his case, his suit ought to have been dismissed without any reference to the defence set up. The plaintiff's case was that he gave the property to K in trust. Unless he could establish the trust, he had, on the face of his plaint, no cause of action, and no right to come into Court at all. And unless he made out at least a *prima facie* trust, he certainly was not entitled to call upon the defendants for their defence or in any way to look to or attempt to rely on the defence set up. He had not only not made out any *prima facie* case of trust but he had not even alleged that any deed of trust was executed or that any writing took place at the time of the alleged creation of the trust. Proof of the trust was thus limited to the statements of certain witnesses, but the High Court considered their evidence to be perfectly unreliable and not to be such as would justify any Court in finding, as a fact, that a trust was created. KHOODEEJENNISSA BIBEE v. AFSUR HOSSEIN, **2 W.R. 58.**

(13)—*Trust created by will—Collector, if could take charge of property—Act* XL *of* 1858.—Where, under the terms of a will, certain properties have been dedicated to the worship of an idol and a trust has also been created with respect to certain other properties for the purposes detailed in the will, *viz.*, the maintenance of religious worship and charitable institutions, the Collector could not, under Act XL of 1858, take charge of the properties in respect of which the trust is created. RAJESSUREE DEBIA v. JOGENDRO NATH ROY, **23 W.R. 278.**

(14)—*Moveable and immoveable property—Voluntary settlement—Trustee, Possession not delivered to—Charitable trust.*—Case where a suit for an account and recovery of the net amount, alleged to have been realised by the defendant under a succession certificate obtained by him to collect the debts due to the estate of a deceased person after the execution by the collateral heirs and daughter of the deceased of a document to the plaintiff assigning to him for specified charitable and religious purposes all the moveable and immoveable property of the deceased, was held to fail. The Court observed that, though it was not prepared to lay down as a general proposition, that, in all transactions pertaining to moveable property, actual transmutation of possession is essential for the complete creation of a trust, yet, in this special case, it was necessary for the purpose of proving a complete divesting of themselves by the defendants of their interest in such property. RAM SINGH v. SANTOKH SINGH, **14 P.R. 1896.**

(15)—*Trust, Creation of—No transmutation of possession—Subsequent disposition by donor—Income.*—When once a trust is properly created, it cannot be defeated by any subsequent act of the settler although there is no transmutation of possession. All subsequent dispositions of portions of the property to different members of the donor's family must be regarded, not as gifts to them or creations of new trusts in their favour which he has no power to make, but as acts of a trustee and only available in favour of the parties to the extent of the shares to which they may be entitled. But this applies only to dispositions of principal. Payments which have been made to any of the family out of the income of the property for their maintenance or other family expenses, ought not to be disturbed, or the parties made to account for what they have received; for there may be circumstances which would render it inequitable to take an account of the income, apportion it among the different parties and charge any of them with what he or she may have received beyond his or her share of the income SIR JAMSETJI JIJIBHAI v. SONABAI, **2 B.H.C. 133,** [*R.*, 9 B. 115, 20 C. 51, F. B., U.B.R. 1892—1896, Vol. II, 645; *D.*, 10 Bom. L. R. 1209.]

(16)—*Manager of joint family—Agent—Trustee and* cestui que *trust*—The manager of a joint family property is not the agent of the members of the family so as to make them liable to be sued as if they were the principals. The relation of such persons is not that of principal and agent, or of partners; it is much more like that of trustee and *cestui que* trust. ANNAMALAI CHETTY v. MURUGESA CHETTI, **26 M. 544. P.C. = 7 C.W.N. 754 = 30 I.A. 210 = 13 M.L.J. 287 = 5 Bom. L.R. 494 = 8 Sar. 523.** [*Expl.*, 5 M.L.T. 145 = 19 M.L.J. 70 = 32 M. 271; *R.*, 24 P.R. 1904, 29 A. 37 = 5 A.L.J. 785 = A.W.N. 1906 261, 30 A. 422 = 3 A.L.J. 375 = A.W.N. 1908, 175 = 4 M.L.T. 49, 13 C.W.N. 815.]

(17)—*Party setting up a secret trust—Evidence.*—A party setting up a secret trust must show that the trust was communicated to the universal legatee by the testator, and that the legatee agreed to accept property bequeathed,

Advocate High Co
Jammu & Kashm
Srinagar,

Trust—*continued.*

on those terms. KALI CHARAN GHOSAL v. RAM CHANDRA MANDAL, **30 C. 783.** (*Jones* v. *Badley*, (1868) 3 Ch. A.C. 362, *R.*) [*R.*, 1 C.L.J. 388, 31 M. 187 = 18 M.L.J. 158.]

(18)—*Original trust departed from for about three hundred years—Original trust useless.*—When properties have been held on trust for a period of nearly three hundred years for an object different from the original trust, effect cannot be given to the original trust. AUGUSTINE v. MEDLYCOTT, **15 M. 241.**

(19)—*Confidential relationship—Transactions between persons holding.*—Persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the Court that the person by whom the benefits have been conferred had competent and independent advice in conferring them. This applies to the case of trustee and *cestui que trust.* RAGHUNATHJI v. VARJIWANDAS, **8 Bom. L.R 525 = 30 B. 578.**

(20)—*Dismissal of hereditary trustee—Right of heirs—Minority of heirs—Effect.*—In the case of hereditary offices, the dismissal of a hereditary trustee will not work a forfeiture of such office, but it descends to the next heir if of full age. If the next heir is a minor, a proper person should be appointed trustee during the minority. MUTHU KUMARA MUDALIAR v. PALANIAPPA CHETTIAR, **9 M.L.T. 493.** (19 M. 285, *F.*)

(21)—*Deed of—Construction—Distinct provisions for devolution of trusteeship and of beneficial interest — Clear language in one — Ambiguity in the other—Construction placed on earlier document—Use in interpreting later document—"Heirs," meaning of.*—In construing an instrument which provided that certain pension was to devolve on the 'heirs' of the original pensioners, it was contended that the term 'heirs' must mean 'heirs' who are also 'descendants' because, the terms 'heirs' and 'descendants' were used as convertible terms in describing the descent of certain trusteeship including the trusteeship of the pension. *Held* that it could not be assumed that the donor intended the descent of the trusteeship and the descent of the beneficial interest to be governed by the same rules. The ambiguity of the language used on the one subject cannot control the clear and unambiguous words employed with regard to the other. The construction placed on an earlier document could not be used in construing a later document executed by the same person, when the later document did not embody or refer to the earlier document, and when, further, they did not form parts of the same transaction and were not even contemporaneous. Nor could the decision on the earlier document afford a precedent for the interpretation of the later document when the language of the two documents

Trust—*continued.*

was found to be entirely dissimilar. HAIDAR HUSAIN KHAN v. FAGHFUR MIRZA, **9 C.W.N. 817 = 2 C.L.J. 57 = 8 O.C. 270 = 27 A. 383, P.C. = 15 M.L.J. 327 = 7 Bom. L.R. 850 = 3 A.L.J. 64 = 32 I.A. 135 = 8 Sar. 826.** (16 I.A. 175, *R. and D.*)

(22)—*Objection to appointment of trustee—Procedure.*—If there should be any objection that a person was illegally appointed trustee, an application might be made by any person interested in the performance of the trust to have him removed, and a new trustee appointed by the Court under the Code. BISHEN CHAND BASAWAT v. NADIR HOSSEIN, **15 C. 329 = 15 I.A. 1, P.C. = 5 Sar. 113.** [*Rel. on*, 26 M. 450.]

(23)—*Estate subject to partial trusts—Vesting not postponed.*—The creation of partial trusts or charges on the estate would not postpone the vesting in possession; nor would it have the effect of letting in grandsons of the testator born after his death and during the continuance of the trusts or charges. (9 C.L.R. 121, *Discussed.*) Extra-judicial observation of *Pontifex, J.*, on 8 C. 157 and the construction put in that case upon the Hindu Wills Act. CALLY NATH NAUGH CHOWDHRY v. CHUNDER NATH NAUGH CHOWDHRY, **8 C. 378 = 10 C.L.R. 207,** [*Cons.*, 8 C. 637.]

(24)—*Escheat—Fate of previous trusts and charges.*—Where the Crown takes by escheat, the estate is subject to the same trusts and charges as previously affected it. THE COLLECTOR OF MASULIPATAM v. CAVALY VENCATA NARAINAPPA, **2 W.R. P.C. 59 = 8 M.I.A. 500 = 1 Suther. 417 = 1 Sar. 752.**

(25)—*Escheat, Crown taking by.*—On failure of heirs, the Crown takes by escheat, subject to trusts or charges affecting the estate. SONET KOOER v. HIMMUT BAHADOOR, **1 C. 391, P.C. = 3 I.A. 92 = 25 W.R. 239 = 3 Sar. 608.** [*R.*, 28 B. 276, 7 C.W.N. 812, 17 C. 826, 15 C.P.L.R. 90.]

(26)—*Right of stranger to demand performance*—Cestui que trust.—Ordinarily, a stranger to the contract cannot demand performance. But a person, beneficially entitled under the contract (*i.e.*) a *cestui que trust*, although he was no party to it, may enforce the obligation arising under it. SURENDRO KESHUB ROY v. DOORGA SOONDARY DOSSEE, **19 C. 513 = 19 I.A. 108, P.C. = 6 Sar. 150.**

(27)—*Limitation—Statute of limitation does not apply in case of express trust—Where the person paying and the person receiving the legacy are the same, limitation does not apply.*—Where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to lapse of time. Where the person liable for the payment of a legacy, and the person entitled to receive it are the same, no question of limitation arises. NARANDAS RAMJI v. NARANDAS RAMJI, **9 Bom. L.R. 287 = 31 B. 418.**

Trust —*continued.*

(28)—*Duties of a trustee—Trust estate to be kept distinct from private property—Liability to maintain separate accounts—Claims by former trustee to be scrutinised carefully by Court.* —Where a person is acting in a fiduciary capacity, it is clearly his duty to keep his private property distinct from the trust property and to maintain accounts of all loans taken from one property for the benefit of the other. It is necessary for the Court to scrutinise carefully all claims on the part of a former trustee against the trust estate, and not to pass items unsupported by accounts kept in the course of business during the tenure of the trusteeship. NEELAYATHAKSHIAMMAL v. THE TALUK BOARD OF MAYAVARAM, **2 M.W.N. 1911, 350.**

(29)—*Mixing up of trust moneys with common fund—Obiter.*—It is a grave breach of duty in trustees to mix the incomes raised by him from trust properties, or moneys raised by taking out letters of administration in one common fund with their own moneys. This grave breach of duty in trustees, in some circumstances, would expose them to very serious consequences, criminal as well as civil *In the matter of the petition of* D. COWIE. **6 C. 70 = 7 C.L.R. 19.**

(30)—*Trustee—Right to borrow money—Duty of creditor lending money to trustee—Advance for starting money lending business—Right of creditor to claim lien on trust property.*—A person, who lends money to a trustee on the security of trust property, is bound to see that the money is borrowed for purposes for which the trustee is authorized to borrow it. As a trustee has no right to speculate with trust money, a creditor who advanced money to a trustee to enable him to start a money-lending business, though intended for the benefit of the trust estate, is not entitled to claim a lien on the trust property for the money advanced. GANPAT RAO GOPAL v. DEWASTHAN BALASAHIB, **1 C.P.L.R. 141.**

(31)—*Trust property—Non-liability to pay debts incurred on behalf of trust—Income of the trust property—Liability of the manager of the trust.* —Plaintiff sued for the cost of fuel supplied to a choultry under the management of the defendant. The lower Court passed a decree against the defendant personally and in the alternative, against trust property. The High Court modified the decree and declared that the trust property should not be made liable as such, that the debt is to be paid out of its income and that, if not so recovered, the plaintiff can recover it personally from the defendant (manager). SEETHA LAKSHMI AMMAL v. SRINIVASA IYENGAR, **16 M L J 412.**

(32)—*Administration of trust by Court—Power of nomination of new trustees given by deed of trust—Exercise of such power after a preliminary decree in an administration-suit—Validity of appointment—Sanction of Court.*—A deed of trust appointed a certain person as trustee to carry out the trust, and gave power

Trust—*continued.*

to the trustee appointed thereunder to appoint new trustees. Subsequently, a suit was instituted for the administration of the trust. In this suit a preliminary decree was passed and the estate was under the administration of the Court. In the state of things, the original trustee, under the power vested in him under the original deed of trust, appointed a person as trustee without the sanction of the Court. *Held*, that when a suit has been instituted for the administration of a trust and a decree has been made, that attracts the jurisdiction of the Court and the trustee under the deed of trust cannot, afterwards, exercise the power of nomination or of a new trustee except with the sanction of the Court. Such an appointment, made without the sanction of the Court, cannot be valid. It may, however, be taken as a nomination by the trustee, subject to confirmation by Court, regard being had to the fitness of the nominee. In determining his fitness, no question of his alleged mismanagement, since the date of his appointment, can be gone into. AMRITA BIBEE v. KANHAI LAL AGARWALLA, **9 C.W.N. 239 = 32 C. 448.**

(33)—*Civ. Pro. Code, s. 244—Personal decree—Suit to establish right as trustee.*—A suit by a trustee for a declaration of his right as trustee, to property attached in execution of a decree against him personally, is not barred by s. 244 of the Civ. Pro. Code NATH MAL DAS v. TAJAMUL HUSAIN, **7 A. 36 = A.W.N. 1884, 218,** (5 A. 406 and 2 A. 752, *R*) [*F.*, 15 C. 437, 23 M. 195, F.B., 6 C.W.N. 63; *R.*, 8 A. 626 = A.W.N. 1886, 228, 16 C. 1, 12 A. 313, F.B., 1 O.C. Sup. 11, 23 B. 237, 23 A. 263 = A. W.N. 1901, 75; *D.*, 7 A. 547, 16 C. 603.]

(34)—*Registered deed settling certain property for charitable purpose and providing for appointment of successor—Whether revocable.*—If an instrument is a deed in form, in order to hold it testamentary, or in the nature of a will, there must be something very special in the case, and unless there are circumstances which compel the Court to treat an instrument in the form of a deed, as a will, the Court will not do so. Where by a registered deed a person settled certain immoveable property on certain charitable trusts, and appointed himself as hukdar for life, and provided that after his death, his grandson should succeed him as hukdar, and that such grandson and every successive hukdar should in turn select a successor in like manner, *held*, that though the provisions as to the succession after the death of the settler's immediate successor may be open to objection, that cannot affect the provisions as to the succession of the settler's immediate successor, that the right to the trusteeship which became vested in him at the date of the deed took effect in possession at the death of the settler, and that the appointment made by the settler in the deed of trust cannot be cancelled by a subsequent deed. MAHADEVA IYER v. SANKARASUBRAMANIA IYER, **4 M.L.T. 103 = 18 M.L.J. 450.**

Trust—*continued.*

(35)—*Trust—Suit for declaration of trust—Possession of trust property—Breach of duty.*—In a suit for declaration of trust with reference to lands, it must be shown that the party against whom the trust is prayed for, must have obtained a more or less rightful possession of the lands, but impressed with the obligation of a trust; that in a suit, such as last mentioned, it must be shown that some duty *prima facie* fell on the defendants, of which they were committing a breach. MUZHUR HOSSAIN v. DINOBUNDO SEN, **Bourke O.C. 8=Cor. 94.**

(36)—*Trustee discharged by Court—Court's order that new trustee should pay certain amount to discharged trustee—Suit by discharged trustee against new trustee to recover amount—Defence that discharged trustee has not rendered accounts of his management.*—Where a trustee was discharged by the Court which, at the time of the discharge, took some account and made an order that the new trustee should pay to the discharged trustee a certain amount found to be due to the latter and that it was to be a first charge upon the estate, *held*, in a suit brought by the discharged trustee against the new trustee who had refused to pay the amount because the discharged trustee had not given an account of his management—that the original order the Court was not a decree within the meaning of s. 2, Civ. Pro. Code, and was not executable as such and that the suit was therefore maintainable. BARCLAY v. STANES, **11 M.L.J. 188.**

(37)—*Debt incurred for benefit of trust estate by trustee—Trustee's right of indemnity—Right of creditor.*—A trustee is entitled to be indemnified out of the trust estate for all debts incurred for the benefit of the trust estate, and the creditors on failure by him to pay such debts are entitled to stand in his shoes. But, if the trustee, through his own neglect or default, loses his right of indemnity, such right cannot pass to the creditor, for the creditor cannot have the benefit of that which does not exist. BRIDGE v. MADDEN, **31 C. 1084=9 C.W.N. 9.** (28 C. 574, *R.*) [*R.*, 35 C. 320=12 C.W.N. 256=3 M.L.T. 156.]

(38)—*Trust-property — Surplus profits of trust.*—Where property is purchased out of the surplus profits of a trust which are not required for the purposes of the trust, and which the trustee is entitled to retain for his benefit, such purchase enures for his own benefit. SYUD NADIR HOSSEIN v. PEAROO THOVILDARINEE, **14 B.L.R. 425, Note.**

(39)—*Trust—Non-delivery of trust deed—Registration of the deed—Creation of valid trust—Collection of rents by settlor—Adverse title—Whether amounts to—Tenant not left into possession by landlord—Payment of rent—Denial of title—No estoppel.*—Where the settlor intended title to pass when the deed was executed and registered. *Held*, that, in the absence of delivery of the trust-deed, it could not be said that such registration did not convey any title. The mere collection, by the settlor, of rents of the property conveyed to the trustees, does not, in itself, constitute a setting up of a title adverse to the trustees or amount to an ouster of the trustees. Where the defendant, who was not put into possession by the plaintiff, is found to have paid rent to him, *held*, that the mere payment of rent is only *prima facie* evidence of an attornment, and that, notwithstanding the payment, it is open to the defendant to show that the plaintiff's title was defective. PULLAYA CHETTI v. VEDACHALLA PILLAI, **10 M.L.T. 44.** (27 C. 7, 28 M. 124, *D.*; 17 M. 146, *F.*)

(40)—*Possession of estate of missing person—Adverse possession—Possession as trustee—Possession by widow.*—A distinction may fairly be drawn between the possession of the estate of a missing person by his widow or some other member of his family, and the possession of it by an utter stranger. The possession by the widow or relative may, in the absence of indications of an adverse nature, be regarded as that of a trustee until the expiry of the term fixed for his return. NARAIN SAHAI v. POSOO, **2 Agra 78.**

(41)—*Invalid trust—Donor one of the trustees—Suit by donor for recovery of property from co-trustees, on basis of resulting trust—Plea of adverse possession.*—Where a donor creates a trust and transfers the property to several trustees of whom he is himself one, they all become joint owners of the trust property, and they cannot act otherwise than jointly, even though frequently and for many purposes one member of the body, it may be the donor trustee himself, represents the others. And such joint possession excludes that of any one of the joint possessors on his own behalf. In such a case, when the donor pleads that the trust was invalid and created a resulting trust in his favour, and sues to recover the property from the co-trustees, the co-trustees are entitled to set up the plea of adverse possession; and the joint possession of the donor as a trustee along with the other trustees will not enure to his benefit. COWASJI N. POCHAKANAWALLA v. R. R. SETNA, **20 B. 511.**

(42)—*Adverse possession—Prescription—Village tank—Common property—Trustees.*—The plaintiff's claimed to be hereditary trustees in respect of a village pond or tank (common property of the villagers) and prayed for a declaration that, as such trustees, they were entitled to look after the conservancy of the tank and for an injunction restraining defendants from molesting them in their enjoyment of it. The following acts were relied on by plaintiffs in support of their claim, *viz.*, that they and their ancestors had been maintaining and conserving the tank at their cost, that they built at their cost a flight of steps, and sluices, and had been cleaning them repairing and strengthening the *bunds*, enjoying the fruits of the trees on the

Trust—*continued.*

banks, and that the occupants of the houses on the *bunds* constructed them with the leave of plaintiffs' ancestors. *Held*, that whatever might be the nature of the evidence required to establish a proprietary right, the above acts were not sufficient to sustain the plaintiffs' right as trustees, and the presumption of a lost grant could not be made in favour of the plaintiffs. MARUTHAN CHETTY v. KALIMUTHAN, **8 M. L.T. 368=8 Ind Cas. 114.** (6 M. 229, 12 M. 241, 16 I A. 48, *Expl. and Appl.*; 20 M.L.J. 74, 7 M.L.T. 139, 5 Ind. Cas. 118, *D.*)

(43)—*Creation of trust—Abandonment of office by trustees—Acquiescence—Adverse possession—Action in ejectment — Notice—Invalidity of notice—Objection taken for the first time in second appeal.*—Where persons, who originally acted as trustees of a temple, were found to have abandoned the office in 1858, and since then the plaintiffs were found to have been exercising the powers and performing the duties of the trustees.—*Held*, that the presumption was that plaintiffs acquired title to the office of trustees either with the acquiescence of their predecessors or by adverse possession. Where, in an action in ejectment, the notice of surrender was prematurely given, and objection as to want of proper notice was taken for the first time in second appeal. *Held*, that the objection should be deemed to have been waived and could not be sustained. MUISLI NAIDU v. NATARAJA CHETTIAR, **8 M. L. T. 435=8 Ind. Cas. 132.**

(44)—*Trust—Plaintiff holding property as trustee—Right to trusteeship negatived by suit—Plaintiff cannot now turn round and claim the benefit of such possession for himself*—'Animus possidendi,' *decisive factor in determining adverse possession—Defendant, a kanom demisee from plaintiff's father as trustee, not estopped from denying plaintiff's title to redeem, on the ground that he was not a trustee at date of suit.*—Plaintiff's father as the trustee of a certain temple granted a kanom demise of lands belonging to the temple to the defendant's assignor in 1866. Plaintiff now sued to redeem the kanom. The defendant denied his right to redeem on the ground that he was not the trustee at the date of suit. The lower appellate Court, finding that the plaintiff was not the trustee, dismissed his suit. In second appeal it was contended (1) that the defendant who was the assignee of the original kanomdar was estopped from denying the plaintiff's title to redeem; and (2) that the right of the temple and of its real trustee to the property is extinguished by limitation and that plaintiff has acquired a right thereto by adverse possession. *Held*, (1) that the defendant would be estopped only from denying the title of the temple to the property, but would not be estopped from denying the plaintiff's right to redeem on the ground that he was not the trustee at the date of suit; (2) that, having all along claimed to hold the property *as a trustee*, he cannot by such possession acquire a right to the property by

Trust—*continued.*

prescription *for himself* against the beneficiaries, when his right to trusteeship is negatived. In determining what right adverse possession would confer on the holder, the *animus possidendi* is the decisive factor. The character in which possession is held must determine the right which the possession would confer. (9 M. 224, 27 B. 515, 29 C. 518, *F.*) The right to the property must go with the right to the trusteeship. PARAMATHAN THUPPAN v. CHOORAKKAPATHIL MUNDEKOTTIL, **M W.N. 1912, 445.** (33 M. 271, *F.*)

(45)—*Decree—Death of judgment-debtor—Person proved to hold assets—Extent of assets in his hands—Onus of proof—Trustee—Dealings with trust money—Liability.*—Where it is admitted or proved that the person, sought to be made liable under a decree obtained against a deceased person, had come into possession of assets belonging to the estate of the deceased judgment-debtor, the *onus* lies on him to satisfy the Court as to the extent of the assets received by him and to account for them. (3 M. 359, *R.*) Where a trustee carried on money lending transactions, of which some were done with the money which he borrowed from the estate, allowing a certain rate of interest to the estate and appropriating to himself whatever he gained over and above that rate, and the rest were embarked with his own moneys and also with the moneys belonging to the estate crediting the proportionate share of the gain to the estate: *Held* that, as regards the former, the trust estate was entitled to all the profits, and that, as regards the latter, it was entitled only to a share of the profits proportionate to the capital belonging to it. RANCHODE DAS GOVARDHANA DAS v. KRISHANA DAS VITTAL DAS, **10 M.L.T. 272=2 M.W.N. 1911, 271.**

(46)—*Alienation of trust property—Alienee looking after charities from date of transfer—Prescription—Limitation Act* (XV *of* 1877), *art.* 124—*Purchaser having knowledge of trust, purchaser of trust property from trustee, adverse possession—Civ. Pro Code*, 1882, s. 30.—Where the trustee of a religious endowment alienated the properties belonging to it in 1872, and his successor in office brought a suit in 1897 to recover the properties, and it appeared that the plaintiffs predecessor neglected the charities since 1872 and that the defendants took upon themselves to cause them to be carried out, *held*, that, the alienation was not one of a hereditary office within the meaning of art. 124 of the Limitation Act and that the plaintiff did not lose his right to the management itself. In a suit to recover the trust-property from the purchaser, where it appears that the purchaser knew at the time of the sale that the property was held by the vendor merely as trustee and that the sale was not for a purpose binding on the trust, the article applicable is art, 144 and not art. 134. [*R.*, 123 P.W.R. 1908, F.B.=127 P.R. 1908.] Where a trustee improperly alienates the trust property, the purchaser's possession does not become adverse to the trust till the date of that

Advocate High Court
Jammu & Kashmir

Trust—*continued.*

trustee's death. This is equitable, for, under the law, the general body of worshippers interested in the trust have themselves no remedy whatever against persons taking trust property under improper alienations :—(*a*) the worshippers cannot sue the alienees under s. 539, Civ. Pro. Code (17 M 462, *F.*); (*b*) nor can the alienees be proceeded against under s. 14 of the Religious Endowments (Act XX of 1863) ; (*c*) s. 30, Civ. Pro. Code, does not enable worshippers to sue either managers or alienees concerned in transactions whereby such institutions may be defrauded. AMBALAVANA DESIGAR v. BAPPU ROW JAGADAP, **9 M.L.J. 93** (9 M. 466, 20 C. 407, *R.*)

(47)—*Trust—Trustees—Mortgage of trust property—Sanction of Court.*—Where the income of the trust property is quite sufficient for carrying out the purposes of the trust, the Court will not sanction the mortgage of the trust properties, although the object of the mortgage was to raise money to improve the trust properties and thus enhance the income thereof. In the present case, certain houses were devised to trustees upon trust to receive the rents and profits, and after defraying all expenses for taxes and repairs, for re-building of the same when necessary and to pay and appropriate the balance for the performance of certain religious rites and charities. The income of the property was more than was required for the purposes of the trust, and the trustees had a surplus of Rs. 19,000 in their hands. They proposed to spend this surplus in pulling down the buildings and in erecting a larger and more substantial building than the former ones. For this purpose, a sum of Rs. 20,000 was found necessary, over and above the said surplus. They applied to the Court for sanction to raise this amount by mortgaging the property. The Court refused to accord its sanction to the proposed mortgage. A mortgage would be a burden on the property, and although at present it seemed probable that it might be very rapidly paid off, the Court cannot allow the trust-property to be the subject of speculation. DINSHAW BODE v. NOWROJI NASARWANJI BODE, **20 B. 46.**

(48)—*Devise for life in trust—No gift over to executors—Surviving heirs take as heirs subject to trust—Trusteeship vests in all—Suit on trust, by one of them, maintainability of—Alienation of trust-property by trustees—Validity—Trustee—Conveyance—Breach of trust—Succeeding trustee—Suit to recover trust property.*—Where a devisee for life in trust dies, there being no gift of the estate to the executors named in the will, the ownership in it devolves upon the surviving heirs of the testator subject to the trust and such heirs would accordingly be trustees under, by reason of the will, though succeeding to the property in their character of heirs. Where such a trusteeship vests in all the surviving heirs, the release by all of them of their beneficial interests in favour of

Trust—*continued.*

one of them, though operative to pass the legal estate so as to vest in it that one alone, could not vest the trusteeship in him alone ; and, therefore, that one cannot maintain a suit on the trust, unless joined by the other heirs. The alienation of charity property by the trustees, standing by itself, is not a breach of trust at all ; for, that which the Court might have done upon its own consideration of what would have been beneficially to the charity, might have been done by the trustees, upon their own authority, in the exercise of their legal powers. A trustee, as between himself and one to whom he has conveyed trust property, is as much concluded by his own completed act as any other vendor. So also, the completed act of former trustee, though in itself a breach of trust, is as conclusive against a successor in the trusteeship where it is the successor who, in a suit against one claiming under and by virtue of such act, is seeking to disaffirm and annul it. MANIKLAL ATMARAM v. MANCHERSHI DILSHA COACHMAN, **1 B. 269** [*R.*, 1 Bom. L.R. 303, 23 B. 614 ; *D.*, 13 M. 277, 15 B. 625.]

(49)—*Right of alienees of testator's property from executor before his obtaining probate—Provision in indenture of mortgage for appointment of new trustees by election by debenture holders—Holder of debenture transferred by executor before obtaining probate, right of, to attend meeting and elect trustee.*—The Dhurumsey Spinning and Weaving Company executed a mortgage of certain lands in the name of certain trustees for securing money borrowed by the Company on debentures. The indenture of mortgage provided that, in case any trustee should die, or retire, or become incapable to act, the surviving or continuing trustees may appoint a new trustee. In default of such appointment, provision was made for the election of a new trustee by the holders of the Company's debentures at a meeting of them convened for the purpose. At such a meeting subsequently held, the chairman excluded certain debenture-holders to whom the executors of one of the parties had transferred the debentures before they had obtained probate. For the purpose of deciding whether the trustee elected at such meeting had been validly appointed or not, the question had to be decided, whether the mere fact that the executors under the deceased trustee's Will had not, on the day of the meeting for electing the new trustee, obtained probate, had or had not the effect of depriving the transferees of debentures from them of their ordinary right to vote, and it was *held* that these alienees for valuable consideration had, at the date of the meeting, the ordinary rights of other debenture-holders under the indenture, that they were entitled to vote and ought not to have been excluded. Decree was therefore passed that the new trustee had not been validly appointed under the term of the indenture, that he be therefore restrained from acting as such, and that the surviving trustees do, within a month, proceed in the manner provided by such indenture to call a meeting

Trust—*continued.*

and elect another trustee. MATHURADAS LOWJI v. GOCULDAS MADHOWJI, **10 B. 468**. [*R.*, 31 B. 418=9 Bom. L.R. 287.]

(50)—*Assignment of property to trustees for benefit of creditors—Absence of bankruptcy law Validity of assignment.*—A person in the mofussil in failing circumstances could, in the absence of any statutory provision and of a bankruptcy law, make a valid assignment of his property before liens had attached upon it or afterwards subject to such liens to trustees simply for the purpose of having it distributed fairly among all his creditors, although the effect of it was to defeat particular creditors and deprive them of their execution. *Semble.*—Such a trust did not become inoperative by reason of the retirement of two out of three trustees, and of the inability of the third to discharge his duties properly. BAUMGARTNER v. STEPHENSON, **3 Agra 321.**

(51)—*Assignment of property—Trust—Mortgage—Revocation—Payment of necessary expenses to trustee.*—In February 1880, a son, by a deed made over to his mother, the whole of his landed property, in order that she might manage it for him and pay off his debts granting him a certain monthly allowance. The deed contained the following stipulation:—"Until all the property mortgaged is redeemed, I will take Rs. 125 for my own food and maintenance." A suit was brought by the son more than four years after the deed, for redemption of the property, with an offer of payment to his mother, of the money which might be found due by him. *Held*, whether such deed was a deed of trust or mortgage, that he was equally entitled to a decree in case he paid to his mother all the expenses which she had incurred on the estate; and that, even assuming the deed was a trust, there was nothing in it to prevent him from revoking it at any time that he pleased, after satisfying the trustee. SARDAR RANDHIR SINGH v. RANI LACHMAN KOOER, **133 P. R. 1889.** (8 C. 887, *D.*)

(52)—*Deed of settlement—Trustee to discharge certain debts—Provision for payment of allowances, 'as and when they shall be required'—Construction—Power to postpone payment of allowances—Trustee executing mortgage deeds to secure post-settlement debts and in compromise of suit for setting aside trust deed—Whether commits breach of trust—If so, whether protected if acting under competent legal advice—Transferee with notice of trust—Whether fixed with notice of trustee's prudence in the transaction—Transferee's opinion as to the benefit to* cestui que trust—*Effect—Absence of intention to cheat on the part of purchaser—Effect—Breach of trust—*Onus *of proof—Settlement for paying off secured debts—When in fraud of unsecured debtors—Absence of prayer for removal of trustee—Maintainability of suit for payment of moneys to the trustee—When such prayer necessary—Money got in consequence of a breach of trust—Whether can be followed—Suit to set aside trus-deed—Trustee's appointment impugned—Trustee's power to compromise.*—The late Rajah of Ramnad, who had contracted heavy debts, executed a deed of settlement, dated 12th July, 1895, with the object of saving his estate in the interests of his son, the present plaintiff. By that deed, he conveyed the Ramnad Zemindari to the second defendant for the purposes mentioned in the deed. One of the terms of the deed empowered the trustee to pay the debts, etc., in any order he pleased and to pay the allowance to the allowance holders, *as and when required* Subsequent to the settlement deed, the Rajah continued to contract debts. Meanwhile, the second defendant (*i e*, the trustee) entered into negotiation with an English firm to raise a large sum of money for clearing off the liabilities. The negotiation turned mainly on the questions of postponement of the claims of the Rajah and of the members of his family, who were entitled to certain allowances under the settlement deed, to the payment of interest on the contemplated English loan. Pending these negotiations, the first defendant instituted a suit for the purpose of setting aside the settlement deed of the 12th July, 1895. The Rajah, when approached, did not acquiesce in the postponement of the allowances in favour of the English firm, until he was paid a sum of four lacs of rupees to discharge his post-settlement debts. Thereupon, after taking competent legal advice, the trustee (who is the second defendant in the present suit), in the exercise of the discretion vested in him by the deed, postponed the allowances in full to the discharge of the creditors, and entered into an agreement with the first defendant whereby some of his unsecured loans to the Rajah were secured by a mortgage of portions of the Zemindari and further loans were taken from him to discharge the Rajah's post-settlement debts. In pursuance of the said agreement, the second defendant executed two mortgages in favour of the first defendant and also paid to him a sum of Rs. 43,000, under these instruments. The agreement and the mortgages purported to have been executed also in compromise of the suit instituted by the first defendant to set aside the settlement deed, dated 12th July, 1895. The plaintiff, as heir of the settlor, filed the present suit to set aside the agreement and the two mortgages executed by the second defendant in favour of the first, and to recover the sum of Rs. 43,000 paid by the second defendant to the first defendant, on the ground that the transactions were not warranted by the terms of the settlement. *Held*, that the allowances were, under the terms of the settlement-deed to be paid "*as and when they shall be required*," that there was nothing inconsistent with this in an undertaking that calls upon an income *shall* rank in a particular order, that there was nothing to require the trustee to keep the discretion open, or to prevent him if circumstances required him to do so, from fixing once for all the order of payment and that, in consequence, it was not necessary for

Trust—*continued.*

him to have obtained the consent of allowance-holders for postponing payment of the allowances. *Held*, also, that, under the facts and circumstances of this particular case, the trustee had committed a breach of his trust in entering into the transactions which are impugned in this suit. *Held*, also, that it is no answer to a breach of trust that the trustee acted under competent legal advise. *Held*, also, that a transferee having full notice of the trust is not absolved from the liability to lose the estate he had acquired, merely because, in his opinion, the transaction is prudent and beneficial to the *cestui qui trust*. A person having notice of the trust has also notice that the trustee must act reasonably and prudently. *Held*, also that the mere fact that a purchaser acted with a view of getting good security for his money and not with a desire to cheat any one, will not suffice to protect him. *Held*, further, that it does not lie on the plaintiff to prove that this transaction is a breach of trust. If a transaction of this kind is impugned, a transaction which *prima facie* throws a heavy burden on the trust estate for no apparently commensurate benefit it will lie on the trustee to show that there is a real benefit to the beneficiaries. A settlement made with the object of paying off secured creditors does not necessarily delay the unsecured creditors. *Held*, also, that the suit need not fail, merely because there is no prayer for the removal of the trustee. (23 M. 239, *D.*) Except where it is established that the plaintiff can get no relief, unless he seeks to remove the trustee and procure the appointment of another, there is no principle on which he ought to be held disentitled to a decree that the money due to the trust be paid over to the trustee. (10 M. 375, 16 M. 31, *D.*) *Held*, also, that, where trust money has, by a breach of trust, come into the hands of a person, the beneficiary can follow it, if he desires so to do. *Obiter* : It is doubtful whether a trustee has power to compromise, at the expense of the trust estate, a suit in which his own position as trustee was attacked. M.R.M.A. SUBRAMANIAN CHETTYAR v. RAJA RAJESWARA DORAI *alias* MUTHURAMALINGA DORAI, **6 M.L.T. 143=2 Ind. Cas. 963=32 M. 490.**

(53)—*Trust property—Creditor's right to follow it—Promissory Note—Suit against person not party to Promissory Note—Appeal—Power of the Chief Court to transfer to its own file connected appeals—Interest—Civ. Pro. Code (Act V of 1908), s. 151—Limitation Act (1908), ss. 5 and 14—Trust Act (II of 1882), s. 63.*—Where several appeals, which are ordinarily entertainable by the Divisional Judge, are so connected with another appeal, which lies direct to the Chief Court, that it is desirable that all should be dealt with together, the former can be presented along with the latter, and the Chief Court can transfer them to its own file, without going through the formality of their being first presented to the Divisional Judge. A trust property can be followed into the hands

Trust—*continued.*

of any one in whose hands it can be identified as laid down in s. 63 of Trusts Act, and the only person who can escape liability for trust property in his possession is a *bona fide* transferee for value without notice of trust or a transferee from him. An appeal is filed in wrong Court ss. 5 and 14 of Act IX of 1908 can save the Limitation. By two deeds of 21st March and 20th April, 1903, L made over his property in trust to P and H in order that his debts might be liquidated. One of the deeds was also attested by his son S. On 25th May, 1903, the trustees executed some Promissory notes in favour of certain creditors making them payable on 26th Jan., 1904. On 1st January, 1904, L died and his son S, three days later gave notice repudiating the trust. On 21st April, 1904, the District Judge released the original trustees and appointed two others in their place. *Held*, on the above principle, that suits based on the Promissory notes are maintainable both against the trustees and S, although S is no party to them. *Held*, also that interest at 6 per cent. per annum is allowable on the amount decreed from the institution of the suit to date of realisation. SHEIKH GHULAM ALI v. DIWAN SHIV NATH, **158 P. W. R. 1912.**

(54)—*Debtor's trust-deed—Unclaimed dividends—No provision for redistribution—Claim by one of the creditors*—Under a creditor's trust deed, containing no provision for redistribution of unclaimed dividends of some of the creditors for whom funds were allotted by way of dividends, but who did not claim them for a long period, it is not open to one of the creditors to bring a suit for the administration and distribution of the unclaimed funds in the possession of the trustees. (*Wilde* v *Banning*, L.R. 2 Eq. 577 *D.*) MANICKAVELU MUDALI v. ARBUTHNOT & CO., **4 M. 404** [*R.*, 31 B. 222=8 Bom. L.R. 328.]

(55) *Administration of—Vote or act of majority of trustees how far binding on minority—Right of suit by one trustee.*—In the administration of all trusts of a private nature, the vote or act of the majority of the trustees cannot, in the absence of an express or implied power, bind a dissenting minority. The very principle of recognising the validity of the acts of the majority involves the necessity of the majority being arrived at after mutual discussion among all the members. Without deciding that in every case of a transaction entered into by the majority of trustees of a public and charitable trust, there should have been a meeting of all to validate it, it may safely be held that all the trustees should have had an opportunity of stating their opinion. (6 M. 270, *R.*) There is no objection to one trustee suing for redemption without consulting the others or making them co-plaintiffs. KUNHAN v. MOORTHI, **8 M.L.T. 208.** (14 M. 489, 23 M. 82, 24 M. 296, 26 M. 461, 26 M. 649, 29 M. 302, 24 A. 226, 96 C. 409, 5 C.L.J. 527, *Cons.*)

(56)—*Civ. Pro. Code, s. 437—Non-joinder.* In suits concerning property vested in a trustee,

Trust – *continued.*

the trustee represents the beneficiaries, and it is not necessary, ordinarily, to make them parties unless the trustee is wholly uninterested in the subject-matter of the suit, or has an interest hostile to that of the beneficiaries. BERESFORD v. RAMASUBBA, **13 M. 197.**

(57)—*Civ. Pro. Code—O.* XXXV, *r.* 1—*Suit for trust properties—Non-joinder of trustees—Bad and fatal to the suit—Agreement between trustees—May vest management in one—The office as trustee of others not thereby deprived.*—One of the *uralars* alone cannot institute a suit for redeeming a *kanom* without making the other two parties to the suit. Although by agreement the ordinary management of the trust is vested in one trustee, the agreement does not deprive the other trustees of their office of trustees. O. XXXV, r. 1, Civ. Pro. Code, is quite clear as to the making of trustees parties to the suit. MALAPPURATH NARAYANA NAMBI v. CHANAZHI KRISHNAN, **2 M.W.N. 1911, 537.**

(58)—*Suit to appoint a trustee and recover trust properties – Joinder of parties—Stranger to trust, whether can be joined as party—Widow and heir of trustee – Civ Pro. Code, ss.* 28, 43, 45 *and* 539.—The trustees of a religious endowment lent on a pro-note a certain sum of money belonging to the trust funds to a stranger. The pro-note and the balance of the trust funds remained with one of the trustees. On the death of that trustee, his widow took possession of the pro-note and funds. The remaining trustees alleged that the money was advanced in equal shares by them and the deceased trustee, and not out of the trust funds. The plaintiff who was appointed a fresh trustee sued the remaining trustees and the widow for the appointment of a trustee for the trust funds, for a declaration that the pro-note and the funds in the hands of the widow were part of the trust property, for the vesting in such trustee of the property, belonging to the trust, and for directing the widow to hand over to the trustee the papers and the funds in her possession belonging to the trust. *Held*, (1) that the joining of the widow with the trustees did not constitute a mis-joinder, and, (2) that the suit fell within s. 539 of the Civ. Pro. Code. MAUNG CHO v. MA CHAW, **4 L.B.R. 183.** (5 A. 163, 23 C. 821, 16 A. 279, 26 B. 259, 33 C. 789, *R.*; 2 C.L.J. 431, *F*)

(59)—Muktad trusts *are valid trusts—Zoroastrian faith, tenets of—Scheme of the belief of the Zoroastrian faith explained--Practice—Decisions by single Judges how far binding their successors.*—Trusts and bequests of lands of money—for the purpose of devoting the incomer thereof in perpetuity for the performance of Mutkad, Baj, Yejushni and other like ceremonies, are valid "charitable" bequests, and as such exempt from the application of the rule of law forbidding perpetuities. The performance of the Muktad ceremonies is a religious duty imposed upon the Zoroastrians by the proved tenets of the religion they profess. The ceremonies themselves are acts of religious worship. They

Trust—*continued.*

include worship, praise and adoration of the supreme Deity, and a thank-giving for all his mercies. They contain petitions for benefits both temporal and spiritual for all Zoroastrians —for all holy and virtuous men of all other communities—and they comprise prayers for the well being and long reign of the sovereign, for good Government by him, and for victory to him over all his enemies. The Muktad ceremonies tend most unmistakably towards the advancement of the religion promulgated by the Persian Prophet Zoroaster, and the performance of these ceremonies is an act of the Divine worship in its highest and truest sense. The moneys paid to the priests for the performance of the Muktad ceremonies forms a good portion of their ordinary income. The priests make a higher income during the Farvardigan days than they do during any other period of the year, and the Muktad ceremonies form a sort of endowment which goes a long way to maintain the priestly classes whose exixtence is necessary to the community of Zorostrains. According to the belief prevailing amongst the faithful followers of the Prophet Zoroaster the performance of the Muktad ceremonies confers public benefits—benefits on the Zoroaster community, on the peoples amongst whom they live, and upon the country which they have chosen as their home. The fundamental principle underlying this belief is faith in the efficacy of prayers addressed to the great Creator JAMSHED v. SOONABAI, **10 Bom. L. R. 417=33 B. 122.**

(60)—*Trustees and Mortgagees' Powers Act* (XXVIII *of* 1866), *s.* 34—*No applicability to charitable trust—Statute of Frauds* (*St.* 29 *Car.* 11, *C.* 3), *s.* 7—*Indian Trusts Act* (I *of* 1882), *s.* 1—*Statute of Frauds, s.* 7, *does not apply in India—Indian Evidence Act* (I *of* 1872), *Civ. Pro. Code* (*Act* XIV *of* 1882), *s.* 539 — *Religious or charitable trusts* — "*Further or other relief*"— *Construction of* ejusdum generis—*Parsis—Conversion among Indian Zoroastrians— Juddins—Convert not entitled to certain religious and charitable institutions of the Parsis.*—The Trustees' and Mortgagees' Powers Act (XXVIII of 1866) does not apply to charitable trusts. S. 34 of the Act is repealed wholly; there is no saving or exception in favour of charitable trusts or of trustees of properties dedicated to charity. The saving clause in s. 1, Indian Trusts Act, 1882, has no applicability to the repealing section that immediately follows; and s. 7 of the Statute of Frauds is wholly repealed by s. 2 of the former Act. S. 7 of the Statute of Frauds was mainly intended to regulate procedure. It never applied to India at any time; even if it did, the Indian Evidence Act, 1872, when it came into force, entirely superseded it. *Held, by Davar, J.*—S. 539, Civ. Pro. Code, 1882, is very limited in its scope and operation. It contemplates the institution of a suit to "obtain a decree" for reliefs that are strictly confined to five heads. The first branch of the suit clearly falls under the provisions of the

Trust—*continued.*

section, for the plaintiffs have obtained a decree under three of the five provisions of the section, *viz.*, (*a*) the appointment of new trustees, (*b*) vesting trust property in the trustees, and (*c*) settling a scheme. But the reliefs asked for in the second branch of the case—namely, the ascertainment and declaration of what are the trusts, the rectification of the trust deeds, the declaration that the defendants have either wrongly declared the trust in the deeds or wrongly interpreted the trusts therein, do not fall under any of the five heads, mentioned in the section. The words "further or other relief" that follow must necessarily be construed to refer to reliefs *ejusdem generis* and not to reliefs wholly outside those specifically defined under these five heads. A suit brought not to establish a public right in respect of a public trust, but to remedy a particular infringement of an individual right, is not within s. 539, Civ. Pro. Code, 1882. S. 539 contemplates a suit either in the name of Advocate-General at the instance of relators, or a suit in the name of parties "having an interest in the trust" with the consent of the Advocate-General. The "interest" of the parties here contemplated must be the "interest" that is threatened or infringed. A well-established and ancient usage prevailing amongst a community must override such of the tenets of its religion as are shown to have fallen into desuetude and conflict with ancient usage prevailing in the community. (13B. 302, 22 B. 430, *F.*) Although the conversion of Juddins is permissible amongst Zoroastrians, such conversions are entirely unknown to Zoroastrian community in India; and far from being customary or usual for it to convert a Juddin the Zoroastrian community of India has never attempted, encouraged, or permitted the conversion of Juddins to Zoroastrianism. Even if an entire alien—a Juddin—is duly admitted into the Zoroastrian religion after satisfying all conditions and undergoing all necessary ceremonies, he or she would not, as a matter of right, be entitled to the use and benefits of the funds and institutions under the defendants' management and control; these were founded and endowed only for the members of the Parsi community; and the Parsi community consists of Parsis who are descended from the original Persian emigrants, and who are born of both Zoroastrian parents and who profess the Zoroastrian religion the Iranies from Persia professing the Zoroastrian religion who came to India either temporarily or permanently, and the children of Parsi fathers by alien mothers who have been duly and properly admitted into the religion. *Held, by Beaman, J.*—The decision of a suit under s. 589, Civ. Pro. Code, is not only binding on the parties to it, but to all persons affected by it. The expression "such further or other relief" in the section means such further or other relief as, from the nature of the introductory words and the exemplificatory cases, appears to the Court to be appropriate in such a suit, *e.g.*, removing fraudulent trustees,

Trust—*continued.*

restraining a breach of trust, and so forth. Any extension or limitation of the scope of a trust, so as to exclude those who were intended to be included or to include those who were intended to be excluded, is a breach of trust. The Zoroastrian religion does admit and enjoin conversion. The Indian Zoroastrians, while theoretically adhering to their ancient religion and consistently avowing its principal tenets, including, of course, the merit of conversion as a theological dogma, erected about themselves real caste barriers, and gradually fell under the influence of the caste idea, till, in modern popular language, it has found current expression in the term Parsi, which now seems to have as distinctly a caste meaning and has essentially a caste connotation as that used to denominate any other great Indian caste. In the Zoroastrian community, while the religion and its ritual purity are still the mainspring of the communal life, they are so intimately bound up with the exclusiveness and the purity of the tribe or caste, that they have become practically identical. It is, therefore, fairly accurate to describe the Indian Zoroastrians as Parsis—thereby implying a caste, or communal, or tribal organization. Conversion—in the abstract at any rate, and as a theoretical religious tenet—was perfectly familiar to the Parsi community, not only in the remote past, but in our own time. It was not the intention of the founders of the trusts in question to extend their benefits to any one who was not, in the most rigid caste sense Parsi, that is, born into the community of the Indian Zoroastrians and born of an Indian Zoroastrian father. SIR DINSHAW M. PETIT, BART. v. SIR JAMSETJI JIJIBHAI, BART. **11 Bom. L.R. 85=5 M L T. 301=33 B. 509=2 Ind. Cas. 701.**

(61)—*Hindu Law — Voluntary declarations of trust—Binding nature of—Quære*—Whether the Hindu Law admits of the applicability of the principle on which Courts of Equity in England hold voluntary declarations of trust to be binding against the declarant? VENKATACHELLA MANIYARER v. THATHAMMAL, **4 M.H.C. 460.**

(62)—*Religious Trusts—Joint Hindu family—Partition—Intention*—Onus.—Whatever may be the real intention amongst themselves of some of the members of a Hindu joint family in executing a deed of partition, purchasers from them have an undoubted right to bind them, by the execution of their deed, and their public acts attending it, to the fulfilment of those obligations, which such public acts cast upon them. Where the plaintiffs sued to establish a religious trust upon certain lands in the occupation of defendants (the plaintiffs and defendants being members of a joint Hindu family), and stated that the trust was created by a deed of sale subsequent to another deed by which the property had been partitioned by the joint family, but which latter deed, they alleged, had never been acted on, having been a mere

Trust—*continued.*

device to protect the property from the creditors of one of its members who had become an insolvent, it was *held* that it lay on the plaintiffs to make out a sufficient case to set aside the prior deed of partition, which was found to be a registered document, and which was *prima facie* a good and operative deed. A Hindu family, consisting of persons in a near connection to each other, may separate and then re-unite, and such re-united members may impress on their re-united property by common family consent such trusts as their law will support. SRIMATI SUKHIMANI DASI v. MAHENDRA NATH DUTT, **4 B.L.R.P.C. 16=13 W.R.P.C. 14=2 Sar. 297.** [*R.*, 33 C. 967=10 C.W.N. 650=4 C.L.J. 22.]

(63)—*Hindu Law - Gift— Trustee.*— That which cannot be done directly by gift cannot be done by the intervention of a trustee. RAJOMOYEE DASSEE v. TROYLUKHO MOHINEY DASSEE, **29 C. 260=6 C.W.N. 267** (4 B. L.R. O.C. 231, 6 C. 106, *R.*)

(64)—*Khojas—Shiah Mahomedan law—Trust-deed— Trust deed turning out to be invalid— Aaverse possession by trustees as against* cestui que trust—*Resulting trust in favour of settlor — Limitation Act* (IX *of* 1908), *s.* 10 — *Mahomedan Law*— Wakf— *Creation of wakf after a life estate — Gift— Power of revocation—Gift coupled with condition—Irrevocable gift— Gift* in futuro— *Contingent gifts — Local usage among Khojas— Estoppel* —Res judicata—*Civ. Pro. Code* (*Act* V *of* 1908), *s.* 11. —J, a Khoja Mahomedan, executed in 1886 a deed of settlement, whereby he settled the whole of his property upon himself and others in trust for himself for his life, and after his death, for his son N for his life, subject to the payment of certain monthly payments to members of J's family. In the event of N dying issueless (which event happened) the property was to be divided into ten portions, six of which were given to various donees, and the remaining four were to go to charity. The deed contained a revocation clause. Up to his death J was himself one of the trustees and was in physical possession, occupation and enjoyment of all the trust property. There was no formal delivery of possession of the property to the trustees, but on the day of the settlement, J opened in his books an account of the property as trust property. After the execution of the deed, a son C (plaintiff) was born to J, who, acting under the power reserved to himself under the revocation clause, caused another draft agreement to be prepared, according to which the monthly payments payable under the deed were maintained, but the whole property was directed to be held by the trustees upon trust for N and C as members of a joint and undivided Khoja family. The draft agreement was engrossed, but as the copyist made mistakes in the engrossing, the document was not signed by J and another engrossment was ordered, but before it could be got ready, J died. C then filed a suit for ascertaining whether or not

Trust—*continued.*

the deed of 1886 was a valid instrument and praying that the defective execution of the second deed may be aided by the Court and the provisions of the same be carried out: *Held*, (1) that, however restricted might have been the gift in form to J, it was in effect a gift absolute to him for life, (2) that the gifts to N, following on the life-estate of J, was valid under Mahomedan law, (3) that the gifts over on N's death without male issue were clearly contingent and as such were not good gifts under Mahomedan Law, (4) that the portion of the deed of settlement which purported to create a *wakf* in respect of four-tenths of the settled property was bad and void inasmuch as it was a contingent gift in *wakf*, (5) that the gift was bad for want of contemporaneous delivery of possession, (6) that this was a case in which the Court might act upon those principles which had always guided the Courts of Equity in England and aided defective execution of a power, defective not through any fault on the part of the persons intending to execute it but by reason of an act of God; and that therefore the second deed ought to be effectuated by the Court to the extent of making it binding upon the conscience of the trustees. Where what appears to be a trust-deed turns out to have been entirely void and therefore not to have passed the legal estate, the position of those who took possession, believing themselves to be trustees but not in law real trustees, necessarily assumes the character of possession by trespass and is therefore from its inception in law adverse against all the world. Where, however, the trust-deed in itself is good and valid to the extent of passing the legal estate but the trusts declared are in themselves wholly or partially bad, then there is resultant trust over to the author of the trust; and the possession of the trustees, whatever they may think of it and however they might intend to use it for the purpose of carrying out the bad trust, could not in law be adverse to the *cestui que trust*, that is to say, the grantor. Where it is the intention that there shall be an ultimate resultant trust in favour of the grantor, it is usual to express that on the face of the deed. A deed so framed as upon its very face to provide for the springing back of the trust fund or a part of it in certain events to the author of the trust, does create what is at once an express or a resultant trust. A resultant, implied or constructive *cestui que trust* is not entitled to the benefit of s. 10 of the Limitation Act, 1908. Where a trust is express, even though the *cestui que trust* chooses to put up with the acts of a trustee and to take no steps to recover the trust property for more than 12 years, yet he is not barred when he does so choose to pursue and endeavour to recover it. But where the relations between the trustee and *cestui que trust* are not express but have arisen by implication of law only, then if the trustee assume an adverse attitude towards his *cestui que trust*, the *cestui que trust* must seek his remedy within the period of twelve years. —In general, limitation against a resultant

Trust—*continued*.

trustee cannot commence to run until the question whether or not the declared trusts are good or bad is decided. In the case where there is a failure of the declared trust and a resultant trust over to the settlor or his heirs, the possession of the trustee is always that of the *cestui que trust*; on failure of the trust, the trustee holds as trustee for the settlor. Thus, so long as he retains and professes to retain the character of a good and legal trustee, he is holding the legal estate as stake-holder for two claimants the intended beneficiaries of the declared trusts which have failed and the resultant trustee, *i.e.*, the settlor. No length of possession by such a trustee can be adverse to his true *cestui que trust* as soon as that legal person is discovered and ascertained. Where the ultimate resultant trust which is to spring back to the settlor is consistent with the discharge of the declared trust, then it may by loose use of language be said to be express on the face of the deed, but where the extinction or failure of all the intended trusts is a condition precedent to the resultant trust coming into being, then the latter is clearly a true resultant trust and is not express and never can be express on the face of the deed. So long as a trustee occupies the position of a trustee, as soon as the declared trusts fail and there is a resultant trust in favour of the settlor, the trustee's possession is essentially that of his *cestui que trust* and can only be changed into adverse possession by a conscious and deliberate act. That is to say, he must repudiate all intention of holding for the resultant *cestui que trust* and he must assert his intention of continuing to apply the trust fund to uses which the Court has declared or which are known to him to have failed. In that event his possession becomes adverse to his legal *cestui que trust* and if that person does not take steps within twelve years, he will not be able to avail himself of the provisions of s. 10 of the Limitation Act, 1908. Under Mahomedan Law, a person can devote his property in *wakf* and yet reserve to himself and his descendants in a very indefinite manner the usufruct of the property. A document which is a declaration of a *wakf* is not necessarily invalid by reason of the postponement of the *wakf* to a life enjoyment of the donor. (12 Bom. L.R. 341, *Reconsidered*.) Under Mahomedan Law, the general rule is that the power of revocation is inherent in the donor of every gift. But when the gifts are to persons of certain particular classes or when the donor has received from the donees anything in exchange for the gift or part of the substance of the gift itself, the gift is irrevocable. According to Mahomedan Law, where a gift is conditioned by a power restricting alienation, the gift is absolute and the condition is void. It is the essence of a Mahomedan gift *inter vivos* that the donor should divest himself of the actual possession of the thing given and transfer it to the donee; if the donee does not take physical possession of it at the time of making the gift, then, until he does, the gift is revocable. No gift *in futuro* can be made by a Mahomedan *inter vivos*. To validate such a

Trust—*continued*.

gift, there must be an actual delivery of *sesin* to the donee there must be a transfer of possession and that transfer of possession must be from the donor to the donee. Under Mahomedan Law, gift made contingent upon the happening of uncertain future events is not valid. While the Mahomedan law insists that a gift to private persons should be free of all pious and religious purposes, it does not necessarily prohibit the making of the gift to *wakf* which may be contained in a deed which makes gifts at the same time to private persons. Under Mahomedan law, a donor may give his property in *wakf*, that is to say, appropriate and dedicate the *corpus* of it to the service of God, while reserving for himself a life interest in the usufruct. But, as in the case of gifts to private individuals, the Mahomedan law never contemplated and will not allow a merely contingent gift in *wakf*. This necessarily flows from the jural conception of a *wakf*, which is the immediate appropriation and consecration of specified property to the service of God, and the reservation of the donor's life-interest in that property does not in any way clash with that conception, for the *corpus* is there and then definitely and finally appropriated to its intended purpose. But it is plainly otherwise, while the gift is conditioned upon the happening of some future uncertain events. There can, in such circumstances, be no appropriation synchronizing with the declaration, because should the future events happen, it is neither the donor's intention then nor after the happening of that event that the property ever should be appropriated to the service of God. Local usage cannot be allowed to permit Khojas to override the Mahomedan law which prohibits any Moslem from disposing of more than one-third of his property by will. Estoppel and *res judicata* are entirely distinct. *Res judicata* precludes a man averring the same thing twice over in successive litigations, while estoppel prevents him saying one thing at one time and the opposite at another. CASAMALLY JAIRAJBHOY PEERBHOY v. SIR CURRIMBHOY EBRAHIM BART., **13 Bom. L R. 717.**

(65)—*Will—Establishment of charity under—Trust outside jurisdiction—Settlement of scheme—Duty of Court—Subsequent execution of trust-deed in contravention of provisions of will—Suit for declaration of trusts—Jurisdiction—Trust—Suit for establishing—Limitation Act XV of 1877, s. 10—Misapplication of trust funds—Taking of accounts—Suit against trustees—Fraud—Proof—Declaration of trust in will—Execution of trust-deed after testator's death—Trust-deed not in conformity with provisions in will—Discrepancy caused by mistake—Effect—Practice—Will—Declaration of trusts—Subsequent execution of two trust-deeds not according to provisions of Will—Suit for account—Decree in prior suit instituted by trustees of charity—Omission to ask for account—Right of Advocate-General how affected—Civ. Pro. Code, 1882, s. 43.—Semble.*—In cases of bequests of

Trust—*continued.*

money to found a charity in territories outside the jurisdiction of the Court, the Court should hand the money to the trustees named by the testator, leaving it to the Courts of the country in which the charity is to be carried out to settle the scheme in accordance with which the trustees are to deal with the money. Where the trust-deed of a charity executed subsequently to the death of a testator under whose Will the charity was established did not strictly conform to the provisions of the Will, *held* that the properties to be held in charitable trusts being in Bombay and the trustees thereof also being in Bombay, the High Court at Bombay had jurisdiction to pass a decree in a suit brought for declaring the trusts upon which the trustees held the property comprised in the deed of trust and for rectifying the deed in accordance with such declaration. [*R.*, 20 B. 495.] A suit against a trustee and his assigns for the purpose of following the trust property in their hands and having it applied for the proper purposes of the trust, falls within s. 10 of the Limitation Act, 1877, and is not barred by any length of time. In a suit brought against certain trustees of a charity for the taking of accounts, on the ground of misapplication of trust funds, charges of fraud and dishonesty made against them must be established at the hearing of the case and must not be allowed to be reserved and proved subsequently in the course of taking accounts. Where the trust deed of a charity executed subsequently to the death of a testator under whose Will the charity was established, is not in conformity with the provisions of the Will, the Court will not, if satisfied that the discrepancy has been the result of a *bona fide* mistake, visit the past consequences of the mistake upon the trustees. A died in February 1863, leaving a Will which directed that the income arising from certain properties belonging to him should be utilised in the conduct of certain charities. His widow, the first defendant, who had obtained letters of administration with the Will annexed, executed a trust-deed on 13-10-1868, purporting to convey thereunder to the trustees, certain properties of the testator for the trusts declared therein. On 17-4-1869, she executed a second trust-deed in respect of some other properties of the testator. The trusts declared in these two deeds were not in accordance with those mentioned in the Will. The present suit was brought on 10-3-1892 at the instance of certain members of the community interested in the trust, demanding an account from the first defendant of the income arising from the property from the testator's death to the execution of the deed of 13-10-1868, and also an account from the trustees under the deed of 17-4-1869. *Held* that the first defendant, having made over the property to the trustees in 1868, was not liable to render accounts. There being no evidence that she had used any of the income for her own purposes, the presumption was that she had faithfully discharged her duty. The account was barred by art. 120 of the

Trust—*continued.*

Limitation Act (1877). *Held* also that, it having been found that the trustees under the deed of 1869 had paid the income received by them to the trustees under the earlier deed of 1868, no account would be decreed against them. [*R.*, 21 B 257, 10 Bom. L.R. 117=32 B. 364] In the above case, the Advocate-General, as plaintiff also, prayed for an account against the legal representatives of one T, who had been trustee under the deed of 1868 from the date on which it was executed up to his death in 1889. In a previous suit which the trustees had instituted, they had received from T's estate the balance which in that suit they had claimed to be due from him to the charity. The trustees had omitted to ask for an account against him in that suit. *Held* that under s. 43 of the Civ. Pro. Code, 1882, the Advocate-General, as plaintiff in the present suit, could not sue for an account, as he represented the same interests as the trustees. Granting that there was no bar under s. 43, the Court, in the exercise of its discretion, would not grant the relief asking for the taking of accounts under the circumstances of the case THE ADVOCATE GENERAL OF BOMBAY v. BAI PUNJABAI, **18 B. 551.**

(66)—*Grant for religious and charitable purposes—Inalienability—Breach of trust—Successor in office—Estoppel.*—Property granted in inam for religious and charitable purposes is inalienable, except under special circumstances. And no person, other than the duly authorized trustee, can alienate by sale or mortgage the property of a religious trust. Where a trustee does any act in breach or repudiation of the trust, such act is not binding by estoppel on his successor in the trust. SHRI GANESH DHAMIDAR MAHARAJDEV v. KESHAVRAU GOVIND KULGAVKAR, **15 B. 625.** [*R.*, 22 B. 475, 23 B. 237.]

(67)—*Charitable trusts—Suit for removal of trustee of mosque and injunction—Right to injunction—Whether carries with it right to possession of lands attached to the mosque.*—A right to pray for removal of the trustee of a mosque from his office and for an injunction restraining him from performing the duties thereof, does not necessarily carry with it the right to possession of the lands attached to the mosque. PODIA v. ABDUL RAIMAN, **8 Ind. Cas. 525.** (23 M. 99, *R.*)

(68)—*Right of suit—Suit for removal of officer of a temple—Suit by some of the trustees—Other trustees not consulted—Maintainability of suit.*—In a suit by two of the trustees of a temple, (thirty-one in number), for removal of two of the officers thereof, the other trustees were made co-defendants as they were not consulted about the matter: *Held* that the action of the minority of the trustees of a temple, without consulting the other trustees, was illegal, and the suit was liable to be dismissed. SUNDRAM IYER v. VENKATESWARA IYER, **7 Ind. Cas. 391=8 M.L.T. 248.** (22 M. 117, *R.*)

Trust—*continued.*

(69)—*Trust— Charitable endowment —Co-trustees—Trust property—Arrangement between them that each should hold exclusive possession and remain in management of specified portions — Validity—* Tirva *lease deed—Provision for payment of rent in money—No period fixed—Permanent occupancy—No creation of—Notice to quit by one trustee—Ejectment suit by one trustee— Whether bad for non-joinder of co-trustees.*—An arrangement between the hereditary trustees of a *chatram* charity, by which each of them agreed to remain in exclusive possession and management of specified portions of the charity property, is not legally invalid. (27 M. 192 and 18 M. 1, P. C., *R*) A notice to quit given by one of such trustees to a tenant occupying the land in his possession is sufficient to put an end to the tenancy; and a suit to eject the tenant cannot be dismissed on the ground of nonjoinder of the other trustees. Where a document executed by the defendants styled as *tirva* lease deed provided for payment of rent in money and no period was fixed by it during which the lessee should be entitled to remain in possession of the land. *Held*, that, on a proper construction of the document, the defendants acquired no permanent right. The result of the omission to fix a period in the document must be to show that the tenant was entitled to hold as lessee from year to year and not to confer on him a permanent right. RAJA RAM v. RAM BOY, **24 M.L.J. 75 = 13 M. L T. 106 = M.W.N. 1913, 176.**

(70)—*Contribution, suit for—Debt incurred by Temple trustee for benefit of temple--Decree against trustee and others—Payment by trustee of his share of the decree debt—Resignation by Trustee—Right to indemnity out of trust estate —Contract Act* (IX *of* 1872), *ss.* 69, 70—A Temple Trustee borrowed money for the benefit of the temple on pro notes, on which a decree was obtained against him and other Trustees. The Trustee paid his share of the decree amount out of his own pocket. He had previously resigned the Trusteeship He then sued the trust for the recovery of the amount paid by him: *Held*, that, though ss. 69 and 70 of the Contract, 1872, Act did not apply to the case, the plaintiff was entitled to indemnify himself from the Trust estate. (37 C. 229, 5 Ind. Cas. 404, 14 C.W.N. 261, 7 A L.J. 125, 7 M.L.T. 63, 11 C L. J. 220, 12 Bom. L.R. 257, 20 M.L.J. 171, *Rel. upon*) SEETHARAMA IYER v. MURUGAYYA, **12 Ind. Cas. 338.**

(71)—*Trust—Duration and object of—Who are beneficiaries—Rights of community and individual member thereof.*—Where a gift of certain premises was made to the Baptist Mission Society of England for the purpose of establishing a hamlet of Native Christians of the Baptist community, and certain persons were also appointed as trustees for aiding and assisting in establishing the said hamlet, the trust did not come to an end as soon as certain houses had been built and some Native Christians were settled therein as tenants, but it was something like a perpetual trust. The

Trust—*continued.*

beneficiaries under the trust were the Society and not the Native Christian community. The community may have certain rights to call upon the trustees to explain or account for their action; but such right does not exist in any particular member of the community who holds any portion of the land or house in the compound of the Mission as a tenant. PERMANAND KARAN v. BAPTIST MISSION SOCIETY OF LONDON, **8 C.W.N. 918.**

(72)—*Dedication of village to the temple proved —Diversion of trust property—Representation by the manager in his private capacity—No estoppel.*—Where the dedication of the income of a village to a temple is fully proved, the diversion of the trust funds, if any, must be treated as an unauthorised use of the trust funds and not as evidence of there being no real dedication. And when the village was dedicated to the religious services of the idol, it constituted "in legal contemplation, its property," though the idol can enforce its rights only through a manager. The idol or deity, for this purpose, must, therefore, be treated in law as a "person," who can be bound only by any statement of its manager or agent acting on its behalf, within the scope of his authority. And when he made a statement admittedly not acting on behalf of the temple, but avowedly on his own account, any statement made by him in that capacity cannot bind the idol or the deity or its representative. GRANTHI SUBBIAH CHETTY v. SREEMAN MAHA MANDALESWARA KATARI SALWA MAHARAJA UMADE MAHARAJA RAJA BOMMARAJU BAHADUR DEVA MAHARAJULAM GARU, **4 M.L T. 417 = 19 M.L.J. 305.** (13 M.I.A. 270, *F*)

(73)—*Religious trusts—Wrongful alienation by trustee--Suit to recover property—Limitation —Adverse possession—Limitation Act, art.* 134.—In the case of religious trusts, when immoveable property forming the endowments of such institutions is wrongfully alienated by a trustee, his immediate successor in the office of trustee is entitled to bring an action to recover possession at any time within twelve years from his succeeding to such office. (13 M. 403, 18 M. 266, *F.*) The possession held by virtue of a wrongful alienation of trust-property by a trustee is, so long as that trustee continues to hold office, not adverse to the trust. Therefore, it follows that a trustee who wrongfully alienates the trust property may set right the wrong done to the trust by himself, by suing for the recovery of possession at any time during which he is in office. Such a case does not fall within art. 134 of the Limitation Act. SYED GULAM NABI SAHIB v. NAGAMMAL, **6 M.L.J. 270.**

(74)—*Trusts—Improvements by receiver with sanction and consent—Life-tenants and remainderman, rights of,* re *the sums spent.*—With the consent of the parties and sanction of the Court, a receiver improved the trust property by raising a loan. The will was silent as to whether the life-tenants or the remainderman should

Trust—*continued.*

bear the burden. *Held*, the life-tenants were entitled to have the sums spent in improvements charged on the corpus, they keeping down the interest, and the remainderman paying the corpus of the debt. OUCHTERLONY AND OUCHTERLONY BY REVIVOR ADMINISTRATOR-GENERAL OF MADRAS AND WAPSHARE, **11 M. 360.**

(75)—*Created in* **1787**—*Consent decree in* 1869 *setting the management of the trust*—*Effect*—*Rights of descendant of founder.*—Plaintiff's ancestor created a trust for charitable purposes in 1787 and appointed the then Pandara Sannadhi and his successors in office as trustee. In 1869, the then Pandara Sannadhi brought a suit against the plaintiff's grandfather for a declaration of the Pandaram's right to manage the trust, and a compromise decree was passed declaring that the Pandarams had the right to manage the trust and that the trustee might nominate a deputy from the male descendants of the founder's family. Plaintiff, as the lineal male descendant of the family, brought this suit for removing certain abuses of the trust and for settling a scheme for the management of the trust. *Held* that the consent decree in the suit of 1869 did not have the effect of altering the terms of,the trust as created in 1787; and that, although that decree gives the present plaintiff no right in law to be appointed a deputy, the arrangement come to in 1869 might well be taken into consideration in settling the terms of the scheme. KRISHNASWAMI MUDALIAR v. NATARAJA THAMBIRAN, **8 M.L.T. 205=7 Ind. Cas. 151.** (30 M. 255, *R.*)

(76)—*Suit for land*—*Suit to protect trust property from improper acts of trustee*—*Land in mofussil*—*Letters Patent*, 1865, *s.* 12—*Injunction.*—In a suit by certain trustees against others to have a deed of trust under which both were appointed, construed and given effect to, and to protect the property from the alleged improper acts of the defendant-trustees by the appointment of a receiver, and by an injunction restraining the defendants from dealing with the property the subject of the trust which land was situated in the mofussil, it appeared that the deed of gift gave neither the plaintiffs nor the defendants any beneficial interest and that the property was given to the deities named and that under the deed the plaintiffs and the defendanis who were appointed *shebaits* had no sort of personal beneficial interest in the property and that they had no right to appropriate any portion of it or of its income. *Held* that the suit was not a suit for land or other immoveable property within the meaning of s. 12 of the Letters Patent. PUDDOMANI DASI v. JUGGODUMBA DASI, **14 B.L.R. 360, Note.**

(77)—*Trust*—*Transfer of trust property made in excess of trustee's powers*—**Suit for recovery of property by managers of charity**—*Maintainability of suit.*—Plaintiffs as managers of a public charity, '*chhatra bhandara*' or almshouse, connected with a certain temple, sued

Trust—*continued.*

to have their right declared to protect certain endowments made in favour of the '*Bhandara*' and to have certain mortgages by the trustee thereof declared invalid. *Held* that there was a trust for the support of the charity, and the plaintiffs, whether as managers of the charity and temple, or as members of the community interested in the preservation of the property, the subject of the trust, had a right to maintain the suit for its protection. GANGA NAND v. BALGOBIND DAS, **A.W.N. 1884, 61.**

(78)—*Constructive trust*—*Consideration, to live with promiser till death, whether can support a contract.*—A purchased a village, in her name, with her own money, and remained in possession of it till her death. At A's request B consented to live with A till her death; in consideration for that, A promised to leave the village to B after A's death. In a suit by B to recover the village from A's reversioners, *held*, A did not purchase the village *benami* or in trust for B. *Per Sankaran Nair, J.* (*Abdur Rahim, J., dissenting*).—As B lived with A and, in consideration of that, A promised to leave the village to B, there was a contract under the Indian Contract Act. *Held per Abdur Rahim, J.* (*dissentiente*) that there was no contract. Even if the parties intended to enter into such a contract, it is not one which the Court could enforce; that A had only an intention to create a trust for B's benefit. Unless some act is done to effectuate an intention to create a trust no trust is created. The Court cannot perfect a gift which has been left imperfect by the donor, either deliberately, or through accident, or misconception of the law, because the Court has no jurisdiction, as there is no equity in the Court to perfect an imperfect gift. Nor will the Court go out of its way to help a disappointed expectant of a bounty, by converting a declaration of intention to give into a declaration of trust. STREERAJA VENKATA NARASIMHA APPA ROW v. SREE RAJHA MALRAJU LAKSHMI VENKAYAMA, **5 M.L.T. 108=19 M.L.J. 106=2 Ind. Cas. 316.**

See ABSENTEE, 5 P.R. 1871.

Suit for removal of trustee—Suit for appointment of a trustee—S. 539, Civ. Pro. Code, 1882—Plaintiff not trustee cannot claim possession—*See* ACT XX OF 1863, ss. 14, 18. 9 Ind. Cas. 168=9 M.L.T. 301=21 M.L.J. 450.

Devolution of trust—Power to appoint successor—Acquisition by prescription of trusteeship—Suit in High Court for neglect by trustee—Necessity for leave to sue—*See* ACT XX OF 1863, s. 18, 24 M. 219=11 M.L.J. 1.

Hindu—Indian Trustees Act, applicability of, to—*See* ACT XXVII OF 1866, 32 C. 143=9 C.W.N. 179.

See U.P. ACT I OF 1869, 6 I.A. 161.

Liability of Administrator-General in respect of breaches of trust by intestate executor—*See* ADMINISTRATOR-GENERAL, Cor. 97=2 Hyde, 3=Bourke, O.C. 11.

Trust—*continued*.

Property held by judgment-debtor in—For specific purpose—Attachment of surplus after fulfilment of trust—*See* ATTACHMENT—SUBJECTS OF ATTACHMENT, 15 C. 329=15 I.A. 1, P. C.

When can attachment of—property be made—*See* ATTACHMENT—SUBJECT OF ATTACHMENT, 28 C. 574.

Implied trust—*See* AWARD, 5 M.L.T. 199.

Suit under s. 539, Civ. Pro. Code—Persons disputing existence of — Whether necessary parties—*See* CIV. PRO. CODE, 1908, ss. 11, 92, 93, 8 A.L.J. 896.

Judgment-debtor in possession as trustee——Personal decree against judgment-debtor—"Parties to suit"—*See* CIV. PRO CODE, 1908, s. 47, sch. I, O. XXI, r. 58, 14 C.L.J. 425, F.B.

Trustees—Accounts for different periods—Misjoinder—*See* CIV. PRO. CODE, 1908, O I, rr. 3, 4 (*b*), 9 M.L.T 233=9 Ind. Cas. 565.

Suit for removal of trustee—Trustee as plaintiff—Others interested—Permission under s. 30, Civ. Pro. Code, 1882—Necessity—*See* CIV. PRO. CODE. 1908, O I, r. 8 (1) ss. 92, 93, 8 M.L.T. 357=7 Ind. Cas. 868.

See CIV. PRO. CODE, 1908, O. XXI, r. 16, 2 C.P.L.R. 45.

Settlement — Attachment — Claim—Sale — Purchase of settler's right—Right to set aside deed—Fraud—Suit on behalf of all creditors—Limitation Act XV of 1877, art. 95—*See* CIV. PRO. CODE, 1908, O. XXI, rr. 60, 63, 16 B. 1.

See CO-SHARERS—GENERAL, 3 A. 458.

Delay by trustee in the assignment of legal estate—Costs of suit—Costs of conveyance—*See* COSTS—SPECIAL CASES, 11 C. 628.

Property subject to—*See* COURT FEES ACT, 1870, sch. I, cl. 11, 6 B.L.R. App. 138=15 W.R. 457, Note.

See DEBTOR AND CREDITOR, 19 B. 12.

Effect of sending half notes to creditor—*See* DEBTOR AND CREDITOR, 5 M.L.T. 82=19 M.L.J. 283=2 Ind. Cas. 611.

Managing member of firm appointed trustee—Firm dissolved — Trustee's right of—*See* DEBTOR AND CREDITOR, 20 M. 91.

Suit by dismissed trustee for mere declaration and injunction—No prayer for possession — Maintainability—*See* DECLARATORY DECREE, SUIT FOR—GENERAL, 7 M.L.T. 311=20 M.L.J. 306=5 Ind. Cas. 630=33 M. 452.

See DECLARATORY DECREE, SUIT FOR—ENDOWMENTS, 23 M. 385=10 M.L.J. 54.

Trust—*continued*.

Deed of settlement — Beneficiary — Proviso for forfeiture of interest in case of insolvency if bad for repugnancy—*See* DEED—CONSTRUCTION OF DEEDS, 20 B. 310.

Pawn—*See* DEPOSIT OF TITLE DEEDS, 9 M. I. A. 303.

Transfer of trust property by trustee in breach of trust—Suit by trustee to recover on ground of trust—Bona fide purchaser for value without notice of trust—Estoppel—*See* ESTOPPEL—ESTOPPEL BY CONDUCT, 6 A. 24=A.W.N. 1883, 182.

Decree binding endowed property—Judgment-debtor, no interest in property—Shebait if can object to execution—Decree made for execution of trust—Powers of trustees—*See* EXECUTION OF DECREE—GENERAL, 14 C.L.J. 337.

See EXECUTION OF DECREE—APPLICATION FOR EXECUTION AND POWERS OF COURT, 4 C. 6.

Currency notes entrusted for a specific purpose—Notes lost by gambling—Trover—Loan—Bailment — Bona fide holder for value—Costs—*See* GAMBLING, 6 B.L.R. 581.

See GIFT, 7 B. 229.

Gift of Government Notes—Necessity of endorsement to complete gift—Creation of trust by donor constituting himself trustee—Enforceability of trust against representative of donor—Practice among Parsis—*See* GOVERNMENT PROMISSORY NOTES, 5 B. 268.

See HINDU LAW—GIFT, 4 M.H.C. 460.

Dedication by trustees as highway—*See* HIGHWAY, 8 Ind. Cas. 175=20 M.L.J. 879.

Gift—Possession—Hindu Law—Creation of—*See* HINDU LAW—GIFT, 17 B. 486.

For religious, purposes what constitutes—Succession to property of Hindu religious mendicant who is not 'hermit' or 'ascetic'—*See* HINDU LAW—INHERITANCE, 3 O.C. 281.

Hindu Law—Trust, declaration of, in favour of joint family—Joint family, property acquired from funds of — Mitakshara—Talukdari estate—Act I of 1869 (Oudh Estates Act, ss. 3 & 8)—*See* HINDU LAW—JOINT FAMILY, 1 O. C. Sup. 24.

Hindu Law—Agreement between brothers with the object of creating—for maintenance of members born and to be born, binding nature of, on heirs—*See* HINDU LAW—MAINTENANCE, 6 C. 106.

See HINDU LAW — RELIGIOUS ENDOWMENT, 2 Hay, 557.

See HINDU LAW—WILL, 9 B.L.R. 377=18 W.R. 359, 4 B.L.R.O.C. 231, 4 C.W.N. 671, Note.

Trust—*continued.*

Perpetuities—Recital in will indicating intention to create perpetuity—Valid trusts—*See* HINDU LAW—WILL, 7 C L.R. 241.

When Court will frame scheme for administration of—*See* HINDU LAW—WILL, 9 C.W. N. 528=1 C.L.J. 605.

Precatory—*See* HINDU LAW—WILL, 14 C. 222.

Principle that obligation to convey property creates trust inapplicable to reputed ownership under Insolvency Act—*See* INSOLVENCY—ORDER AND DISPOSITION, 2 B. 542.

Insolvency—Appointment of members of a banking firm as trustees of a fund to be invested in their own Bank—Failure of the Bank—Whether the trustees are entitled to recover the whole amount from the assets—*See* INSOLVENCY—MISCELLANEOUS, 7 M.L.T. 266=5 Ind. Cas. 331=33 M. 154.

Administration Suit—Setting aside a deed of—Non-joinder of parties—*See* JOINDER OF PARTIES, 26 C 891=3 C.W.N. 670.

See JURISDICTION—QUESTION OF JURISDICTION, 8 B.H C. A.C. 245.

See JURISDICTION—SUITS FOR LAND, 1 Hyde, 284.

Jurisdiction of Courts—Suit for removal of persons from management of charitable—Malversation—*See* JURISDICTION OF CIVIL COURTS, 7 M.H.C. 117.

Suit for trust-property as manager—Limitation—*See* LIMITATION ACT, 1908, arts. 124, 144, A.W.N. 1905, 69=27 A. 513=2 A.L.J. 304.

Deed of—Creating a life estate with a remainder over, is void under Muhammadan Law—*See* MAHOMEDAN LAW—GENERAL, 36 C. 431=2 Ind. Cas. 292.

Dispute about succession to trusteeship cannot be referred to arbitration—Award—application to file award—Jurisdiction of Court—*See* MAHOMEDAN LAW—WAKF, 6 Ind. Cas. 219=7 A.L J. 761.

Mortgage-suit — Question whether suit amount belongs to mortgagee personally or to trust funds in his hands—Evidence—*See* MORTGAGE—MISCELLANEOUS, 4 C.W.N. 70.

Obligation to release property settled — Whether creates a—*See* OUDH SETTLEMENT, 8 A.L.J. 132, P.C.=9 M.LT. 200=15 C.W.N. 273=21 M.L.J. 109=13 Bom. L.R. 75=9 Ind. Cas. 391=14 O.C. 95=33 A. 125=13 C.L.J. 63.

Statute of frauds, applicability of, in the case of Parsis—Resulting—Under will, necessity of taking probate—*See* PARSIS, 6 B. 363.

Trust—*continued.*

Direction in will to keep properties in trust for several beneficiaries—Suit to recover entire trust properties, whether maintainable by some alone of the beneficiaries—*See* PARTIES TO SUIT—GENERAL, 23 M. 239=10 M.L.J. 10.

See PARTIES TO SUIT—GENERAL, 15 C. 329=15 I.A. 1, P.C.

Application to set aside a consent decree in suit to set aside—Deed—Right of trustee—*See* PARTIES TO SUIT—GENERAL, 27 C. 428=4 C.W.N. 169.

Trustee mixing his own property with that of minor—Effect—Onus of proof—*See* PARTITION—GENERAL, 10 Ind. Cas. 57.

Trustee and *cestui que* trust — Unconscionable bargain—Duty of Court—*See* PLEADINGS, 12 Bom. L.R. 795.

An entry in a record of rights that the lands should be returned to the landlord who has abandoned them, when he comes back and wants them, does not create a trust for his benefit—*See* POSSESSION—ADVERSE POSSESSION, 85 P.R. 1909=135 P.W.R. 1909=3 Ind. Cas. 599.

Suit relating to—Appointment of plaintiff by deed of trust—Suit for salary—Small Cause suit—*See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, art. 18, 26 M. 368.

Suit for subscription against a—Jurisdiction. *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, art. 18, 20 M.L.J. 146=5 Ind. Cas. 912=8 M.L.T. 67=33 M. 494.

Manager of trust property must set out his title in an ejectment suit—*Res judicata*—*See* RES JUDICATA—ADJUDICATIONS, 11 Bom. L.R. 921=34 B. 416=4 Ind. Cas. 241.

Suit to recover property as trustee—Subsequent suit by heirs after plaintiff's death—*See* RES JUDICATA—CAUSE OF ACTION, 7 Ind. Cas. 184=8 M.L.T. 221.

See RIGHT OF SUIT—GENERAL, 6 C.L.R. 58.

Suit for payment of trust fund into Court, plaintiff not having actual title to any part of fund — Bill-quia-tivat— Assent of trustee of fund to decree in plaintiff's favour—Maintainability of suit—*See* RIGHT OF SUIT—GENERAL, 2 M.H.C. 8.

Trust deed not stamped—Admissibility in evidence—*See* SALE—SALE IN EXECUTION OF DECREE—MISCELLANEOUS, 12 Bom. L. R.723=7 Ind. Cas. 955.

Voluntary settlement—Revocation of—*See* SETTLEMENT—GENERAL, 8 C. 837.

Trust—*concluded.*

Hereditary trust held by adoptive father—Right of adopted son to manage—Nature of the devolution of the trust—Suit by adopted son for mere declaration not sustainable—*See* SPECIFIC RELIEF ACT, 1877, s. 42, 15 M.L.J. 456.

Subscriptions gathered by appeal to the public—Declaration of trust as regards subscriptions—*See* STAMP ACT, 1899, s. 2 (24), art. 58-A, 13 Bom. L.R. 646.

Succession to property of Armenian Christian residing in Oudh at time of annexation—*Lex loci* with reference to the English Law of Succession—Territorial Law of Oudh on the introduction of British rule—Executory trust—Will, construction of—Justice, equity and good conscience—Intention of testator—Limitation Act, 1877, sch. ii, arts. 134, 136, 140, 144—Champerty—Sale in execution of decree upon mortgage executed by holder of life-interest—Purchaser for value without notice—*See* SUCCESSION, 6 O.C. 305.

See SUCCESSION CERTIFICATE ACT, 1860, 3 B.L.R.A.C. 46=11 W.R. 388.

Suit for removal of trustee—Jurisdiction—*See* SUITS VALUATION ACT, 1887, s. 81. 20 M.L.J. 726=8 M.L.T. 404=8 Ind. Cas. 545.

Provision in a will that devisee should not have power to dismiss certain servants did not create—In favour of servants—*See* WILL—CONSTRUCTION, A.W.N. 1905, 228=2 A.L.J. 637.

For maintenance—Perpetuities—*See* WILL—CONSTRUCTION, 5 C.L.R. 496.

Rule against perpetuities—For masses—*See* WILL—CONSTRUCTION, 15 M. 424.

Validity of trusts created by will—*See* WILL—EXECUTION, P.L.R. 1900, p. 251.

Bequests under will of Parsi Perpetual trusts for performance of religious ceremonies—Clause restraining alienation, invalidity of—*See* WILL—MISCELLANEOUS, 11 B. 441.

Trust Deed.

Construction of instrument—Settlement—Testamentary document—*See* STAMP ACT, 1879, 20 B. 210, F.B.

For securing mortgage debentures—Stamp duty—*See* STAMP ACT, 1899, s. (2), cl. 17, 4 L.B.R. 2, F.B.

Trustee.

See ACT XX OF 1863.

See CIV. PRO. CODE, 1908, ss. 92, 93.

See CIV. PRO CODE, 1908, O. XXXI, rr. 1—3.

See HINDU LAW—RELIGIOUS ENDOWMENT.

Trustee—*continued.*

See LIMITATION ACT, 1908, s. 10.

See RELIGIOUS ENDOWMENTS.

See RIGHT OF SUIT—ENDOWMENTS, SUITS RELATING TO.

See RIGHT OF SUIT—TRUSTS, SUITS RELATING TO.

See TRUST.

See TRUSTS ACT, 1882.

(1)—*Executor and trustee, difference between.*—The true position, powers and duties of an executor are essentially different from those of a trustee. HARA COOMAR SIRCAR v. DOORGAMONI DASI, **21 C. 195.**

(2)—*Liability of receiver, executor and trustee, contrasted.*—A Receiver occupies a position towards the estate in his hands different from that of an executor or trustee. A Receiver acts through the Court. His acts are virtually the acts of the Court. Executors or trustees, not acting through or under directions of the Court do not and cannot, under ordinary circumstances, create obligations binding on the estate in favour of creditors. MOHARI BIBI v. SHYMA BIBI, **30 C. 937=7 C.W.N. 799.**

(3)—*Registrar of High Court, Secretary of State, Comptroller-General not trustee in respect of Government pro-note.*—Neither the Registrar of a High Court or *Sudder Dewani Adawalat*, nor the Secretary of State, nor the Comptroller-General, is a trustee on behalf of the owner of Government pro-note deposited with Registrar of *Adawalut* or High Court for benefit of such owner. RANEE CHANDRA KALLY DEBI v. EDMUND PELLY CHAPMAN, **9 C.W.N. 443=32 C. 799.**

(4)—*Manager of a joint Hindu family, if trustee.*—The manager of a joint Hindu family is not the agent of the members of the family so as to make them liable to be sued as if they were the principals of the manager. The relation of such persons is not that of principal or agent, or of partners; it is much more like that of trustee and *cestui que trust*. ANNAMALAI v. MURUGASA, **5 Bom. L.R. 494.**

(5)—*Trustee and* cestui que trust—*Trustee trading with trust estates*—Cestui que trust *entitled to profits.*—Any profit acquired by a trustee out of investments of the trust funds must be regarded as earned for and belonging to the *cestui que trust*, for, it would not be tolerated that trustees should gain pecuniary benefit to themselves by speculating with trust funds and thus avail themselves of their fiduciary position to fill their own pockets. GOBIND DEO v. HARNARAIN, **A.W.N. 1882, 169.**

(6)—*Trustee — Fiduciary relationship — Assignment by married woman.*—L M died in 1856, having bequeathed certain personal property to J S, who then and at the time of the

Trustee—*continued.*

subsequently mentioned suit was a married woman, and who executed a power-of-attorney, authorizing O G & Co. to receive payment of the legacy and to execute a settlement of a portion of the same according to articles contained in the power. This settlement was made, and under it a portion of the legacy was assigned to trustees, who did not execute the deed or undertake the trust, and no other trustee was substituted for them. O G & Co. at various times advanced money to J S, and in acknowledgment received promissory notes from her for a portion of such advances; and in a suit by O G & Co. to recover the amount of these advances, it was held that O G & Co., standing in a fiduciary relation to J S, before they could avail themselves of her acts, must show that she did them with a full knowledge of the circumstances of the case and of her own position with regard to it. SMITH v. STEWART, **Bourke O.C. 292.**

(7)—*Trust—Possession given by Revenue Officer—Direction to pay profits to another—Nature of possession given.*—Where a Revenue Officer gave possession of certain lands to the defendant with a direction to give to the plaintiff the profits after paying the revenue due to Government, the nature of possession given to the defendant was that of a trustee and not that of a depositary. VITHAL VISHVANATH PRABHU v. RAMACHANDRA SADASHIV KIRKIRE, **7 B.H.C.A.C. 149.**

(8)—*Insolvent Estates Court, appointment of trustees by—Buying of insolvent's property by trustee for pre-existing debt, whether valid.*—When trustees are appointed to realize the assets of an insolvent's estate, to convert them into money and distribute the proceeds rateably among the creditors, a transfer of the insolvent's property to one of the trustees, by himself and his co-trustees in consideration of a pre-existing debt due to him from the insolvent is not valid, as such transaction amounts to constructive fraud as against the creditors. PERTAB SHAH v. FATTEH CHAND, **17 P.R. 1876.**

(9)—*Appointment of new trustee—Right of stranger.*—A total stranger to the trust has no right to ask for the appointment of a new trustee of the trust-deed. BHUJENDRO BHUSAN CHATTERJEE v. TRIGUNANATH MOOKERJEE, **8 C. 761.**

(10)—*Commission to Trustees—Calculation.*—When commission is allowed to trustees annually, it must be calculated on the imcome of the estate and not on the corpus. LLOYD v. WEBB, **24 C. 44.** [*R.*, 9 C.W.N. 528=1 C. L.J. 605.]

(11)—*Trustee* de son tort.—A person, who without being appointed a trustee by the founder of an endowment, takes charge of the endowment and manages it as the endowment property, makes himself a constructive trustee, or in other words, a trustee *de son tort.* JUGAL KISHORE v. LAKSHMANDAS, **1 Bom. L.R. 118=23 B. 659.**

Trustee—*continued.*

(12)—*Trustee, duty of—Trust—Trustee must assume it to be valid until set aside—Trustees cannot set up a title by adverse possession.*—A trustee must assume the validity of a trust until it is actually impeached. A trustee cannot set up a title to the trust property by adverse possession. A trustee can have no beneficial estate in the trust property except what he may derive from lapse of time, but his is no adverse possession. ARDESHIR v. BAI SIRINBAI, **1 Bom. L.R. 721.**

(13)—*Trustee and* cestui que trust—*Right of trustee to grant remissions of rent to tenant—Trustee in* loco-parentis—*Duty of trustee to invest money—Failure to invest small sums—Breach of trust—Right of trustee to insist on getting release as condition precedent to delivery of property*—Bona fide *belief in existence of such right—Effect of such belief on question of costs in suit necessitated by wrongful refusal to deliver—Wrongful refusal to deliver possession to* cestui que trust—*Right to claim rent.*—A trustee is competent to make small remissions of rent to tenants on sufficient grounds. But the Court will not allow the remission of a large sum, where it has been made after the trustee has become a wrong doer by his improperly retaining possession of the property after the *cestui qui trust* has attained majority. Where the trust property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound to invest the money for the benefit of the *cestui que trust.* Where the trustee was in *loco parentis* towards the *cestui que trust* under the will of the testator who created the trust and defrayed all the expenses of the *cestui que trust*, he could not be considered to have committed breach of trust in having failed to invest comparatively small sums of money that were required for and spent in a short time for the benefit of the *cestui que trust.* A trustee is not justified in insisting on the *cestui que trust* giving him a lease as a condition precedent to his delivering the trust property to him, and a *bona fide* belief on the part of the trustee that such is his right is immaterial as affecting the question of costs in a suit necessitated by his wrongful refusal. The obtaining a release is solely for the personal benefit of the trustee and is not an act done in the execution of the trust. Where the trustee improperly retains possession of the property (house) belonging to the *cestui que trust*, and refuses to deliver the same on insufficient grounds, the latter is entitled to claim rent up to the date of delivery of the property to him. RAJARAM DEVI v. LAKSHMI SANKARA, **13 M.L.J. 206.**

(14) — *Express trust — Outside trespasser.*—If express trusts are created, and some outside trespasser who has no business to interfere does interfere then he becomes trustee *de son tort*, and as such the Court will make him account as if he were the rightful trustee. Lapse of time will not act as a bar to the action

Trustee—*continued.*

against such a trustee, in virtue of s. 10 of the Limitation Act, 1877. MOOSABHOY *v.* YAKURBHAI, **7 Bom. L.R. 45=29 B. 267.**

(15)—*Jurisdiction of Court to remove trustee.*—The Court can, on the ground of misconduct, immorality or breach of trust, remove from his office the Mahant of a religious institution as being a trustee who is unfit for his office. BASANT DASS v. GANGA DASS, **2 O.C. 340.** [*R.*, 6 O.C. 355.]

(16)—*Liability of Hindu trustee—Breach of trust—Small Cause Court—Equitable jurisdiction, extent of Act* IX *of* 1850, *ss.* 25, 32—*Act* XXVI *of* 1864, *s.* 2.—A Hindu trustee, who, having accepted a trust remains passive and takes no steps to see the trust carried into execution is liable for losses arising from the breach of trust of his co-trustee. [*R.*, 12 B. 573, 21 B. 48.] The Court of Small Causes has an equitable jurisdiction only in the cases specified in s. 32 of Act IX of 1850, as the provisions of s. 2 of Act XXXVI of 1864 do not extend the class of cases over which the Court has jurisdiction, but only enlarge the amount for which it may make a decree. Cases where it has been held the Small Causes Courts cannot enforce trusts, unless the trust, sought to be enforced is one for the payment of a distributive share under an intestacy or a legacy under a will, the value of the claim being not greater than Rs. 1,000. The trustees cannot be sued in the Court of Small Causes by the *cestui que trust* for the recovery of the specific trust property or the value thereof. BAI JADAV v. TRIBHUVANDAS JAGJIVANDAS, **9 B.H.C. 333.** [*R.*, 12 B. 573, 21 B. 48.]

(17)—*Suit for removal of trustee—Reference to arbitration by Court — Jurisdiction.*—The District Judge has jurisdiction to refer to arbitration a suit for the removal of a trustee. NAMBI AIYANGAR v. NARAYANA, **11 M.L.J. 337.**

(18)—*Removal of, by beneficiary or co-trustees —Trustees cannot remove a co-trustee without the sanction of Court—Specific Relief Act (I of* 1877), *s.* 42—*A trustee who has been removed can sue for declaration of his trusteeship.*—An instrument creating a trust, may confer on its beneficiaries the power to remove a trustee appointed under it and appoint a new one in his place; but the power must be exercised reasonably; and the Court will not uphold the removal unless it is satisfied that the power was exercised for the benefit of the trust and not in a capricious manner. Trustees were appointed by a deed of trust, executed by members of a caste, which contained no provision empowering the caste to remove them. One of the trustees was excluded from the management of the trust property by his co-trustees. He filed a suit asking for a declaration of his trusteeship and for an injunction to restrain the defendants from denying to him, or otherwise interfering with, his rights as a trustee: *Held*, (1) that no beneficiary or trustee has

Trustee—*continued.*

any right to remove a trustee. There is no difference in this respect whether the beneficiary is an individual or a caste; (2) that where the legal character of a person is denied, he is entitled, according to s. 42 of the Specific Relief Act, to institute a suit "against any person denying" such character. Because there are other persons than those sued who also are denying the right, it does not follow that he must sue them all; (3) that the plaintiff was entitled to the declaration and injunction prayed for. Friction or hostility between trustees and the immediate possessor of trust is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, when it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded. CHAPSEY v. JETHABHAI, **9 Bom. L.R. 514.**

(19)—*Mahant of an asthan and temple, position of—Trustee, power of, to create a trust—Estoppel, essentials of—Trusts Act (Indian)*, s. 47. —*Held*, that the Mahant of an *asthan* and temple dedicated to worship is in the position of a mere trustee and has at the utmost the powers of a manager or guardian of an infant. *Held* further, that a person has no power to appoint a trustee of property of which he himself is the trustee and therefore a deed creating a trust executed by such a person is void *ab initio*. *Held*, also, that there can be no estoppel against plaintiff where the defendant acted with full knowledge of the facts and where there was no misrepresentation on the plaintiff's part. SRI DHAR v. MAHANT DHAGAM DAS, **12 O.C. 236=3 Ind. Cas. 549.** (6 O.C. 355, *R.*)

(20)—*Trustee of a temple—Purchase of property in his own name, during tenure of office—Nature of acquisition whether for himself or for temple.*—A, B and C were trustees of a temple. A purchased in his own name certain properties charged with the performance of certain charity for the temple. *Held*, where properties were purchased by a trustee under an assignment deed taken in his sole name, while there were at the time two other trustees, and where there is nothing to show that the assignment was taken by him as a trustee, it is probable that he purchased them for himself. P. M. APPASAWMY PILLAI v. VANAMAMALAI RAMANUJACHARIAR, **5 M.L.T. 137=19 M.L.J. 310=4 Ind. Cas. 620.**

(21)—*Co-trustees— Death of a trustee—Representative taking possession of trust property and acting jointly with the surviving trustee—Right of a trustee passing under a settlement to others—Right to join possession.*—M and P were trustees. On the death of M, his sister, N, took possession of the trust property, and was acting jointly with P, till his death as trustees. When P's interest passed away to X and Y under a settlement deed, *held*, X and Y

Trustee—*continued.*

were entitled to be joint trustees with N and were only entitled to the joint possession of trust property. ARAKKAL MUTTUKALEL UMMATHI UMMAH v. ERAMBATHIL KUNHAMAD, **8 M.L.T. 200=7 Ind. Cas. 801.**

(22)—*Trusts—Limitation—Cause of action—Adverse possession.*—Plaintiff having made over his property in trust to the defendant who was to look after it and enjoy its profits till plaintiff's return, went abroad for more than 12 years and then returned and demanded restoration of the property. Five years after such demand, he sued to recover possession. *Held* that the suit was brought within time from the date of the demand, and was therefore not barred by the Statute of Limitation. RAKHAL DAS MADAK v. MADHUSUDAN MADAK, **3 B.L.R.A.C. 409=12 M.R. 319.** [*D.*, 6.M. 54.]

(23)—*Limitation—Act* XIV *of* 1859, *ss.* 2, 5—*Purchase of property belonging to an idol.*—The purchaser, for valuable consideration, of property from a person who brought the same in the name of an idol, is not a trustee, especially where there is no formal dedication to the idol. MAHARANI BRAJA SUNDARI DEBI v. RANI LACHMI KUNWARI, **2 B.L.R. A.C. 155 =11 W.R. 13.** (5 W.R. 120, *R.*)

(24)—*Relinquishment—Withdrawal from contest—Effect—Endowed property—Suit against trustees—Limitation—Delay—Nazir's report—Evidence—Act* VIII *of* 1859, *s.* 180.—Where one of three trustees of an endowment each entitled to a third share of the profits, withdraws from a contest between them, his share can only be said to be relinquished in favour of the remaining partners, and to be merged in the general account. No limitation applies in the case of trustees holding endowed property in trust and under accountability; but no consideration could be shown in such a case to claims so stale and antiquated that difficulty arises in finding any reliable evidence whereby to decide on their validity and extent. The report of a Nazir deputed to inquire into the condition of the property in dispute under s. 180, Act VIII of 1859, is not inadmissible merely because he is not an Ameen appointed under Act XII of 1856. BUZL RUHIM v. MOONSHEE LUTAFUT HOSSEIN, **W.R. 1864, 171.**

(25)—*Trustee and* cestui que trust—*Suit to set aside alienations by trustee*—Bona fide *purchaser—Limitation—Trustee having power to convey—Purchase for consideration without notice of trust.*—A suit by a *cestui que trust* to set aside, as fraudulent, certain alienations made by the trustee, is not barred by limitation merely on the ground that more than twelve years have, at the commencement of the suit, elapsed since the execution of the deeds of alienation. If the alienees, at the time of taking their respective interests, were cognizant of a subsisting trust affecting the property, or if reasonable enquiry would have made them so, then they would take the property subject to the trust notwithstanding they paid full

Trustee—*continued.*

value for it, and would in all respects stand in the shoes of the original trustee. They would not be *bona fide* purchaser from trustees entitled to the benefit of the Limitation Act, but actual trustees within the scope of the clauses of the Act which affect such persons. [*R.*, 5 W.R. 238.] If a trustee has power to make valid grants or conveyances, the grantees or purchasers would have a perfectly good title if they take for valuable consideration without notice of the trust. LUTEEFUN v. BEGO JAN **5 W.R. 120.**

Relation of—and beneficiary between Collector and Zemindar—*See* ACT XXIII OF 1861, s. 11, 6 M.H.C. 293.

Banker whether a trustee for customer—*See* BANKER AND CUSTOMER, 7 M.L.T. 214=33 M. 134=5 Ind. Cas. 974.

Right to inspect documents relating to trust and caste matters—*See* CASTE, 11 Bom. L.R. 1014=34 B. 467=4 Ind. Cas. 108.

Suit by—Co-trustee made defendant without showing that he refused to be joined as plaintiff —*See* CIV. PRO. CODE, 1908, O. I, rr. 3 and 4 (*a*), 4 M.L.T. 194.

Suit by trustee—Decree in favour of trustee —Compromise giving up rights acquired by decree—Agreement opposed to purpose and usage of institution—Application to record agreement and pass decree in pursuance thereof —Permissibility—*See* CIV. PRO. CODE, 1908, O. XXIII, r. 3, 12 M.L.J. 360

See CIV. PRO. CODE, 1908, sch. II, r. 16, 12 M.L J. 431.

And Director of a public company—Distinction—*See* COMPANY—POWERS AND LIABILITIES OF DIRECTORS, 6 B.L.R. 278.

See COSTS—TAXATION OF COSTS, 18 B. 189, 20 B. 301.

See DEBTOR AND CREDITOR, 3 Agra 104.

Grantee under Government—Evidence that he is only trustee— *See* GRANT —MISCELLANEOUS, 3 C. 645, P.C.

Order against, under s. 43, Act VIII of 1890 —Jurisdiction—*See* GUARDIANS AND WARDS ACT, 1890, s. 43, 6 Ind. Cas. 862.

Temple trustee—Joint right of management —Partition of right—Civil Court—Jurisdiction —*See* HINDU LAW—PARTITION, 19 A. 428= A.W.N. 1891, 103.

Trustee abandoning decree — Beneficiaries joined as co-plaintiffs on appeal—Power of trustee to change usages of trust—*See* HINDU TEMPLE, 12 C.W.N. 946, P.C.=4 M.L.T. 101=8 C.L.J. 230=31 M. 236=10 Bom. L.R. 781.

Trustee—*continued.*

Power of — Grant of a permanent lease, when can be made—*See* LEASE—GENERAL, 5 M.L.T. 220=19 M.L J. 208.

Of temple — Lease of land for building purposes—No term fixed—Lease not prejudicial to temple—Presumption of permanent tenancy—*See* LEASE—GENERAL, 5 M.L.T. 282=1 Ind. Cas. 802.

A female trustee has got the same powers of transfer as those of a male trustee—*See* LIMITATION ACT, 1908, arts. 124, 141, 28 M. 197.

Lunatic as—Removal of—*See* LUNACY, 8 M.L.T. 243=20 M.L.J. 949=8 Ind. Cas. 316.

See MAHOMEDAN LAW—WAKF, 18 B. 401.

Person unauthorisedly obtaining renewal of a promissory note is—for the rightful owner thereof—*See* MISJOINDER OF PARTIES, 29 M. 87.

Mortgagee, position of—Whether a—Power to grant leases or make other dispositions of mortgaged property in his own favour—Grant of the property to undivided son—Presumption—Trust Act, s. 90—*See* MORTGAGE REDEMPTION, 7 M.L.T. 148.

Of a Mutt—Appointment of successor by will—Right to revoke—Cancellation of appointment—*See* MUTT, 2 M.W.N. 1911, 359 =11 Ind. Cas. 336.

Life interest, not attachable by notice to trustee of funds—*See* OFFICIAL TRUSTEE, 12 M. 250.

Suit by trustees of deed for benefit of creditors to set aside attachment—*See* PARTIES TO SUITS—GENERAL, 3 Agra 104.

Suit for removal of trustee—*See* PARTIES TO SUIT — GENERAL, 20 A. 46=A.W.N. 1897, 210.

Worshippers, interference with rights of—Suits for land maintainable by trustee only—*See* PARTIES TO SUIT—SUITS BY REPRESENTATIVES OF A CLASS, 23 M. 100, Note.

Grant of probate to, as executors according to tenor—*See* PROBATE AND ADMINISTRATION ACT, 1881, s. 3, 16 M.L.J. 558=30 M. 191.

Purchase by prospective trustee— Validity —*See* PROBATE AND ADMINISTRATION ACT, 1881, ss. 11, 91, 102, 13 C.W.N. 557=9 C.L.J. 383=1 Ind. Cas. 289.

Instrument appointing new trustee, if should be registered—Order allowing new trustee to be brought on record—Appeal—*See* REGISTRATION ACT, 1908, s. 17 (*b*), 6 M.L.J. 240=3 Ind. Cas. 435.

Appointed under a will, power of — as to appointing co-trustees—*See* RES JUDICATA —MISCELLANEOUS, 15 M.L.J. 466 = 28 M. 517.

Trustee—*concluded.*

Decree in favour of—reversed — Trustees' personal liability—*See* RESTITUTION, 14 M. L.J. 377.

Suit to recover money collected as subscriptions for building debera—Person collecting subscriptions, trustee for community—Suit for recovering of subscriptions—Suit entertainable by Subordinate Judge's Court, and not on Small Cause side — *See* RIGHT OF SUIT—SUBSCRIPTION, 22 B. 729.

See SUCCESSION CERTIFICATE ACT, 1860, 3 B.L.R. A.C. 46=11 W.R. 388.

Suit for account—Removal of Trustee— Appointment of Trustee—Stamp—*See* VALUATION OF SUITS, 12 C.L.R. 148.

Suit to eject trustee—Possession —Valuation for jurisdiction—Specific Relief Act, s. 42—*See* VALUATION OF SUITS, 8 M. 516.

Constructive— suit to remove, never time barred—*See* VILLAGE COMMUNITY, 5 Bom. L.R. 745=28 B. 20.

Trusteeship—Acquisition by will and adverse possession— *See* WILL—GENERAL, 7 M.L.T. 189.

Trustees Act.

See ACT XXVII OF 1866.

Trustees' and Mortgagees' Powers Act.

See ACT XXVIII OF 1866.

Trustees, Official Act.

See ACT XVII OF 1864.

Trust Property.

(1)—*Money kept in deposit for a specific purpose—Liability to attachment and sale in execution.*—A mortgagor placed in deposit with the mortgagee a portion of the mortgage amount in trust to be expended by the latter on the occasion of the marriage of the former's daughter. A creditor of the mortgagor attached and sold, in execution of a decree obtained against the mortgagor, the deposit amount, and himself having become the purchaser now sued the mortgagee for recovery of the amount. *Held*, that such suit must fail since it was kept by the mortgagor with the mortgagee in trust for a specific purpose of meeting the expenses of his daughter's marriage in the discharge of parental duty. MEHR CHAND v. GOKAL MAL, 7 P.L. R. 1905.

Letters of administration—Limited grant—Exemption from probate duty—*See* COURT FEES ACT, 1870, s. 19-D, 29 B. 161.

See COURT FEES ACT, s. 19-D, 23 C. 980 =1 C.W.N. 31.

A suit to recover a trust-property by a person claiming the office of manager by right

Trust Property—*concluded.*

of inheritance, is governed either by art. 124 or art. 144 of the Limitation Act—*See* LIMITATION ACT, 1908, s. 10, A.W.N. 1905, 69=2 A.L.J. 304=27 A. 513.

Trust property, suit to set aside alienation of —*See* LIMITATION ACT, 1908, art. 134, 5 Bom. L.R. 303=27 B. 500.

Trusts Act (II of 1882).

[REP. IN PT., ACT XII OF 1891. S. 20 (D). AM., ACT III OF 1908.]

(1)—*Presumption of — Sangat of Nanak Shahifakirs—Place of public worship—Property held by Mahant of Sangat—Mahant, removal of by Court.*—Where a person gives property like a village to the Mahant of such an institution as the *Sangat* of *Nanak Shahi* fakirs, there is a strong presumption that the property is given for the benefit of the institution and not for the private benefit of the Mahant, and was therefore trust property. *Held* that the Sangat in dispute was trust property and not the private property of the Mahant. The Court can, on the ground of misconduct, immorality or breach of trust, remove from his office the Mahant of a religious institution as being a trustee who is unfit for his office. BASANT DASS v. GANGA DASS, **2 O.C. 340** [*R.*, 6 O.C. 355.]

(2)—*Ss. 1 and 5—Trust of immoveable property, creation of—Endowments by Hindus—Gift of debt—Right of debtor to object that gift was incomplete*—A mortgagee of certain immoveable property made an oral gift of the principal and interest due on the mortgage along with other debts in favour of a religious society on the condition that the interest that may be realized by the society be applied to *sada barat i.e.*, the charitable distribution of food to the needy. The society brought a suit to enforce the mortgage. The suit was dismissed on appeal on the ground that under s. 5 of the Trusts Act a trust of immoveable property can only be created by a document in writing and registered in accordance with law. The donor when examined in the case supported the gift. *Held*, that the provisions of s. 5 of the Trusts Act were not applicable to the case for s.1 expressly exempts public or private religious or charitable endowments from the operation of the Act. *Held* also, that the gift was not void for uncertainty. *Held*, further, that when in such cases the title or ownership of the donee is established and the donor supports the gift the debtor has no *locus standi* to urge that the gift was incomplete. SANATION DHARAM SABHA. HOSHIARPUR v. MUSSAMMAT SOBHI, **25 P L.R. 1903=75 P.R. 1903.**

(3)—Ss. 1. 75 —*See* DEED—CONSTRUCTION OF DEEDS, 9 Bom. L.R. 1071.

(4)—*S. 3—Trust Act (Indian) — Trust — Purchase of trust property — Notice —Good faith*—B as the Mahant of a Nanak-shahi Sangat, to which office he was elected on the

Trusts Act (II of 1882)—*continued.*

death of the preceding Mahant, came into possession of the Sangat, a share in Kamal Sarae, and the whole of Karwar Kola and Chak Kharak Sen. He subsequently purchased shares in Kamal Sarae. In 1891 he executed a deed in which he declared that these properties and the shares in Kamal Sarae purchased by him were trust property. In 1892 he sold all the shares in Kamal Sarae and also lands in Kharak Sen. *Held* that the facts that the Sangat was a public place of worship and an ancient religious institution and that B succeeded to it by virtue of his office as Mahant established that the Sangat was trust property. *Held* also, that there was a strong presumption that Karwar Kolah was trust property arising from the facts that it was granted to a Mahant of the Sangat, and had passed from Mahant to Mahant for 150 years or so, that such presumption and B's admission was sufficient evidence that the village was trust property ; that the facts that Karwar Kolah was trust property and that B succeeded to the Chak and the share in Kamal Sarae by virtue of his office as Mahant, raised the presumptions that these properties were also trust properties ; that the fact that B had no private property raised the presumption that the shares in Kamal Sarae which he purchased were purchased out of money which came into his hands as Mahant ; and that these presumptions and the admissions of B were sufficient proof that the chak and all the shares in Kamal Sarae were trust property. *Held* also, that the position of B was also calculated to put the transferees upon an inquiry as to his authority to transfer, and they were therefore bound to make such inquiry they were guilty of gross negligence in not inquiring whether B held the transferred properties as the Mahant of the Sangat or as his private properties, and that, as, had they made such inquiry they would have discovered that he held them as Mahant and therefore as trust property, they did not purchase in good faith without notice of the trust. GANGA DAS v. BASANT DAS, **2 O.C. 319.**

(5)—*Ss. 3, 6, 46, 78—Trust or bailment—Guardianship of child and of child's share of property and ownership of such property upon second marriage of father subject to Buddhist Law—Guardians and Wards Act, s. 6.*—The parties were brother and sister. The brother lived with his sister till the death of his wife, and in view of a second marriage made over to his sister for the benefit of the child of his first wife the ownership of certain jewellery to prevent confusion when he entered into the second marriage. He subsequently took away the child surreptitiously and brought this suit to recover the property. The Court of Small causes gave him a decree for recovery as a bailment. *Held*, that the sister had become the guardian of the child and the child's property, and the brother had ceased to be the guardian of the person of the child and also of the child's property; and that he had apparently therefore no status to sue, but that, whether

Trusts Act (II of 1882) —*continued.*

he had or not, there was a trust and not a bailment and that he could not recover in this action in a Court of Small Causes. Whether the plaintiff could have what was done altered under the provisions of the Guardian and Wards Act, or the provisions of the Specific Relief Act or not, it seemed clear that he could not do so of his own authority without the defendant's consent. MA CHOK v. MAUNG PO SIN, **U.B.R. 1892—1896, Vol. II, 645.** (8 C. 887, 2 B.H.C. 133, *R.*)

(6)—Ss. 3, 15, 23—Position of administrator —*See* ADMINISTRATOR, 12 Bom. L.R 53=5 Ind. Cas. 63.

(7)—*Ss.* 4, 6—*Deed of trust, conduct of trustees after execution of*—*Oudh Laws Act, s.* 3 (*b*)—*Trust, non-applicability of Mahomedan Law to*—*Gift does not include trust*—*Dower debt, discharge of, not unlawful*—*Trust*—*Trust. creation of, requires no physical delivery*—*English rules not applicable to Indian cases*—*Shia Law fixes no minimum for dower while Sunni Law does*—*Family settlements, construction of.*—*Held*, that the conduct of trustees as manifested after the execution of the deed of trust, and misconduct on their part or their neglect to perform their duties, cannot be put forward as a valid reason for holding that the author of the trust had no intention of acting seriously or for determining his intention at the time when he executed the deed of trust. *Held also*, that, under s. 3 (*b*) of the Oudh Laws Act, the Mahomedan Law does not apply to trusts. The term "gift" as used in the section cannot be interpreted so as to include trust. The discharge of a dower debt due from the settler to his wife and the prevention of future disputes and litigation between the members of the settler's family are not in any sense unlawful within the meaning of s. 4 of the Trusts Act. *Held further*, that physical delivery of the property in addition to the execution of a registered instrument of transfer is not necessary to effect a valid trust under s. 6 of the Trusts Act. *Held also*, that, in construing family settlements, Courts are to ascertain the real meaning of the parties to the transaction; that, when that meaning has been ascertained, if it appears that the whole plan cannot be carried out but that a part of it can, effect is to be given to that part. The rules established in English Courts for construing English documents are not, as such, applicable to transactions between natives of this country. (12 C. 662, 6 A. 560, *R.*) *Held also*, that, in the case of Shias, there appears to be no fixed legal minimum for dower, though in the case of Sunnis there is some authority saying that the minimum amount is 10 dirams. (2 A. 573. *R.*) (MOHEMMAD) HASHIM ALI KHAN v. SADIQ HUSAIN KHAN, **14 O.C. 356.**

(8)—*S.* 5—*Applicability of Act to religious endowments.*—The Indian Trusts Act is inapplicable to religious endowments. PALLAYYA v. RAMAVADHANULU, **13 M.L.J. 364.**

Trusts Act (II of 1882) —*continued.*

(9)—*S.* 5—*Trust declared outside British India*—*Section applies to proceedings in British Indian Courts based on the trust*—*Shares in limited company* — *Pledge* — *Redemption of pledge*—*Pledgee holding the share for pledger*—*Pledger creating a trust of the share*—*Pledgee signing the transfer of share in favour of intended beneficiaries*—*Company declining to accept transfer*—*Fresh transfer to trustees of beneficiaries*—*The author of trust dying before the fresh transfer*—*Completion of trust*—*Gift valid.* —N asked her brother to redeem the pledge of a share in the Bank of Bombay with P and to get it transferred to the names of her sister's sons, who were minors, and to whom it was given by way of gift. The share was redeemed and P signed the transfer form in the minor's favour on the 1st of December 1902. The Bank refused to accept it for registration on account of the incompetence of the transferees. To get over this difficulty N directed that the share should be transferred to the names of her two brothers as trustees for the minors. The brother's names were accordingly substituted as transferees and the transfer was lodged for registration on the 15th December 1902. It was duly registered in the names of the brothers. Meanwhile, N had died on the 14th December 1902. Both N and P resided at Mangrol outside British India. It was contended that there was an invalid trust as well as an imperfect gift of the share: *Held*, that both the trust and gift were valid, for the share had passed out of N's control before her death, and the legal holder, P, having notice and having signed a transfer on the 1st December in favour of the minors, could only convey for their benefit, which she subsequently did to the trustees desired by N. *Held* (1) that N had an equitable interest in the share although the legal holder was P who was the registered proprietor; and that, the mortgage having been discharged, P held the legal title as trustee for N. (2) That, as the certificate as well as the transfer was then under the control of N's brother to whom N had communicated her desire to benefit the minors, she had done all she could to divest herself of her equitable interest in favour of her nephews. (3) That, s. 5 of the Indian Trusts Act applied to N's brother who set up a trust by N in a British Indian Court, although both N and P resided out of British India, when N had declared her wishes regarding the share. (4) That, though there was no written and signed declaration of trust by N, the property was already vested in a trustee, *viz.*, P, who could be compelled, if necessary, to perform the trust. According to the custom of the Jain community of Mangrol and Uplata, a widow becomes, on the death of her husband, absolutely entitled to the properties left by him. MADANJI v. TRIBHEWAN, **13 Bom. L. R. 1121.**

(10) S. 5—Wakf—Applicability of the Act to Mahomedan—*See* MAHOMEDAN LAW—GIFT, 106 P.R. 1912.

Trusts Act (II of 1882)—*continued.*

(11)—S. 5—*See* RELIGIOUS ENDOWMENTS, 13 M.L.J. 364.

(12)—S. 5—*See* No. 2, *supra.*

(13)—*Ss.* 5, 6—*Oral declaration of trust—Transfer.*—Reading ss. 5 and 6 of the Indian Trusts Act together, the legislature seems to have meant that a specific oral declaration of trust on points (*a*) to (*d*) would be enough to create a trust without transfer whether the author was himself the trustee. MANCHERSHAW v. ARDESHIR, **10 Bom.L.R. 1209.**

(14)—*Ss.* 5 *and* 6—*Creation of trust—Transfer of Property—When necessary—Transfer of Property Act* (IV *of* 1882), *ss.* 5, 54—*Deposit in wife's name—Right of wife to the money.*—On the 1st November 1891, D made a credit entry of Rs. 20,000 in his books in the name of his wife H, carrying interest at 4½ per cent. The entry was made as of the 30th November 1890. In the annual balance sheets (*sarvaya*), in the *samadaskat* book and in the *vyajvahi* (interest account-book) the amount was shown as belonging to H, and interest on it was calculated from year to year at varying rates. When H went on pilgrimage in November 1895, she withdrew some money from her account. H died on the 2nd March 1901. On the 29th July 1901, D, on the occasion of his going on pilgrimage, wrote a letter to his four daughters by H, in which he stated that the money was given by him to H by way of gift, that it was placed to her credit in the books and that they had equal right to take the money but it was to be divided after his death. In 1903 the sum of Rs. 20,000 with interest amounted to Rs.31,740. On the 7th February 1903, D debited Rs. 15,000 to H's account and credited the sum to three sons of one of the daughters M; and on the 22nd he did the same thing in respect of the remaining balance. In the will which D made on the 23rd February 1903, he stated that the amount was his own and never belonged to his wife. After D's death, the three remaining daughters of H, sued to recover their share of the money: *Held*, by *Chandavarkar, J.*, decreeing the claim, that D intended a trust in favour of H, and that that trust was validly created. *Held*, by *Heaton J.*, that no trust was created; that D intended to give his wife the rights of a depositor and that the positions of depositor and depositee were established; and that D conferred on H a right to the money, though he did not actually give the money. *Per Chandavarkar, J.*—Reading ss. 5 and 6 of the Indian Trusts Act by the light of the relevant provisions of the Transfer of Property Act, s. 6 of the former Act must be construed as meaning that, though as a rule transfer is one of the conditions necessary for a valid trust, whether in the case of moveable or immoveable property, no transfer is required where the trust is declared by will or the author of the trust himself to be the trustee; and that one of the modes of transfer is a non-testamentary instrument in writing which is registered. BAI MAHAKORE v. BAI MANGLA, **13 Bom. L.R. 564.**

Trusts Act (II of 1882)—*continued.*

(15)—Ss. 5, 6—*See* GIFT, **10 Bom. L.R. 1209,** *reversed on appeal* **12 Bom. L.R. 53.**

(16)—*Ss.* 5, 81 — *Will, Construction of—Creation of beneficial interest—Admissibility of unattested letter to establish a trust in favour of testator's next-of-kin — Fraud — "Attendant circumstances," meaning of--The "disposal of the beneficial interest therein"--Meaning of—Legatee holding* benami *for testator's next of kin—English Law*—By his will, dated April 19, 1892, T gave all his properties to P and appointed him his sole executor. The will, however, contained a proviso that the testator had no doubt that the executor would carry out his wishes. After the testator's death, a letter signed by him was discovered, addressed to P and dated April 28, 1895, in which he requested his executor to sell some of his properties and Bank shares and remit the proceeds to his London Bankers for being transmitted to his brother R. The testator's next-of-kin, on the strength of that letter, brought this suit for administration of the testator's estate, against the heirs and legal representatives of P. *Held, per White, C.J.*—(1) that the letter of April 28, 1895, was inadmissible for the purpose of establishing a trust in favour of the testator's brother R. (31 M. 187, *F.*) (2) That the letter was not admissible for the purpose of establishing even a resulting trust in favour of the testator's next-of-kin; (3) that the expression in the will, that the testator had no doubt that the executor would carry out his wishes, was not inconsistent with the testator's intention to pass the beneficial interest to legatee; (4) that no question of the executor having held the properties *benami* for the testator's heirs arose and could be considered. With reference to secret trusts under a will, the Law of India is the same as that of England, and extrinsic evidence to show a specific trust is inadmissible, unless the legatee under the will has assented to the trust or led the testator to believe that he has assented to it. "Attendant circumstances" in s. 81 of the Indian Trusts Act means "circumstances in existence at the date of execution of the will, and means the same as surrounding circumstances." The letter of the testator was inadmissible as evidence of an "attendant circumstance," to show that the testator did not intend to dispose of the beneficial interest, and when the "attendant circumstance," as disclosed by the testator, showed an intention to give the property to R, it also showed that the next-of-kin *qua* next-of-kin should not get it. *Per Sankaran Nair, J.*—(1) The testator's letter does not create a trust under s. 5 of the Trusts Act, and it cannot be treated as a will as it is unattested, nor has it any effect as a non-testamentary instrument for want of registration, but it may be looked at for the purpose of determining whether P was only a *benamidar* or trustee for R; (2) that the letter was "an attendant circumstance" within the meaning of s. 81, Trusts Act, that it was intended to accompany or follow the will, and therefore could be taken into consideration to discover

Advocate High Court
Jammu & Kashmir
Srinagar,

Trusts Act (II of 1882)—*continued.*

the intentions of the testator; (3) that the combined effect of the will and the testator's letter was to pass the beneficial interest to R and to make P only a trustee for him.—The words "the disposal of the beneficial interest therein" occurring in s. 81, Trusts Act, have reference to the transfer or bequest referred to in the earlier part of the section, and if it is legally proved that the transferor or testator did not intend *by such transfer or bequest* to part with the beneficial interest, the transferee or legatee is a trustee for the transferor or his legal representative and cannot claim the property under such transfer or bequest. The doctrine of English law that the appointment of executors is a gift to them of the personal estate is not applicable to India. In the case of Hindus, an executor is only the manager of the property, and the Trusts Act was intended to get rid of conceptions of double ownership, as a "legal" and an "equitable" estate. RICHARD TAYLOR v. SRI SRI SRI KRISHNA CHANDRA GAJAPATI NARAYANA DEO MAHARAJULU GARU, **2 Ind. Cas. 4=32 M. 443.**

(17)—*S.* 6—*Trust-deed, construction of and formalities necessary for—Settlement on children of grand children by way of remainder, whether valid under Hindu Law or bad as violating rule against perpetuities—Transfer of Property Act, ss.* 14, 15 *and* 2 (*d*).—Under the trust-deed in question in this case one R and his wife conveyed certain lands to trustees in trust to pay certain monthly allowance during the joint lives of R and his wife and throughout the life of the survivor of them and on the death of the said survivor, to pay the same allowance to two grand-daughters of R. The deed further provided that, on the death of the survivor of the grand-daughters, the trustees were to hold the property in trust for the sons of the grand daughters, who attain the age of eighteen and the daughters of the grand-daughters, who attain that age or marry, such that each child of the grand-daughter was to take his or her share of the *corpus* on coming of age if a male or, if a female, on being married. On the question whether such gift to the children of the grand-daughters was good under Hindu Law or bad for remoteness or on any other ground, it was *held* that, since the trust in favour of the children of a grand-child was an event which was to happen upon the death of the grand-child or of the widow whichever should last happen, and the parties, to whom an estate for life was conveyed, were in being at the date of the settlement, the gift in remainder to the children of the grand-daughters was good and valid under Hindu Law, and did not contravene the rule against perpetuities, s. 2 (*d*) of the Transfer of Property Act providing that nothing in the second chapter of that Act shall be deemed to affect any rule of Hindu Law. On behalf of the appellant, it was further argued that something was required over and above the execution of the conveyance and its registration, something in the nature of physical delivery of possession in order to effect a valid transfer and it was *held*, there is nothing in s. 6 of the Trust Act to suggest that trust property cannot be effectively transferred by a registered instrument. Under s. 123 of the Transfer of Property Act, transfer, by way of gift, of immoveable property can be effected by a registered instrument and, there being no reason for holding that what is sufficient in the case of a gift of land is not sufficient in the case of a conveyance of land in trust, the deed in question operates as a valid declaration of trust and an effective transfer of the property. RANGANATHA MUDALIYAR v. BAGHIRATHI AMMAL, **1 M.L.T. 227=29 M. 412.** (9 M.I.A. 134, 9 B.L.R. 337, 32 C. 992, 12 C. 663, *R.*)

(18)—*S.* 6—*Creation of trust—Transfer of property.*—One of the essentials to the creation of a trust under s. 6 of the Indian Trusts Act, 1882, is that the author of the trust should transfer the trust property to the trustee. DHONDO v. KESHAV. **7 Bom. L.R. 179.**

(19)—S. 6—*See* SETTLEMENT—GENERAL, 6 Bom. L.R. 263.

(20)—S. 6—*See* Nos. 5, 7, 13, 14, 15, *supra*.

(21)—Ss. 6, 94—*See* HINDU LAW—WILL, 5 Bom. L.R. 334.

(22)—S. 8—*See* HINDU LAW—WILL, 7 Bom. L.R. 255=29 B. 351.

(23)—S. 15—*See* No. 6, *supra*.

(24)—*Ss.* 15, 20, 23—*Trust—Amount payable to minor—Responsibility of trustees—Investment in unauthorised securities—Liability for damages—Interest.*—Where trust money is payable to a minor (testator's son), the money could not be applied for the purposes of the trust at an early date, as the trustees could not pay the money until the attainment of his majority. The trustees could not discharge themselves by payment to the minor's natural guardian who was his mother. The trustees, who took the place of the guardian so far as the protection of this money was concerned, could not lawfully make payment either to the infant or to the guardian. Even with regard to money which is capable of being applied at an early date, *e.g.*, money payable to the testator's daughter for jewels, if the trustees take the responsibility of keeping the money in investment for a long time, they are bound to make the investment in accordance with their obligations as trustees. The specific provisions contained in the other sections of the Indian Trusts Act are as obligatory as the general provisions in s. 15. The measure of prudence required of a trustee by s. 15 must be regulated by any specific provisions applicable to special matters found in the other sections of the Act. The (trustees) defendants were bound to comply with the provisions of s. 20, and having failed to do so, they must be held to have committed a breach of trust, although there can be no reason to

Trusts Act (II of 1882) —*continued.*

doubt that they acted honestly and with the prudence which an ordinary man would exercise in the conduct of his own affairs, and that they were influenced merely by a desire to secure for the minor a higher rate of interest than could have been obtained by resorting to some of the other modes of investment sanctioned by s. 20. It cannot be held that provisions in s. 15 exempting trustees from responsibility where they have acted with prudence is intended to exonerate them, where, by not acting with prudence, they have committed a breach of trust. The meaning of 2nd clause of the section is that where a trustee has acted with prudence, he should not be held to be guilty of breach of trust. But this rule must be applied in conjunction with the other sections which regulate the measure of prudence required in particular cases. S. 23 lays down in broad terms that, "where the trustee commits a breach of trust, he is liable to make good the loss which the trust property or the beneficiary has thereby sustained." This statement is followed by certain exceptions to the rule. It is impossible to hold that s. 23 can be controlled by interpreting s. 15 in such a manner as to exempt a trustee from liability for damages on the ground that he has acted with ordinary prudence. Powers have been conferred on English Courts by successive English Statutes of relieving honest trustees from their liability for breach of trust. But the Indian Courts have not been given the power to protect trustees in any case, when a clear breach of trust has been committed. The ordinary principle must therefore apply that, when an injury has been caused to the beneficiary by an act done by the trustee in violation of his duty, he is entitled to claim from him the damages he has sustained by his breach of trust. Where the trustee invests money in an unauthorized security, this must apparently be treated as tantamount to failure to invest, for a trustee cannot be taken to have fulfilled his duty to invest, unless he does so in the manner required by law. Besides it may be doubted whether the rule disentitling the beneficiary to interest except in the cases enumerated could be applied where the trust money has been altogether lost. The Court should have power in such cases to award interest as damages. Illustration (*e*) to s. 23 shows that where a trustee has failed to invest trust-money in the manner directed by the instrument of trust he is liable for interest, although he may have made some other investment. The same principle should be applicable where the failure is in making an investment in accordance with the provisions of s. 20, Illustration (*f*) to s. 23 justifies the same conclusion. Defendants as trustees under the will of A invested the trust money with the late Messrs. Arbuthnot & Co. In consequence of the failure of that firm, the investment was lost and the present suit was to recover from those trustees the amount lost with interest. *Held* the trustees were liable, though they acted *bona fide*, inasmuch as the investment was in an unauthorised security not mentioned in s. 20 of the Trusts Act, NEELAM TIRUPATHIRAYUDU NAIDU GARU v. VINJAMURI LAKSHMINARASAMMA, **12 M.L.T. 530 = 23 M.L J. 599 = M.W.N. 1912, 1237.**

Trusts Act (II of 1882)—*continued.*

(25)—S. 20—*See* No. 24, *supra*.

(26)—S. 23—*See* Nos. 6, 24, *supra*.

(27)—S. 26—*Trustee—Default by his co-trustees—Liability of the trustee—Breach of trust.*—The general rule is that trustees and executors are not chargeable with each other's defaults : but the benefit of this rule is denied to a trustee or executor who has been guilty of negligence. The law requires from trustees an active and vigilant prudence, and a trustee is called upon, even if a breach of trust is only threatened, to prevent it by obtaining an injunction. Hence, where a trustee stands by for four years while the trust funds are retained by his co-trustees and though he has abundant reasons to put him upon inquiry, makes nothing that can be called an inquiry but passively acquiesces in the disappearance of the funds, he is liable to the beneficiary for the default of his co-trustees. MAHMOOD v. RODRIGUES, **7 Bom. L.R. 691.**

(28)—S. 27—*Liability of trustee to co-trustee—Extent.*—Where there are three trustees and the management is left exclusively to one among them, as between the other two they are *in pari delicto* and no suit can be brought by one against the other as being more responsible for the breaches of trust by the third trustee. RANGA PAI v. BABA, **20 M. 398.**

(29)—S. 30—*Liability of Executor—Advisory duty no valid defence—Care to be taken in appointing agent—Want of diligence—Liability for mismanagement of co-executor—Breach of duty.*—A testator left a will appointing five persons including defendant No. 1 his widow, and defendant No. 2, as executors for the management of his estate and directed that a proper boy should be adopted and that the property should be managed by the executors according to the votes of the majority including his widow, giving powers to invest the money due to the estate on some business and directing that it should be handed over to his adopted son as soon as he attained majority. The plaintiff, the adopted son, on attaining majority, sued to recover the amount that might be due to him on taking account of the debts and moveable property of his deceased father, received and recovered by the executors, and to make good the loss that he might have incurred owing to their negligence, fraud, want of proper care and mismanagement. First defendant, the widow, contended that, though she was mentioned in the will as an executor, the estate was managed by the other four executors, and that she was, therefore, not liable for any mismanagement. 2nd defendant contended that his duties were purely advisory, that he was but one of many, that the votes of the majority governed, that

Trusts Act (II of 1882)—*continued.*

the business had been carried on by an agent appointed for the purpose and that he was, therefore not liable. It was found upon evidence that the agent was, to the knowledge of the 2nd defendant, not a man of probity and that there was no proper supervision in his work. *Held*, that the defendants were liable to render accounts to the plaintiff and must make good the loss sustained, if any, owing to their negligence, want of proper care and mismanagement. When those entrusted with a fund for the benefit of another could not produce it at the appointed time, *prima facie* they were liable for the loss. An executor could not be relieved of his liability on the ground that his duties were merely advisory, that he was one of the many, that he was not specially entrusted with the management of the trust-property and that the management was carried under the votes of the majority. One, who undertook a duty, was bound to know what his duty required. Where there was want of proper care and diligence on the part of a trustee not only in the appointment of an agent to carry on the trust business, but also in the supervision of the agent, there was a clear breach of duty and that the trustee was liable for breach of trust. S. 30 of the Act was inapplicable to such a case. LAKHMI CHAND NEMCHAND v. JAI KUVARBAI, **29 B. 170=6 Bom. L.R. 907.**

(30)—*S.* 34—*Trustee—Power to refer a question for opinion of the Court—Appeal from the opinion—Executor cannot refer—Administration suit is the only remedy available to him.*—No appeal lies from an opinion expressed by the Court under s. 34, Trusts Act, 1882. An executor, who has not become a trustee by assenting to the legacies, cannot claim the advantages provided for trustees by s. 34 of the Act. His remedy, if he feels any doubt as to the manner in which he should administer the estate come to his hands, is to file an administration suit. TRIMBAK MADHAV TILAK v. NARAYAN HARI LELE. **11 Bom. L. R. 495=33 B. 429=3 Ind. Cas. 164.**

(31)—*S.* 34 — *Application for direction by trustees—Jurisdiction—Procedure—Purpose of settlement specified—Some other purpose necessary—Power of trustee.*—The funds of a charity were vested in trustees and the trust deed provided that the committee of management had power to require the trustees to invest such portion of the fund as exceeded a definite amount in the purchase or building of any additional land, buildings and premises. Certain existing buildings were in bad repair, and the trustees applied to the Court under s. 34 of the Trust Act for its opinion as to whether a certain portion of the Fund in excess of the defined sum could be spent for the necessary repairs. It was *held* that the question was one of detail with which the Court could not effectively deal, without having a superintending power, and that the case was not one in which the Court could give directions under this section. The proper procedure was to file a suit

Trusts Act (II of 1882)—*continued.*

on the original side. The Court has power to sanction the expenditure of a fund in making the necessary repairs of existing buildings, though the trust deed specifically empowered the expenditure only in the purchase or building of land and buildings. *In the matter of the* MADRAS DOVETON TRUST FUND, **18 M. 443.**

(32)—*S.* 34—*Applicability of, to public charitable trust--Proper remedy in such cases--Whether Collector, Chaplain, &c. are corporation sole—Effect of constituting such as trustees.*—On 25th April, 1862, one C executed a trust deed, constituting the Collector of Karachi, the Chaplain and the officer commanding the troops trustees for administering certain property mentioned in the deed, and giving the rents and profits thereof in charity to the poor. On the 29th May, 1907, the gentlemen holding the said offices at the time, filed an application under the Trust Act for permission to sell the property and invest the sale proceeds thereof in some recognized securities; the interest accruing therefrom being appropriated for the purpose specified in the trust. *Held* that the application could not be made, as s. 1 of the Act excluded public charitable trusts from the scope of the Act. *Held*, also, that, as the officers mentioned in the trust deed were not corporations sole, and as only legally recognized persons could be appointed trustees, the effect of appointing them as trustees was to be restricted to those only who were holding the offices at the time the deed came into operation. The present incumbents of those offices could at best be considered as constructive trustees, to which case s. 34 was inapplicable. The proper remedy open to them under the circumstances was a suit under s. 539, Civ. Pro. Code, or an application under ss. 4 to 6 of the Charitable Endowments Act, 1890. APPLICATION BY GERALD EDWARD, NICOLLS, **1 S.L. R. 218.**

(33)—*S.* 36—*Lease for a term of* 25 *years—Void or voidable.*—Leases for a term exceeding 21 years are not void as being *malum prohibitum* and illegal *per se*, though they no doubt are voidable at the instance of *cestui que trust*. KADIR IBRAHAM ROWTHER v. ARUNACHELAM CHETTIAR, **19 M.L.J. 737=4 Ind. Cas 1082=33 M. 397.**

(34)—S. 42 - *See* RELIGIOUS ENDOWMENT, 1 Bom. L.R. 667.

(34-*a*)—S. 46 - *See* No. 5, *supra*.

(35)—S. 49—*See* ACT XX OF 1863, 17 M. 212=4 M.L.J. 48.

(36)—S. 53—*See* MAHOMEDAN LAW — INHERITANCE, 8 Bom. L.R. 652=31 B. 271.

(37)—Ss. 53, 88—Guardian, purchase by, of property at auction—Sale in execution of decree against minor—Trustee purchasing trust property at auction-sale without permission of Court—*See* GUARDIAN—MISCELLANEOUS, 6 O.C. 252.

Trusts Act (II of 1882)—*continued.*

(38)—*Ss.* 63, 64—*Trustee—Acquisition of title adverse to the trust—Prior judgment not* inter partes, *admissibility in evidence of.*—The main question in this case was whether or not the share in certain villages sued for by the plaintiff was subject to a trust for religious and charitable purposes under a will as set up by the defendant who pleaded that the estate had been jointly held, by him and the person from whom the plaintiff claimed by inheritance, only for the trust purposes specified in a will by the original owner. Plaintiff stated that the will had been revoked and denied the trust set up. The High Court decreed the claim and the Judicial Committee did the same, on the ground that the will and the trust alleged were not established by the evidence. With reference to the ground set forth by the High Court, *viz.*, that, assuming that there was a will and it was not revoked, it was yet competent to the trustees to appropriate the trust property to their own private uses and that they did so and held adversely to the trust title and themselves acquired a title, the Judicial Committee remarked that the High Court was wrong on the point, since, under the law contained in ss. 63, 64, of the Indian Trusts Act, 1882, if there was a trust, the trustees could acquire no title adversely to the trust by having possession of the property and claiming to appropriate it to their own use. In this case certain prior judgments, which were not *inter partes*, but had been passed between parties interested in the trust in question, and contained a reference to the revocation of the will creating the trust, were taken to be admissible in evidence, though such judgments could neither afford any conclusive evidence against the present parties, nor bind them operating as *res judicata* under s. 13 of the Civ. Pro. Code. BITTO KUNWAR v. KESHO PRASAD MISR, **19 A. 277. P.C. = 1 C. W.N. 265 = 24 I A. 10 = 7 Sar. 131.** [*F.*, 5 Bom. L.R. 230, 25 A. 546, 35 C. 701 = 12 C. W.N. 657 = 7 C.L.J. 563, 12 C W.N. 739 = 9 C. L.J. 597; *R.*, 25 C. 522, 4 C.W.N. 63, 24 B. 591 = 2 Bom. L.R. 386, 9 C.W.N. 402.]

(39)—S. 64—*See* No. 38, *supra.*

(40)—Ss. 73 and 75—Instrument appointing new trustee under s. 73 does not require registration—*See* REGISTRATION ACT, 1908, s. 17 (*b*), 6 M.L.T. 240 = 3 Ind. Cas. 435.

(41)—S. 75—*See* Nos. 3, 40, *supra.*

(42)—*S.* 78, *cl.* (*c*)—*Revocation of trust—Limitation Act* (XV *of* 1877), *s.* 10—*Misappropriation by trustee—Limitation—Time runs from the date of misappropriation.*—A debtor, by an arrangement in writing, made one of his creditors a trustee, in respect of some of his property, for the payment of his debts. No communication of the arrangement was made to the creditors. The debtor subsequently hypothecated a portion of the trust property, to secure an advance made by the creditor who had been made trustee under the arrangement. The creditor afterwards appropriated the property. *Held*, that the hypothecation bond, subsequent to the trust arrangement, unde the circumstances, amounted to revocation. *Held*, further, that the time against the creditor, who misappropriated, began to run from the date of misappropriation. SAYED ZAKIR ALI v. MUSST. UMATUL HABIB BEGUM, **1 Ind. Cas. 347.**

(43)—S. 78—*See* No. 5, *supra.*

(44)—S. 81—*See* LIMITATION ACT, 1908, s. 10, 8 Bom. L.R. 328 = 31 B. 222.

(45)—S. 81—*See* No. 16, *supra.*

(46)—S. 82—Purchase of land by Public Officer *benamee*—Agreement opposed to public policy—*See* CONTRACT ACT, s. 23, 1872, 27 A. 73 = 1 A.L.J. 412.

(47)—S. 82—Effect of, on Privy Council ruling in 25 I.A. 15—*See* HINDU LAW—WILL, 29 B. 306.

(48)—Ss. 82, 88—*See* CIV. PRO. CODE, 1908, s. 66, 22 A. 434 = A.W.N. 1900, 152.

(49)—S. 83—*See* LIMITATION ACT, 1908, s. 10, 8 Bom. L.R. 328 = 31 B. 222.

(50)—*S.* 84—*Registered conveyance in fraud of third person's title—Plaintiff* "in pari delicto" *with defendant not entitled to any relief—*"*Illegal purpose not carried into execution,*" *meaning of the words—Partial but substantial performance sufficient execution.*—Plaintiff sued for recovery of price alleged to have been paid by him to first defendant on account of sale of land by the latter, of which land plaintiff was subsequently deprived. Defendant alleged that, in pursuance of a conspiracy between him and the plaintiff to defeat the title of a third person in possession of the land under a prior oral sale to him followed by an unregistered instrument by its original owner, plaintiff got the original owner's son to execute a registered conveyance of the land in favour of the 1st defendant, who in his turn was made to convey it to plaintiff under the registered sale-deed in question. Defendant, therefore, pleaded that plaintiff as one concerned in the fraud of which, the execution of the present conveyance to him formed part, was not entitled to seek the relief claimed as for breach by vendor of warranty of title. *Held*, plaintiff was not entitled to recover, as the transaction of the sale he relied on was part of a fraud in which he himself was concerned. Further, on the contention raised for the plaintiff that he was not debarred from seeking relief since the unlawful compact was not fully carried out and the third person conspired against was not in fact defrauded and the illegal purpose in this case was "not carried into execution" within s. 84 of the Act, *held*, the unlawful agreement need not be fully carried out to warrant the application of the rule as to persons *in pari delicto*. Part performance of a substantial character would suffice to prevent the plaintiff from recovering and such a partial execution of

Trusts Act (II of 1882)—*continued.*

an illegal purpose must be regarded as "carrying out into execution" of the illegal purpose within the meaning of s. 84 of the Act. MUTHOO RAMAN CHETTY v. KRISHNA PILLAI, **15 M.L.J. 478=29 M. 72.**

(51)—S. 84— *See* FRAUD—EFFECT OF FRAUD, 11 B. 708.

(52)—*S.* 88—*Trustee gaining a pecuniary advantage—Possible conflict of interests between trustee and beneficiary—Trustee and beneficiary—Benefit to be retained for beneficiary.*—A was a trustee for B. At a sale in execution of a simple money-decree in favour of B against C, A purchased for himself a mortgage-bond at a very low price, A and his co trustees not having obtained leave to bid at the sale. B had previously, in execution of a simple money-decree, acquired the equity of redemption in some of the properties charged in the bond purchased by A. In a suit by A on foot of the bond for sale of the hypothecated property, *held* that A must be deemed to hold his purchase for the benefit of the trust estate, and that he could charge the trust with the amount he actually paid for the bond, it being reasonably clear under the circumstances that his interests as purchaser of the bond were or might be adverse to the interests of the trust estate as owner of the equity of redemption in some of the properties. GOPI NARAIN v. KUNJ BEHARI LAL, **9 A.L.J. 311.**

(53)—S. 88—*See* Nos. 37, 48, *supra.*

(54)—*Ss.* 88, 95 (*a*) *and* 96—*Executor—Trustee—Surviving partners, liability of, when carrying on the trade—Liability to account to the legal representative of the deceased partner—Relation between surviving partner and legal representative of deceased partner—Co-executor—Transfer of business to the surviving partner—Good faith of co-executor in the transaction—Onus of proving good faith—Evidence Act* (I of 1872), *s.* 111—*Good will—Survival of good will.*—Under s. 88 of the Trusts Act, 1882, a person who occupies the position either of an executor or a partner, must hold for the benefit of any person, whose interests he is bound to protect, every pecuniary advantage he has gained for himself in each of the following cases: (1) if he has gained the advantage by availing himself of either character, or, (2) if he has gained the advantage by entering into any dealings under circumstances in which his own interests are or ever may be adverse to those which he is bound to protect. Thus in both cases one essential condition of liability is "an advantage gained." In the first, there must also be unconscientious conduct. In the second, that is not necessary if there were a possibility of conflict between interest and duty. Under the section there is no saving clause for cases of good faith. The section, therefore, taken by itself does not validate a purchase by an executor of the trust property either on the ground of *bona fide* assent by his co-executor or of good faith in the executor himself who under the section could not

Trusts Act (II of 1882)—*continued.*

retain an advantage even though unconsciously obtained in the transaction where his interest and duty were in conflict. A surviving partner being a person who holds the property by virtue of a contract may buy the property in trade of his deceased co-partner under proviso (*b*) to s. 95 of the Trusts Act, but inasmuch as his interests in the transaction may conflict with his duty he is even then precluded by s. 88 from retaining for himself any advantage he may have acquired by the bargain. That is, he must give full value or what he could reasonably believe to be full value. There is no exception in favour of a co-executor or surviving partner who transgresses those limits with the assent of a *bona fide* executor. The only saving clause which protects the executor or surviving partner transgressing those limits from the liabilities attaching to an ordinary trustee is that contained in s. 96. S. 96 of the Trusts Act applies to all the various classes of so-called constructive trustees described in ch. IX and differentiates them from trustees properly so-called by declaring that nothing in the chapter relating to them shall impair the rights of transferees in good faith for consideration. And that is the only provision that saves an executor buying his testator's assets from liability for advantage gained unwittingly in the bargain, and a surviving partner purchasing under proviso (*b*) of s. 95 is yet subject to the latter part of s. 88 and could only retain an advantage thereby gained, on proof of good faith as well as of consideration. The good faith must be good faith in the transferee. The good faith of a co-executor will not avail him. It appears from ill. (*f*) to s. 88 of the Trusts Act, that the section demands from a surviving partner the same *uberrima fides* as regards the interests of a deceased partner as was due before death had dissolved the partnership, so far as the profits arising from the capital of the deceased are concerned. For these he must account to the legal representative, though no doubt when he has done so there is nothing there to prevent him from receiving the assets in purchase or loan from such representative. But so long as he is under that liability to account, he is evidently within the meaning of the phrase which classes him with "other person bound in a fiduciary character to protect the interests of another." Under the Indian Trusts Act, surviving partners are not classed with trustees; but they are subject to obligations in the nature of a trust and classed with persons bound in a fiduciary character to protect the interests of others, and the same duties, liabilities and disabilities, so far as may be, attach to them as to trustees subject to the provisos in s. 95 and the saving provisions of s. 96 of the Act. S. 111 of the Indian Evidence Act applies to the question of good faith arising under s. 96 of Indian Trusts Act. In the absence of agreement, the good will of a business does not survive. HASANALI v. ESMAILJI, **9 Bom. L.R. 606.**

(55)—*S.* 90—*Co-owners of a mahal—Surrender of an occupancy holding in favour of one co owner—Advantage gained by one co-owner*

Trusts Act (II of 1882)—*continued.*

after expense—Nature of the right of others to a share in the advantage—Waiver or abandonment of right, what constitutes—Negligence in the enforcement of the claim, effect of—Distinction between laches and acquiescence—Election.—S. 90, Trusts Act, does not create an absolute right, but a right subject to a condition, the condition being that the party seeking to benefit by its provisions must repay his due share of the expenses properly incurred in the acquisition of the advantage. The burden of these expenses may, in his estimation, prove to be such as to make it not worth his while to enforce his right. There is thus clearly an election to make, a condition to fulfil. If when called upon to make the election and to comply with the conditions, he holds back and shrinks from accepting the burden attaching to the right, he cannot afterwards be permitted to change his mind, especially when he so conducts himself as to induce a reasonable belief that the right is foregone, and his adversary, acting upon that belief, enters into a speculative transaction, which may end in placing him in a position of disadvantage. The right recognised by this section is not an absolutely vested right or a right which can be enforced by an unconditional decree for joint possession, without any regard being paid to the nature of the property, or the defendant's right in it, or the equities arising in the case from the conduct of the parties. (2 M.H.C. 270, *D.*) Where there is an element of uncertainty in a property, the Court requires a person to be active in the prosecution of his rights, and not to sleep over them. Distinction between laches and acquiescence explained. A and B were the co-owners of a certain *Mahal*. B accepted a surrender of an occupancy holding, but since the surrender was also followed by an application by the heirs of the tenant under s. 36 of the Tenancy Act to be placed in possession of the surrendered holding, B had to undergo certain expenses for securing the holding. While these proceedings, which were of a protracted character, were pending, B gave A a notice giving him the option to share in the benefit of the surrender on payment of his *quota* of all charges incurred in connection with it. But to this notice there was no response. The litigation, at last, ended in favour of B, and an order for possession of the holding was made in his favour by the revenue authorities. A then instituted the present suit for joint possession of the holding, offering to pay his share of the expenses properly incurred by B. *Held*, the case is not merely one of neglecting to enforce a claim for the period during which the law permits him to delay without losing his right, but of so conducting oneself as to induce the belief that it has been waived or abandoned, and that it would not be equitable in the circumstances to permit A now to enforce his right under s. 90 of the Trusts Act. MOOLCHAND v. CHITTOO, **6 N.L.R. 12=5 Ind. Cas. 431.** (18 C. 13, *R.*)

(56)—S.90—Mortgagee, position of—Whether a trustee—Power to grant leases or make

Trusts Act (II of 1882)—*concluded.*

other dispositions of mortgaged property in his own favour—Grant of the property to undivided son—Presumption—*See* MORTGAGE—REDEMPTION, 7 M.L.T. 148.

(57)—S. 90—Whether mortgagee is trustee to mortgagor in respect of accretions to mortgaged property—*See* MORTGAGE—REDEMPTION, 4 Ind. Cas. 357.

(58)—S 91—Purchaser with notice of prior contract to sell—*See* SPECIFIC RELIEF ACT, 1877, s. 27, 18 M. 43.

(59)—S. 91—*See* TRANSFER OF PROPERTY ACT, 1882, s. 40, 29 M. 177.

(60)—S. 94—*See* No. 21, *supra.*

(61)—S. 95—*See* No. 54, *supra.*

(62)—S. 96—*See* No. 54, *supra.*

Truth.

Action for personal insult—Justification by truth cannot avail as defence—*See* DEFAMATION, 10 A. 425=A.W.N. 1888, 157.

Tullubana.

This circular deals with the levy of Tullubana. Cir. No. 24, dated the 15th September 1865, **4 W.R. Civ. Cir. Order, p. 2.**

In modification of previous circular this letter issues instructions as to the mode of levying Tullubana for the service and execution of civil process by peons under Ben. Act V of 1863. Cir. No. 31, dated the 25th September 1867, **8 W.R. Civ. Cir. Orders, p. 10.**

This circular forwards the resolution prescribing rules for the payment of Tullubana on account of service of notice to respondents in appeals to the High Court. **Civ. Cir. No. 11, dated 7th October 1869. 12 W.R. Civ. Cir. 7.**

This circular extends the rules regarding the payment of the cost of tullubana-fees to process in Privy Council appeals and to all other processes of the High Court, **Civ. Cir. No. 17, dated 21st December 1869, 13 W.R. Civ. Cir. 1.**

This circular states that Quarterly Returns of Peons' Tullubana are to be submitted by Judges of Small Cause Courts through District Judges. **Civ. Cir. Memo. No. 6, 23 W.R., Rules and Orders of the H.C. p. 9.**

Ulanadi Mirasdar.

See LANDLORD AND TENANT—MISCELLANEOUS, 19 M. 485=6 M.L.J. 247.

Ulkudi Tenants.

'Sukhavasis'—Ulkudi tenants—Rights of—Compulsory sale—Right on—Value of land acquired — How apportioned.—The class of tenants known as "Ulkudi tenants," also called 'Sukhavasis,' have a qualified interest in the soil. Generally it would seem Ulkudis cannot sell their holdings without the Mirasdar's consent, but when a statutory transfer is forced on them they are clearly entitled to

Ulkudi Tenants—*concluded.*

compensation for the loss of their interest. The value of the land appropriated having been ascertained, it must be assigned to the Mirasdar and the Ulkudi proportionately to the value of their respective interests. APPASAMI v. RANGAPPA, **4 M. 367.**

Ultra Vires.

The resolution of a limited company refusing to transfer shares is—*See* COMPANY TRANSFER OF SHARES. 1 Bom.L.R. 269=23 B. 685.

Act of Executive-Government is nullity—*See* LIMITATION ACT, 1908, art. 14, 7 Bom. L.R. 497=29 B. 480.

See STATUTES, CONSTRUCTION OF, 9 B.H.C. 216.

Umpire.

See ARBITRATION.

See AWARD.

(1) *Act* VIII *of* 1859—*Arbitrator—Umpire.*—Under s. 216 of Act VIII of 1859 an umpire is appointed if there be two or more arbitrators, so as to provide for any difference of opinion among them. But where only one arbitrator has been appointed by the Court with the consent of the parties, the appointment of an umpire is wholly unnecessary. MAHABEER MISSER v. JUGGER NATH MISSER, **25 W.R.11**

(2) *Power to extend time—Umpire—Arbitration.*—A Court has power to extend the period within which an umpire may give in his decision, just as it may in the case of an arbitrator. KUPPU v. VENKATARAMAYYAR, **4 M. 311.**

Unascertained Goods.

Sale of—Appropriation—Conditional appropriation—*See* CONTRACT ACT, 1872, ss. 77,83, 95,178, 34 C. 173.

Unauthorized Conversion.

Pledgee selling to himself—Effect—No damage to pledgor—Pledgor—Whether entitled to recover property without payment—*See* PLEDGE, 19 C. 322=19 I. A. 60, P. C.

Unborn Child.

Rights of—under Mitakshara Law — *See* HINDU LAW—ALIENATION, 3 C. 214=4 I.A. 159, P.C.

Unborn-persons.

See HINDU LAW—GIFT, 28 C. 720, P.C.= 5 C.W.N. 806.

Gift to unborn persons void—*See* MAHOMEDAN LAW—GENERAL, 36 C. 431=2 Ind. Cas. 292.

Uncertified Payment.

Payment to decree-holder—Not certified — Subsequent pagment to attaching creditor—Damages to judgment-debtor—Suit for—Cause of action.—When a judgment-debtor pays out of Court the decree amount, there is an obligation on the part of the decree-holder to report satisfaction to the Court. The consideration for the payment is certifying payment as the judgment is to discharge the decree debt, and the decree-holder is therefore bound to take the necessary steps to give a proper discharge; otherwise the decree still remains capable of execution by the decree-holder or any other attaching decree-holder. The payment therefore must be treated as having been made without consideration, and the judgment-debtor is entitled to get back the money so paid. In a suit for damages, the cause of action arises only when the damage is sustained and the amount recoverable is the amount paid the second time. A. SHANMUGAPPA v. A. MARIAPPA, **7 M.L.T. 351.**

Unchastity.

See HINDU LAW—INHERITANCE.

See HINDU LAW—MAINTENANCE.

See HINDU LAW—WIDOW.

See CUSTOMS—PUNJAB—INHERITANCE, 2 P.R. 1888.

Of widow—Effect of, in regard to estate vested in her—Hindu Law — *See* CUSTOMS PUNJAB—INHERITANCE, 76 P.R. 1901.

Defamation—Imputation of unchastity to wife—Husband's right to sue—*See* DEFAMATION, 18 M. 250=5 M.L J. 89.

Marital relations between husband and wife satisfactory—Outsiders imputing unchastity to wife—Practice—*See* HINDU LAW—INHERITANCE, 13 Bom. L.R. 1038.

Mother inheriting son's estate—Unchastity, no bar—*See* HINDU LAW—INHERITANCE, 8 A.L.J. 811.

Succession to properties of prostitute—*See* HINDU LAW—INHERITANCE, 3 Ind. Cas. 374 =11 C.L.J. 124.

Of widow—Effect on maintenance — *See* HINDU LAW—MAINTENANCE, A.W.N. 1885, 164.

See HINDU LAW—MAINTENANCE, 12 B.L. R. 238, P.C. =20 W.R. 21, 1 M.H.C. 372, 17 M. 392.

Widow, not entitled even to bare maintenance—*See* HINDU LAW—MAINTENANCE, 7 B. 84.

Of widow — *See* HINDU LAW—MAINTENANCE, 15 A. 382=A.W.N. 1893, 149.

See HINDU LAW—STRIDHANAM, 1 A. 46 F.B., 30 C. 521=7 C.W.N. 121.

Hindu Law—Widow—Unchastity—Divesting of property—*See* HINDU LAW—WIDOW, 3 B. L.R.A.C. 421=12 W.R. 336.

Unchastity—*concluded.*

See HINDU LAW—WIDOW, 5 B.L.R. 362=2 Ind. Jur. N.S. 24=Bourke, 189, 9 B. 108, 13 B.L.R. 1, F.B.=19 W.R. 367.

Hindu Law—Estate vested in daughter-in-law—Son adopted by mother-in-law, suit not maintainable by, to set aside subsequent adoption by daughter-in-law — Subsequent unchastity of daughter-in-law, whether annuls her power to adopt—*See* HINDU LAW—WIDOW, 9 B. 94.

Widow's estate—Forfeiture—During widowhood—*See* HINDU LAW—WIDOW, 2 A.171.

Succession by mother—No bar—*See* HINDU LAW—WIDOW, 5 M. 149.

Not proved—Suspicion if should be expressed in judgment—*See* MAHOMEDAN LAW—GENERAL, 14 C.W.N. 865, P.C.=7 A.L.J. 871=8 M.L.T. 147=12 Bom. L.R. 638=12 C.L.J. 205=20 M.L.J. 614=7 Ind. Cas. 237=31 A. 410.

Agreement to pay pin-money to daughter-in-law—Her unchastity—Whether she is entitled to enforce it—*See* MARRIAGE, 4 A.L.J. 13=A.W.N. 1907, 3=29 A. 151.

Unclaimed Deposits Act.

See ACT XXV OF 1866.

Unclaimed Property.

(1)—*Unclaimed article found not hidden on land—Respective rights of land owner and finder of article—Ownership of unclaimed hidden treasure—Act* VI *of* 1878 (*Treasure Trove*).—The law with reference tc the ownership of unclaimed hidden treasures is regulated by the provisions of the Indian Treasure Trove Act, VI of 1878. A brief review of the law of hidden unclaimed treasures and its history traced. Where an unclaimed article was found, not hidden, on the land of a certain person, *held* that it was the property, of the person on whose land it was found, unless it was found in some public place, and that the land-owner is entitled to recover it. VIRUPAKSHA SWAMI TEMPLE, BY ITS MANAGER, SITARAMA SASTRULU v. LAMBANI GOLAYA, **4 M. L. T. 219.** (7 M. H.C. 150, *Cons.*)

(2)—*Act* V (*B.C.*) 1861, *s.* 25—*Timber washed on to an estate—Unclaimed property.*—Timber claimed by the owner of an estate as having been washed on to his estate by a river, is not unclaimed property within the meaning of s. 25 and the following sections of Act V (B.C.) of 1861. CHUTTER LAL SINGH v. THE GOVERNMENT, **9 W. R. 97.**

Unconscionable Bargain.

See CONTRACT ACT, 1872, s. 16.

(1)—*Extortionate bargains — Conditions of relief.*—In the case of unconscionable bargains, it is only where it also appears that the person entering into it was ignorant of the unfair nature of the transaction that the Court would be justified in interfering. So, the Court will not protect persons who, with their eyes open, choose, wilfully and knowingly, to enter into unconscionable bargains. MACKINTOSH v. WINGROVE, **4 C. 137=2 C.L.R. 433.** (2 C. 202, *D.*) [*F.*, 10 M. 203, 7 C.W.N. 876; *Diss.*, 4 A. 8, 4 C. 137; *D.*, 9 C. 615; *Appl.*, 31 C. 233; *R.*, 29 C. 823.]

Unconscionable Bargain—*concluded.*

(2)—*Bond—Circumstances under which relief may be granted by the Court.*—A person of the age of some twenty-eight years, the son of a wealthy father, but of profligate habits and greatly in need of money, his father having refused to supply him, executed a bond to secure a sum of Rs. 500 with interest which amounted to Rs. 37 8-0 *per centum per annum* with six monthly rests. The bond further contained a stipulation that the borrower should not be empowered to repay the money within three years, and if he did pay within three years, he should nevertheless be obliged to pay three year's interest at the rate mentioned. *Held*, though it could not be said that the execution of this bond was procured by means of undue influence, or that the rate of interest was penal, nevertheless, the bargain was an unconscionable bargain, against which the Court might properly give relief. The High Court affirmed the decree of the lower appellate Court, which gave the plaintiff the principal sum, with simple interest at the rate of 24 *per centum per annum*. BALAKISHAN DAS v. MADAN LAL, **A.W.N. 1907, 55=4 A.L.J. 222=29 A. 303.** (9 A. 228, 25 A. 284, 12 C. 225, 20 I.A. 112, 127, *R.*)

Contract against public policy—Undue influence—Voidable contract, power of Court in respect of—Contract Act, 1872, ss. 16, 19-A, 23—Act VI of 1899, s. 2—Ratification of contract caused by undue influence, proof of—*See* U.P. ACT XVII OF 1876, ss. 173, 174, 5 O.C. 256.

See CHAMPERTY, 1 M.L.J. 340.

What is—*See* CUSTOM—PUNJAB—ALIENATION, 109 P.W.R. 1910.

Mortgage bond—Compound interest at excessive rate—*See* INTEREST — SPECIAL CASES, 25 A. 284=A.W.N. 1903, 44.

Interest on usufructuary mortgage — *See* MORTGAGE—REDEMPTION, 5 O.C. 155.

Duty of Court—*See* PLEADINGS, 12 Bom. L.R. 795.

Unconscionable rate of Interest.

Loan from village money-lender to zemindar—Bond with unconscionable and usurious rate of interest—Obligee entitled to amount reasonably awardable.—The parties to the bond sued on in this case were a village money-lender and the zemindar. They had stood in the relation of creditor and debtor for a considerable period before the execution of the bond. The sum claimed under the bond was Rs. 700. The defendant pleaded that the amount claimed consisted for the most part of interest at an usurious rate and he asked for an examination of the account upon which the bond was based.

Unconscionable Rate of Interest—*concluded.*

The first Court, on going into the account, found that the amount claimed by the plaintiff consisted of only Rs. 145 as principal while the remaining Rs. 555 was for interest, and accordingly gave him a decree for Rs. 145 principal, and Rs. 197-1-3 interest or a total of Rs. 342-1-3. On the facts, the bond was found to be extortionate and unconscionable and the Chief Court was of opinion that, in the absence of rebutting proof from the plaintiff, the bond could be taken to have been executed under undue influence, and the Courts were therefore justified under s. 19 of the Contract Act in treating at the defendant's instance, the bond as void, and in decreeing to the plaintiff only the principal with interest at a reasonable rate. RAMDHAN v. JIVAN KHAN, **110 P.R. 1879.** [*R.*, 72 P.R. 1889, 135 P.R. 1889, 32 P.R. 1890, 110 P.R. 1908.]

Unconsolidated Suits.

Valuation of appeal in three similar but unconsolidated suits—*See* APPEAL TO PRIVY COUNCIL—GENERAL, 6 C.W.N. 41.

Uncovenanted Officers, Madras.

See MAD. ACT VII OF 1857.

Uncovenanted Service Family Pension Fund.

See STAMP ACT, 1879, ss. 3 (15), 25 (*c*), 19 C. 499.

Uncultivable Lands.

Suits for lands under cultivation and uncultivable—*See* BURDEN OF PROOF—LIMITATION AND ADVERSE POSSESSION, 5 C. 36.

Underground Rights.

See MINES.

(1)—*Mineral rights — Grant of tenure by zamindar--Underground rights if pass to tenure-holder when tenure permanent—Presumption in favour of zemindar.*—The Zemindar must be presumed to be the owner of the underground rights appertaining to a tenure granted by him, in the absence of evidence that he parted with them. *Quære.*—Whether, in this case, the evidence justified the conclusion that the grant conferred permanant, heritable and transferable rights on the tenure-holders. *Quære.*—Whether the grant of a permanent, heritable and transferable tenure necessarily carries with it the underground rights. KUMAR HARI NARAYAN SINGH DEO BAHADUR v. SRIRAM CHAKRAVARTI, **14 C.W.N. 746, P.C. = 11 C.L.J. 653 = 7 A L.J. 633 = 8 M.L.T. 51 = 12 Bom. L.R. 495 = 6 Ind. Cas. 785 = 20 M.L.J. 569.**

Under-Proprietary Rights.

(1)—*Sir and* nankar *rights—Claim for under-proprietary rights not made at regular settlement--Sub-settlement Act* (XXVI *of* 1866)--*Estoppel—Landlord accepting mortgage of non-transferable holding, effect of.*—Where a person

Under-Proprietary Rights—*concluded.*

at the time of regular settlement of the province of Oudh claimed certain land as *sir* and also certain *nankar* right and was decreed by the Settlement Courts only heritable and non-transferable rights, subject to the payment of a fixed amount of rent: *Held*, that he could not subsequently claim under-proprietary rights with respect to the same land. (21 M. 153, *R.*) Where a landlord accepts from a tenant mortgage of his non-transferable holding or brings a suit for arrears of rent styling him in the plaint as an under-proprietor, there can be no estoppel in law, unless the person pleading it can show that by such action of the landlord he has been made to alter his position to his detriment. MAIKU LAL v. MOHAMMAD MAH, **8 Ind. Cas. 691.**

(2)—"*Under-proprietary right,*" *facts necessary to establish—Sub-settlement* (*Oudh Act* XXVI *of* 1866), *r.* 10—*Provisions in the rule not exhaustive—Acknowledgment of under-proprietary right sufficient to establish it.*—The provisions of Sub-Settlement (Oudh Act XXVI of 1866) are not necessarily exhaustive, and an under-proprietary right can also be established by evidence of some specific grant or by an acknowledgment by the superior proprietor. SHEO GHULAM SINGH v. HAUSILA SINGH, **8 Ind. Cas. 407.** (8 O. C. 145, 9 O. C. 167, 4 O.C. 31, 4 I.A. 198, *R.*)

(3)—*Under-proprietary title claimed by tenant served with a notice of ejectment—Ejectment notice, cancellation of, on the ground that the person was more than a mere tenant-Cause of action for a declaration from the Civil Court*—Nankar *granted in consideration of founding a* purwa—*Sub-settlement Act* (*Oudh*), *s.* 11.—Where the plaintiffs in a suit to contest a notice of ejectment claimed to be under-proprietors of the land, and the notice was cancelled by the Revenue Courts on the findings that they had greater rights than those of a mere tenant *held*, that the decision of the Revenue Courts afforded a cause of action to the landlord to go to the Civil Court for a declaration that the plaintiff did not possess any under-proprietary rights. In order to maintain such a suit in the Civil Court, it is not necessary that the Revenue Court should definitely hold the tenant to possess under proprietary rights. It is enough that the decision should be adverse to the title of the landlord. *Held*, further, that, in order to establish under-proprietary rights under s. 11 of the Oudh Sub-Settlement Act, it must be shown that the *nankar* was granted in consideration of having founded a *purwa*, and even then the under-proprietary rights could be granted only in respect of such *nankar*. AMRIT LAL v. JANG BAHADUR SINGH, **14 O.C. 196.**

Suit for declaration of—Cause of action—Plaintiffs being recorded as occupancy-tenant—*See* CAUSE OF ACTION, 8 O.C. 30.

Tenant when may acquire, by prescription—*See* LANDLORD AND TENANT—MISCELLANEOUS, 8 Ind. Cas. 710.

Under-Proprietor.

Estate of—, devolving upon his widow after death—During widow's possession Government enlarging estate—Effect of Government's action will not make widow Zemindar with title independent of what she derived from her husband--*See* HINDU LAW — WIDOW, A.W.N. 1908, 222=5 A.L.J. 590.

Under-raiyat.

(1)—*Suit by heir of under-raiyat--Suit to recover possession with mesne profits--Heritability.*—Irrespective of custom or local usage the heir of an under-raiyat under an annual holding is entitled, on the death of the under-raiyat, to remain in possession of the land until the end of the then agricultural year for the purpose, if the land has been sub-let, of realizing the rent which might accrue during the year, or, if not sub-let for the purpose of tending and gathering in the crops. ARIP MANDAL v. RAM RATAN MANDAL, **31 C. 757, F.B.=8 C.W.N. 479.**

(2)—*Heritability—Bengal Tenancy Act* (VIII *of* 1885), *s.* 49.—The heirs of an under-raiyat under an annual holding do not acquire an interest in his holding by inheritance. The only right which they have, irrespective of custom or local usage, is to remain in possession of the land, until the end of the agricultural year, for the purpose of either realizing the rent, which might accrue during that year, or for the purpose of tending and gathering in the crops. JAMINI SUNDARI DASI v. RAJENDRA NATH CHUKRABUTTY, **11 C.W.N. 519.** (18 C.W N. 479, *Expl.*)

(3)—*Under-raiyat's tenure—Whether heritable.*—Where plaintiffs claimed possession of land under an ancestral *mourasi jotedari* right and, on their failing to prove that right, it was found that their father was only an under-raiyat under the defendant, *held* that the right of an under-raiyat was not one which could be inherited and that, unless the plaintiffs proved the acquisition of any fresh right after their father's death, their claim should fail. KARAMULLA SHEIKH v. AFAJAN BIBI, **8 C.W.N. 481, Note=31 C. 758, Note.** [*Overruled*, 8 C.W.N. 479, F.B.=31 C. 757.]

See BEN. ACT VIII OF 1885, s. 49, cl. 6, 29 C. 231=6 C.W.N. 183.

Suit for ejectment of under-raivat, whether notice necessary—*See* BEN. ACT VIII OF 1885, s. 85, cl. (2), 11 C.W.N. 190.

See CIV. PRO. CODE, 1908, O. XXI, r. 89, 29 C. 459.

Under-tenant.

Of sir land—Rights of—Suit against trespassers—*See* U.P. ACT XII OF 1881, s. 8, A.W.N. 1882, 63.

Under-tenures, Bengal Rent Recovery.

See BEN. ACT VIII OF 1865.

Under-valuation.

See SUITS VALUATION ACT, 1887.

See VALUATION OF APPEAL.

See VALUATION OF SUITS.

See JURISDICTION OF CIVIL COURTS, 15 M. 181.

See PLAINT—MISCELLANEOUS, 8 W.R 47.

Undivided Talook.

(1)—*Sharer of undivided talook—Rights to recover share.*—One of the co-sharers in an undivided talook is entitled to recover his share of the rent from the talook generally; but it does not follow that he is entitled to his share of rent from a particular jote in the possession of the jote-holder, unless there is an agreement express or implied under which he would be entitled to recover. SHAMA SOONDUREE DEBIA v. KRISTO CHUNDER ROY, **13 W.R. 316.**

Undue Influence.

See CONTRACT ACT, 1872, ss. 16, 19, 19-A.

(1)—*Obtaining of property or of any benefit through undue influence—Fraud.*—The obtaining of property, or of any benefit through the undue and unconscious abuse of influence by a person, in whom trust and confidence are placed, has always been treated as a fraud of the gravest character (*Mixon* v. *Payne*, 1873, L.R. 8 Ch. App 881, *F.*) NISTARINI DASSI v. NUNDO LAL BOSE, **30 C. 369=7 C.W.N 353.** [*Affirm.*, 33 C. 180, P.C.=9 C.W.N. 961=2 C.L.J. 183=7 Bom. L R. 887=15 M.L.J. 331=32 I.A. 193, 1 S.L.R. 160.]

(2)—*Undue influence—Presumption.*—Suit to set aside a bequest made by the widow of plaintiff's deceased brother to the defendant. The testatrix was very old and the defendant was the only man attending on her when she was on her death-bed. *Held* that these facts did not necessarily lead to the presumption that undue influence was exercised KIRPA v. TIRUTH, **50 P.R. 1872.**

(3)—*Undue influence—Burden of proof.*—The existence of influence can be inferred from the relation existing between the parties, as in the case of a parent and child, guardian and ward, etc., and the parent guardian, etc., who takes the benefit of the transaction, especially when the child is just of age, must show that the other had independent advice and acted of his free will. But a third party who stands in no confidential relation to the grantor who is under age is not bound in the first instance to show that no undue influence was used. RA... COOMAR ROY v. ALFUZUDDIN AHMED, **8 C... L.R. 419.** [*R.*, 11 O.C. 295.]

(4)—*Contract Act*, IX *of* 1872, *s.* 16—*Undue influence—Burden of proof—Extent of relief.*—Where one person is so situated as to be under the control and influence of another, the Court will have to see that such other does not unduly or unfairly exercise that influence and

Undue Influence—*continued.*

control over such person for his own advantage or benefit, or for the advantage or benefit of some religious object in which he is interested, and it will call upon him to give clear and cogent proof that the transaction complained of was such a one as the law would support and recognize. [*F.*, 12 A. 523; *R.*, 11 O.C. 295; *D.*, 90 P.L.R. 1901=36 P R. 1901.] Where a fiduciary or *quasi*-fiduciary relation had existed, Courts of Equity will always place the burden of sustaining the transaction upon the party benefited by it, requiring him to show that it was of an unobjectionable character and one which it ought not to disturb. The exercise of such beneficial jurisdiction stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another, and is not confined to cases of guardian and ward, attorney and client, or father and son, or of any of the more commonly recognized relations, which involves such consequences. (*Huguenin* v. *Basely*, 2 W. and T. (L.C.), 4th Ed., p. 592, *Dent* v. *Bennet*, 4 My. and Cr. 262, *R.*) SITAL PRASAD v. PARBHU LAL, **10 A. 535.**

(5)—*Undue influence—Position to dominate.* —Where a person is in a position to dominate, there the contract is to be regarded as induced by undue influence. RANGNATH v. GOVIND, **6 Bom. L.R. 592=28 B. 639.**

(6)—*Undue influence—The Indian Contract Act, Amendment Act* (VI *of* 1899), *s.* 2—*Presumption—Landlord and tenant—Dominating the will—Kabuliyat unfairly obtained, onus—Executants—Suit to set aside by one of the executants—Fraud—Pleadings—Full particulars.*—There is no broad or general presumption that a landlord, even an influential one, can so dominate the will of his tenants as to induce them to make unconscionable bargain in his favour. The onus of proving that a kabuliyat was unfairly obtained lies on the person who alleges it. Where a kabuliyat was executed by several persons, it cannot be set aside as a whole, when all the executants did not question it. *Per Rivers, J.*—It is incumbent on a party, be he plaintiff defendant who seeks to avoid a contract on the ground of fraud or undue influence, to give in his pleadings full particulars of the circumstances on which he relies as the basis of his plea. It is not enough to boldly assert that fraud or the like vitiated the contract. RAJA PROMADA NATH ROY BAHADUR v. KINOO MOLLAH *alias* KALA MIA, **8 C.L J. 315=4 Ind. Cas. 495=13 C.W N. 167** (15 C. 533, P.C., *R.*)

(7)—*Exercise of—Will obtained by undue influence—Undue influence, what amounts to, in case of will—Confidential position.*—*Held*, that in order to set aside a will on the ground of undue influence, it is not sufficient to establish that a person, who is largely benefited under the will had the power to overbear the will of the testator, but it must also be shown that such power was exercised and that it was by the exercise of such power that the will was

Undue Influence—*continued.*

obtained. BHABHUTI SINGH v. MUSAMMAT MULA, **10 O. C. 76.**

(8)—*Relationship between mother and daughter—Pardanash in lady—Gift—Sale—Benami transaction—Intention*—The mere relation of daughter to mother in itself suggests nothing in the way of special influence or control. ISMAIL v. HAFIZ BOO, **8 Bom. L. R. 379=10 C.W.N. 570=3 A L.J. 353=3 C.L. J. 484=33 C. 773, P. C.=16 M.L.J. 166=33 I.A. 86.**

(9)—*Contract Act*, IX *of* 1872, *s.* 16—*Undue influence—Pleader and client—Gift by client to pleader while fiduciary relation subsisted—Validity of gift.*—A pleader practising in the mofussil entered into an agreement with a gosha lady to conduct her affairs in the Civil and Revenue Courts at Madras and in the mofussil for a monthly remuneration. During the pendency of a case in the High Court at Madras he refused to go to Madras and instruct counsel there unless he was given a considerable sum of money by way of present. The lady gave him a large sum. It was only then that he went to Madras. On his services being dispensed with, he sued the lady to recover certain amounts alleged to have been due to him. The defendant pleaded the amount presented by her by way of set-off on the ground that the gift was not voluntary and was invalid.—*Held* that even if the plaintiff's conduct did not amount to coercion, he had made use of "undue influence" within the meaning of s. 16 of the Contract Act, in that he had made use of the fiduciary relation existing between himself and the defendant to obtain an advantage over her which, but for such confidential relation, he could not have obtained. The gift not being valid, the defendant was entitled to claim the sum presented by her by way of set-off. RAJA PAPAMMA ROW v. SITARAMAYYA, **5 M.L J. 233.**

(10)—*Undue influence, what constitutes*—*Succession Act* (X *of* 1865), *s.* 48—*Will of a Mahomedan.*—As to what constitutes undue influence in this country, a useful guide is afforded by s. 48 of the Indian Succession Act. It is true that that section does not apply to the Wills of Mahomedans, but still it is a useful guide for all as to what does or does not constitute undue influence. KHAS MEHAL v THE ADMINISTRATOR GENERAL OF BENGAL, **5 C.W N. 505.**

(11)—*Undue influence—Gift—Points to be considered*—Where undue influence is alleged, it is necessary to examine closely all the circumstances of the case. The principles are always the same, though the circumstances differ. The questions to be considered in a case of gift are—(1) was the transaction a thing which a right-minded person might be expected to do, (2) was it an improvident act, (3) was it a matter requiring a legal adviser, (4) whether the intention to make the gift originated with the donor. MAHOMED BUKSH KHAN v. HOSSEIN BIBEE, **15 C. 684=15 I.A, 81, P.C. =5 Sar. 175.** [*Appl.*, 14 A. 8=11 A.W.N. 21.]

Undue Influence—*continued.*

(12)—*Custom—Alienation — Mortgage and sale of ancestral land by a male proprietor—Suit for its possession on his death by his descendants —Necessity—Equity—Alienee, a Zaildar and Lambardar—Undue influence—Unconscionable transaction—Interference by Courts justifiable—Sale rejected* in toto.—*Held*, that, where the alienee is an influential person, like a Zaildar or Lumbardar in the locality, where the alienated property is situate, and the alienor is a simple-minded Zemindar, and the terms of the contract are, on the very face of them, so harsh and onerous that no person even of ordinary intellect would have accepted them, the presumption is, that the alienor was completely under the thumb of the alienee and was obliged to agree to any conditions imposed at the time of making the bargain, and that the whole transaction is unconscionable and unenforceable by law. In such a case the Courts should interfere and re-arrange the terms according to the principle of justice, equity, and good conscience. On the above principles, in the present case, a charge on landed property, apparently for Rs. 1,174, was reduced to Rs. 284 exclusive of interest on the reduced amount, and a sale-deed of the same property for Rs. 7,880 was entirely ignored. The plaintiff's suit brought against the defendants as trespassers holding under an invalid mortgage was treated as one for redemption. MIAN AMAR SINGH v. TULSI RAM, **123 P.W.R. 1909.**

(13)—*Undue influence.*—Plaintiffs in this suit sued to set aside an ikrarnamah executed by them in favour of defendants, who were their (plaintiffs') near relatives. Under this document, the plaintiffs parted with one-half of the property to which they succeeded by right of inheritance. It was found that one of the plaintiffs had just attained his majority, while the remaining two were minors, when the document was executed, that they executed the document without any consideration, and that they were not informed of their rights. It was found, also, that the document was executed under undue influence and pressure and that the executants were without professional or other advice. Under the circumstances, the Judicial Committee confirmed the decree of the High Court, which set aside the deed. PREM NARAIN SINGH v. PARASRAM SINGH; PREM NARAIN SINGH v. ROODER NARAIN SINGH, **4 I.A. 101=3 Sar. 413.**

See ACQUIESCENCE, 17 M. 275.

Contract against public policy—Unconscionable bargain—Voidable contract, power of Court in respect of—Contract Act, 1872, ss. 16, 19-A, 23—Act VI of 1899, s. 2—Ratification of contract caused by undue influence, proof of—*See* U. P. ACT XVII OF 1876, ss. 173, 174, 5 O.C. 256.

See ARBITRATION — MISCELLANEOUS, 7 M.I.A. 441.

Gift to persons in a fiduciary relationship—Burden of proving absence of undue influence

Undue Influence—*concluded.*

—*See* BURDEN OF PROOF - DECREES AND DEEDS, SUITS RELATING TO, 18 C. 545=18 I.A. 144, P.C.

Suit for cancellation of instrument—Gift to spiritual adviser—Fiduciary relationship—*See* BURDEN OF PROOF—DECREES AND DEEDS, SUITS RELATING TO, 12 A. 523=A.W.N. 1890, 56.

See BURDEN OF PROOF—NEGOTIABLE INSTRUMENT, 2 P.R. 1902.

Obstruction to removal of corpse—*See* COERCION, 13 M. 214.

Contract by woman—Effect of—*See* CONTRACT—GENERAL, 77 P.W.R. 1910=6 Ind. Cas. 1005=177 P.L.R. 1910.

See DEED—EXECUTION OF DEEDS, 9 P.L.R. 1904=77 P.R. 1903.

Gift for pious purposes—*See* EVIDENCE ACT, 1872, s. 111, A.W.N. 1884, 184.

Hindu Law—Release by widow, of her claims on her husband's estate—Suit to set aside release—Duress—Coercion—Fraud—Undue influence—*See* HINDU LAW—ALIENATION, 8 M. 304.

See HINDU LAW—ALIENATION, 3 C.P.L.R. 64.

See INTEREST—SPECIAL CASES, 25 A. 284 =A.W.N. 1903, 44.

Suit to set aside kabuliat on ground of undue influence — *See* JURISDICTION OF CIVIL COURTS, 20 A. 241=A.W.N. 1898, 29.

Suit to set aside deed—Fraud and—*See* LIMITATION ACT, 1908, art. 91, 15 C. 58, P. C =14 I. A. 148.

Questions of undue influence and incapacity, totally different ones—*See* MAHOMEDAN LAW —WAKF, 22 C. 324, P. C=22 I. A. 4.

See NEGOTIABLE INSTRUMENTS ACT, 1881, s. 118, 2 P. R. 1902.

Legal adviser and client—Contract with persons in fiduciary relation — Mooktear—Presumption - *Onus probandi*—*See* VENDOR AND PURCHASER—INVALID SALES, 1 B.L.R. A.C. 95=10 W. R. 128.

Sale by Hindu widow—Old and illiterate and near to her death—Fraud and undue influence —Inadequacy of consideration—Sale set aside—*See* VENDOR AND PURCHASER—INVALID SALES, 5 B. 450.

Will procured by wife's importunity—Undue influence—*See* WILL—EXECUTION, 7 M. 515.

Codicils—Testamentary capacity—Undue influence—*See* WILL—EXECUTION, 1 C. W. N. 481, P. C.=22 B. 17=24 I. A. 148.

Advocate High Court
Jammu & Kashmir
Srinagar.

Union.

Sanitary Inspector of—Whether a public servant under the Act—*See* MAD. ACT V OF 1884, s. 43, 21 M. 428.

United Provinces Acts.

See ACTS.

United Provinces Court of Wards.

See U. P. ACT III of 1899.

United Provinces General Clauses.

See U. P. ACT I OF 1904.

United Provinces Kanungos and Patwaris.

See U.P. ACT IX OF 1889.

United Provinces Land Revenue.

See U.P. ACT III OF 1901.

United Provinces Municipalities.

See U.P. ACT XV OF 1873.

See U.P. ACT XV OF 1883.

See U.P. ACT I OF 1900.

United Provinces Village Courts.

See U.P. ACT III OF 1892.

Universal Legatee.

Application by—For probate, maintainability of—*See* PROBATE AND ADMINISTRATION ACT, 1881, ss. 6 and 7, 1 N.L.R. 164.

See PROBATE AND ADMINISTRATION ACT, 1881, ss. 6, 18, 19, 84, 6 C.W.N. 787.

Entitled to letters of administration and not to probate—*See* PROBATE AND ADMINISTRATION ACT, 1881, s. 19, 19 C. 582.

University, Bombay.

See BOM. ACT XXII OF 1857.

University Buildings.

Taxation—Exemption of—Charitable purposes—*See* BOM. ACT III OF 1888, ss. 143, 144, 16 B. 217.

University, Calcutta.

See BEN. ACT II of 1857.

Unlawful Assembly.

(1) *Unlawful Assembly--A lawful assembly may become an.*—An assembly which was not unlawful when it assembled may subsequently become an unlawful assembly. QUEEN-EMPRESS v. SHETTYA, 2 Bom. L.R. 1129.

Unlawful Consideration.

See CONTRACT ACT, 1872, s. 23, 41 P.L.R. 1901.

Unliquidated Damages.

See MESNE PROFITS—RIGHT TO MESNE PROFITS, 9 B.H.C. 7.

See SALT, 7 B.H.C.A.C. 89.

See SET-OFF, 3 Agra 43.

Right of defendant to set off claim for—*See* SET-OFF, 2 M.H.C. 296.

Claim for—Whether can be set-off—General right of set-off how far affected by the Code of Civil Procedure - *See* SET-OFF, 4 B. 407.

See SET-OFF, 3 Agra 97.

Claim for unliquidated damages—*See* SUCCESSION CERTIFICATE ACT, 1889, s.4, sub-s.2, 18 M. 457=5 M.L.J. 61.

Unobstructed Heritage.

See HINDU LAW—INHERITANCE, 27 M. 300, F.B.

Unprofessional Conduct.

Of practitioner—Dismissal—Irregularity in procedure—*See* ACT XVIII OF 1879, ss. 14, 40, 15 C. 152=14 I.A. 154.

Of Attorney—Attorney appearing for both sides—*See* LEGAL PRACTITIONERS—ATTORNEY, 8 C.L.J. 165, F.B.=8 Cr. L.J. 131= 4 M.L.T. 153.

Unproved Documents.

(1)—*Unproved documents filed with the record.*—Unproved documents simply filed with the record in accordance with some usage must be passed over by the Judge; and the party against whom they are intended to be used must insist on their removal from the record. KALLIDA PERSHAD DUTT v. RAM HARI CHUCKERBUTTY, 5 C. 317.

Unreported Case.

(1)—*Unreported case — No authority — Act XVIII of 1875, s. 3.*—An unreported case or ruling is not to be treated as an authority, regard being had to s. 3 of Act XVIII of 1875. MAKHUL AHMED v. RAKHAL DAS HAZRA, 4 C.W.N. 732. [*Diss.*, 28 C. 289=5 C.W.N. 326.]

(2)—*Unreported High Court judgment—An authority.*—A judgment of the High Court is none the less an authority because it has not been reported. MAHOMED ALI HOSSEIN v. NAZAR ALI, 28 C. 289=5 C.W.N. 326.

Unreported Judgment.

See UNREPORTED CASE.

Unseaworthiness.

See CONTRACT—CONDITIONS PRECEDENT, 2 B.L.R.O.C. 127.

Of ship—*See* DAMAGES—MISCELLANEOUS, 6 B.L.R App. 20.

Unsettled Poliem.

See POLIEM.

(1)—*Zemindars and Poligars—Proprietary rights in land—Reg.* XXV *of* 1802.—Zemindars and Poligars, and others in a like position, and occupying tenants, possessed different proprietary rights in land, by recognition of the Government, before the passing of Reg. XXV of 1802. By it the Government declared, with the force of law, their acknowledgment and confirmation of such rights, as they were then enjoyed, and, in order to quiet all uncertainty and disquietude respecting them, and to establish general certainty of tenure in the holders of the same, provided for the permanent assessment of all lands liable to pay revenue to Government; and for the issuing thereupon of express hereditary grants to every Zemindar and other intermediate proprietor, and written engagements between them and their tenants; and therefore, the Regulation does not operate to exclude or disfavour the maintenance of a claim against the Government to a hereditary or other estate in lands, which has not been secured the benefits of a settled title under the Regulation, because, for political reasons, the Government has thought it inexpedient to give full effect to its enactments. But claims of title to such estates are merely left without the conclusive proof of hereditary title afforded by an Istimrari Sannad. It could never have been intended that the Government, by delaying to do in regard to some estates, what the Regulation enacts should be done in regard to all lands for the purpose of setting at rest all uncertainty as to titles, should secure the power to treat all such estates as held by no permanent title whatever. It follows that the existence of a proprietary estate in poliems, or other lands not permanently assessed, and the tenure by which it has been held, are matters judicially determinable on legal evidence, just as the right to any other property. LEKKAMANI v. PUCHAYA NAIKER, **6 M.H.C. 208.** [*Affirmed on appeal*, 1 I A. 282, P.C. = 14 B.L.R. 115; *R.*, 29 M. 453 = 16 M.L.J. 339 = 1 M.L.T. 272.]

Poliem—Debts incurred by previous holder of—Son's liability—Assets—*See* HINDU LAW—DEBTS, 5 M.H.C. 303.

Unsound Mind.

See LUNATIC, 7 B. 15.

Unsoundness of Mind.

See INSANITY.

See LUNACY.

See LUNATIC.

(1) *Suit against person of unsound mind—Procedure to be adopted.*—No suit could be instituted against a person of unsound mind, without first obtaining an adjudication that he is such, and having a curator appointed for him under Act XXV of 1858, or some other law for the time being in force. NARAYANA v. KRISHNA, **8 M. 214.** [*R.*, 24 M. 504.]

Upanchowki Tenure.

See MESNE PROFITS—RIGHT TO MESNE PROFITS, 1 B.L.R.A.C. 167.

Uraima Right.

Sale by Uralers (trustees) — Custom — Evidence—*See* MALABAR LAW—ENDOWMENT, 1 M. 235 = 4 I A. 76, P.C.

Uralers.

See MALABAR LAW—ENDOWMENT, 2 M. 167.

Uraima right—Sale by—Trustees—Custom—Evidence — *See* MALABAR LAW—ENDOWMENT, 1 M. 235 = 4 I.A. 76, P.C.

Nature of possession of a joint Uraler—*See* MALABAR LAW—MISCELLANEOUS, 9 Ind. Cas. 156 = 21 M.L.J. 178 = 9 M.L.T. 457.

Urban Areas.

Applicability of Act VIII of 1885 (Bengal Tenancy) to—outside Calcutta—*See* BEN. ACT VIII of 1885, s. 3, sub-s. (10) and s. 21, 9 C. W.N. 141.

Usage.

See BURDEN OF PROOF—CUSTOM.

See CUSTOM.

See CUSTOMS—PUNJAB.

See HINDU LAW—CUSTOM.

See MAHOMEDAN LAW—CUSTOM.

See MALABAR LAW—CUSTOM.

See BEN. ACT VIII OF 1885, s. 53, 15 C. 714.

See BEN. ACT VIII OF 1885, ss. 173 (3-*d*), 183, 23 C. 427.

See BEN. ACT VIII OF 1885, ss. 178, 183, 26 C. 184.

See CIV. PRO. CODE, 1908, s. 47, 27 C. 187.

Proof of usage—Evidence—*See* EVIDENCE ACT, 1872, ss. 42, 48, 23 C. 427.

Contract—Admissibility of evidence of custom of—*See* EVIDENCE ACT, 1872, s. 92, Proviso 5, 17 B. 129.

Proof of—by evidence—*See* LANDLORD AND TENANT—MIRASDARS, 1 M.H.C. 264.

Suit to establish exclusive right to receive fees paid to purohits—Necessity for proof of contract or—*See* RIGHT OF SUIT—OFFICE OR EMOLUMENT SUITS RELATING TO, 2 M H C. 330.

Finding of lower Courts on existence of usage, based on irrelevant matters—Effect—*See* SPECIAL OR SECOND APPEAL—MISCELLANEOUS, 23 C. 179.

Established usage in conflict with tenets of religion—Effect—*See* TRUST, 11 Bom. L.R. 85 = 5 M.L.T. 301 = 33 B. 509 = 2 Ind. Cas. 701.

Use and Occupation.

See LANDLORD AND TENANT.

See LEASE.

(1)—*Landlord and tenant--Suit for rent—Dismissal—Suit for use and occupation.*—A landlord who has failed in a suit for rent under the Rent Recovery Act cannot bring a fresh suit for use and occupation. ALI KHAN v. APPADU, **7 M. 304.**

(2)—*Damages—Use and occupation—Demise—Permission of plaintiff* — An action for damages for use and occupation does not necessarily suppose any demise. It is enough that the defendant used and occupied the premises by the permission of the plaintiff. But where it is not established that the plaintiff agreed to accept the possession of the premises by the defendant as possession held on his own behalf, no suit for damages for use and occupation lies against the defendant. KANAI LAL BISWAS v. NITAI CHAND SAHA ; NITAI CHAND SAHA v. BAIDO JINNO, **7 Ind. Cas. 492=12 C. L. J. 612.**

(3)—*Arrears of rent—Compensation for use and occupation of land—Making new case for plaintiff, not set up in plaint—Intention to occupy as tenant a necessary condition in suit for compensation for use and occupation of land—Lease of right to receive collections of a village not an agricultural lease—Registration of lease—Transfer of Property Act, ss. 107 and 117—Oral evidence inadmissible to prove lease for a term exceeding one year.*—The plaintiff sued M and E for arrears of rent on the allegation that they had taken from him a theka of a mauza from 1302 to 1306 Fasli at an annual rent of Rs. 1,059 14-3 and that Rs. 515-7-0 as arrears for 1305 Fasli and the whole of the rent for the year 1306 Fasli were due from them. M admitted the lease and E denied it. The lease was an oral one. The Assistant Collector held that, inasmuch as under s. 107 of the Transfer of Property Act, a lease of immoveable property for any term exceeding one year could be made only by a registered instrument, no oral evidence could be given to prove the alleged lease. But finding, however, that E had been in possession of the village during 1305 Fasli he passed a decree against him and M jointly for the arrears of rent claimed in respect of that year on the ground that E was liable to pay reasonable compensation for the use and occupation of the village. E appealed to the District Judge who dismissed the suit as against him. He found that E. even supposing that he was in possession during the year 1305 Fasli, did not enter into possession with the intention of occupying as a tenant. *Held*, that the alleged lease was a lease of the right to receive the collections of a village and not a lease for agricultural purposes, within the meaning of s. 117 of the Transfer of Property Act, that the provisions of the s. 107 of that Act, were applicable to it, and that oral evidence to prove it was inadmissible. In order that a suit for use and occupation may be maintainable, one of the conditions which

Use and Occupation—*concluded.*

must be fulfilled is that the defendant is in possession intending to occupy as a tenant. *Held*, therefore, that assuming that the Revenue Court has jurisdiction to award, in a proper case, reasonable compensation for the use and occupation of land, it could not award such compensation in this case. *Held* further that as the plaintiff made no claim for use and occupation against E, and as the case went to trial merely on the point whether the village had been leased for five years to E, the Assistant Collector was wrong in making a new case for the plaintiff and in decreeing his suit against E, as if he had made a claim for use and occupation. JANG BAHADUR SINGH v. ESHAN ALI, **5 O.C. 222.**

(4)—*Claim for, when arises.*—A claim for use and occupation only arises where it is shown that the occupation was by the permission or sufferance of the plaintiff. RAMRICK DASS v. MOHAMED YACUBJI DUDAH, **2 L.B.R. 122.**

Right of lambardar to sue a co-sharer for compensation for—*See* CO-SHARERS--ENJOYMENT OF PROPERTY BY CO-SHARERS, 13 C. P.L.R. 48.

Right to interest—*See* INTEREST—SPECIAL CASES, 9 Ind. Cas. 221.

Suit for rent—Court can award damages, for use and occupation when — *See* RENT, SUIT FOR, 27 C. 239.

Suit for rent and eviction— Waiver of trespass — Decree for use and occupation—*See* RENT, SUIT FOR, 9 C. 908=13 C.L.R. 69.

See SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF—GENERAL. 5 B. 572, 17 C. 541, 24 C. 557, 22 M. 149.

Decree declaring title to house—Suit for compensation for—Whether maintainable in Court of Small Causes—*See* SMALL CAUSE COURT, MOFUSSIL, JURISDICTION OF — GENERAL, 6 B. 79.

See TRANSFER OF PROPERTY ACT, 1882, s. 107, 22 C. 752.

See VARIANCE BETWEEN PLEADING AND PROOF, 5 N.W.P. 65.

User.

See PRESCRIPTION.

See EASEMENTS.

(1)—*Continued enjoyment—Question of fact.*—No rule can be laid down as to what will or will not constitute a continuance of enjoyment, as of right, when there is no exercise of it for any given period. That must depend upon the circumstances of each case and the nature of the right claimed. The question of continued enjoyment is a question of fact. It is an inference to be drawn from facts. JANHAVI CHOWDHURANI v. BINDU BASHINI CHOWDHURANI, **26 C. 593=3 C.W.N. 610.**

User —*continued.*

(2) – *User —Proof of right* —No precise period of enjoyment is required to prove a right of user; and there is no objection in point of law to the finding of such a right from the fact of there having been a user for a very long time. MULLICK KURIM BAKSH v. HARRIHAR MANDAR, **5 B.L.R. 174=13 W.R. 440.**

(3) —*User —Prescription —Construction.*—Proof of uninterrupted user for 12 years and upwards is sufficient to establish a prescriptive right to water. The term "*barabar*" in respect to user construed to mean "*all along*" for "*always*," certainly for more than 12 years. KARTIK CHANDRA SIRKAR v. KARTIK CHANDRA DEY, **3 B. L. R. A. C 166=11 W. R. 522.** (11 W. R. 236, *Com on.*)

(4) —"*User*" —*Presumption of legal origin.*—Where there has been a well-established user extending over a long series of years, it is the duty of the Court, if possible, to find a legal origin of the existing facts—SECRETARY OF STATE FOR INDIA v. HAIBATRAO, **6 Bom. L.R. 43=28 B. 276.**

(5)—*Easement —Inference from user —English Law.*—In a suit to establish a right of way, it would not be right in this country to draw the same inference from user as would be proper in a case arising in England. The English rule that user must be presumed to be as of right must not be applied without reference to the habits of the people of this country and the particular circumstances of each case. SHAIKH KHODA LUKSH v. SHAIKH TAJUDDIN, **8 C.W. N. 359.**

(6)—*User—Proof of right—Acquisition thereof.* —A user all along or from before does not necessarily prove a right. It must be proved to have existed from a time from which the right would be gained or presumed to have been gained. MOOKTARAM BHUTTACHARJEE v. HURRO CHUNDER ROY, **7 W.R. 1.** [*F.*, 12 W.R. 76, 14 W.R. 349, 14 W R 199.]

(7) *Right of way—User —Prescription—Limitation—Implied consent.*—A user for only 4 or 5 years is not sufficient to show a right by prescription. Defendant prepared a road across the plaintiff's lands. *Held* that it was quite open to the plaintiff to sue within the ordinary period of limitation, and that no consent could be inferred from the fact that the plaintiff did not sue immediately after the commencement of the preparation or the completion of the road. HURO SOONDUREE DEBIA v. RAM DHUN BHUTTACHARJEE, **7 W.R 276.** [*D*, 12 W.R. 519.]

(8)—*Wrongful interruption—Right of user—Assertion of right—Delay —Acquiescence.*—Where a right of user is interfered with and steps are immediately taken to assert that right, it cannot be destroyed by wrongful interruption; but when no steps whatever are taken for a long time, as for instance, for 6 years, we may safely presume acquiescence. HEERA LALL KOOER v. PURMESSUR KOOER, **15 W.R. 401.**

User—*continued.*

(9)—*Easement—User interrupted from time to time.*—The mere fact of user for any number of years will not be sufficient to confer a right if the user be, from time to time, interrupted by the owner resuming, as occasion may require, the exclusive use of his land. In such a case, the character of the user is changed. It will be treated as permissive only and not as the exercise of a right. What is the true character of the user is, in each case, to be inferred from the circumstances, AUKHOY COOMAR CHUCKERBUTTY v. MOLLAH NOBEE NOWAS, **13 W.R. 449.**

(10)—*Rights of user of easements incidental to house, not affected by lease of house to stranger.*—The contention in this case was limited to a drain and to a passage. The lower appellate Court wrongly considered that the plaintiff had really no right to what he claimed, inasmuch as the circumstances under which the right was created had ceased and a new state of things had arisen, in which the introduction of a stranger into the premises had become possible. The High Court was of opinion that the point never having been raised by the defendant at all, the Judge was in error in having raised or allowed the point to be raised at the trial. The Judge should have confined himself to the existence or not of the plaintiff's right to the user which he claimed as incidental to his property; if the Judge found such right to exist, it was not one to be exercised conditionally, nor one that could be annulled by the introduction of any such new feature as the tenancy of the house created by its owner in favour of a stranger. MUSSAMUT AMJUDEE BEGUM v. SYUD AHMED HOSSEIN, **6 W.R. 314.**

(11)—*Contract of tenancy—Right of tenant to use a plot as threshing floor, a term of such contract.*—On evidence that a tenant has, for a great many years, used a particular piece of land along with other tenants as a threshing floor for threshing out crops, it is competent to the Court to find, there being no evidence to the contrary, that the right to use the plot of land for such purpose was part of the contract of tenancy. DALEL v. BHAJJU, **16 A 181= A.W.N. 1894, 15.** (14 A. 185, *D.*)

See DAMAGES—DAMAGES, SUITS FOR, 2 B.L.R. App. 53 (*a*).

Right to pass filthy water can be acquired by—*See* EASEMENT, 2 Bom. L.R. 89.

See FERRY, 18 C. 652.

Public tank, right to repair—Long user—*See* INJUNCTION—SPECIAL CASES, 6 M. 229.

As of right—Elements—User of Oothan—Relation and neighbour—*See* LIMITATION ACT, 1908, s. 26, 13 C.L.J. 316.

Vacant land—Encroachment—Nature of user—*See* POSSESSION—ADVERSE POSSESSION, 16 B. 338,

User—*concluded.*

Absence of a right of—*See* POSSESSION—NATURE OF POSSESSION, 2 Bom. L.R. 620.

Possession not always actual user—Presumption where actual enjoyment not possible—Nature of presumption—*See* POSSESSION—NATURE OF POSSESSION, 9 C. 741, F.B. = 12 C.L.R. 257.

See PRESCRIPTION—EASEMENT—GENERAL, 3 B.L.R. A.C. 325 = 12 W.R. 274, 3 B.L.R. A.C. 281.

Right of way for particular purpose—Extent of—*See* RIGHT OF WAY, 9 C. 778.

See RIGHT OF WAY, 3 B.L.R.A.C. 211 = 5 B.L.R. App. 84 = 14 W.R. 124.

Usufructuary Mortgage.

See MORTGAGE.

See DECREE—DECREE, FORM OF.

Usury.

See HINDU LAW—USURY.

See INTEREST.

Interest—Mahomedan Law—Act XXVIII of 1855—*See* MAHOMEDAN LAW—MISCELLANEOUS, 5 B.L.R. 500 = 14 W.R. 308.

Usury Laws Repeal Act.

See ACT XXVIII OF 1855.

Utbandi Tenure.

(1)—"Utbandi *holding*," *what is—Its incidents.*—"*Utbandi*" is applied to land held for a year, or rather for a season only. The general custom is for the husbandman to get verbal permission to cultivate a certain amount of land in a particular place at a rate agreed upon when the crop is on the ground. The land is measured and the rent is assessed on it. The *Utbandi* ryot abandons altogether (*i.e.*, has no right to claim again) any land, except such as he has under cultivation in any given year. The zemindar may let in jumma some or any land which the *Utbandi* ryot has not got under cultivation in any year. BEDI MADHUB CHUCKERBUTTY v. BHUBUN MOHUN BISWAS, **17 C. 393.** [*R.*, 5 C.L.J. 398 = 11 C.W.N. 581.]

(2)—*Suit for rent of—Abandonment—Notice—Onus—Benami sale—Admission by vendor, effect of.*—No notice is required to be given by the tenant to the landlord in abandoning an *utbandi* tenure, as it is a settlement for a year only. In a suit for rent by an assignee of the landlord, when the landlord admits that he has sold the arrears of rent to the plaintiff, and, when such landlord is also a party to the suit, it is not open to the Court to find that the sale is benami. AMRITA LAL MUKERJEE v. GIRIDHAR GHOSE. **5 C.L.J. 398 = 11 C.W.N. 581.** (17 C. 393, *R.*)

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(END OF VOLUME IX.)

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